Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/02238/2019 (V) & HU/03940/2019(V)

THE IMMIGRATION ACTS

Field House
On 8th December 2020

Decision & Reasons Promulgated
On 22nd December 2020

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between
KIRUBAKARAN [B] (1)
ANPARASAY [M] (2)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Direct Access Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Sri Lanka, and are a married couple with a baby, AK, born in June 2018. The first appellant arrived in the UK on 31st May 2008 as a student, and was granted leave in that capacity until 18th October 2013. On 27th September 2013 the first appellant applied for an

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extension of leave as a Tier 1 migrant which was granted on 18th October 2013 until 10th October 2016. He applied to extend this leave, and then varied this application on 31st May 2018 to an application for indefinite leave to remain. This application was refused in a decision dated 22nd February 2019. The second appellant made a human rights application on 10th October 2016, and this was refused in a decision dated 18th February 2019. Their appeals against these decisions were dismissed by First-tier Tribunal Judge NMK Lawrence in a determination promulgated on the 31st May 2019. Permission to appeal was granted by Upper Tribunal Judge Mandalia and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision at Annex A to this decision, and set aside the decision and all of the findings of the First-tier Tribunal.

2. The matter comes before me now to remake the appeal. The hearing was held remotely, by Skype for Business, in light of the need to reduce the transmission of the Covid-19 virus and in light of this being found to be acceptable by both parties and being a means by which the appeal could be fairly and justly determined. There were some issues of connectivity, particularly with the video element and some issues with audibility during the hearing, but when this happened the hearing was stopped and I checked with the parties that nothing had been missed and recapped so as to ensure that continuity of the proceedings was maintained. The judges' computer screen failed to connect so I conducted the hearing from the court clerk's computer screen.

3. It was agreed that there were three issues on which the hearing needed to focus: firstly, whether the first appellant had submitted dishonest information to the Home Office in August 2013 or dishonest information to HMRC in his April 2013/ April 2014 tax return made in January 2015. Secondly, whether it was undesirable for the first appellant to be allowed to remain in the UK as a result of any such conduct, and thus whether his application under paragraph 276B of the Immigration Rules fell to be refused under paragraph 322(5) of the Immigration Rules. Thirdly, whether the refusal of leave to remain was a disproportionate interference with the appellants' and their baby daughter's right to respect for private life as protected by Article 8 ECHR.

Evidence & Submissions – Remaking

4. The first appellant confirmed his name and address and gave oral evidence in English to the Upper Tribunal. He confirmed that his four statements were true and correct and signed by him. He was cross-examined at length by Mr Melvin for the respondent.

5. The key evidence of the first appellant with respect to his earnings in the tax period April 2013 to April 2014, and the claimed inaccuracy in his initial tax return to HMRC for this period is as follows. The appellant explains that he

only had to amend this one tax return, for the tax period ending in April 2014, and he did so voluntarily, and said it would be unlikely that he would have done this dishonestly given he had paid over £37,000 in tax whilst in the UK and the amount underpaid was under £6000 in tax and national insurance contributions. The error related to his self-employed work for his business BKE IT Solution. His former solicitors, Jein Solicitors, who helped him with his indefinite leave to remain application made in 2016 told him about the error. He had no idea that it had taken place until they informed him.

6. When the first appellant made his April 2014 tax return in January 2015 he had been under emotional stress as his new wife, the second appellant, had just come to the UK in November 2014 and was having difficulties adjusting to life in this country. He provided his accountant with his bank statements, invoices and expenses, but late, in January 2015, due to his marriage and being distracted by the issues his wife was dealing with. His accountant was also having some problems and due to the short time-frame for lodging the tax return on time (it was submitted on 28th January 2015) the accountant just checked the figures with him on the telephone. The accountant provided him with no paperwork for this particular tax return, even after it was submitted, although he would normally have done this.

7. The error in the April 2014 tax return came about because his accountant, TS Accountancy, made a mistake and confused his expenses figures with those belonging to another client of theirs who had his first name as a surname. This led TS Accountancy to deduct £15,000 of expenses rather than £1000 of expenses from the gross income of his business. As a result of this being their error TS Accountancy paid for the service in amending the tax return and the interest owing to HMRC for the late payment. The first appellant did not spot the error made because he is not an accountant, he is a software engineer, and because he relied upon his accountancy professionals he had employed to get it right. He did initially pay £4416 in tax, and it did not occur to him that this was not correct. The first appellant was not able to use TS Accountancy for his Home Office application made in August 2013 as they were not able to take on the work at that time, but he has used them at all other times as they are his preferred accountancy firm.

8. The reason the first appellant worked hard to earn more self-employed money in this period, and at other periods when he had to make applications to the respondent for leave to remain (2010/2011 and 2016/2017), compared to other times, was because he knew he needed to earn enough to meet the threshold for the immigration applications. As he also got married in September 2014 this explains why he did not have much money in his bank account as he also had a lot of expenses at that time. He did not do half of his work in August 2013 as contended by the Home Office

in their submissions, as he billed in August 2013 for some of the work he had done earlier in that tax year.

9. The first appellant explained that he likes his team job with KFC so would not choose to give it up even if his self-employed work was going well and he was earning a lot of money, and further his employed KFC job gives him perks such as holiday pay, sick pay and a pension and allows him more family time which is important given he has had some very emotional stuff going on in his personal life. He therefore does less self-employed work if it is not needed for his immigration applications; if there is less demand; and if he wants to spend more time with his family. It is also his view that although sometimes self-employment brings in a lot of money it is not such a reliable consistent source of income.

10. The first appellant explained that he obtains his self-employed work through personal recommendation and word of mouth through his community contacts, and does not use advertising or a website. He has done his work, installing electronic tills, CCTV and setting up and repairing computers mostly for small convenience stores and off-licences run by members of his ethnic community, and he believes he is chosen because he can provide a cheap service. He did not buy the hardware but let the clients do this as they were mostly VAT registered so it is cheaper for them to do this than for him, as he is not VAT registered. When references are made to cabling on invoices this is the work done to cable not the cost of the physical cables. He did not claim depreciation on his tools with HMRC as they remained in good condition, and he used public transport or transport laid on by his clients to do his work. His claimed travel costs of £784 for 2013/2014 are accurate, despite some of the work being at a distance from his home in Luton (for instance jobs in Wales). He had had public liability insurance in 2011 but did not renew it to save costs (even though this was only around £100) although he now accepts he should have renewed it, but at the time he did not think it necessary as he could not see that his work was risky in this way. He was not accredited by potential associations for persons doing this type of work because he was offering a cheap service that clients could trust. His clients would not have chosen him due to his having accreditations, and further for the type of work he did it was not compulsory to be regulated or accredited. He denied the contention put to him that the invoices were fabricated, and gave evidence that he had done all of this work. He had invoiced some of his customers with a two-year warranty and offered to check the tills/CCTV after six months but if the equipment was still working with no problems then he had not always done these checks as there was no point. His training and testing charges varied depending on the job specification and wishes of the customer. He explained that he kept up to date via internet research and was able to do the work due to his degree in information technology (software engineering) which he had started in Sri Lanka and finished at Sheffield

Hallam University. He had not done any further courses or studies in the UK as this was not needed.

11. The key evidence of the first appellant with respect to his more general private life application to remain is that firstly that he wishes to be here so that he can continue to visit the grave of his son who was stillborn on 23rd February 2017. He and the second appellant do this regularly and find some comfort from this. Secondly, the first appellant argues that they need to be allowed to remain in the UK as this is in the best interests of their daughter, AK, born on 10th June 2018, who has global developmental delay, and is reliant on a feeding tube and a team of some 18 professionals in the UK. He says that this team of expert UK professionals are struggling to understand her rare genetic condition in the UK and her care could not be replicated in Sri Lanka. He accepted that neither he nor the UK professionals have made any enquiries about whether it would be possible to access this package of care for his daughter in Sri Lanka, but he just does not believe it would be possible given that experts here were struggling. In addition, the first appellant wishes to remain in the UK so he can continue to contribute to the UK by running his own business BKE IT Solution, which he has now run for ten years, and to do his work as a trainee manager for KFC.

12. The evidence from TS Accountancy consists of three letters from Mr Subeasharan Kulasegaram, together with a statement of truth dated 7th December 2020 which he adopted before me. The letters dated 19th September 2016 and 23rd September 2016 concerning the appellant's income from self-employment during the period September 2015 and September 2016, which the respondent did not pursue as an issue in this appeal. The letter dated 14th September 2016 concerning the tax return made in April 2014 which was said to be inaccurate because mistakenly expenses of £13,655 were claimed rather than £1027 due to an "error in our side", meaning when corrected that the first appellant had to pay an additional £5729.07 in tax, and that his gross profit was £29,545 for that tax year.

13. In oral evidence, adduced in response to cross-examination, Mr Kulasegaram explained that he had taken over TS Accountancy in late November 2014 and at the same time he had had to deal with a problem with a leak in the ceiling of his office (which meant a move in premises) and the fact that his wife had cancer and he was going with her to hospital (she sadly passed way in 2018), and the fact that a lot of tax returns were needing to be completed by the deadline of the end of January 2015. As a result he had only checked the appellant's figures with him on the telephone and provided him with no correspondence. This would not have been his normal practice, but circumstances had led to him not doing things properly at that time. Fortunately, there had been no other mistakes for any other clients, but with the appellant he had mixed up his expenses with those of another client also called Kirubakaran. He did not know he had made this

mistake until it was drawn to his attention in 2016, when he corrected it with a revised tax return. When he found out he self- reported his error to his professional body, the IFA in September 2016, and also told them that he had filed a corrected tax return to address the error. He has not heard anything from the IFA since that time.

14. The medical evidence regarding the appellant's daughter, AK, born on 10th June 2018, shows that she is a patient of Dr K Lindley, Consultant Gastroenterologist at Great Ormond Street Hospital and of Dr F Omisakin at Edwin Lobo Child Development Centre in Luton. Dr Omisakin, in her letter of 2nd September 2020, explains that AK has a rare genetic disorder associated with low muscle tone, learning difficulties, difficulties feeding, problems with weight gain, unusual facial features and disordered breathing. There are very few children in the world with this condition. She is unable to sit or move independently and has very little verbal communication. She has to be fed by way of tube from her nose to her lower gut, but this system may be changed to one which goes directly to her stomach. AK receives physiotherapy support, support from a dietician, and will received educational and speech and language support in the near future. It is Dr Omisakin's view that it is in the best interests of AK to remain in the UK as all of her clinicians are working as a team, and this team work should not be disrupted particularly at a time when the Covid-19 pandemic is globally making the delivery of medical services very difficult, and in addition it is in the interests of other families of children with this condition for AK to be allowed to remain so that information from her care can be shared.

15. Mr Melvin submitted for the respondent that reliance was placed on the reasons for refusal letter of 22nd January 2019 relating to the first appellant and his written submissions of 8th December 2020, as well as his oral submissions. He clarified that the only points taken with respect to dishonesty were with regards the discrepancy between the April 2014 tax return and the August 2013 Home Office application and not with respect to any other tax returns, as there were some other contentions in the original reasons for refusal letter.

16. In summary it is argued by the respondent that the first appellant is refused indefinite leave to remain under paragraph 276B of the Immigration Rules because it is said he falls to be refused under paragraph 322(5) of the Immigration Rules because of discrepancies between his income declared to HMRC and the Home Office. In particular the appellant declared self-employed earnings of £3270 to HMRC for the tax year ending April 2013 and £13,655 to HMRC for the tax year ending April 2014, whereas he declared annual self-employed earnings of £30,242 to the Home Office in August 2013. The first appellant said in interview that this discrepancy was due to human error by his accountant (TS Accountancy Ltd), who had filed

a correcting tax return amending the amount of the year ending April 2014 to £28,518, thus making it consistent with the information provided to the Home Office, and further has provided a letter from TS Accountancy Ltd confirming that the error was made by them. The respondent view is however that this is not an explanation which satisfies the test of basic plausibility, and further it was the first appellant's responsibility to ensure that his tax return was accurate, and as such it was undesirable to allow the appellant to remain in the UK due to his character and conduct.

17. Further and more specifically it is contended that:

- There has been no explanation as to why the first appellant used two accountants: one to deal with the Home Office Tier 1 application and one to make the tax return to HMRC in 2013/14.
- There has been no provision of the correspondence between TS Accountancy Ltd and the first appellant with respect to the 2013/2014 submissions to HMRC.
- There are no reasons why the first appellant did not realise the discrepancy between his tax liability and the figures in his application in 2013 to the respondent earlier.
- There are no proper reasons as to why there was delay in amending and repaying the tax liability.
- There is no proper explanation as to why the discrepancy only came to light when the appellant was applying for ILR.
- There is no proper explanation as to why TS Accountancy made such a large mistake in the 2013/14 tax return.
- There is no proper explanation as to why the first appellant's self-employed income was higher in years when he had to apply to the Home Office, and lower in the years ending April 2012, 2015 and 2017 when applications to the respondent were not needed.
- There is no proper explanation as to why in 2013 nearly all of the self-employed earnings (£28,000) were in May to August 2013, with half of them (£14,000) being in August 2013 and this is not in keeping with the business current account statement of the first appellant which was overdrawn in August 2013.
- There is no evidence of advertising, or the purchase of hardware for the first appellant's work such as CCTV cameras or claims for ladders and motor vehicles which would have been needed to carry out the work, and there was no evidence of extensive travel expenses given that many of the businesses were a long way from his home in Luton (only £784 was claimed in travel expenses for that tax year), there was also no evidence of business and public liability insurance or that the first appellant held Security Systems and Alarm Inspection Board Accreditations needed to install alarms, or the security equipment installers licence or the registered cablers licences or of attendance at any further training relating to the first appellant's specific areas of work.

- There is no explanation as to why the first appellant continued to work at KFC if he was/ could be making such large sums from his IT business.
- Further the fact that there are some corresponding entries in bank statements for the invoices and the fact that there are some letters from clients does not suffice as the bank statement entries might be easily falsely created and the client letters used some of the same wording and were not on headed paper and so should not be given weight.
- It is argued that the evidence of the accountant was not credible because his behaviour with respect to the 2013/2014 tax return for the first appellant was not professional or plausible, and he had not provided evidence of his having reported himself to the IFA.

18. As a result it is contended for the respondent that I should find that the first appellant's invoices for 2013/2014 are fictional in large part, as is the revised tax return, and that they were deceitfully created to obtain an immigration advantage, meaning that discretion is properly exercised under paragraph 322(5) of the Immigration Rules to refuse the first appellant under paragraph 276B of the Immigration Rules.

19. It was also submitted that it would not be contrary to Article 8 ECHR to require the appellants to leave the UK and return to their country of nationality, Sri Lanka. The second appellant was refused on the basis that she had no partner who qualified her to remain on the basis of her marriage, as the first appellant was correctly refused indefinite leave to remain, and again her removal was not contrary to Article 8 ECHR. It is argued that the tragic loss of one child by the appellants, and the fact that their other child has severe medical issues is insufficient to mean that it would be disproportionate to remove them. This is particularly because there is no evidence that the appellants' daughter could not receive the treatment she needs in Sri Lanka.

20. Mr Gajjar relied upon his updated skeleton argument dated 7th December 2020 and oral submissions. He submits, in summary as follows.

21. Firstly the Upper Tribunal should find that the first appellant has put forward an innocent explanation that explains why his initial submission to the HMRC was less for tax year ending April 2014 than the figures given to the Home Office in August 2013 which led to the applicant being granted Tier 1 leave to remain. However, and very much in the alternative, it is argued that even if he were found to have made a dishonest return that should not in all of the circumstances lead to discretion being exercised to refuse him on the basis that this made it undesirable that he should be allowed to remain under paragraph 322(5) of the Immigration Rules; and even if it were in some way found to be undesirable that the first appellant should be allowed to remain due to dishonesty it was argued that their

removal would be disproportionate due to the appellants' first child being still born in February 2017 and buried in the UK, and their second child born in June 2018 having general developmental delay, and in the context of the length of their residence and economic contribution to the UK.

22. With respect to the primary contention that the first appellant has provided a plausible innocent explanation for the HMRC/ Home Office discrepancy in the amount of self-employed earnings for the tax year 2013/2014 it is submitted that it is important that there is only one discrepancy in the first appellant's history of submissions to HMRC, and a corrected HMRC return was made prior to the application for indefinite leave to remain. In August 2013 the first appellant applied to the Home Office and relied upon £30,242 of self- employed income. This amount covered two tax years: 2012/2013 for which £3270 was declared and 2013/2014 for which initially £13,655 was declared. The difference was therefore £16,925. It is accepted that the respondent meets the evidential burden under paragraph 322(5) of the Immigration Rules due to the amount of this discrepancy.

23. It is submitted however that the first appellant raises an innocent explanation going beyond the minimum level of plausibility with respect to this discrepancy and ultimately that the respondent has not shown he was dishonest.

24. In August 2013 the first appellant submitted evidence supporting his claimed income of £30,242 from his self-employed business BKE IT Solution, accompanied by unaudited accounts and letters from some clients, to the Home Office which was satisfied on the balance of probabilities that it was genuine and granted him leave to remain as a Tier 1 migrant on this basis on 10th October 2013. The first appellant has a BSc in Information Technology from Sheffield Hallam University and runs a business installing CCTV and electronic tills, repairing PCs and the like which is commensurate with his qualifications, and he has explained that he uses internet research to make sure he is providing the best up to date service to his customers. The first appellant has explained that he does not need accreditations or further training to do this work, and that he is employed through community contacts running small convenience stores to do the work because he is comparatively cheap. He was not cross examined with regards to his bank statements or the client letters supporting him being forged so it would not be fair to take these points against him, although it should be noted that the writers of the letters have provided evidence of their identity and/or ownership of the stores and it would be unlikely they would have letterhead as small shop owners. It is argued that this evidence is further support for the contention that the business the first appellant does is real, and that he did not make a dishonest application to the Home Office in 2013. It is argued that the fact that he has worked harder at his self-employed business in years when he had to meet the target of a certain

amount of income for his immigration applications does not mean that the work was not done. There is nothing wrong or dubious with this pattern of work as the relevant Immigration Rules do not require continuity of income. The first appellant has also given good reasons why he prefers his employed work generally in terms of working as a team and the benefits of the PAYE system.

25. It is argued that the following stand in favour of the first appellant's credibility: fact that there is only one wrong tax return in the context of others which are correct and consistent with information provided to the Home Office; that this tax return was corrected promptly once the error came to light and the correct tax paid; and that the first appellant would have no motive not to seek to save a relatively small amount of tax and national insurance when he had paid £37,778 over his time in the UK.

26. Further the self-employed discrepancy in the original HMRC return for 2013/2014 is explained as having been made by the first appellant's accountant, Mr Kulasegaram of TS Accountancy, a contention which is properly supported in this appeal by oral testimony, letters and a statement of truth from him. Mr Kulasegaram says that he mixed up the first appellant's records with those of another client whose last name was the same as this appellant's first name at a time when the accountant was operating in very difficult professional and personal circumstances. It is clear from the HMRC letter at page 75 of the appellant's bundle that this tax return was indeed submitted by an accountant. It is to be noted that there is documentary evidence that TS Accountancy corrected the error without charging the first appellant, and paid the late payment interest levy from HMRC OF £332. It is argued that it is plausible that the first appellant did not notice the error as he is not an accountant himself; because he did pay £4416 in tax for that tax year; and because he was preoccupied by the fact that his wife had just arrived from Sri Lanka and was finding it difficult to adapt to life in the UK. The first appellant learned of the error only when he instructed Jein Solicitors in June 2016, which explains the timing of the correction of that error in September 2016. It is submitted therefore the first appellant does not fall to be refused under paragraph 322(5) of the Immigration Rules, and therefore satisfies paragraph 276B of the Immigration Rules.

27. However, if this is not accepted that the appellant was not dishonest with respect to this tax return, it is argued that in any case discretion should be exercised under paragraph 322(5) in the first appellant's favour on the basis that: he has been in the UK since 2008; he is working as a trainee assistant manager and on a self-employed basis and has made a considerable tax contribution to the UK through his work since his arrival; the second appellant has been in the UK lawfully since November 2014; the appellants' son was stillborn and is buried in Luton Cemetery, and the appellants visit

the grave regularly and get some comfort from this; the appellants' daughter has global developmental delay and is fed through a tube, has general fragile health due to a very rare genetic condition and it is in her best interests to remain in the UK to maintain her complex medical care package.

28. It is also argued that to remove the appellants would be contrary to Article 8 ECHR because of their private life ties with the UK as outlined above; and further they are self- supporting and speak English and it would be in the best interests of their daughter to be permitted to remain in the UK under the care of her team of professionals so that her care continues seamlessly given her rare condition and fragile health, particularly as the care package from the many professionals is still being established and in the context of the global pandemic affecting health care in all countries.

Conclusions – Remaking

29. The appellants contend firstly that they are entitled to remain in the UK on the basis of their Article 8 ECHR private life rights on the basis that the first appellant qualifies for indefinite leave to remain under paragraph 276B of the Immigration based on his having ten years lawful residence. This is refused by the respondent on the basis that he falls to be refused under paragraph 322(5) of the Immigration Rules, which is in turn refuted by the appellants. Secondly, the appellants claim that they are entitled to remain even if they do not succeed by way of paragraph 276B of the Immigration Rules due to their private life ties with the UK, and in particular the medical problems of their daughter AK, making their removal a disproportionate interference with their Article 8 ECHR rights.

30. The respondent has to show under paragraph 322(5) of the Immigration Rules firstly sufficient evidence to raise the issue of fraud or deception, and thus show that she can meet the evidential burden. The appellant should, if contesting the application of paragraph 322(5), then raise an innocent explanation which will continue the consideration of the issue if it satisfies a minimum level of plausibility. If that is done then the Secretary of State must establish fraud took place on the balance of probabilities, showing thereby that the innocent explanation should be rejected, if the application is properly to be refused under this provision.

31. In R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC) it is held that where there is a significant difference in the income claimed in a previous application for leave to remain and the income declared to HMRC at the same time the respondent is entitled to draw an inference that an appellant has been deceitful or dishonest and therefore that he/she should be refused under paragraph 322(5) of the Immigration Rules absent any plausible explanation for the discrepancy. In this case Mr Gajjar, for the first appellant, properly accepts

that there was such a significant difference in these amounts in relation to the initial tax return for the first appellant for April 2013/April 2014 and his August 2013 immigration application, so the question for this Tribunal is the plausibility of the first appellant's explanation.

32. The Upper Tribunal in Khan provides further guidance that the matter of plausibility is to be decided on the balance of probabilities with consideration as to whether the evidence shows an appellant to be careless rather than dishonest, and with regard being paid to the very serious consequence of the fact finding on the issue where it may lead to a refusal of indefinite leave to remain. It is not sufficient for an appellant to simply explain a discrepancy by reference to accountancy error, as an appellant should have been asked to confirm the tax return was correct and should have known the amount of his earnings on which he was due to pay tax; and further an appellant should have taken steps to remedy any error in a reasonable period of time. When considering whether the explanation of the accountant being at fault is plausible it will be necessary to consider whether correspondence at the time of the tax return between the accountant and appellant is disclosed or a reason for it being missing is given; whether it was reasonable that the appellant did not know he was due to pay more tax; and whether and how quickly the appellant took steps to remedy the situation.

33. With respect to evidence from accountants in this context it has been said in two different reported decisions, namely Abbasi (rule 43; para 322(5): accountants' evidence) [2020] UKUT 27 (IAC) and Ashfaq (Balajigari: appeals) [2020] UKUT 226 (IAC) that it is vital that an accountant gives evidence to the Tribunal, and in particular oral evidence by reference to a statement of truth, regarding any fault on their part in providing inaccurate information to HMRC. As the allegation goes to the accountant's professional standing it would be expected that insurers and the firm's regulatory body would have been informed.

34. The respondent argues that I should find that the tax revised tax return for the April 2013/2014 tax year submitted in January 2015 and the business information prepared for the Home Office in the application submitted in August 2013 is, at least in part, fake and therefore dishonest, because the work done by the first appellant for his business BKE IT Solution did not, at least in large part, take place. I therefore find it the proper place to start is to look at the evidence with respect to this business for this period.

35. I turn first to the documentary evidence. The first appellant has provided a schedule of evidence for the period September 2012 to August 2013 with invoices and references to the bank statements for the amounts entering the account. There are also eight letters from clients confirming with identity papers that the work was genuinely done. Mr Melvin has submitted that I should doubt the reference letters as two of them written in October 2020

have sections of identical wording, namely that of Mr Jegannathan and that of Mr Gnanesselan. This issue was not put to the appellant for comment so of course there may have been an explanation such as they know each other and discussed how to express the letters, or both had taken advice from the first appellant as to what the Tribunal needed to understand. I find, however, that given that the other client letters do not include any notable similarities and given the supporting evidence of identity and business ownership that this evidence should be given some weight. Mr Melvin put emphasis on the implausibility of the travel expenses given the distances that the appellant had travelled for some of the work, but the invoices only include 4 which are not reasonably near to the appellant in Luton (the rest being in Luton, London and the south east): there are two trips to Aberystwyth (November and December 2012), one to Wallasey (May 2013) and one to Northamptonshire (August 2013). I do not find that the travel expenses amount disclosed, of £784, gives any reason to believe that the work was not genuinely done. Mr Melvin also said that there was evidence that the amounts for staff training had increased unrealistically over the period of the invoices. However, I find that this is not the case the amounts varied from £70 to £375, with both of these amounts being billed in August 2013. I accept the evidence of the appellant that the amounts depended entirely on the clients' requirements. As Mr Gajjar has submitted the documentary evidence satisfied the respondent in 2013 to grant the first appellant further leave, and I do not find that anything which has been said before me causes me not to give it weight.

36. Mr Melvin also submits that the way in which the business was run: the lack of public liability insurance after it expired in 2011; the lack of a website/advertising; the lack of any on-going training for the first appellant; the fact that the first appellant does not belong to trade associations or hold accreditation that would be open to him; and the fact that he apparently did not work consistently hard at his self-employed business – slacking off when he did not need to show more income for his immigration applications even though he could apparently earn a lot of money from this work - means that I should doubt that the business was genuinely conducted. The first appellant argues that he genuinely conducted the business in this way for the following reasons. It was about offering services within his own community to small traders at low cost operating within his sphere of knowledge from his degree topped up by internet research and where they bought the hardware for VAT reasons. This was very much his second work choice as he preferred his employed work in a team as a manager at KFC, and so only did this self-employed work to top up his income and only needed to top that income up significantly in certain years to comply with the Immigration Rules. In support of his work with KFC there are two letters in the bundle of documents from managers which do confirm his commitment and enjoyment of his work with KFC. Ultimately, I consider that there is no reason to find the manner and pattern of the work

implausible. I can see no reason on the evidence before me to disbelieve that there was a market for a cheap, word of mouth services installing tills, CCTV and providing computing support to small businesses and individuals within the first appellant's Sri Lankan community which he was able to fulfil in the way he describes. He also gives good reasons of team fellowship, security of income and work/life balance for preferring his employed work and is candid about earning more in years when he needed this for immigration application reasons.

37. Mr Melvin submits that I should not find the evidence credible with respect to the accountancy mistake which is contended to have led to the difference in the amount submitted to the Home Office in August 2013 and that provided to HMRC in January 2015. Mr Kulasegaram's evidence complied with the requirements of a statement of truth and his attending to give oral testimony. The evidence of the first appellant and the accountant, Mr Kulasegaram, is entirely consistent. It is said that the 2013/2014 tax return for the first appellant was submitted on the basis of documents provided by him but with nothing confirmed in writing by the accountant at the time or after the event. The inaccurate submission to HMRC is said to have came about because expenses relating to a different client, with the same name as the first appellant, were deducted from the profits of the first appellant, and it is said that this was only discovered by Jein Solicitors when they were preparing to make the 2016 application for indefinite leave to remain. An amended tax return was then submitted by Mr Kulasegaram at his own expense, and he made a report of the whole matter to his professional body the IFA. Both the first appellant and Mr Kulasegaram were able to provide reasons why they had acted with less than proper care in making this particular tax return: the first appellant was preoccupied with settling his wife into the UK; Mr Kulasegaram had just taken over TS Accountancy Ltd in November 2014, he found he was overwhelmed with work to be completed prior to the 31st January 2015 deadline; he had to move premises due to a leak in the ceiling; and his wife (who sadly passed way in 2018) was ill with cancer and he had to deal with taking her to hospital appointments.

38. The original tax submission was undoubtedly made by TS Accountancy Ltd on the appellant's behalf as is reflected in the letter from HMRC at page 75 of the bundle. It is also the case that the NatWest bank statement at page 78 of the bundle shows that TS Accountancy paid the first appellant back the interest to HMRC which accrued due to their mistake. The credibility of the explanation otherwise lies in the credibility of the witnesses: having considered all of the evidence in the round I can find no reason to conclude that the first appellant is not generally a credible witness. He answered all questions put to him directly and to the best of his ability. I have not found that there is any evidence which leads me to disbelieve in his self-employed work for the reasons I set out above. As I have noted the two witnesses, who gave their evidence entirely separately, were totally consistent. Mr

Kulasegaram was frank about his professional failings at that particular point in time, and on consideration of all of the evidence I find that the discrepancy between the submission to the Home Office in August 2013 and to the HMRC in January 2015 when submitting the first appellant's 2013/2014 tax return was due to the professional failings of his accountant and the first appellant's own failure to request and check the accounts prior to submission or at least immediately afterwards. I find therefore that the evidence before me is of negligent rather than deceitful behaviour on behalf of both witnesses as I find their explanations to be entirely plausible. I find that there is therefore no relevant correspondence they could have disclosed to the Upper Tribunal; and I accept that as soon as the problem was uncovered by Jein Solicitors that both of them did their best to put it right promptly with a revised tax submission, payment of the outstanding amounts and report to the IFA by Mr Kulasegaram.

39. I therefore find, on consideration of all of the evidence, that the Secretary of State has not shown on the balance of probabilities that the first appellant has been deceitful or dishonest in his dealings with the Home Office or HMRC. As it is accepted that the first appellant fulfils the requirement of having 10 years lawful residence I find that the first appellant fulfils the requirements of paragraph 276B of the Immigration Rules as he does not fall to be refused under paragraph 322(5) of the general grounds of refusal due to having acted dishonestly in the way contended by the respondent and does not fall to be refused on the basis that there is any public interest which makes it undesirable for him to be given indefinite leave to remain in the UK.

40. As the first appellant is able to show compliance with the long residence Immigration Rules for indefinite leave to remain I find that there is no public interest in his being removed from the UK. In this context I find that the first appellant's removal would be a disproportionate interference with his private life rights given his work and long residence in the UK; and in light of the best interests of his two year old daughter, AK, to remain in the UK and keep the continuity of care through the multitude of professionals working to support her health and development in light of her rare genetic condition and the difficulties and risks that would be involved in transferring that care to another country in the time of the Covid-19 global pandemic which is placing considerable strain on all health care systems. I note in this respect that the first appellant speaks English and is financially self-sufficient, and treat these factors as neutral matters.

41. I find that the removal of the second appellant would be a disproportionate interference with her right to respect to family life with the first appellant and her daughter, AK, who I have found cannot be removed proportionately on private life grounds for the reasons set out above. I note in this respect that the second appellant has shown that she has English

language qualifications and work in the UK with Amazon, so I am satisfied that she speaks English, and as a result of her own work and that of her husband, the first appellant, is financially self-supporting. These two matters are again treated as neutral factors.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision and all of the findings of the First-tier Tribunal.

3. I remake the appeal by allowing the appeals under Article 8 ECHR.

Signed: *Fiona Lindsley* Date: 10th December 2020
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellants are citizens of Sri Lanka, and are a married couple with a baby born in June 2018. The first appellant arrived in the UK on 31st May 2008 as a student, and was granted leave in that capacity until 18th October 2013. On 27th September 2013 the first appellant applied for an extension of leave as a Tier 1 migrant which was granted on 18th October 2013 until 10th October 2016. He applied to extend this leave, and then varied this application on 31st May 2018 to an application for indefinite leave to remain. This application was refused in a decision dated 22nd February 2019. The second appellant made a human rights application on 10th October 2016, and this was refused in a decision dated 18th February 2019. Their appeals against these decisions were dismissed by First-tier Tribunal Judge NMK Lawrence in a determination promulgated on the 31st May 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Mandalia on 27th August 2019 on the basis that it was arguable that the First-tier judge had erred in law in refusing the appeal under paragraph 322(5) of the Immigration Rules by the wrong application of the burden of proof and assessment of the evidence.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. In the grounds of appeal it is firstly argued that the First-tier Tribunal applied the wrong burden/standard of proof at paragraphs 8 and 22 where it is said that the legal burden of proof under paragraph 322(5) of the Immigration Rules lies with the appellant, as it is claimed that the appellant must rebut the evidential burden on the respondent on the balance of probabilities whereas in the Upper Tribunal and High Court it has been clearly said that the burden on the appellant is only to submit something to a basic level of plausibility in response to the evidential burden, and then the burden switches back to the respondent with the ultimate burden being on the respondent to prove dishonesty on the balance of probabilities. This error means that a new hearing is the appropriate course.

5. This error has led the First-tier Tribunal to approach the decision-making wrongly. At paragraph 19 it is said that it is difficult to accept two accountants would confuse two similarly named clients, when the correct question was whether it was simple implausible that two similar named clients would have had their records confused.

6. Secondly, the appellant also says that there was a material error of fact at paragraph 15 with regard to when the first appellant amended his tax return: counsel's record of this evidence was that this was done in September 2016, and so there was no contraction in his oral evidence that this was done prior to 18th October 2013 as asserted by the First-tier Tribunal. Another factual mistake in the evidence is found at paragraph 17 of the decision where the First-tier Tribunal states that there are no amended 2013/14 tax returns before the Tribunal, when there were at AB 150, 151 and 167. It was also an error of fact to say at paragraph 14 of the decision that multiple errors were made when in fact this was only in relation to 2013/2014 tax return.

7. Thirdly, it is argued by the appellants, that the First-tier Tribunal acted unfairly by failing to put the contended mistake in the accountant's letter regarding the amount of the other Mr R Kukbakran's expenses set out at paragraph 18 of the decision to the appellant during oral evidence, and that a transcript of the proceedings should be made available. If this had happened then the appellant would have explained that there was an incorrect figure in the accountant's letter at AB 153, but the correct figure was in the accountant's letter at AB155, with the incorrect figure in the first letter being the amount of the first appellant's net profit

8. Fourthly, it is argued that there are irrational findings as to the letters provided by the accountant at paragraph 20 of the decision as it is both said that it is not possible that a mistake could be made and that weight should be given if it is accepted such a mistake was possible. Further, it is argued that at paragraph 21 of the decision it was irrational to find that the fact that the accountants' letters admitting it was their fault were written "to whom it may concern" meant little weight could be given to them, even though there was also bank statement evidence showing that the accountants had paid the appellant the interest money that had become due, which was clearly referenced HMRC in the transfer.

9. Fifthly, it is argued that there were irrational conclusions in relation to the appellants' late child (that they could excavate the remains – set out at paragraph 31) and a failure to consider the best interests of their other child born in June 2018 who has a number of serious medical difficulties, see evidence in ABS 11.

10. Mr Avery submitted that overall when the decision was looked at as a whole the evidence had been thoroughly considered and the correct test had practically been applied even if it had not been properly set out.

11. I informed the parties that I found that the First-tier Tribunal had erred in law and that I would set out my reasons in writing. I informed the parties that I would set aside the decision and all of the findings, and remake the appeal de novo.

12. Mr Gajjar wished the matter to be remitted to the First-tier Tribunal but I found that it was proper that it remained in the Upper Tribunal as there would not be an extensive amount of factual remaking as there was only one tax return that was inaccurate, and so the factual findings that needed to be made to determine the appeal were primarily only about whether this had been deceptive or not. Mr Avery asked that the remaking be adjourned as he had not had an opportunity to look at the rather extensive papers in detail. I agreed to this as the appellant also wished to seek an explanation about the error in the first accountants' letter and the reason for the late payment to the first appellant by the accountants of the interest on the owed money to HMRC.

Conclusions – Error of Law

13. The First-tier Tribunal errs in law at paragraph 8 of the decision with respect to the burden of proof being on "the appellant from start to finish" once the respondent has shown an evidential burden under paragraph 322(5) of the Immigration Rules. As set out in the case law of the higher courts on this point the Secretary of State must first adduce sufficient evidence to raise the issue of fraud or deception, and thus meet the evidential burden. The appellant can then raise an innocent explanation which will continue the consideration of the issue if it satisfies a minimum level of plausibility. If that is done then the Secretary of State must establish fraud took place on the balance of probabilities, showing thereby that the innocent explanation should be rejected.

14. The First-tier Tribunal errs further in the consideration of this matter by not provide sufficiently clear reasoning as to why the first appellant's explanation, supported by letters from his accountants, that it was the accountants fault based on confusing two similarly named clients, did not satisfy a minimum level of plausibility particularly as the material went beyond a mere assertion that a mistake was made. The fact that there was an erroneous figure in one of the letters admitting responsibility is not necessarily indictive that the accountant did not make the original mistake: there also needed to be reasoning to explain this conclusion. Further it was not rational to find that the accountants' letters were undermined in their evidential value by being addressed "to whom it may concern". I find that there is also an error in failing to take into account relevant material as it is

stated at paragraph 17 of the decision that no amended tax returns were in the material before the First-tier Tribunal when these clearly were part of the appellant's bundle; and I find that there were inadequate reasons given to reject the evidence that the accountant had repaid the first appellant the amount of the interest he incurred by making an amended submission to HMRC at paragraph 21 of the decision.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision and all of the findings of the First-tier Tribunal.

3. I adjourn the remaking hearing.

Directions

1. Any new evidence for the remaking hearing be served on the other party and filed with the Upper Tribunal 10 days in advance of that hearing.

Signed: *Fiona Lindsley* Date: 1st October 2019
Upper Tribunal Judge Lindsley