



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34630/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23rd February 2018

Decision & Reasons Promulgated
On 20th March 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR NATHANIEL EKOW APPIYAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Coleman, Direct Access
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ghana born on 7th August 1975 and he entered the United Kingdom in 2010 as a Tier 1 (General) Migrant. His leave was subsequently extended and on 11th January 2013 he submitted an application for further leave to remain which was granted, extending his leave to 25th February 2015.
2. On 16th January 2015 he made an application for indefinite leave to remain as a Tier 1 (General) Migrant. That application was refused by the Secretary of State on the basis that checks had been undertaken and his claimed and declared earnings on a previous application were not consistent between the Home Office and the HMRC.

On review of his previous application dated 11th January 2013, he had stated to the Secretary of State that he had previous earnings as the director of Abse Personnel Limited of £73,526 gross and £54,000 net in the period of 1st December 2011 to 28th November 2012. In support of that application he submitted pay slips and bank statements. His total earnings of £73,526 gave him 45 points for total earnings.

3. On his application for indefinite leave to remain the Secretary of State had consulted HMRC and data confirmed for the tax year ending April 2012, that his income from all sources was £16,545. This was from the Borough of Tower Hamlets, Central Watch Security and a self-assessment return for Abse Personnel Limited. HMRC data also confirmed for the tax year ending April 2013 that his income from all sources was £19,212. This included earnings from the Borough of Tower Hamlets and Guardian Selection Limited and a self-assessment return for Abse Personnel Limited and John Cass School. As such his HMRC record of income was classified as not consistent with his income and it was deduced that he had used deception on a previous application for leave to remain and his application fell for refusal under paragraph 322(2) of the Immigration Rules. He therefore was refused leave under paragraph 245CD(b) as he did not meet the requirements of the Immigration Rules on general grounds.
4. The appellant appealed that decision on 21st December 2015 and initially it was classified as being out of time. On further representations by the appellant who was acting in person he was served with a notice of in time appeal on 4th March 2016. On 12th December 2016 the appellant once again in person made an application for an expedited hearing. That was refused by the First-tier Tribunal on 7th November 2016. The appellant continued to have no representative. On 27th January 2017 a notice was sent by the Tribunal to him, following his request to expedite the appeal hearing and the expedition was granted. On 6th February a notice of hearing was sent to the appellant in person with directions to the appellant to supply witness statements and a bundle of all documents to be relied on, in the hearing on 27th April 2017. This was to arrive at least 5 days prior to the hearing. Nothing was received by the Tribunal.
5. The matter came before First-tier Tribunal Judge Andonian on 27th April 2017 and the appellant appeared in person and requested an adjournment. As recorded in the decision of Judge Andonian at paragraph [1]

“He said he had been unable to obtain representation by a solicitor because that solicitor had been booked on two cases on the same day. When I asked him whether that solicitor was booked to hear those cases at Taylor House or elsewhere, he said he did not know but that only was told that the solicitor had two cases booked on the same day and could not take on his case”.

6. The judge also recorded at paragraphs [2] and [3]

“the appellant had received the notice of refusal on 17th November 2015 and had had plenty of time to instruct solicitors. He did not do so. He filed grounds of appeal without instructing solicitors, and his evidence was that shortly before the hearing date fixed at this Tribunal, he spoke to some solicitors asking them to represent him

but he was advised that the solicitor had two cases to contend with and could not represent him.

In the above circumstances, I told the appellant that since he had plenty of opportunity to instruct solicitors and an expert accountant to deal with the allegations that were raised in the refusal letter and he had not done so, the appeal would proceed" [3].

Application for Permission to Appeal

7. The grounds asserted that at the outset the appellant made an application for appeal and he had been let down by his solicitor and he was entirely blameless. He found himself unrepresented through no fault of his own and the judge had overlooked the fact that he had already spoken to his solicitor prior to the hearing who failed to appear on his behalf because of other "irreversible commitments on the same day". The appellant relied on Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and it was considered that the appellant had not had a fair hearing. The test to be applied was fairness. He submitted that his case was not straightforward and the respondent had made allegations of deception and it was essentially that he was properly represented.
8. Further the appellant submitted that there was a mistake of fact because it was impossible to know from the pay slips whether taxes had been deducted from the gross income and his bank statements only showed net income. He had absolute confidence that all taxes had been paid to the HMRC. He had contacted the accountants to rectify the HMRC any discrepancy and mentioned this to the judge. His accountant was currently looking into how his tax liabilities owed to the HMRC could be settled. This was not a mandatory refusal but a discretionary one. The appellant had followed the guidance and had no idea that his previous accountant had failed or neglected to file the appropriate tax with HMRC.
9. Permission to appeal was granted by First-tier Tribunal Judge Osborne. It was said to be arguable that the judge erred in failing to provide the appellant an opportunity to instruct solicitors and accountants to represent him at the final hearing.

The Hearing

10. At the hearing before me, Mr Coleman relied on the grounds of appeal in writing which he assisted in drafting. He emphasised the point that the appellant said that he had instructed solicitors one week before the hearing and was told that the solicitors would not be able to attend. He was told to attend and get an adjournment. The question was whether it was fair or not. The appellant was refused under paragraph 322(2) and this was a discretionary refusal. It was submitted that there could have been a difference to the outcome with representation.
11. Mr Tufan submitted the appellant had plenty of time to instruct solicitors and there was no evidence at all that he did so. The hearing must be dealt with fairly and that included a fairness to the respondent and with a consideration of the public funds

and the thousands of pounds expended on hearings. It was clear the judge was not satisfied there should be an adjournment.

Conclusions

12. **Nwaigwe** confirms that the essential test in relation to matters of adjournment is fairness. The headnote emphasises

*'If a Tribunal refuses to accede to an adjournment request, such decision **could, in principle**, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.*

13. The overriding objective, however, also sets out as follows principles which assist in deciding on the matter of fairness

Overriding objective and parties' obligation to co-operate with the Tribunal

- 2.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes —
- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it —
- (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.

- (4) Parties must –
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

14. I have outlined the history of this matter and clearly indicated that the original decision was taken on 17th November 2015 and throughout that period until one week before the hearing the appellant chose to represent himself despite a direction from the Tribunal prior to the hearing date, which the appellant clearly received, that he was directed to submit any evidence to the Tribunal at least five days prior to the hearing. Absolutely no evidence was submitted by the appellant. On attendance at the hearing he told the judge that he had instructed a solicitor. The solicitor could not take on two cases in the same day. The judge at paragraph 12 stated

“The appellant had sufficient time to instruct solicitors since the refusal of his application for ILR on 17th November 2015 and he had not dealt with it. He had asked for an adjournment at the hearing of this appeal which was not a good reason to accede to. I found the appellant not to be credible”.

That was open to the judge but however was the conclusion at the close of the decision.

15. The key paragraph is at paragraph [3] of Judge Andonian’s decision.

‘In the above circumstances, I told the appellant that since he had had plenty of opportunity to instruct solicitors and an expert accountant to deal with the allegations that were raised in the refusal letter, and he had not done so, the appeal would proceed’.

16. What is critical is the appellant had produced absolutely no evidence whatsoever that he had instructed a solicitor. He did not produce any evidence that he instructed an accountant. Further as the judge recorded at paragraph [8] when he asked the appellant the name of the accountants, he said he did not know the name of the accountants as he only knew someone from that firm who had now gone away and he could not find him. He said he had tried to telephone him and this individual did not respond. He did not know where the office was as the accountant did not give him details. The judge did not find any of that credible and stated “here is an appellant who has instructed a firm of accountants to deal with his accounts and yet he did not know who these were, did not know their whereabouts and yet said that he trusted his accountants when the accountants filed his returns”.

17. The appellant also confirmed that he had not checked any of the figures before the tax returns were submitted and yet he said he had not checked any of the figures as he trusted his accountants and yet he did not know where they were. He had no details of these accountants, and the judge found “that simply did not make sense and was not credible”, paragraph 8. In the overall scheme of matters that too was a conclusion open to the judge.

18. At paragraph 10 the judge recorded that the appellant said he had instructed another firm of accountants but he could not tell the judge when they were instructed, merely that they were T H L and Co. He could not tell the judge when he asked him whether he had given written instructions to these accountants to deal with his matter after he was refused leave to remain and he said he had not done so but had only recently done so for the hearing of his appeal.

19. As recorded in the First-tier Tribunal Judge's decision at paragraph 8

8. *The appellant said before me that he did have accountants but did not know where they were, he said he provided his accountants with all the details and he trusted them. When I asked the appellant, what was the name of the accountants, he said he did not know the name of the accountants as he only knew someone from that firm who had now gone away and he could not find him. He said he had tried to telephone him and this individual did not respond. I asked whether he had gone to his office and he said he did not know where the office was as this accountant did not give him details of the office. I did not find any of this credible whatsoever. Here is an appellant who had instructed a firm of accountants to deal with his accounts and yet he did not know who these were, did not know their whereabouts and yet said that he trusted his accountants when the accountants filed his returns. I asked him whether he had checked the figures before the tax returns were submitted, and he said he had not checked any of the figures as he trusted his accountants and yet he did not know where they were, he had no name to give me, and he had no details of these accountants. That simply did not make sense and was not credible.*

9. *HMRC data also confirmed for the tax year ending April 2013 the appellant's income from all sources was £19212.00. This included earnings from 2 employers, Borough of Tower Hamlets and Guardian Selection Ltd and a self-assessment return for Abse personnel Ltd and John Cass School. HMRC data confirmed for the tax year ending April 2014 the appellants' income from all sources was £18611.35. this included 2 employers, Borough of Tower Hamlets and London Borough of Newnham. HMRC data confirmed for the tax year ending April 2015 the appellant's income from all sources was £34592.22. This included earnings from 1 employer, London Borough of Newnham.*

10. *As the appellants HMRC records of income were not consistent with the income he declared to the Home Office, it is considered that he had used deception when submitting his application. This is because he had claimed points for earnings from Self-employment/directorships which were not accurate as per the income he declared to HMRC and where therefore deemed to be fabricated. The appellant said he had instructed another accountant to deal with the matter. When I asked who these accountants were, he said that they were T.H.L and Co., chartered certified accountants. He said they had been instructed to deal with the accounts and I asked him when they were instructed and he could not tell me when this was to deal with the matters raised by the respondent in relation to the various discrepancies. I asked him whether he had given written instructions to these accountants to deal with his matter, after he was refused leave to remain and he said he had not done so but had only recently done so for the hearing of his appeal. Looking at the grounds of appeal that the appellant filed they are not relevant to the various allegations made against him in so far as they do not deal*

with and thus answer those allegations. The thrust of the appellant's case was that it was a breach of his human rights not to be granted ILR and that the respondent should have used her discretion to grant him such leave to remain and that not to do so was a breach of Section 6 of the Human Right Act 1998'.

20. Critically as the judge stated, the grounds of appeal that the appellant filed were not relevant to the various allegations made against him insofar as they did not deal with or answer the allegations. It is correct that there must be some time limit on the ability of the appellant to produce evidence, expert or otherwise, to support the bare assertions made by the appellant. Indeed, the judge found no credible explanation in all the circumstances for the discrepancies and clearly as can be seen from the judge's conclusions at the close of his decision that he kept in mind the possible need for an adjournment until the close of the proceedings.

21. The application by the appellant for permission to appeal sets out that

"It was impossible to know from the pay slips whether taxes had been deducted from the gross income, my pay slips clearly showed that deductions had been made from my gross income and my bank statements only showed the net income that appeared on my pay slips. Thus prior to this HMRC discrepancy being flagged up I had absolute confidence that all taxes had been paid to HMRC without any doubt".

22. The fact is however that the gross income declared for the tax years were recorded and compared by the Secretary of State but even the net income as declared by the appellant for his tax period (straddling two years) did not equate with the gross income declared for the equivalent two years tax to the HMRC.

23. The First-tier Tribunal Judge dismissed the appellant's appeal because the judge found there were

"Serious discrepancies between the appellant's stated income as set out in his application and the information before HMRC. No credible explanation was given to me about those discrepancies. The grounds of appeal do not deal with them. The appellant was not able to deal with them: he said he had instructed accountants but in fact no accountants had been instructed to deal with them".

24. The criticism made by the Secretary of State was that it was the **gross** amount that was adrift. It was not disputed that the appellant had produced payslips and bank statements to the Secretary of State in the previous application. It was his representations on his gross declarations which were challenged. The appellant must have been aware of his own tax affairs which included self assessment.

25. The critical point, however, is that the appellant produced absolutely no evidence of instructing a solicitor, of instructing an accountant or of any evidence in relation to his appeal prior to the hearing date. In the light of the overriding objective the appellant had been given ample time to instruct a solicitor on matters which were not complicated, particularly as he has responsibility for his own tax affairs. It is notable that the appellant accepted in his grounds of appeal that there was a discrepancy in his tax affairs. As Mr Tufan pointed out the cost to the public purse of

unnecessary adjournments is substantial, is contrary to the efficient conduct of court proceedings and in these particular circumstances fairness was accorded to the appellant. The only point at which a solicitor was instructed was when the appellant lost his appeal. At no point did the appellant produce any evidence that he had instructed either a solicitor or an accountant prior to the First-tier Tribunal hearing. The judge in essence applied the principle of fairness and in the light of all the circumstances and the evidence before him, the judge showed no unfairness in his approach to the consideration of the adjournment and the decision shall stand.

Notice of Decision

I find no material error of law in the decision of First-tier Tribunal Judge Andonian and the decision will stand.

No anonymity direction is made.

Signed *Helen Rimington*

Date 19th March 2018

Upper Tribunal Judge Rimington