Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04451/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 January 2019	**On 6 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Home Office Presenting Officer
For the Respondent: Ms Akinbolu, Counsel

DECISION AND REASONS

1. For ease of reference I refer to the parties, henceforth, as they were in the First-tier Tribunal. The Secretary of State pursues this appeal before me but I nonetheless refer to him as the respondent, as he was in the First-tier Tribunal.

2. The appellant is a citizen of Sri Lanka, born on [~] 1989. On 25 January 2018 the respondent refused his application of 20 June 2016 for indefinite leave to remain on the basis of long residence. The appellant appealed that decision in the First-tier Tribunal. His appeal was dismissed by First-tier Tribunal Judge Griffith ("the FTTJ") in a decision promulgated on 10 October 2018.

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3. The respondent sought permission to appeal and this was granted in the following terms by the Upper Tribunal:

> "it is arguable that in the light of the finding at [56] to [58] that First-tier Tribunal Judge Griffith erred in concluding that paragraph 322(5) was not engaged.
>
> All grounds are arguable.
>
> It is noted that the judge does not appear to have directed himself [sic] as to the correct test for assessing dishonesty – see **Ivey v Genting Casinos [2017] UKSC 67** at [62]."

4. Hence the matter came before me.

Background

5. The appellant first entered the UK on 12 February 2006, with leave to do so as a student. That leave was extended variously until 31 July 2011. Leave was then extended further as a Tier 1 (General) migrant until June 2013 and again until June 2016. The appellant made an in time application for indefinite leave to remain.

6. On 28 June 2018 the respondent refused the application. The respondent noted the appellant had declared earnings above the minimum for the award of points, when seeking leave to remain as a Tier 1 (General) migrant in June 2013. When dealing with his application for indefinite leave to remain, the respondent had written to the appellant on 11 May 2017 asking him to complete a tax questionnaire and provide evidence of self-employment. The evidence of self-employment provided by the appellant referred to lower earnings than those declared in support of his Tier 1 application. The respondent considered the latter to have been inflated. The respondent decided the appellant had either failed to declare to HMRC the correct figures for his self-employment in the 2012/13 and 2013/14 tax years or there was serious doubt as to the accuracy and genuineness of the information presented to UKVI as part of his application. He decided the appellant fulfilled the criteria in paragraph 322(5) of the Immigration Rules because it was undesirable for him to remain in the United Kingdom in the light of his character and conduct. For similar reasons, the application was also refused pursuant to paragraphs 276B(ii)(c) and (iii) and S-LTR.1.6, namely the suitability requirements.

Submissions

7. Ms Cunha's submissions and the grounds of appeal, which she adopted, can be summarised as follows. The FTTJ had found the appellant had not told the truth, that he had exploited his situation for financial benefit to minimise his tax liability [55] and that he sanctioned questionable practices [56] and "scapegoated" another person without making an effort to trace him [57]. Thus the FTTJ had found the appellant to be dishonest and his behaviour was sufficient to engage Paragraph 322(5). The tribunal's reliance on the failure of HMRC to prosecute was wrong; it was of no relevance because HMRC had different concerns to the respondent.

8. It was submitted, furthermore, that the FTTJ had not made clear findings on the appellant's income for 2012/13 and 2013/14. It was not clear if he met the requirements of the Rules, namely 10 years' continuous residence. Ms Cunha particularly emphasised in her oral submissions that the FTTJ had applied the wrong standard of proof: the FTTJ had applied a higher burden as demonstrated by her reference at [59] to the type of behaviour envisaged by paragraph 322(5) as being "very serious". She submitted that this infected the whole decision

and rendered it unsustainable. She submitted the FTTJ's reasoning was inconsistent given her adverse findings on the appellant's credibility.

9. Ms Akinbolu adopted the Rule 24 response. She submitted the respondent's appeal was no more than a disagreement with the FTTJ's decision: the FTTJ had referred to and applied the appropriate authority (**R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC**)). Ms Akinbolu noted the respondent suggested the findings of the FTTJ were sufficient to show dishonesty. She referred to [74] of **Ivey** and said the FTTJ had had in mind the principles in **Khan,** which, in turn, had been followed in **Dadzie v SSHD [2018] CSOH 128,** and that while the FTTJ did not accept the appellant's explnation for his actions, she did accept the appellant had not asked about or questioned the tax rebate. Ms Akinbolu submitted that the FTTJ had found this, whilst undesirable, was not deceptive. It was submitted that the FTTJ was entitled to take into account, in the round, the failure of HMRC to take adverse action and the fact of the appellant's declaration and repayment of unpaid tax. It was submitted that the view of the body charged with monitoring tax payments, which was relevant to the assessment of the public interest in punishing the individual concerned, was a relevant matter.

10. Ms Akinbolu submitted that the key question for the FTTJ was whether the exclusion of the appellant was undesirable. The FTTJ had not applied a higher standard of proof than was required: the authorities called for anxious scrutiny. The FTTJ had considered whether the appellant's behaviour justified his exclusion. It was submitted that the FTTJ made it clear in her determination that she did not consider, notwithstanding her adverse findings, that the evidence overall was sufficient for a finding that paragraph 322(5) was engaged, given the seriousness of the outcome for the appellant. She found the evidence was not sufficiently strong for a finding of dishonesty [58]. Ms Akinbolu asserted this was a careful and balanced decision where all relevant factors had been considered. It was a matter of the weight to be given to the evidence.

Discussion

11. The respondent states in the reasons for refusal that the appellant had "either failed to declare the correct figures for [his] self-employment in the 2012/2013 and 2013/2014 tax years to HMRC, or there is serious doubt as to the accuracy and genuineness of the information presented to UKVI as part of said application." Thus the use of deception was the essential issue before the FTTJ, namely whether the appellant had deceived either HMRC or the respondent or both. This was the only reason for refusal pursuant to paragraph 322(5). The refusal by reference to other paragraphs in the Immigration Rules hinged on the respondent's conclusions pursuant to 322(5).

12. The respondent's principal submission, before me, is that the FTTJ, having agreed with the respondent that the appellant had been dishonest in his dealings with HMRC, made an inconsistent finding that there was insufficient evidence for paragraph 322(5) to be engaged. However, the FTTJ did not make a finding of dishonesty.

13. The FTTJ says this with regard to the appellant's completion of his tax returns:

> "55. The appellant might not have known exactly what he earned in 2012/13, but he provided invoices to his customers and will have had a reasonable idea of his income. I do not believe his written evidence that he "did not really pay much attention at the time" to how he [sic] much he earned, simply giving his bank statements to his accountants at the time, who calculated the figures. There is no

evidence from that firm, but it is difficult to imagine any reputable firm not asking a client to check the figures before signing off the tax return.

56. I therefore find the appellant knew what his earnings were for the tax year 2012/13. In his oral evidence, he said that his previous accountants had prepared the tax return for 2012/13 but because there was "confusion" he approached Bilal. When I asked him what he meant by "confusion" he said that some friends of his told him he was paying too much tax and recommended that he saw a consultant. I reject this evidence that there was any "confusion" finding that believed he had found a way to reduce his tax bill, giving little or no thought to the methods by which that would be achieved and whether the outcome was accurate. He appears to have been unconcerned about Bilal's somewhat relaxed working practices, for example the absence of any written advice, information about costs etc., which any reputation professional would have provided to his client. Such omissions should have been a warning sign.

57. The appellant saw his tax bill reduced considerably for the year 2012/13, even though it was a good year as far as work was concerned. There was a considerable discrepancy between the figures he declared in his application for Tier 1 leave and the figures disclosed to HMRC. I reject the impression the appellant has tried to give that he was so poor at figures that he did not realise what had happened. No doubt he was pleased to receive a rebate, but it appears he did not question Bilal about how it was calculated or the reason why, according to Bilal, he had been paying too much tax in previous years. It is convenient for him to say that Bilal has disappeared. He has not, however, made any real effort to trace him or to report him, with the help of his current advisors, to any of the professional bodies, given the trouble and additional expense Bilal's advice and actions have caused him.

58. I have difficulty accepting the appellant was so naïve as he claims. There is no evidence available from Bilal and limited evidence from the appellant's current accountants. … I consider he wilfully closed his eyes to Bilal's methods and failed to question the reasons for the significant reduction in his tax liability."

14. Thus the FTTJ made various adverse findings of relevance to the appellant's state of mind, inter alia: he "knew what his earnings were for the tax year 2012/13"; he "believed he had found a way to reduce his tax bill, giving little or no thought to the methods by which that would be achieved and whether the outcome was accurate" and he "saw his tax bill reduced considerably for the year 2012/13, even though it was a good year as far as work was concerned".

15. Furthermore, the FTTJ specifically rejects the appellant's explanation for the inaccurate tax declarations and does so at some length. The FTTJ's findings are that the appellant "wilfully closed his eyes to Bilal's methods and failed to question the reasons for the significant reduction in his tax liability". It could be inferred from this sentence that the FTTJ considered the appellant knew Bilal would act inappropriately in his dealings with HMRC on the appellant's behalf.

16. It is highly relevant that the discrepancies arose, not from error, but from the actions of the appellant's agent, Bilal. As is stated in the headnote to **Khan** at (iv):

> *"(iv) For an Applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter, given that the accountant will or should have asked the tax payer to confirm that*

> *the return was accurate and to have signed the tax return. Furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty.*

17. The FTTJ noted at [24] the appellant acknowledged the declarations to HMRC for the tax years 2012/13 and 2013/14 must have been "untrue". This is not a case where the appellant claims the discrepancies arose from negligence or errors either by himself or Bilal. The appellant's evidence, cited at [24] is that he "honestly did not know that Bilal must have declared an untrue amount of income from self-employment". Thus he blames Bilal for having filed a false declaration with HMRC. The FTTJ's finding that the appellant "wilfully closed his eyes to Bilal's methods and failed to question the reasons for the significant reduction in his tax liability" requires a specific finding as to whether or not the appellant knew Bilal would make and/or did make false declarations on his behalf.

18. Notwithstanding the existence of false declarations to HMRC and the FTTJ's rejection of his explanation, the FTTJ has stopped short of making findings as to the appellant's knowledge or belief as regards the content of his declarations to HMRC, as is required by **Ivey** at [74]:

> "… When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts.
>
> The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

19. The FTTJ states at [59] that "the appellant's behaviour was undesirable, but I do not find it was of such a degree that it meets the type of undesirable conduct envisaged in paragraph 322(5)". The FTTJ states earlier in that paragraph that "the type of behaviour envisaged in that paragraph is, therefore, very serious, presenting not only a threat to the general public but also the nation". This is a mis-statement of the terms of paragraph 322(5) which provides as follows:

> "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security."

The respondent's reasons for refusal focus (as Ms Akinbolu accepts) on the undesirability of the appellant being permitted to remain in the UK in the light of his conduct and character. Dishonesty is the central issue in this case, not a threat to the general public or national security, as is stated by the FTTJ.

20. Irrespective of the absence of findings as to the appellant's state of mind, given the existence of false tax returns and the FTTJ's rejection of the appellant's explanations for those returns, it is not clear why the FTTJ did not consider the evidence to be "sufficiently strong" for the

engagement of paragraph 322(5). She has given inadequate reasons for deciding this paragraph was not engaged, contrary to **MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)**.

21. I would not criticise the FTTJ for having regard to the failure of HMRC to prosecute the appellant if she had taken into account the circumstances of that failure: namely the fact the appellant amended declarations following the respondent's identification of discrepancies. These were not therefore "voluntary" amendments in the true sense of the word, albeit HMRC might have perceived them to be such. It is not clear whether the FTTJ took into account the circumstances known to HMRC at the time of its decision not to prosecute.

22. For all these reasons, I find that the FTTJ's reasoning is defective and inadequate such as to amount to an error of law. The error is material to the outcome, being related to the central issue in the appeal, namely the appellant's conduct and character and the undesirability of permitting him to remain in the UK, pursuant to paragraph 322(5). The decision is not sustainable and must be set aside.

23. I invited submissions from the parties' representatives on whether I should remake the decision. Ms Akinbolu pointed out that the FTTJ had not made findings on other aspects of the human rights appeal, particularly with regard to the appellant's family life. There were, she said, insufficient findings for the decision to be remade by me. Ms Cunha agreed, as do I. The matter must be remitted to the First-tier Tribunal for a fresh hearing.

Decision

24. The making of the decision of the First-tier Tribunal involved material errors on points of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Griffith.

25. Given the nature of the respondent's case, namely that the appellant had acted dishonestly, I make an anonymity direction.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019

DIRECTIONS

1. Any further documentary and/or witness evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 28 days before the date of the hearing in the First Tier Tribunal.

2. The appeal is listed at Taylor House with a time estimate of two hours to be heard at 10.00 am on …….

3. An interpreter in Tamil is required.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019