Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03825/2019
HU/08735/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2020	**On 02 June 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SWAPNIL DIWAKAR SURADKAR
SAMANTHA MERLE DSOUZA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J. Gajjar, instructed by Eldons Berkeley Solicitors
For the respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is the main appellant ("the appellant") and his wife is his dependent for the purpose of this appeal. The appellant appealed the respondent's decision dated 14 February 2019 to refuse a human rights claim.

2. First-tier Tribunal Judge A.K. Hussain dismissed the appeal in a decision promulgated on 07 August 2019.

3. The Upper Tribunal found that the First-tier Tribunal decision involved the making of an error of law in a decision promulgated on 04 December 2019 (annexed). The Upper Tribunal upheld some parts of the First-tier Tribunal decision but found that there was an error of law relating to the judge's assessment of the overall balancing exercise under Article 8. The judge failed to make findings regarding material matters that were relevant to the weight to be given to the public interest considerations. Although negative findings relating to the allegations of deception would have yielded the same outcome, a positive finding might have affected the weight that should be given to the appellant's side of the scale.

4. The Upper Tribunal made clear that the scope of the remaking was narrowed to (i) findings of fact relating to the general grounds for refusal; and (ii) how those findings impact on the overall balancing exercise under Article 8.

5. A chronology of events may assist in understanding the background to the case. I have highlighted relevant applications for ease of understanding given the proliferation and layering of applications made by the appellant in recent years.

23/09/05	Appellant entered the UK with leave to enter (LTE) as a student valid until 31/03/07. An application for further leave to remain (LTR) was refused on 25/04/07 with a right of appeal. It is said that the appellant withdrew the appeal and made a voluntary departure, but it is not clear what date he left the UK.
25/01/09	Entered the UK with LTE as a Tier 1 (Post-study work) Migrant valid until 05/11/10
05/11/10	**Applied for LTR as a Tier 1 (General) Migrant**
11/01/11	Applied for LTR refused with a right of appeal
01/03/11	Appeal allowed
05/04/11	Granted LTR until 05/04/13
05/04/13	**Applied for further LTR Tier 1 (General) Migrant**
11/11/13	Granted LTR until 11/11/16
15/03/16	**Application Indefinite Leave to Remain (ILR) as Tier 1 (General) Migrant ("the PBS application")**
27/04/17	Refused ILR with right to Administrative Review **("first PBS decision")**
08/06/17	Administrative Review maintains decision to refuse ILR
23/06/17	**Application for LTR on grounds of long residence ("the human rights claim")**

28/07/17	Judicial review claim to challenge the first PBS decision
30/11/17	Judicial review claim settled by consent The respondent agreed to reconsider the first PBS decision dated 27/04/17
04/12/18	PBS application refused with right to Administrative Review **("second PBS decision")**
27/12/18	Application for Administrative Review of the second PBS decision
28/12/18	**Application to vary outstanding human rights claim to an application for ILR on grounds of 10 years lawful residence**
14/01/19	Appellant sent request for further information
22/01/19	Appellant returned questionnaire re: tax affairs
29/01/19	Administrative Review relating to the PBS application treated as withdrawn with effect from 28/12/18 with reference to paragraph 34X(4) of the immigration rules
14/02/19	Human Rights claim on grounds of 10 years' lawful residence refused with right of appeal **("the human rights decision")**
04/03/19	Judicial review claim to challenge second PBS decision
06/06/19	Permission granted to bring judicial review proceedings
07/08/19	First-tier Tribunal dismissed appeal brought on human rights grounds
04/12/19	Upper Tribunal set aside First-tier Tribunal decision
24/12/19	Judicial review claim settled by consent. The respondent agreed to reconsider the second PBS decision
25/02/20	Upper Tribunal hearing to remake the decision in the human rights appeal

Decision and reasons

6. The appeal was relisted for hearing primarily to make findings of fact relating to the general grounds of refusal under paragraph 322(2) and 322(5) of the immigration rules because the First-tier Tribunal failed to do so.

7. This decision is not concerned with the ongoing proceedings relating to the refusal of ILR as a Tier 1 (General) Migrant but the reasons for refusal were same as the decision to refuse the human rights claim. Both applications were refused under the general grounds for refusal and for the same underlying reasons.

8. I note that the appellant did not act promptly to file the most recent judicial review claim which sought to challenge the second PBS decision dated 04 December 2018. Instead, he waited until the last day of the extended three-month deadline before

filing the claim. By that time, he and his representatives would have been fully aware of the fact that he had lodged an appeal to the First-tier Tribunal against the decision to refuse the human rights claim. The Upper Tribunal Judge who granted permission on the papers was unlikely to be aware of this fact, which was omitted from the chronology of events in the Statement of Grounds. While I appreciate that the appellant was seeking to challenge a decision relating to a separate application, given the fact that the same issues are at the heart of both decisions, those who assisted him to make the judicial review application should have been alive to their duties to the court if they knew that the appellant had a full fact finding appeal available to him in which further evidence could be produced to rebut the allegations. Nevertheless, the Secretary of State should have been aware of that fact when she agreed to settle the claim. A third decision relating to the PBS application is awaited.

9. The appellant continues to assert that the chronology outlined above shows that he met the requirements for 10 years lawful residence because it is argued that leave extended under section 3C of the Immigration Act 1971 was 'revived' upon the Secretary of State's withdrawal of the first and second PBS decisions.

10. Whether it is possible for section 3C leave to be 'revived' in light of the statutory framework is a matter that will only need to be determined if the respondent fails to show that the decision to refuse the human rights claim was justified because the general grounds for refusal applied. The application would normally be refused if the appellant fell within the general grounds for refusal with reference to paragraph 276B(iii) of the immigration rules. For this reason, I will start by considering the general grounds for refusal first.

General grounds for refusal

11. At the date of the decision to refuse the human rights claim on 14 February 2019 the respondent was not satisfied that the appellant had at least 10 years continuous lawful residence. In any event, the application was refused with reference to paragraph 276B(ii)(c) of the immigration rules which states that there must be no reasons why it would be undesirable for the person to be granted ILR taking into account his personal history, including character, conduct and associations. The application was also refused with reference to paragraph 276B(iii) which states that the applicant must not fall for refusal under the general grounds for refusal. The respondent went on to consider whether the appellant's character and conduct were such that he fell within the general grounds for refusal

12. Paragraph 322(2) of the immigration rules states that an application for leave to remain should normally be refused if there is a failure to disclose a material fact or false representations were made in the application for leave to remain or a previous application.

13. Paragraph 322(5) states that an application for leave to remain should normally be refused if it is undesirable for the person concerned to remain in the United Kingdom in light of his conduct, character or associations or because he represents a threat to national security.

14. The respondent highlighted two areas of concern, which both relate to the appellant's application for leave to remain as a Tier 1 (General) Migrant in 2010. The first is an allegation that the appellant made false representations and/or produced false documents. The second allegation is that the appellant used deception by falsely inflating his income for the purpose of the immigration application, or alternatively, failed to declare his income for the purpose of his tax obligations.

15. Although the focus of each allegation is slightly different, at the core of both is the suggestion that the appellant may have falsely inflated his claimed self-employed earnings for the year 2010-2011 in order to meet the income requirements of the immigration rules. In such circumstances it is appropriate to consider the evidence as it relates to both allegations before coming to a decision. My task is made more difficult by the fact that little evidence has been produced by either party relating to the application for leave to remain made in 2010. It is not possible to obtain a clear picture of the figures the appellant put forward or to assess what evidence was produced to support the application. Although some documents contained in the appellant's bundle might have been included with the application in 2010, they are patchy and incomplete. The application was initially refused, but the subsequent appeal was allowed. Neither party has produced a copy of the relevant First-tier Tribunal decision.

16. In relation to the first area of concern, the appellant was required to show a minimum level of income of for the purpose of the immigration rules. There does not appear to be any evidence to show what level of income, and therefore what points the appellant claimed, when he first applied for leave to remain as a Tier 1 Migrant. In 2010, the minimum level of income required by Appendix A of the immigration rules was £16,000. The evidence shows that the appellant's employed income was likely to be below the minimum level of required income. In the relevant period before the application for leave to remain the appellant claimed that he earned £11,928 from employment. In other words, the appellant had to rely on self-employed income in order to meet the requirements for leave to remain as a Tier 1 Migrant.

17. The appellant says that his self-employed income was derived from selling the personal data of people who had been involved in accidents to third parties. At the time when he made the application for leave to remain in 2010, he says that he was trading under the name Addonnet. One of the few documents relevant to this period is an undated summary of income prepared by PKG Plus Chartered Accountants for a three-month period from 25 June 2010 to 30 September 2010 [pg. F106]. It is not clear whether this document was sent with the 2010 application

for leave to remain or formed part of the assessment when he amended his tax return for 2010-2011 in 2015. In any event, the appellant relies on it as a summary of his self-employed earnings during the tax year 2010-2011. The schedule details ten invoices issued at regular intervals during a six-week period from 16 August 2010 to 29 September 2010. The schedule records that the invoices were paid, also at regular intervals, over the period 19 August 2010 to 23 October 2010. Most of the invoices were issued to named individuals and were for similar amounts of between £3,500-£3,800. Only one was issued to a company, "Iwin Technological Ltd", on 16 September 2010 for £5,000. The schedule records that "Iwin Technological Ltd" paid the invoice on 29 September 2010. The total income said to have been earned in the three-month period was £40,765.

18. When the appellant applied for leave to remain in November 2010, he claimed to have earned £39,068 from self-employment in the qualifying period preceding the application. The figure of £40,765 contained in the schedule is consistent with the calculations submitted to HMRC when the appellant amended the 2010-2011 tax return in 2015 before a deduction of £1,696.67 for expenses [pg. G12]. The net income from self-employed work was amended to £39,068. In other words, the schedule is said to represent the appellant's total self-employed earnings during the 2010-2011 tax year.

19. The respondent alleges that Iwin Technologies Ltd was complicit in the recycling of funds to help people to obtain leave to remain by deception. She produced a witness statement from an investigating officer from the Home Office Immigration Crime Team. Operation Cudgegong commenced in September 2012 and finished in July 2016. The operation investigated organised abuse of the Tier 1 (General) visa system by Indian nationals. The investigation featured several companies, which on further examination, did not undertake legitimate trading. The bank accounts of the companies primarily were used to receive cash deposits. The money was then paid back to individuals purporting to be invoice payments. The individuals receiving the payments were almost exclusively Indian nationals who later applied for a Tier 1 (General) visa claiming to have undertaken some form of self-employed work for the company (normally as an IT consultant).

20. Among the companies investigated by Operation Cudgegong was a company called Iwin Technologies Limited. The investigation also focussed on an individual who was the director of an accountancy company called AGS Business Consultancy called Anil Kumar Kasula and another individual who was the director of an OISC registered organisation called Incredible Immigration Services. The officer gave a detailed explanation of how the fraud worked. Individuals who intended to apply for leave to remain sought to manufacture evidence to show they earned the level of income required for the visa by purporting to undertake self-employed work in the months preceding the visa application. The self-employed income was not genuine. The individuals paid cash into the company account directly or through a third party which was then paid back to the individual in order to give the impression that it was earned income. Tax was typically paid on the false income.

21. The officer outlined what was discovered about the sole director of Iwin Technologies Ltd, Raghavendra Karanam. After investigating his personal and business accounts it was discovered that Mr Karanam often received money into his personal account and then transferred it to the Iwin Technologies business account before transferring the money back to the person as a purported invoice payment. Mr Karanam left the UK and did not return when other organisers of the fraud were arrested in October 2012. The officer says that 27 people who applied for Tier 1 (General) visas were arrested on suspicion of conspiracy to facilitate a breach of immigration law. Of those, 23 admitted that the self-employed income was falsified and that the payments were recycled back to them. They said that the recycling of monies was arranged either by Mr Karanam or Mr Kasula. Some received cautions, their visas were revoked, and they made voluntary departures to India. Others were prosecuted and received sentences of 14-18 months. The investigation asked an approved forensic accountant to look at the accounts of the companies concerned. The forensic accountant concluded that the companies did not trade genuinely. The accounts were used for recycling monies for Tier 1 visas.

22. In relation to this appellant the officer states:

> "Swapnil Diwakar SURADKAR 3/5/78 a national of India applied for a Tier 1 General visa on 5/11/10. This application stated he had earned a total of £50,996 in the qualifying period of which £11,928 was from paid employment with Anthonydonaldevans Ltd and £39,068 (net) from self-employment. At the time of the application SURADKAR was resident in Liverpool.
>
> The account of Iwin Technologies shows the following payment being made to SURADKAR.
>
> 29-Sep-2010 BP S SUDARKAR CONSULTANT PAY 5,000.00
>
> This payment can be seen to be funded by a number of cash deposits made into Iwin Technologies account in Liverpool shortly before the payment is made.
>
> The accountant recorded in the application was PKG Plus although not investigated as part of Op Cudgegong this accountant was used on at least one other beneficiary I have come across in the course of the investigation."

23. Although the respondent has not produced copies of the documents referred to in the statement the information provided by the officer from Operation Cudgegong is from a reliable source and has not been challenged.

24. In any event, the appellant does not dispute that he received a payment of £5,000 from Iwin Technologies only a few weeks before he made the application for leave to remain. The appellant says that he worked for a company called Anthony Donald Evans Ltd in Liverpool. He had also become involved in a self-employed work selling information relating to people who had suffered personal injury following an accident who might be interested in pursuing a claim (described as "leads"). He says that one of his clients in Liverpool introduced him to a person

called "Raj" from London who was interested in purchasing leads. The appellant says that once Raj placed the order over the phone, he worked through the data to generate the leads that fitted the criteria. After that, he travelled to Liverpool Street Station in London where he met Raj to hand over the hard copies of the leads. When cross-examined the appellant said that he only spoke to Raj on the phone. He did not have any postal or email contact details. He did not think this was out of the ordinary. He wanted to meet his client face to face. He took Raj on his word when he said that he would pay him for the data. He later received a payment from Iwin Techonologies Ltd.

25. The appellant included example "leads" in the bundle, which appear to be a series of handwritten notes of the personal details of people who suffered injury following an accident. It is unclear how the appellant obtained this information. Other examples are typewritten. I note that most of the evidence relating to self-employed income included in the appellant's bundle appears to relate to the application for further leave to remain as a Tier 1 Migrant made in 2013 although a few of the leads appear to go back as far as 2010. I can see no copies of the invoices that were said to have been issued for work outlined in the schedule for 2010 or any bank statements showing payments for self-employed work undertaken in 2010.

26. In response to the statement made by the officer from the Home Office Immigration Crime Team the appellant points out that the respondent could only point to one payment of £5,000 from Iwin Technologies. If he was involved in the fraud as claimed, one might expect more payments from the company to generate the income required to meet the requirements of the immigration rules. He also points out that he has not be arrested or questioned in relation to the fraud. He says that it is reasonable to infer that there was insufficient evidence to show that he was involved in recycling funds. He was interviewed in relation to his work when he applied for further leave to remain in 2013 and the officer was satisfied that it was a genuine business.

27. In relation to the second area of concern, the respondent noted that there was a large discrepancy between the amount of self-employed income declared to the UK Border Agency for the purpose of the visa application in 2010 and the amount of self-employed income initially declared to HMRC for the tax year 2010-2011. The appellant accepts that he did not file a tax return for 2010-2011 on time. The appellant has not provided an explanation as to why he did not file a tax return by the deadline in January 2012 even though he claimed to earn the bulk of his income for that tax year through self-employed work.

28. The appellant says that he filed his first tax return in April 2012. This is born out by the evidence from HMRC produced by the respondent. A witness statement of an official from HMRC dated 06 February 2019 summarises the information held. The records indicate that the appellant filed a tax return for the year 2010-2011 on 29 April 2012. The original figures supplied to HMRC were £10,362 for employed

income and £8,669 for self-employed income. There does not appear to be a record of a return being filed for 2011-2012.

29. The appellant's bundle also contains copies of several HMRC tax calculations.

(i) ***2010-2011*** - The calculation shows the amendments made by the appellant in 2015 to declare self-employed income of £39,680. This reflected all the self-employed income he claimed to earn in a relatively brief three-month period shortly before the first application for leave to remain as a Tier 1 Migrant.

(ii) ***2011-2012*** – The calculation shows only £5,479 of employed income.

(iii) ***2012-2013*** – The calculation is consistent with the HMRC statement in showing gross self-employed income of £52,848. No employed income is recorded. I note that the appellant made an application for further leave to remain as a Tier 1 Migrant on 05 April 2013. The qualifying period for the application for further leave to remain would have covered this tax year.

(iv) ***2013-2014*** – The calculation shows a significantly reduced income of £10,157 declared from self-employment in the tax year following the grant of further leave to remain.

(v) ***2014-2015*** – The calculation shows that the appellant's income from self-employment remained at a low level of £11,830.

(vi) ***2015-2016*** – The appellant's declared self-employed income rose sharply to £42,610. I note that the appellant applied for ILR as a Tier 1 Migrant on 15 March 2016. The qualifying period for the application was likely to cover most of this tax year.

(vii) ***2016-2017*** – The appellant's self-employed income dropped once again to £19,640 in the following tax year.

30. In response to the application for ILR on grounds of long residence the appellant was asked to complete a questionnaire about his tax affairs. He provided a detailed response. The figures he provided at paragraph 5 of the questionnaire are consistent with the HMRC figures. The appellant explained how he got into the business of selling leads through friends in India. He registered as self-employed on 25 June 2010. He explained how he began to sell information to people he met through online forums and personal networking. He said that the following year (2011-2012) he was involved in a lost making business called AMS Helpline Ltd, which is why his income for that year was so low. At the time, he was unfamiliar with the tax system. He did not realise that tax years ran from April to April. When he filed his first tax return in April 2012, he says that he offset the losses from AMS Helpline during the 2011-2012 tax year from his self-employed earnings in 2010-2011, which was why the initial declaration of self-employed income was so much

lower than the figure stated in the application for leave to remain. When he realised the mistake he contacted HMRC to amend the tax return in 2015 after he had saved the money that he estimated he owed.

31. The appellant says that after the failure of AMS Helpline he restarted self-employed work selling data and was able to earn an income of £52,848 in the next tax year. He traded under the name Sammsolutions and later also under the name Sharp Communications. After he applied for further leave to remain as a Tier 1 Migrant in 2013 he was invited for an interview to test whether his earnings were genuine. He gave a detailed explanation of how the business worked. The officer was satisfied that the business was likely to be genuine. The appellant asserts that he made a mistake in his tax affairs and was not dishonest.

32. The burden of proof in on the respondent to produce cogent evidence to show on the balance of probability that the appellant was dishonest in the earlier application for leave to remain. Dishonesty needs to be shown in order to discharge the burden of proving that the appellant made false representations for the purpose of paragraph 322(2). Dishonesty is also at the heart of the second allegation. A mistake in his tax affairs which was not dishonest is not likely to be sufficiently serious to justify refusing an application under paragraph 322(5).

33. I begin by considering whether the respondent has discharged the initial evidential burden of proof to show that there is a reasonable suspicion that the appellant was dishonest when he applied for leave to remain as a Tier 1 (General) Migrant in November 2010.

34. The evidence from the investigating officer from Operation Cudgegong is not disputed. It comes from a reliable source. I have been given no reason to doubt what the officer says about the level of fraud uncovered by the investigation. The evidence is compelling. It paints a picture of a systematic fraud conducted by the sole director of Iwin Technologies, Raghavendra Karanam, in co-ordination with others. The evidence is sufficiently strong to suggest that Mr Karanam did not run a genuine business. A forensic accountant inspected the company accounts and was satisfied that Iwin Techonologies was a front for recycling funds for the purpose of manufacturing evidence to support Tier 1 applications. A number of people were arrested and admitted that they had recycled money in this way. Some were removed and others were successfully prosecuted.

35. The appellant accepts that he received a payment of £5,000 from Iwin Technologies on 29 September 2010. This is consistent with the information provided in the investigating officer's statement. The respondent asserts that this shows that the appellant used Iwin Technologies to recyle money to create false evidence of self-employed income.

36. I have considered whether the appellant has been able to provide an innocent explanation in response. I am not satisfied that he has provided a credible account

to rebut the allegation. I accept that there is evidence in the bundle to suggest that, at least since 2012, the appellant is likely to have been earning a self-employed income from selling data. In 2013 the interviewing officer was satisfied that the appellant was able to give detailed knowledge of the business. However, I note that the GCID notes relating to the interview stated that the officer had some concerns over the level of earnings the appellant claimed to earn from self-employment, but at the time, felt that they had "no solid evidence to act on suspicions" [pg.F11].

37. When one steps back and looks at the evidence as a whole, in my assessment, the following picture emerges. In 2010 the appellant was not earning enough from employed work to meet the income requirements of the immigration rules for leave to remain as a Tier 1 (General) Migrant. As a result, it is possible that the appellant had an incentive to make up the shortcoming by falsely exaggerating the level of self-employed income. Although there is evidence to show that the appellant is likely to have been involved in the business of selling data, the pattern of income gives rise to a strong inference that the level of his self-employed earnings has been exaggerated in each of the three years that he applied for leave to remain. In between those years, the level of self-employed income declared to HMRC drops significantly. I have taken into account the appellant's evidence that he had to undergo a series of operations from late 2012 to early 2015, which he says explains the fluctuation in income, but it remains a strong coincidence that the highest earning years coincided with applications for leave to remain when a certain level of income was required. Even after his period of ill-health, his declared income dropped sharply again in the tax year after he applied for ILR as a Tier 1 Migrant (2016-2017).

38. Other aspects of the chronology also lack credibility. The appellant claims that he began selling data in mid-2010 and has remained in the same business, with varying levels of income, ever since. When he applied for leave to remain in November 2010 the appellant claimed that he earned £39,068 from self-employment. He produced evidence claiming that he received ten payments from clients over a brief three-month period shortly before the application for leave to remain. I can see no evidence to suggest that the appellant continued with this work after September 2010. When the appellant amended the tax return for 2010-2011 he declared exactly the same amount of income as he did in the application for leave to remain even though the tax year ran until April 2011. On the appellant's own evidence, his self-employed income came to an abrupt halt once he received the ten payments outlined in the schedule and he earned no further self-employed income for the remaining six months of that tax year. This picture is not consistent with an ongoing business and is more consistent with a pattern of manufactured evidence in the months preceding the visa application described by the officer from Operation Cudgegong.

39. If the evidence relating to Operation Cudgegong is then taken into account, the reliability of the income claimed in the schedule is further undermined. The appellant is correct to say that the respondent has not produced evidence to show

that the other nine payments were recycled to falsely create the impression of genuine income, but the evidence is damning in relation to at least one of those payments.

40. The appellant's response lacked credibility. First, it is reasonable to infer that the person called Raj who the appellant claimed to meet at Liverpool Street Station is more likely than not to be Raghavendra Karanam. It is plausible that his first name could be shortened in that way. The appellant accepts that he received a payment from Iwin Technologies. Mr Karanam was the sole director of the company. The evidence shows that any payment was likely to be made by him. Second, the appellant's claim to have sold Mr Karanam leads as part of his self-employed work is weak in light of the evidence from Operation Cudgegong, which strongly suggests that Mr Karanam was not likely to be running a genuine business and would have no reason to buy leads from the appellant. The account of travelling to Liverpool Street Station to hand over leads is implausible when the documents could easily be sent by post. Third, the evidence shows that it is far more likely that Mr Karanam was in the business of receiving cash payments from Tier 1 applicants, which he recycled back as purported invoice payments.

41. The respondent does not need to prove her case with any certainty. It matters not if she can only prove that one and not all the payments in the schedule were false. It is sufficient to show on the balance of probability that at least one of the payments was not likely to be genuine for the appellant to have made a false representations in the application. However, the fact that at least one payment was false casts doubt on the whole schedule when taken with the other credibility issues outlined above.

42. The fact that the appellant was not arrested and questioned is immaterial. The standard of proof for a criminal prosecution is much higher. A lower standard is applied for the purpose of assessing the immigration rules. The fact that the interviewing officer in 2013 was satisfied that he was likely to be earning an income selling data at that time does not mean that he earned the level of income he claimed in 2010. Even then, the officer suspected that the level of income claimed in 2013 might have been exaggerated but did not feel that there was enough evidence to refuse the application at the time.

43. The second concern relating to the HMRC payments forms part of the overall picture. If this was the only issue, I might have given the appellant the benefit of the doubt. His explanation is that he made a mistake in his tax affairs and was not dishonest. However, when it is put alongside the stronger evidence relating to the organised fraud carried out by Iwin Technologies to assist Tier 1 applicants the appellant's explanation becomes less persuasive. Even if he had begun to carry out some self-employed work selling data in 2010, when he initially declared his self-employed income for the tax year 2010-2011, he only declared £8,669. Taken with his employed income of £11,928 in the qualifying period preceding the application for leave to remain, his income from both sources was not likely to be sufficient to meet the income requirements for Tier 1. Again, the appellant was likely to have an

incentive to exaggerate the level of self-employed income to satisfy the requirements but was unlikely to want to pay tax on money he did not earn. I find that it is more likely that the appellant declared his real level of self-employed income to HMRC in 2012 thereby belying his claim to have earned as much as £39,068. The fact that he was later willing to pay tax on money he may not have earned in preparation for an application for ILR is a matter that cannot be given significant weight given the importance of such an application to his future in the UK.

44. I bear in mind that the respondent does not have to prove her case with certainty. Having weighed the evidence as a whole, I am satisfied that the respondent has discharged the legal burden of proof. It is more likely than not that the appellant was dishonest by falsely inflating his self-employed income for the purpose of an earlier Tier 1 application. The respondent was justified in refusing the application for leave to remain on grounds of long residence with reference to paragraph 276B(ii) and (iii) as well as paragraphs 322(2) and 322(5) of the immigration rules. The appellant fails to meet the requirement of paragraph 276B for this reason alone, so it is not necessary to determine whether he had 10 years lawful residence.

Article 8(1) – private life

45. The appellant has lived in the UK for a period of 11 years and his wife for a period of nearly 10 years. It is likely that during this time the appellant and his wife have developed private life ties in the UK. I find that removal in consequence of the decision is likely to interfere with their private lives in a sufficiently grave way as to engage the operation of Article 8(1) of the European Convention.

Article 8(2) - proportionality

46. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

47. Part 5A of the NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must have regard to the issues outlined in section 117B in non-deportation cases. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention.

48. It is in the public interest to maintain an effective system of immigration control. The appellant and his wife do not meet the requirements of the immigration rules. The appellant does not meet the requirements of paragraph 276B on grounds of 10 years lawful residence. His wife has not been resident long enough to meet the long residence requirement. The appellants do not meet the 20-year long residence requirement contained in paragraph 276ADE(1)(iii). It is not argued, nor arguable, that there are 'very significant obstacles' to the couple being able to integrate in India for the purpose of paragraph 276ADE(1)(vi). They were born and brought up in India and continue to have linguistic, cultural and family ties there. It is understandable that they would prefer to remain in the UK, where the appellant has established a business selling data, but there is no evidence to suggest that they would face significant obstacles if they returned to their country of origin. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position as to where a fair balance is struck for the purpose of Article 8 of the European Convention.

49. The appellant speaks English and can support himself financially. Those are neutral factors. Over time, he has been able to develop his business and has plans to develop it further. It is likely that his ties to the UK have strengthened over time. However, the foundation of all that the appellant has achieved in the UK was based on an initial deception. But for that deception, it is likely that he would not have qualified for leave to remain and would have been expected to leave the UK many years ago. The general grounds for refusal reflect legitimate public policy considerations in cases where a person's conduct means that it is undesirable for them to remain in the UK. The appellant might well have worked hard to establish himself, but there are consequences arising from his conduct if he used deception in an initial application for leave to remain. The fact that he has been able to remain for many years before the dishonesty was discovered does not weaken the weight that must be given to the public interest. The appellant simply gained an advantage that he was not likely to be entitled to in the first place.

50. The appellant does not meet the requirements of the immigration rules. Additional weight must be given to the public interest in a case where a person has been dishonest in an application for leave to remain. The evidence does not disclose any other exceptional circumstances that might justify a grant of leave to remain on human rights grounds. The appellants do not have children. No serious medical or other compassionate circumstances have been highlighted. The appellant's wife expresses concerns about returning to India because of their mixed religion marriage, but this issue was not relied upon in argument. Even if she has some concerns about the attitudes of her family, it would be possible for the appellants to relocate to another area of India. They are both Indian nationals with qualifications that would assist them to re-establish themselves there. Having weighed all the relevant factors, I conclude that the decision to refuse the human rights claim is proportionate.

51. For the reasons given above, I conclude that removal in consequence of the decision would not be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is DISMISSED on human rights grounds

Signed M. Canavan Date 28 May 2020
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03825/2019
HU/08735/2018

THE IMMIGRATION ACTS

Heard at Field House
On 02 December 2019

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SWAPNIL DIWAKAR SURADKAR
SAMANTHA MERLE DSOUZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr J. Gajjar, instructed by Eldon Berkeley Solicitors
For the respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant ("the appellant") is the main applicant; his wife is his dependent for the purpose of the decision that is the subject of this appeal.

2. The appellant entered the UK on 25 January 2009 with entry clearance as a Tier 1 (Post-study work) Migrant, which was valid until 05 November 2010. He was granted further leave to remain as a Tier 1 (General) Migrant until 05 April 2013, and further leave on the same basis until 11 November 2016. On 15 March 2016 the appellant applied for Indefinite Leave to Remain (ILR) as a Tier 1 (General) Migrant. The respondent refused the application in a decision dated 27 April 2017. A subsequent Administrative Review upheld the decision on 08 June 2017. At this point the appellant's leave to remain, extended by virtue of section 3C(2)(d) of the Immigration Act 1971, came to an end. At the date of the Administrative Review decision the appellant had resided in the UK on a lawful basis for a period of eight years and five months. On 23 June 2017 the appellant made an out of time application for leave to remain on grounds of long residence.

3. A few weeks later, on 27 July 2017, he filed an application for judicial review seeking to challenge the respondent's decision to refuse to grant ILR as a Tier 1 (General) Migrant. The judicial review claim settled by consent on 29 November 2017. The respondent agreed to make a fresh decision in relation to the application for ILR as a Tier 1 (General) Migrant. In a further decision dated 04 December 2018 the respondent refused the application again. The appellant applied for Administrative Review of the decision.

4. The appellant applied to vary the long residence application on 28 December 2018. The effect of the application was that the Administrative Review was treated as withdrawn with reference to paragraph 34X(4) of the immigration rules. I am told that the applicant nevertheless applied to challenge the respondent's decision dated 04 December 2018 and that an application for judicial review is pending.

5. The respondent refused a human rights claim in the context of the application for leave to remain on grounds of 10 years' lawful residence on 14 February 2019. The decision is the subject of this appeal. The respondent outlined the same public interest issues, which formed the basis of the refusal of the previous applications under paragraphs 322(2) and 322(5) of the immigration rules. The first allegation was that he obtained earlier leave to remain by deception based on false documents provided by a company called Iwin Technologies, which was said to have been involved in providing false documents for immigration applications. The second allegation of deception related to discrepancies in the amount of self-employed income declared to the UKVI for the purpose of an earlier application for leave to remain compared with the amount of self-employed income declared to HMRC during the same tax period. In any event, the respondent was not satisfied that the appellant met the requirement for 10 years' lawful residence because his leave to remain expired on 08 June 2017.

6. First-tier Tribunal Judge A.K. Hussain ("the judge") dismissed the appeal in a decision promulgated on 07 August 2019. The judge explained why the appellant did not meet the requirement for 10 years' lawful residence with reference to the

chronology. In light of that finding, he said that he did not need to make detailed findings relating to the general grounds for refusal under paragraphs 322(2) and 322(5). He concluded that the appellants did not meet the requirements of paragraph 276ADE(1)(iii) (20 years' long residence) and could not show that there were 'very significant obstacles' to their integration if they returned to India for the purpose of paragraph 276ADE(1)(vi). He went on to conduct a balancing exercise under Article 8. Having found that the appellants did not meet the requirements of the immigration rules, he concluded that there were no compelling circumstances that might outweigh the public interest in maintaining an effective system of immigration control and dismissed the appeal.

7. At the hearing, Mr Gajjar said that he was not going to rely on the third ground of appeal. He distilled his case into a single point. He argued that the judge erred in failing to make any findings relating to the general grounds for refusal under paragraphs 322(2) and 322(5). He accepted that this would not make any material difference to the outcome of the appeal in so far as it related to the application for leave to remain under paragraph 276B (10 years' lawful residence) but argued that it was material to a proper assessment of the overall balancing exercise under Article 8.

8. Mr Lindsay argued that the outcome of the balancing exercise would have been the same regardless of any findings relating to the allegations of deception. Any error was not material.

Decision and reasons

9. It was not necessary for the judge to make findings of fact relating to the allegations of deception for the purpose of determining the appeal in so far as it related to paragraph 276B of the immigration rules when the appellant fell short of meeting the core requirement for 10 years' lawful residence. No challenge has been made to those findings or to the findings relating to paragraph 276ADE(1). Those findings shall stand.

10. However, the allegations of deception were relevant to a proper assessment of what weight should be placed on the public interest in the overall balancing exercise under Article 8. If the judge had decided that the allegations were made out, it would only have lent greater weight to the public interest in maintaining an effective system of immigration control. But if the appellant was successful in rebutting the allegations it may have been relevant to the issue of what weight should be placed on his individual circumstances in the balancing exercise. The allegations of deception were the only reasons given for refusing the earlier application for ILR as a Tier 1 (General) Migrant. Although it does not necessarily follow that, but for the allegation of deception, the appellant would have been granted ILR, it would at least cast doubt on the reasons given for refusing the earlier applications for settlement. The fact that he might have missed the opportunity for settlement based on allegations that were subsequently not made out would be a relevant consideration when assessing whether it would be proportionate to require the appellants to leave the UK.

11. For these reasons, I conclude that the First-tier Tribunal failed to make findings on a relevant matter that was material to a proper determination of the appeal. This failure amounts to an error of law.

12. It is appropriate to remake the decision in the Upper Tribunal because some of the findings have been preserved. Given the complexity of some of the issues involved in remaking it was agreed that the parties needed more time to prepare. The matter will be listed for a resumed hearing.

13. The judge's findings relating to paragraphs 276B and 276ADE(1) of the immigration rules shall stand. The scope of the next hearing is confined to (i) findings of fact relating to the general grounds for refusal; and (ii) how those findings impact on an overall balancing exercise under Article 8.

DIRECTIONS

14. The parties are granted permission to produce up to date evidence, which must be filed at least **seven days** before the next hearing.

15. It is anticipated that the first appellant will give evidence at the resumed hearing. If he requires the assistance of an interpreter, he should notify the Upper Tribunal within **14 days** of the date this decision is sent so that arrangements can be made for the resumed hearing.

DECISION

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

The decision will be remade at a resumed hearing in the Upper Tribunal

Signed  Date 04 December 2019
Upper Tribunal Judge Canavan