Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04522/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2020	**On 23 March 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SANDEEP CHAUDHARY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel, instructed on a direct access basis
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Nazir (the judge) who, in a decision promulgated on 19 July 2019, dismissed the appellant's human rights appeal against the respondent's decision of 11 February 2019 refusing his human rights claim (in the form of an application for Indefinite Leave to Reman [ILR] based on the appellant's long residence).

2. At the outset of the 'error of law' hearing the Presenting Officer expressed his view that the determination contained an error on a point of law requiring it to be set aside and that it should be remitted back to the First-tier Tribunal for a fresh hearing. There was no objection from the appellant's representative to this position. I agree with the respondent's position.

Background

3. The appellant is an Indian national born in 4 October 1983. He entered the UK on 27 September 2006 with entry clearance as a student. The appellant applied for further leave in various categories and leave was granted, the last period as a Tier 1 migrant valid until 25 May 2016. On that date the appellant made an application for ILR as a Tier 1 General Migrant. This was refused on 31 October 2017. The refusal was apparently received by the appellant on 10 November 2017. He did not request an Administrative Review. He made an application for ILR under paragraph 276B of the immigration rules on 24 November 2017. I note that, according to the immigration history detailed in the decision of 11 February 2019, the appellant had been refused leave to remain as a Tier 1 Migrant on 19 August 2010 and then made an out-of-time application for leave to remain on 17 September 2010. This is different to the timeline identified by the judge at [2], where the appellant is said to have been granted leave to remain as a Tier 1 Migrant until 19 September 2010. The respondent considered that the appellant had achieved 10 continuous years residence in the UK. No issue appears to have been raised as to whether the appellant has in fact achieved 10 years continuous lawful residence in light of the assertion that the appellant made an out-of-time application in September 2010. I merely flag this up for possible clarification by the First-tier Tribunal.

4. The respondent refused the application for ILR under paragraph 322(5) of the immigration rules. This provision deals with general grounds of refusal and falls under the heading "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused." It is not therefore mandatory ground of refusal. Paragraph 322(5) reads,

> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security

5. The respondent noted that, for the tax year 2010/11, the appellant's tax returns need to be amended to show a net profit from his self-employment of £32,179, as opposed to £6,233. There was a difference of £25,946. The respondent rejected the appellant's claim that a temporary member of staff at the accountant's firm altered the tax return. For the tax year 2012/2013 the appellant's net profit based on his self-employment had to be amended from £7,137 to £18,640. The respondent rejected the appellant's claim that the variation stemmed from a dispute with a client relating to a project and a provision made to deal with this

dispute in the tax returns. The respondent considered that the appellant had been dishonest in his dealings with HMRC or the Home Office and that his application fell to be refused under paragraph 322(5).

6. The appellant exercised his right of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002. His appeal was heard on 4 October 2019.

The decision of the First-tier Tribunal

7. The judge summarised the appellant's case and set out the relevant legal framework. At [17] the judge indicated that he had considered all the evidence in the case, including the witness statements and the oral evidence. Having satisfied himself that the respondent had discharged the initial evidential burden of showing the existence of prima facie evidence of deception, the judge considered the explanation for the amended tax returns. At [20] the judge stated, having considered the appellant's explanation,

> However, the reality was that these are not the figures that were submitted to the HMRC… The Appellant explains that this happened as a result of a 'temp' that worked at DK Accountants, and relies on letters from the accountant and his oral evidence in support.

8. At [24] the judge considered the evidence of Mr Kundi of DK Accountants who, consistent with his own statement and the appellant's evidence, maintained that he had submitted the correct tax return but that a 'junior temp' member of staff had lodged the incorrect figures with HMRC. The judge did not find it credible that Mr Kundi could not recall the name of this member of staff and did not find it plausible that a junior member of staff would have gone to the HMRC system after the appellant's tax returns had been submitted at 14.47 and significantly amended those figures without the knowledge of the appellant or Mr Kundi [25]. The judge did not find it plausible that the appellant would only have realised more than a year after the tax returns were submitted that there had been an error. The judge did not find it plausible that the appellant would not have realised that his tax liability fell from £7257.92 to zero.

9. At [26] the judge dealt with the tax return for 2012/13. The judge noted that, in respect of the application for further leave to remain made on 25 April 2013, the appellant relied in some part on income from a project with the Indian High Commission. In his tax return of January 2014 however a provision was created as a result of which the income from the project was reduced because of the dispute. Whilst accepting that the appellant had done work for the Indian High Commission, the judge said there was no evidence relating to the claimed dispute.

10. At [30] and [31] the judge satisfied himself, having regard to all the evidence before him and his findings in respect of the various discrepancies, that the respondent had proved that the appellant had engaged in deliberate deception.

11. The judge then went on to consider Article 8 outside the immigration rules, noting that the appellant had resided in the UK since September 2006, had established a business in this country, was well integrated and that his wife and children resided in the UK. They were however all Indian nationals who were familiar with the language and culture of India and the appellant was someone who would be able to obtain employment in India. Having regard to the appellant's dishonesty, the judge concluded that it would not be disproportionate to refuse his human rights claim. The appeal was dismissed.

The challenge to the judge's decision

12. The 1st ground of appeal contends that the judge failed to take into account evidence of a key witness, the accountant Mr Naresh Jani of Andersons Europe. Mr Jani had prepared a witness statement relating to the appellant's tax return for the year 2012/2013 confirming that the appellant had asked him how to deal with disputed fees in his tax return arising from a dispute between the appellant and the Indian High Commission. Mr Jani advise the appellant to create the provision which would reduce his net profit by £11,503 in the self-assessment tax return filed in January 2014. Mr Jani gave oral evidence and his evidence was not challenged by the Presenting Officer, but this was not recorded by the judge and there was no assessment of Mr Jani's credibility. As the appellant's overall credibility was in issue, the failure by the judge to engage with or consider the evidence relating to the 2012/2013 tax returns affected the judge's overall assessment of credibility.

13. The 2nd ground of appeal contends that the judge failed to take material evidence into account, namely, the online self-assessment dated 30 January 2012 filed at 14:47. The 3rd ground contends that the judge failed to properly apply **Balajigari** [2019] EWCA Civ 673 in relation to the burden and standard of proof. The 4th ground contends that the judge failed to take into account the timing of the appellant's amendment to his tax return to the year ending 2011. The 5th ground contends that the judge failed to take relevant evidence into account when assessing the issue of dishonesty as the target of the dishonesty was the subject of ambivalent findings. The 6th and 7th grounds of appeal contend that the judge failed to consider the discretion contained in paragraph 322 (5) when assessing whether it was undesirable for the appellant to remain in the UK in light of his positive contributions.

14. In granting permission Judge of the First-tier Tribunal Scott-Baker noted that, according to the record of proceedings, Mr Jani had given evidence but that no reference was made in the decision to this evidence. Permission was granted on all grounds.

15. As I have already indicated, Mr Clarke accepted that the 1st ground had been made out and that this rendered the decision unsafe. I expressed my agreement

with Mr Clarke's position and indicated that I was satisfied the decision contained an error on a point of law requiring it to be set aside.

Discussion

16. It is not in dispute between the parties that Mr Jani prepared a statement and gave oral evidence. Although the judge indicated at [17] that he had considered all the written and oral evidence, and although it is not necessary for a judge to refer to all the evidence relied on by the parties, it is nevertheless incumbent on a judge to engage with relevant and material evidence and to make a finding in respect of that evidence, albeit that this can be done in brief terms. Mr Jani's evidence related to the establishment of a provision within the appellant's tax returns for the year 2012/2013. Although his oral evidence was brief, it was also unchallenged by the respondent. Mr Jani's written and oral evidence was capable of supporting the appellant's explanation for the discrepancies in profits disclosed to the Home Office and those initially disclosed to HMRC. Whilst the judge was not obliged to accept this evidence, the judge was obliged to engage with this evidence or to explain why evidence capable of supporting the appellant's explanation was not accepted. Given that the judge's conclusions relating to the appellant's honesty was based on a cumulative assessment of all the evidence before him, I agree with both parties that, in respect of ground 1, the judge materially erred in law.

17. I am additionally satisfied that grounds 6 and 7 are made out. The application of paragraph 322 (5) is discretionary and requires a balance when determining, even if dishonesty has been proved, that it is undesirable to grant leave (see **Balajigari** [2019] EWCA Civ 673, at [38]). Although many of the factors considered by the judge in his assessment of Article 8 outside the Immigration Rules are relevant to the balancing exercise under paragraph 322 (5), the tests remain different and factors relevant to determining the undesirability of the appellant remaining in the UK may have no part to play in the Article 8 assessment. It was incumbent on the judge to engage in the balancing exercise under paragraph 322 (5) and his failure to do so also constitutes an error of law.

18. It is not necessary for me to comment in any detail on the remaining grounds given that the error identified in the first ground requires this appeal to be considered afresh. It does however appear to me that the judge gave cogent and legally sustainable reasons at [21] and [22] for finding implausible the appellant's failure to question why he initially paid no tax for the tax year 2010/11 when, on his own account, he was aware that he had a tax liability of over £7000. Nor am I persuaded that the judge failed to take into account material evidence when he stated, at [20], that the actual figures submitted to HMRC were £6,233. It is apparent from the decision, read holistically, that the judge was aware that the tax returns were initially submitted at 14.47 on 30 January 2012 and that it was the appellant's claim that a 'junior temp' later amended the figures (see for example, [12 (iii)] and [25]). Nor am I satisfied that

the judge misdirected himself in respect of the burden and standard of proof. The judge was entitled to find that the initial discrepancies between the figures submitted to the Home Office and HMRC did establish a prima face case of dishonesty that required an explanation from the appellant. This is entirely consistent with the principles established in **Balajigari** [2019] EWCA Civ 673.

19. The errors of law that have been identified, particularly the 1st ground, are however material and require a de novo hearing on all the issues.

Remittal to First-Tier Tribunal

20. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

21. I have determined that the judge's conclusions relating to the issue of dishonesty are unsafe. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Nazir.

D. Blum

Signed

20 March 2020

Date

Upper Tribunal Judge Blum