



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04928/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 31 October 2019

Decision & Reasons Promulgated
On 19 November 2019

Before

**UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

Between
Md Jamal UDDIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, instructed by Lex House Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted in the First-tier Tribunal on 20 August 2019, against the decision of the First-tier Tribunal (Judge Lloyd-Lawrie) which, in a determination sent on 11 July 2019, dismissed his appeal against the Secretary of State's decision taken on 25 February 2019 to refuse his application for settled status on the grounds of 10 years lawful residence.
2. The respondent relied on a single discrepancy between the appellant's claimed income in a previous immigration application in March 2011 and his return to the Inland Revenue for the same tax period. The earlier immigration application required him to meet a financial threshold. In the immigration application he stated

an employed income of £22,000 topped up with an additional self-employed income earned in the last quarter of the tax year i.e. the three months between December 2010 and March 2011, of £13,830. The resulting combined income of some £33,800 was sufficient to meet the Tier 1 entrepreneur rules. The application was made in March 2011, i.e. before the end of the tax year. Tax returns for that tax year were not due until the period after the end of the tax year i.e. April 2011 and could be submitted prior to 31 January 2012. The respondent noted that the appellant in the event had declared to the Inland Revenue a much lower self-employed income of £1,325. The respondent concluded this was a deliberate deceitful act: either the appellant had not earned the money and had lied to obtain an immigration benefit, or he had earned the money and deliberately underdeclared to the Revenue to obtain a tax benefit. The deceit meant that the appellant failed the character suitability requirements of the Immigration Rules (HC 395 as amended) at paragraph 322(5). Finally, the Secretary of State concluded that the consequences of the refusal did not result in unjustifiably harsh consequences such that the appellant should succeed under Art 8 outside the Rules.

3. The appellant appealed arguing that the decision breached Art 8 because the discrepancy arose from an innocent error on his part and was due to the failure of his accountant at that time, who may or may not in fact have been an accountant, so that refusing him leave to remain so that he and his wife and children had to return to Bangladesh, was an unwarranted interference with their private and family life developed here.
4. The Judge found that the discrepancy was primary facie evidence of deception and moved to consider whether the appellant discharged the burden of providing a plausible innocent explanation. The Judge concluded that the appellant had not, and found that the respondent had discharged the burden of showing on the balance of probabilities that the appellant had been deceitful and correctly refused the application under the discretionary refusal provisions at paragraph 322(5)
5. At the hearing before us, both parties were represented, there was no application to submit any additional documentary or oral evidence, and the matter proceeded on the basis of submissions.
6. The grounds argue that the Judge, in finding the appellant was deliberately deceitful, failed to take into account material factors such as:
 - (1) The discrepancy was a single discrepancy. The appellant had asserted in his witness statement at paragraph 11 that he had continued to run his consultancy business and pay full income and corporation tax since this initial tax return for the period 2010/11. The grounds argue that on that witness statement evidence this was an initial mistake which “must tally” with a relative lack of knowledge and experience.
 - (2) The Judge failed to give proper consideration to the payment made to Ms Ismail on 9 August 2011.

- (3) HMRC had concluded that the discrepancy arose as a result of carelessness and not deceit.
7. This is not a case where the Judge failed to take into account relevant considerations which might have supported the credibility of the application. The grounds are correct in pointing out that the frequency/number of errors can be of relevance so that a single mistake in the first tax return an appellant was required to file might be viewed in a different light from a series of mistakes that are corrected at a later date. The appellant's explanation would become less plausible if he alleged a series of unlikely mistakes by his accountant. However, when the grounds at paragraph 8 assert that the fact of this being a single error "must tally with a relative lack of knowledge and experience in the system", they mistake the role of the Judge which is to decide the weight to be given to the evidence. Similarly where the grounds at paragraph 10 argue that the Judge failed to have regard to an otherwise unblemished history with HMRC, they conflate the requirement for the Judge to "have regard" to a factor with the assertion that because the error is a single error it is determinative of innocence.
8. That there is a single discrepancy is not determinative. Although ground one asserts that the Judge failed to consider the infrequency of the discrepancy, as the particularisation recognises, the challenge here goes to the issue of weight. It cannot be said that the Judge did not take into account that this was a single error. The Judge correctly rehearsed the chronology, including the singleness of the discrepancy relied upon, not least when she sets out firstly the appellant's explanation at paragraph 9 (iii) and the parameters of the dispute between the parties about the instance of dishonesty at paragraph 16, and secondly, at paragraph 19 when she refers in the singular to "the discrepancy".
9. The second limb of the grounds concerns the evidence of the payment made to Ms Zahira Ismail on 9 August 2011. In summary, the appellant's account is that in order to make his Tier 1 entrepreneur application he approached an adviser, Ms Ismail, who explained to him that to make a Tier 1 application he needed to establish his income by providing accounts and she introduced him to a firm of accountants, whom he then paid directly to prepare accounts for the three-month period of December 2010 to the beginning of March 2011, which the accountants sent to him for his approval. Those accounts were submitted with the application to the respondent through Ms Ismail. Subsequently, he sent by email a copy of his P60 concerning his employed income to Ms Ismail on 4 August 2011. A copy of that email was pasted into an email to the solicitors representing the appellant in this appeal in 2019 and was included in his bundle before the First-tier Tribunal. The appellant said that he did that because she had contacted him and told him that she wanted to prepare his return to the Inland Revenue. Similarly, he provided an email to a colleague of hers dated 9 August 2011 explaining that he was going abroad to Bangladesh until December and asking if he needed to come in beforehand or if things could be picked up after he returned from Bangladesh in December. In the same email he confirmed that he had transferred £190 from his bank account on 9 August, described as "Zahira LEND BBP". The appellant told the Judge he described

it to the bank as a loan because of his uncertainty as to what the payment was for. The appellant told the Judge that he never heard anything further, he never received a copy of any self-assessment submitted on his behalf. The next he knew of it was when the respondent contacted him in 2017 in response to his application for indefinite leave to remain and pointed out the discrepancy to him in his interview. It is his assumption that the work was completed incorrectly. Hence his assertion that his "accountant who may or may not be an accountant" had filed the false tax return without his knowledge. The appellant's evidence was that, having been advised of the discrepancy in 2017, he paid the tax due as calculated on the accounts prepared and submitted in support of his immigration application.

10. In his bundle of evidence, the appellant provided an email sent in February 2019 to Ms Ismail, in which he sets out that she had prepared his tax return incorrectly and that it had caused him a problem with his immigration history. He says that he had sought administrative review and judicial review of the respondent's decision and that the respondent had pointed out in the judicial review proceedings that he had failed to provide any evidence from his accountant confirming their responsibility for the error. He said that he had attempted to telephone her but the number was not working and he had been unable to get her address or new telephone number.
11. We pause to note that this email was sent to the same email address as the earlier August 2011 emails, and that they stand alone as the evidence of the appellant's contact with his adviser.
12. The appellant put before the Judge a response from Ms Ismail dated 14 February 2019 in which she denies having acted as his agent or accountant for the HMRC in submitting a tax return. Ms Ismail states:

"It was always clients (sic) responsibility to declare income to HM Revenue and Customs and pay the correct amount of tax.

To best of our knowledge, we supported you in registering for self-employment and to receive your UTR number.

Further, we ceased our accountancy operation since the year 2011, and we do not hold any files or records which are older than six years or more."

13. The submission before us is that the Judge misapprehended the importance and relevance of the email correspondence, including the response from Ms Ismail because it showed that, as the appellant said, he was in contact with her during the relevant period prior to the submission of the self-assessment tax return, and so counted positively towards the credibility of his believing that she was submitting his self-assessment tax return and would do so correctly. In reality this is nothing more than a re-arguing of the appellant's case.
14. Counsel before us was not the representative on the day. The ROP shows that the appellant told the Judge that he believed firstly that his immigration consultant worked for the accountants and was an accountant. On the one hand he said he saw

nothing strange in having paid the accountants directly for the preparation of the accounts in March 2011, and then being asked to pay Ms Ismail directly into her personal bank account in August 2011, but also that he was suspicious as to what it was that she was asking money for and so accordingly entered it as a loan payment on his bank statement. As he explained it to the Judge "I had no idea what self-assessment is, I was employed, did not know have to pay tax. Maybe she was just trying to get money from me. Used lend so can get money from her later."

15. It was suggested to us that Ms Ismail's assertion that she had simply been obtaining a UTR and registering the appellant as self-employed made no sense at all because he had started his self-employment as per the accounts in December 2010 and would have been required to obtain his unique tax reference, i.e. the UTR, within three months of that date namely before the end of that tax year, and to have registered as self-employed. The difficulty with that submission is that the documentary evidence to support that contention was not before the First-tier Tribunal. Indeed, the documentary evidence before the First-tier Tribunal included the company registration documentation which shows that the company was registered in September 2011. Further, the appellant's oral evidence set out in the ROP was that he started his consultancy firm in September 2011, albeit he was doing the work from the end of 2010.
16. Accordingly, and contrary to the submission before us, the documentary evidence of the email correspondence is not so clear as to show any misapprehension as to its import. The Judge took account of that evidence in the round. Having had the benefit of hearing and seeing the appellant give his evidence, the Judge was entitled to find that the appellant, who is highly educated to degree level and with a Master's degree, was implausible when he failed to make any follow-up enquiries in connection with a self-assessment tax return which he never thought that he had to submit, and when he was suspicious of the demand for funds, evidence of which he never obtained, particularly when in the context of his earlier contact with a legitimate firm of accountants he had an existing avenue through which to make enquiries.
17. The Judge dealt with this evidence at paragraph 20 and 21 of the decision. We note firstly that what is set out there accords with the documentary evidence.
18. At paragraph 3 the Judge reminded herself of the Court of Appeal's judgment in Balajigari and others v SSHD [2019] EWCA Civ 673 which had given guidance on the approach to take. The Judge correctly self-directed at paragraphs 18 and 19 in respect of the burden of proof and the need for fair process.
19. At the hearing before us, Mr Turner sought to enlarge the grounds to argue that the Judge had incorrectly concluded that the appellant had had the opportunity of putting his plausible explanation to the respondent. Mr Turner suggested that when the appellant was interviewed in 2017 it was not plainly put to him that the respondent thought that the discrepancy between his immigration application and tax return was dishonest. The appellant's understanding was that, although the

discrepancy was drawn to his attention, and he gave his explanation, he was left with a view that all the respondent required from him was that he should resolve the discrepancy with the Inland Revenue. This exceeds the grounds of the application for permission but, in any event, we find that it does not take the appellant's case further. As the Judge noted, there had been an earlier decision in May 2018 which the appellant had challenged, and not only through administrative review but also through judicial review proceedings as set out in the email correspondence. Balajigari involved judicial review, where the impugned decision maker was the Secretary of State rather than a Judge as here, but the same principles apply. There is no basis for suggesting that the appellant here has been subjected to an unfair process resulting in his being unable to put his explanation either to the respondent prior to the making of the new refusal decision of 25 February 2019 or to the Judge in these appeal proceedings.

20. The final point the Judge is said to have failed to give weight to, is the Inland Revenue's having treated the discrepancy in the tax return as careless behaviour. The appellant's grounds of appeal to the First-tier Tribunal placed no reliance on that point: the point made in submissions to the Judge was that HMRC could have conducted an investigation but did not and chose to treat the discrepancy as careless behaviour. The grounds accept that the Tribunals and Courts have given short shrift to the submission that HMRC's position can be binding on the SSHD or the First-tier Tribunal. The grounds assert however that in Balijigari at paragraph [74] Lord Justice Underhill did not rule out its significance in the round:

"we further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would be information which was within an applicant's own knowledge and they could draw this to the attention of the Secretary of State".

21. On the face of the Judge's decision, the appellant did in this case draw it to the Judge's attention.
22. On the face of the evidence the appellant, following the interview with the respondent in 2017 and through his newly instructed accountants, wrote to the Inland Revenue revealing the under-disclosure of income in bald terms, without mentioning that the matter had come to light as a result of Home Office enquiries in the context of an outstanding immigration application. HMRC wrote to the appellant. They do not set out in their letter the reasons why they did not launch any investigation as to fraud but simply accepted the assertion of carelessness and accepted the offer of voluntary repayment. The HMRC state that as such, and because the discrepancy had occurred more than six years ago they could not conduct their own reassessment or compel the repayment of tax due. The total tax, outstanding National Insurance Contributions, and interest amounted to some £3,700. It was paid by the appellant in instalments. However, the fact that HMRC did

not launch an investigation and decided to treat the discrepancy as careless behaviour rather than dishonesty does not mean that the First-tier Tribunal Judge was perverse in concluding that the appellant had not provided a plausible innocent explanation and that the respondent had established on the balance of probabilities that the appellant had been deceitful.

23. The Judge reiterated her conclusion at paragraph 29 that the appellant practised deception, whether to obtain an immigration benefit or to escape paying tax and concluded that the only reason the appellant paid his outstanding tax was in order to bolster his immigration application. Figures were prepared on the same self-employed income basis as those submitted to the respondent, i.e. one month short of the full tax year.
24. It is all too easy for an appellant to point to selective parts of the evidence which support his case, but an allegation of perversity requires an assessment of the evidence in its totality. Although there is evidence of Ms Ismail's involvement in June/August 2011, and the submission is that her correspondence could be explained in a way which when viewed or interpreted in a particular way would show that she might be lying when she said her involvement was limited to registering the appellant as self-employed and obtaining his UTR i.e. matters other than the self-assessment, the appellant did not bring forward evidence about those matters. This is not a case where the appellant provided a copy of the erroneous self-assessment tax return, nor evidence from the HMRC that Ms Ismail was his nominated or approved agent for the submission of the 2010/11 tax year return, or a case where she has accepted that did submit the tax return without his knowledge or signature as he says. There is nothing in the evidence which is determinative so as to show any mistake of fact or perversity.
25. The question of weight was a matter for the Judge who had the benefit of hearing the evidence. That a different Judge may have reached a different conclusion does not establish an error of law absent perversity. The appellant has had an opportunity to obtain and give his evidence as well as to call witnesses. It is not for us to re-weigh the evidence and reach our own conclusion.
26. The Judge was undoubtedly correct to find that, on the facts as she found them, the appellant failed under the Rules.
27. The Judge then went on to consider the appellant's Art 8 claim. The Judge concluded that, as the appellant could not meet the suitability requirements, any interference with his private and family life would not be disproportionate. It has never been the appellant's case that, even were the respondent right to find that he had been deliberately deceptive, he ought nonetheless to have been allowed leave to remain on the basis of his family and private life rights. On the basis of that finding, it would have seemed obvious that the appeal should be dismissed as no breach of Art 8 had been established. The grounds take no issue with the Judge's reasoning in this regard, and it was not suggested in submissions before us that, in the event that we

found the appellant had been correctly viewed as deceptive, he nonetheless had a good Art 8 case which had been overlooked.

28. For these reasons, the Judge did not materially err in law in dismissing the appellant's appeal.

Decision

29. The First-tier Tribunal's decision dismissing the appellant's appeal did not involve the making of an error of law and it stands.

Signed

E Davidge
Deputy Judge of the Upper Tribunal

14 November 2019