Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04464/2018
HU/09837/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 17 September 2019	**On 26 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MR MUHAMMAD [Z]
MRS MARIAM [Y]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr G Hodgetts, Counsel, Chambers of Glen Hodgetts
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal brought by the appellants against the decision of Judge of the First-tier Tribunal Mark Davies dated 25 January 2019 in which the judge dismissed the appellants' appeals against the respondent's decision of 30 January 2018 refusing the appellants indefinite leave to remain and refusing their human rights claims.

2. The first appellant has resided in the UK with lawful leave to enter and thereafter leave to remain since September 2006. He had initially resided in the United Kingdom as a student, thereafter as a Tier 1 post-study migrant, and later still as a Tier 1 (General) Migrant. His application for indefinite leave to remain was made as long ago as 20 April 2016. I have seen reference within the papers suggesting that the respondent had suspended decision-making in certain types of case for a period of time, such that the respondent's decision on the application was only ultimately made on 30 January 2018.

3. The respondent's reasons for refusing indefinite leave to remain were that, using the discretionary power under paragraph 322(5) in Part 9 of the Immigration Rules, general grounds for refusal, it was undesirable to permit the first appellant to remain in the UK in the light of certain conduct, character and associations of the appellant.

4. That conduct was said to have involved the submission of a tax return for the year 2010/2011 to HMRC, asserting that the appellant's income in that year totalled only £18,447. The respondent noted, however, that in an application for leave to remain made by the appellant at that time, he had declared to the respondent earnings of some £38,646.50. This discrepancy only came to light during the course of the respondent considering the application for indefinite leave to remain. The respondent made further enquiries of the appellant in relation to the discrepancy. It was the first appellant's case that a friend and trainee accountant ('FM') had assisted him in preparing his accounts in 2011 and had mistakenly used incorrect figures. This had only come to light at a later stage in or around 2015, when the appellant instructed new accountants. It was said that those new accountants had then advised the appellant of the apparent discrepancy as between his tax return for 2010/2011 and his income as declared to the respondent. There was then some further delay before the appellant instructed those accountants to make an amended tax return for the 2010/2011 period. Although the appellant does not appear to have informed the respondent of these changes to his tax returns prior to his application for indefinite leave to remain, the respondent took the appellant's further explanation into account when making the decision on the application.

5. In making the decision of 30 January 2018 the respondent disbelieved the explanation given by the appellant for the lower figure having been included in the appellant's tax return for 2011 and found it implausible that he would not himself have checked the figures. The conclusion reached at page 6 of 12 of the decision letter is as follows:

> "The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom in light of your character and conduct. She is satisfied that you have misrepresented your earnings and have changed what you have represented in respect of your earnings to HM Revenue & Customs and/or UK Visas and Immigration for the purpose of reducing your tax liability or for the purpose of obtaining leave to remain or both."

That same formula of words is also used towards the end of page 7 of 12.

6. It seems to me then that the position of the respondent in the decision letter at that time was to plough two furrows in the allegations against the appellant; either deception had been employed against HMRC in seeking to underestimate his tax liability, or the respondent when declaring his income for the purposes of his application for leave to remain, or potentially both. That seems to me to be an unfortunate position to adopt as it fails to identify with any specificity what the deception was that is said to have been employed by the appellant.

7. The appellants appealed against that decision, the matter coming before the judge on 18 December 2018. In the judge's decision of 25 January 2019, the judge notes as follows under the heading 'Cross- examination – Mr Phillips' (the Presenting Officer):

> "33. The witness accepted that had he declared the correct income in 2011 he would not have been awarded points."

8. Further, under the heading 'Respondent's Submissions' is the following:

> "45. If the principal Appellant had put in the correct level of income regarding his 2011 tax return he would not have scored the necessary points to be granted leave to remain as a Tier 1 immigrant and that is of significance today."

9. The judge's own findings, which start at paragraph 67, provide as follows:

> "67. … The principal Appellant accepted that had he supplied the correct information to the Respondent he would not have been entitled to points which would have allowed him to remain in the United Kingdom.
>
> 68. I consider taking into account all the evidence that in all probability the principal Appellant chose to perpetrate a deception upon the Respondent to enable him to remain in the United Kingdom as a Tier 1 Migrant, even though he was not entitled to remain in the United Kingdom on that basis.
>
> 69. I am also satisfied that the principal Appellant with the assistance of (*FM*) perpetrated a deception upon the HMRC with the intention of paying a lesser amount of tax and national insurance than was due.
>
> 70. The significant feature of this appeal is the large difference between the Appellant's income declared to the HMRC in his 2011 tax return and his actual income. I conclude that it is wholly implausible that the principal Appellant or (*FM*) made a genuine error and that the deception that was perpetrated was innocent. We are talking about a figure of some £16,000. It is simply not credible that the Appellant or (*FM*) would not be aware that figures had been submitted to the HMRC which were not correct.
>
> 71. I take into account the evidence of (*FM*). Although I accept he has never qualified as an accountant he was working for a firm of accountants who authorised him to submit his own tax return. It is wholly incredible, as (*FM*) claims, that he simply got the figures on his own tax return confused with those of the Appellant. It is wholly implausible that (*FM*), a trainee accountant and long-standing friend of the principal Appellant, would not check the figures he had submitted in the tax return. I therefore conclude that it is probable that the principal Appellant in conjunction with (*FM*)

> decided to perpetrate a deception on the HMRC and that was done intentionally and with the intention to deceive."

10. The judge also provides as follows at his paragraph 78, when considering any interference with the Appellants' rights under Article 8 ECHR:

> "Even if interference had been established by the Appellants it would not have consequences of such gravity as to potentially engage the operation of Article 8. Even if interference was established the Respondent would be able to satisfy me that it was in accordance with the law and for one of the reasons set out in Article 8. The Respondent would also be able to satisfy me on the balance of probability that it was proportionate to the legitimate public end sought to be achieved, namely the maintenance of effective immigration control. That is particularly pertinent taking into account the Appellant's immigration history and the circumstances in which he obtained leave to remain as a Tier 1 Student when he was not entitled to do so because of his inadequate income."

In fact, the judge there seems to erroneously suggest that the Appellant in 2011 had been applying for further leave to remain as a student whereas it was a Tier 1 (General) leave to remain application but nothing stands on that particular point. The judge dismissed the appeals.

11. In detailed grounds of appeal dated 5 February 2019 a number of points were raised against the judge's decision. Permission was initially refused on 1 April 2019 and renewed grounds were submitted to the Upper Tribunal in substantially the same form on 8 June 2019.

12. The grounds argue that the judge erred in law, in summary, as follows.

(1) Ground 1 argues that the judge erred in law by proceeding under a mistake of fact as to the evidence actually given by the appellant as recorded in the decision at paragraph 33 and as referred to in the decision again at the end of paragraph 67. The appellant asserts that he did not agree that had he declared the correct income in 2011 he would not have been awarded points. The grounds of appeal seek to refer not only to the appellant's own evidence in his witness statement on that point but also to Counsel's note of proceedings, which was set out in the following way in the grounds of appeal:

> "Q: [Do you] accept [that] if [you] declared [the] correct [figures] [you would have had] no points.
>
> A. No."

The grounds assert that words in parentheses were inserted to make sense Counsel's shorthand note. The grounds of appeal assert that the appellant's answer therefore disagreed with the proposition in the question, rather than having agreed with it.

(2) Ground 2 argues that inadequate reasoning was given for rejecting the credibility of both the appellant and FM, the trainee accountant, having described in particular the accountant's evidence as being 'wholly incredible' and 'wholly implausible', these amounting to conclusions, rather than reasons.

(3) Ground 3 argues that the judge had acted irrationally and had failed to take into account relevant factors in support of his conclusion at paragraph 68. In particular, at paragraph 4.4(b) of the grounds of appeal it is argued that the judge's conclusion at paragraph 68 was prima facie inconsistent with the judge's findings at paragraph 69. I will address this issue in more detail below.

(4) Ground 4 argues that the judge erred in failing to take material evidence and factors into account in accordance with the Upper Tribunal guidance in the case of R (on the application of Khan) v Secretary of State [2018] UKUT 00384, which is a case dealing with the potential discrepancies that might exist as between HMRC and records and submissions for leave to remain to the Secretary of State, and that the judge had failed to give any consideration to the fact that the appellant himself had made an amendment to his tax returns of his own motion in 2015.

(5) Ground 5 argues that the judge had erred in law in failing to make any findings on the credibility of the evidence given by the appellant's wife, who had, it is said, given evidence that her husband had not deceived either the Home Office or HMRC.

(6) Ground 6 argues that the judge erred in law in failing to take into account evidence relating to the character of the appellant, relevant both to (i) whether any deception had taken place, and also (ii) whether the discretionary power of the Secretary of State to invoke the terms of paragraph 322(5) was appropriate.

(7) Ground 7 argues that the judge erred in failing to consider the serious consequences for both the appellant and the trainee as a result of the finding of a criminal conspiracy to defraud HMRC.

(8) Ground 8 argues that the judge erred in adopting the wrong starting point for a finding of dishonesty.

(9) Ground 9 argues that the judge proceeded irrationally at paragraph 67 in having observed that the appellant at 2011 would have been aware that he had been required to show over a lengthy period that his applications for leave to remain would have required submission of financial information, whereas the appellant argues that that application for leave to remain as a Tier 1 Migrant would have been the first such application in which evidence of that nature would have been required.

13. Permission to appeal was granted by Designated Judge Peart on 28 June 2019, finding that the judge initially refusing permission to appeal may have proceeded on an erroneous basis, not believing that the Counsel's note of evidence had been submitted with the original application for permission to appeal, when in fact it had.

Discussion

14. I have heard submissions from both parties, who are in fact in agreement that the judge materially erred in law in this appeal and that the decision should be set aside and remitted to the First-tier Tribunal. I am of the view that this is an appropriate course of action. I have quoted above from the respondent's decision letter, in which

I have suggested that the Respondent appears to have argued simultaneously that the appellant deceived both the respondent and HMRC in relation to the alleged income in 2011.

15. The judge regrettably, in my finding, fails to identify with any degree of clarity what deception was actually employed by the appellant. The judge appears to find at paragraphs 67 and 68 that had the appellant supplied 'the correct information' to the respondent he would not have been entitled to the necessary points to qualify for leave to remain in 2011. The premise lying behind such finding appears to be that 'the correct information' was that the appellant had actually only earned the lower sum, as declared to HMRC.

16. However, the premise lying behind the judge's findings at paragraph 70 and 71 was that the appellant's 'actual income' (the expression used paragraph 70) was the higher amount, and that the appellant and FM had conspired to perpetrate 'a deception on the HMRC', by under declaring the appellant's income.

17. Further, at paragraph 78 the judge appears to revert to the hypothesis that the appellant was not entitled to leave to remain in 2011 because he had 'inadequate income' at that time.

18. Although neither the respondent nor the judge may have been able to identify with absolute certainty what the nature of any deception was, I find that in an appeal involving the discretionary invocation of paragraph 322(5) of Part 9 of the Immigration Rules, on the grounds that a person is not suitable to be granted leave to remain in the UK because of their character and conduct, it is necessary to identify on a balance of probabilities, but with a degree of specificity, what the nature of any dishonesty was. It is also appropriate to note that the burden of establishing any deception lies on the respondent (JC (Part 9 HC395, burden of proof) China [2007] UKAIT 00027). I find that the judge's findings appear to contradict each other with respect to whether the Appellant had (i) dishonestly represented to HMRC that his income was lower than its true level, on the one hand, or whether (ii) he had dishonestly represented to the respondent that his earnings were at a higher level than was true. I cannot for my part reconcile the judge seemingly adopting those two positions simultaneously.

19. It is also relevant to note that it is now agreed between the parties that the judge did in fact proceed under a mistake of fact as to the content of the appellant's oral evidence, as set out at paragraph 33 of the judge's decision. I have admitted into evidence under Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008, without objection from the respondent, a witness statement from Mr Schwenk of Counsel (representing the appellant before the judge) dated 10 September 2019, stating that the appellant had answered negatively, not positively in relation to the relevant question. Mr McVeety now agrees that the appellant did not accept the proposition that had he declared the 'correct' income in 2011 that he would not have been awarded points. The judge's apparent misapprehension as to the appellant's

evidence was likely to have contributed to the judge's finding that the appellant employed deception, albeit, as I have held above, that the judge's finding as to the actual nature of the appellant's deception is unclear.

20. I am satisfied overall that the decision of the judge contained material errors of law and cannot stand. I set aside the decision and no findings of fact from the judge's decision will be retained. Because of the extent of the findings of fact that will be required in the remaking of this decision it is appropriate according to the relevant Practice Direction for this matter to be remitted to the First-tier Tribunal. The appeal is allowed to that extent.

21. Further, it is to be noted that although the respondent's decision letter of 30 January 2018 appears, as noted above, to argue that the appellant employed deception as against the respondent, or the HMRC, or both, Mr McVeety accepts before me that the respondent has not at any time disputed the reliability of the documentary evidence which the appellant provided in support of his application for further leave to remain in 2011, and accepts that that documentation resulted in him being entitled under the relevant immigration rules relating to specified evidence to the points that were allocated to him at that time. Mr McVeety clarifies today the respondent's case as being that the respondent asserts that the appellant employed deception as against HMRC and that his character conduct would need to be assessed in the light that alleged deception.

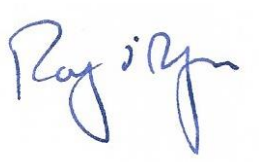
Notice of Decision

The decision involved the making of a material error of law.

The decision is set aside.

The appeal is remitted for rehearing by the First-tier Tribunal.

Signed Date 25.9.19



Deputy Upper Tribunal Judge O'Ryan