



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07804/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18 October 2019 & 4 December 2019

Decision & Reasons Promulgated
On 13 January 2020

Before

**UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE O'CALLAGHAN**

Between

**KASTHURI ABEYRATNE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Sowerby (18 October 2019) and Mr. M. Biggs (4 December 2019), Counsel, instructed by Shanthy & Co

For the Respondent: Mr. I Jarvis (18 October 2019) and Mr. N. Bramble (4 December 2019), Senior Presenting Officers

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Easterman ('the Judge') sent to the parties on 17 June 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him indefinite leave to remain on long residence grounds was dismissed.
2. First-tier Tribunal Judge Andrews granted permission to appeal on all grounds by way of a decision dated 7 August 2019.

Anonymity

3. No anonymity direction was issued by the Judge and no application for such direction was made before us.

Background

4. The appellant is a national of Sri Lanka who is presently aged 56. He secured entry clearance as a student in 2007 and was granted leave to enter upon his arrival in this country on 6 September 2007. His leave was subsequently varied to leave to remain as a student until 31 July 2010. He was then granted leave to remain as a Tier 1 (General) Migrant to 17 August 2012 and following an in-time application such leave was varied to 20 February 2016.
5. The applicant applied for indefinite leave to remain ('ILR') on 23 October 2015 detailing that he was self-employed and earning through employed work. During his interview on 5 May 2016, a copy of which was filed with the First-tier Tribunal ('the FtT'), he asserted that he had temporarily stopped working for his business some two or so months prior to the interview and was working for Sainsbury's Supermarkets. The respondent observed during the interview that the appellant was currently employed by Sainsbury's working 20 hours per week. He had been employed by ARL Services (UK) Ltd, working between 25.5 hours to 69.75 hours per month between October 2014 to February 2015. The appellant was also claiming to have earned £70,783.35 gross profit and £58,623.00 net profit from self-employed earning over a 12-month period prior to the 2015 application.
6. The respondent refused the application for ILR on 11 November 2016 detailing, *inter alia*:

'As evidence of your self-employment earnings you have provided 106 invoices addressed to individuals. Each invoice describes the services provided as 'Business

introduction commission', 'Business co-ordination fee' or 'Consultant fee'. At your interview you initially stated that you 'help to export some Chinese companies' goods to somewhere else, to the warehouse.' However, this information does not corroborate the description of your services which you later provided at your interview in which you stated 'Somebody needs to send some vehicles with tax reduction. I help them to find a suitable vehicle according to their budget and introduce the cargo agent. Arrange with Sri Lankan agent to clear the vehicle with tax reduction. During this period, I help them to get the blue permit to my customer. This is the most important document to reduce tax.' You were also asked whether you could provide further details to describe what 'Business introduction commission' meant and you stated 'Somebody needs to buy a suitable vehicle to send to Sri Lanka. I help them buy the vehicle from their market according to their budget. They find the vehicle from the market for less than 4 years from the first registration date. When they send to Sri Lanka it should be older than 2 to 5 years. After 12 months I help them to get the blue permit. Someone stays more than 1 year and if they have registered their vehicle more than 12 months, they are eligible to send their vehicle to Sri Lanka with tax reduction. I provide advice and find a suitable cargo agent.'

We are not satisfied that the services carried out, as described by the invoices and yourself at interview can viably generate a net profit of £58,623.00. You have provided no services beyond assisting an individual to purchase a vehicle and recommending a cargo agent to ship the vehicle overseas ...

Furthermore, the bank statements you have provided with your application do not demonstrate that you have generated a net profit of £58,623.00. Whilst it is acknowledged that each invoice payment is corroborated by a matching payment to your bank account, it is notable that a corresponding amount is transferred out of the account each month. At your interview you were asked to explain the pattern of transactions shown by your bank statements at interview:

[references to bank statements]

- A. Er. Actually, I don't have an exact idea. Sometimes my clients try to pay me cash in hand. I advised them to deposit in my bank. If I use some urgent money, I use the cash machines. Sometimes they come to my house and try to pay by cash, but I tell them to go to the nearest bank to deposit the money.*

You have failed to satisfactorily account for the pattern of payments shown by your bank statements at your interview. As the sole trader of your business and bank account holder it would be reasonable to expect you to be able to have an idea as to why payments were made to and from your bank account. The fact that you failed to explain where the money was transferred to or explain the purpose of the transactions, casts doubt on the credibility of the self-employed earnings. The pattern of payments to and from your bank account, the fact that you have not opened a

business bank account (or have provided no evidence of a business bank account with your application) and the lack of information you provided at interview with respect to the payments to and from your account lead us to question whether the claimed income was earned through genuine employment, rather than being borrowed, gifted or otherwise shown in your financial transactions or records without being earned.'

7. The appellant requested an administrative review. The respondent maintained the refusal by means of a decision dated 5 January 2017 in which the section of the November 2016 decision detailed above was unamended.
8. The appellant applied for leave to remain on human rights (article 8) grounds on 18 January 2017, some 13 days after the administrative review decision. The application was subsequently varied on 12 September 2017 to one seeking ILR on long residence grounds under paragraph 276B of the Immigration Rules. The respondent refused the application under paragraph 276D by way of a decision dated 19 March 2018, as the appellant did not meet the requirements of paragraph 276B(ii) and 276B(iii), with reference to paragraph 322(5) of the Rules.
9. It is appropriate to observe the core issues identified within the decision of March 2018:

'Within your application dated 17 August 2012 for leave to remain as a Tier 1 (General) migrant, Home Office records show that you claimed self-employed earnings of £68,759 for the period 15 July 2011 and 15 July 2012. However, HMRC data confirms that you have not declared any self-employed earnings or earnings through dividends for the entire tax years 2011/2012 or 2012/2013.

...

On 23 October 2015 you made an application for Indefinite Leave to Remain under the Tier 1 (General) Migrant route. However, this application was refused on the basis that the level of your self-employed income was not accepted. In relation to this application you claimed that you had previous earnings of £58,623.00 net profit for the period from 1 October 2014 to 30 September 2015. However, following an interview with UKVI on 5 May 2016 it was found that you failed to satisfactorily account for the pattern of payments shown in your bank statements. It was believed that as the sole trader of your business and bank account holder it would be reasonable to expect you to be able to have an idea as to why payments were made to and from your bank account, which you appeared not to do. It was also believed that the fact that you failed to explain where money was being transferred to and from or explain the purpose of the transactions in your account cast doubt on the credibility of your self-employed earnings for the period of 1 October 2014 to 30 September 2015 also. The pattern of payments to and from your bank account, the fact that you did not open a business account (or provided no evidence of a business bank account

with your application) and the lack of information you provided at interview with respect to the payments to and from your account led the interviewer to question whether the claimed income was earned through genuine employment, rather than being borrowed, gifted or otherwise show in your financial transactions or records without being earned.

...

On 9 February 2018 you returned the Tax Questionnaire and provided further information relating to earnings from 2011 to 2017. At question 2 of the Tax Questionnaire you were asked to confirm the financial years that you were a director of a limited company in the United Kingdom. You responded that you were registered as a director of a limited company here from 27 January 2011 until 12 November 2013. However, in response to question 5, you claim that your business had no turnover, gross or net profits or expenses for the tax years 2010/11; 2011/12 or 2012/13. It is also noted that in response to question 6 of the questionnaire you state that you received £16,259 in self-employed salary and the dividends for the tax year 2011/12 and £19,995 in self-employed salary and dividends for the tax year 2012/13.

Checks have been made with HM Revenue & Customs (HMRC) which confirm the following: 'As previously stated, you have declared no self-employed earnings to HMRC for the years 2010/11, 2011/12 and 2012/13 but it is noted from the HMRC witness statement that you had £16,529 in employed earnings for 2011/12 and £19,995 in employed earnings for 2012/13 from your employed positions with CIP Recruitment Services and Sainsbury's Supermarkets Limited which you made no mention of in your 17 August 2012 application. Even if these earnings for the 2 years were combined that would result in a total of £36,254 which is significantly lower than the £68,759.00 as self-employed earnings claimed on your Tier 1 General application of 17 August 2012. The declaration of the correct level of employed earnings for the period would not have been sufficient for a grant of leave under the Tier 1 General Migrant rules.

It is acknowledged that Paragraph 322(5) of the Immigration Rules is not a mandatory refusal; however, the evidence submitted does not establish that the failure to declare to HMRC at the time the self-employed earnings on your previous application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant was a genuine error.

It is considered that there would have been a clear benefit to yourself either by failing to declare your full earnings to HMRC with respect to reducing your tax liability or by falsely representing your earnings to UKVI to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant.'

10. The appellant's grounds of appeal to the FtT, filed by Nag Solicitors, confirm at §§4 and 5:

'The application was refused under 276B and 322 of the Immigration Rules' character grounds over an alleged discrepancy of the income declared to the Home Office which was at variance with the income declared to HMRC.

The appellant submitted that he provided genuine details of the income and shall seek to address the issues raised by the Home Office in his witness statement.

11. Accompanying a letter from the appellant's former solicitors, Solidum Solicitors, to the respondent, dated 14 February 2018, the appellant provided SA302 tax calculations for the tax years 2010/11 to 2015/16. For the year ending April 2011, his gross income was identified as £8,838 and his tax liability was £472.60. He received £505.40 from HMRC for tax overpayment. For the year ending April 2012 his gross income was £16,259 and his tax liability was £2,240. He received £483.20 for tax overpayment. For the year ending April 2013, his gross income was £19,925 and his tax liability was £3,240. He received £876 for tax overpayment.
12. A witness statement from Joanne Iwanski, an officer of HMRC, dated 5 March 2018 identified the appellant as having been regularly employed between the tax years 2008/09 to 2016/17. As for self-employment, there was a record of the appellant having worked as a consultant for the tax years 2013/14 to 2015/16. For the year ending April 2014, he declared a gross profit of £13,286 with a net profit of £2,046; for the year ending April 2015 a gross profit of £63,234 with a net profit of £32,374 and for the year ending April 2016 a gross profit of £40,297 with net profit of £36,137.

Hearing before First-tier Tribunal

13. The appeal initially came before the Judge, sitting at York House, on 18 March 2019. Prior to this hearing the FtT had issued several directions to the respondent to file and serve documents relating to the appellant's 2012 application. The directions are dated 24 April 2018, 9 July 2018, 6 September 2018, 22 October 2018 and 19 November 2018.
14. The hearing on 18 March 2019 was adjourned part-heard so as to permit the appellant the opportunity to file and serve further documents and for the respondent 'to do everything possible' to file and serve documents relating to the appellant's 2012 application. At [18] of his decision, the Judge notes that the respondent was unable to file and serve a copy of the 2012 application.

15. The appellant relied upon two witness statements. The first is dated 8 October 2018 and the second is dated 30 January 2019. By means of his first statement, the appellant confirmed that whilst pursuing his studies he became a partner in 'Rithmi Enterprises', who were the Colombo agents for 'sun' and 'astra' branded thread and income from this work enabled him to pursue his Tier 1 (General) application in 2010. He detailed that whilst enjoying leave to remain as a Tier 1 (General) migrant he established a consultancy service for persons seeking to import cars into Sri Lanka from this country. He detailed the difficulties in importing cars into Sri Lanka and described the nature of his business. The exporter of the vehicle from this country to Sri Lanka was required to be a Sri Lankan citizen and was to gift the vehicle to a relative in Sri Lanka. The exporter was required to establish that they were lawfully working in this country and had to present records of remitting funds to Sri Lanka. He worked in partnership with two UK-based companies. The appellant further stated at §19 of his statement that having 'obtained' an extension to his Tier 1 status in 2013 he registered his company with Companies House in the name of 'Pradeep Research Consultant Ltd'. We observe that this is inconsistent with the rule 15(2) documents addressed below where the appellant relied upon this limited liability business when seeking his extension of leave in 2012.
16. The appellant asserted that he issued invoices to customers under the name of the company, but money received was paid into his own account rather than into a separate company account. He further stated that after his visa had 'expired' he did not introduce anymore clients to the two companies. He worked on his own and he offered financial assistance so as to secure the release of vehicles from Sri Lankan customs. However, upon their release, the appellant states that his clients let him down and they walked away without paying him. Consequently, he suffered great financial loss and could not show any profit to HMRC.
17. Whilst enjoying leave to remain the appellant established a second company, 'Pradeep Abeyratne' but did not open a bank account for it. Again, all transactions were paid into his personal account.
18. By way of his second witness statement, the appellant addressed the respondent's observation that he could not be self-employed whilst being employed by several employers. He detailed that he did not work in three jobs at the same time and enjoyed an income through his self-employment. He observed that he worked in average 80 hours to 159.75 hours per month for his employers, leaving him ample time to undertake his self-employed work.
19. The appellant detailed in his statement of 30 January 2019 that he had either cleared, or was continuing to settle, his outstanding tax liability with HMRC. Mr.

Biggs placed significant reliance upon this in his submissions before us, but having received further instructions, and with his usual candour, Mr. Biggs confirmed to us that to date the appellant has not sought to amend his tax liability with HMRC and therefore has not to date declared his purported previous earnings.

20. The Judge records at [16] of his decision:

'At the outset of the hearing on 18 March I discussed the issues in the case with Mr. Sowerby and Mr. Archie and it was agreed that the real issue in this case was whether the respondent could show that there had been dishonesty in the figures presented either to HMRC or the respondent in earlier applications. There has been a number of adjournments to try to find the 2012 application, and the paperwork accompanying it, but none had borne fruit, and we commenced the hearing on the basis that it was for the respondent to show that the appellant had misled either HMRC or the Home Office in relation to the figures presented and that we had all the evidence that was available.'

21. The appellant's evidence was recorded, and we observe [33] of the decision and reasons:

*'In continuing evidence-in-chief the appellant was asked about his bank accounts which appear in bundles A2 and A3. The account is ****9860 in A2 and ****9160 in A3 and he said both were now inactive. The appellant said that one of the accounts he had used with regard to his business, the other he had used for other expenses. It was put to him that the money went in between the accounts and the appellant said that was not the position. The appellant was asked to look at pages 15 and 19 of bundle A3 where on 24 October 2014 there was a transfer into account ****9160 from account ****9860 and then on 30 October on page 19 that money went back out to the account it had come from. The appellant was also asked about the cash payment on page 9 of some £400 and where that had come from. The appellant accepted there were in fact transfers shown between his accounts and he could not assist with where the cash had come from at this stage.'*

22. We further observe [35] - [39]:

'The appellant was asked about D.P.M. Fernando. There are a number of entries relating to her shown in the schedule and he said she was a client closely associated with him. There were others also called Fernando, but the appellant said they were not related so far as he was aware, they simply shared the same name. Pressed further in relation to D.P.M. Fernando the appellant said that her husband was working with him and he got to know her better as a result. He said there was no business relationship with her, her husband was working with him and not her.'

The appellant was referred to page 28 of bundle 3 and the amount of £10,000. He said it was an amount he had received from a friend and he transferred it on, as can be seen on page 29 a transaction on 31 December 2014. He said the amount had come to him by error and it was returned by him to her. He said it has not been included in any calculations relating to his earnings for the points-based scheme.

The appellant was asked why it was received from a business account and yet transferred to a personal account and he said he was dealing with D.P.M. Fernando through her personal account. He said the online payment facility was already set up. It was put to the appellant that he had said that he had no business relationship with this lady, and he said that she had her own business and several people associated with him became clients. He said if there were personal dealings, they went to a business account. I asked why that would be if there had been no business dealing, the appellant said that he had been associated with her. It started with her husband, they were family friends and his wife did financial things, three times she had services from him, and he invoiced her for them.

On the same topic the appellant confirmed that Ms. Fernando was doing business and he was doing a separate business. What he had been trying to explain was that she had nothing to do with his business, she was a client, all the business dealings were in his name.'

23. Before the Judge the appellant addressed concerns as to the circulation of money between his account and those of friends at [39] - [40]:

*'The appellant was asked about matters shown on page 140 of A2 where Shevon is mentioned and [in] other places that is Shevon Ferndando. He was asked about the transfers on 20 October 2014 and 22 October 2014 [where] £900 and £800 [are] shown coming into account ****9860 and how that related to the account at page 64 where in October 2015 there are payments from the appellant to Shevon Fernando in £400, £250 and £800 lots. The appellant said that when money was needed each of his friends would help each other out and they would sort out expenses.*

*The appellant was asked about an invoice on page 78 of bundle A2 where there was an invoice for Shevon Fernando in the sum of £950 and how that fitted with a payment out to the same Shevon Fernando from account ****9160 on 13 April 2015 and it was put to the appellant that there were a large number of transfers back and forth between himself and Shevon Fernando and while the sums may not correspond precisely, Mr. Archie suggested that the business transactions suggested [they] were not genuine and this was the money simply circulating. The appellant said that was not correct. These were genuine transactions. At page 6 of the Record of Proceedings I have recorded a large number of instances and pages where monies went back and forth. The appellant again was asked about the transactions and he said that the money that he was paid was for genuine transactions for work done and he was asked*

about the money that went from him to Shevon Fernando and he said when we go out on trips he gets offers and makes bookings. He denied that the money was simply circulating between them. The appellant was asked whether there was any evidence of these trips and he said there might be pictures on an old phone.'

24. As for the August 2012 application, the appellant confirmed that he could not recall how much he had claimed for self-employment and he could not recall the amount of tax he had paid at the time in relation to such self-employment. The Judge notes at [43]:

'[The appellant] was referred to a document from HMRC on page 2 of 4, and he said the tax return may have been filed, but it appears that the amount filed was insufficient to pay tax on and that could not be a correct amount of his earnings, because he could not have achieved the necessary points on the points-based system, if he had been earning less than the relevant tax threshold. The appellant gave no clear answer ...'

25. As to the appellant's self-employment, the Judge reasoned at [76], [78] and [81]:

'In my view on the face of the evidence such as it is, the respondent has shown a clear discrepancy between the amounts declared to HMRC and the amounts declared to the respondent, even if only a minimum level of what must have been declared is known. The appellant has been on notice since 2016 that these figures were challenged by the respondent and the letter of refusal for this particular application comes as long ago as March 2018. I find it very hard to accept that if the appellant's business was genuine, and if the people with whom he did [work for] were genuine, he would have had any difficulty at all in getting one or more than one to come and give evidence to that effect.'

...

A huge amount of time was spent in the hearing going backwards and forwards over the bank statements and trying to elicit clear answers as to what various payments were for and of course I make due allowance for the fact that this was all some time ago, but having said that, I have also drawn attention to the fact that these figures have been in issue for a very long time and I would have expected the appellant to know whether he had done business with D.P.M. Fernando, and given the nature of the business is somewhat surprising that she would use his services on the number of occasions she allegedly did. It is unclear why someone would want so many cars in Sri Lanka or why the appellant would say in terms he did not do business with her and later on, notwithstanding that there were numerous entries relating to her in the bank statements, to say that he did.'

...

'As a result of considering all the evidence and the matters I have outlined here, I find on balance, notwithstanding that it is a matter of dishonesty, that the Secretary of State has shown that the figures that must have been presented in order to get the points needed for a grant of leave, must have been misleading and not genuine. Even if that is incorrect and those were the true figures, I find that the HMRC were in that case misled as to the correct income for the appellant and the tax he needed to pay.'

26. The Judge concluded at [82] - [83] and [85]:

'I asked myself now whether, given the time the appellant has been in the United Kingdom, these matters of dishonesty are sufficient to allow the Secretary of State to engage paragraph 322(5) on the basis of the appellant's character. As I understand the case of Balajigari, once the respondent has proved dishonesty, either dishonesty to the respondent or to the HMRC, [this] can be sufficient to engage paragraph 322(5), but in each case it will be fact-sensitive, as to whether the dishonesty involved is sufficient to refuse a person, who otherwise meets all the requirements of the Rules.

In this case I am not satisfied that the appellant did meet all the requirements of the Rules at various stages, save for these misleading figures ...'

...

'As a result in the light of the findings I have made I find that the respondent has shown the appellant has been dishonest either to them or to HMRC and that the respondent is entitled to consider the use of paragraph 322(5) and that in the circumstances of the case I find that the appellant's character and behaviour is such that the decision not to grant him leave is proportionate.'

Grounds of appeal

27. The grounds of appeal were drafted by Mr. Sowerby, who represented the appellant before the Judge. One ground is advanced, namely that the Judge erred in law in determining the appeal in the absence of documentary evidence relied upon by the respondent. Reliance is placed upon the decision of MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC) in which this Tribunal considered the requirements of rule 13 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 which is not replicated in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which are relevant to this appeal. The core argument is advanced at §5 of the grounds:

'However, it is submitted that the FTTJ has erred in law in finding that the appellant has provided misleading figures in circumstances where the respondent, having the

burden of proof of proving dishonesty by the appellant, has failed to provide any evidence of alleged dishonesty in relation to the 2012 application.'

Rule 15(2) application

28. At the hearing on 18 October 2019, the respondent applied under rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit two documents that were not before the FtT, namely:
 - i. GCID notes for 15 January 2013, 21 January 2013 and 20 February 2013, concerned with the respondent's consideration of the appellant's 2012 application for further leave to remain as a Tier 1 (General) Migrant;
 - ii. Pages 1 and 2 of the respondent's draft decision confirming the grant to the appellant of further leave to remain as a Tier 1 (General) Migrant, dated 15 January 2013.
29. The GCID notes detail, *inter alia*, that the appellant presented himself as being self-employed and earning £68,759 through such self-employment. His business was identified as 'Pradeep Research Consultant Ltd'. Accompanying the application were bank statements, accounts, invoices, an accountant's letter and a solicitor's letter. On 15 January 2013 a provisional decision was made to grant a variation of leave but on 21 January 2013 an Executive Officer disagreed with the decision as there was missing evidence. The Executive Officer observed that the appellant 'has stated that they are solely self-employed'. The application was reconsidered on 20 February 2013, again on the basis that the appellant had earned £68,759 solely through self-employment for the relevant period and a decision was made to vary his leave.
30. The draft letter of 15 January 2013 records the appellant as having been awarded 40 points for previous earnings.
31. Mr. Sowerby confirmed that he could not go behind the provenance of the documents now relied upon by the respondent and did not object to their admission under rule 15(2). The documents were admitted. The hearing was adjourned so as to permit the appellant time to consider the documents.

Decision

32. At the hearing in December 2019, Mr. Biggs' advanced his case concisely and with care. Having made an allegation of dishonesty, namely the use of false documents

accompanying the 2012 application or alternatively the provision of false information to HMRC, he noted that the evidential burden fell upon the respondent. Mr. Biggs contended that the respondent failed to discharge the evidential burden in this matter consequent to a failure to provide any documents relating to the 2012 application. Further, the Judge materially erred in relying upon failings by the appellant in producing evidence relating to the 2012 application as well as to his businesses, so reversing the burden of proof.

33. Mr. Bramble candidly accepted that the respondent had failed to provide any evidence relating to the 2012 application to the FtT and further that the Judge had reversed the burden of proof at [76] and [78], such failure adversely impacting upon his application of such burden at [81].
34. The question for this Tribunal is as to whether the error of law was a material one. Mr. Bramble submitted that upon considering the evidence presented by the appellant in the round, such error made no difference to the outcome. We are mindful that Mr. Biggs' submissions before us as to materiality were heavily focused upon his understanding that there had been to date no consideration of the appellant's amendment to his 2011 tax return. It was on this issue that he took the opportunity to take further instructions and subsequently informed us post-hearing that there has been no such amendment to date. We have been mindful to consider all relevant issues when assessing materiality. We note Mr. Biggs' acceptance that the appellant has enjoyed several opportunities to explain events, enabling us to consider his detailed evidence both as to the nature of his self-employment and the conduct of his businesses.
35. We are mindful that the burden of proof rests upon the respondent as to her allegation of deceit, though the burden remains upon the appellant with regards to the overall human rights (article 8) appeal.
36. Upon considering the rule 15(2) evidence, we are satisfied that even with the burden of proof being placed upon the respondent there is only one decision that can reasonably be reached in this appeal. The documents now provided by the respondent clearly establish that the application for further leave in 2012 was made solely on the basis that the appellant was self-employed and documents were relied upon to support his contention that from July 2011 to July 2012 he had earned £68,759 through his company, Pradeep Research Consultant Ltd. As Mr. Sowerby conceded at the hearing in October 2019 the appellant is not capable of challenging the provenance of the rule 15(2) documents and Mr. Biggs did not seek to resile from this concession. This is unsurprising as the appellant's case is that he cannot remember what documents he provided to the respondent. Whilst providing requisite evidence of such earnings to the respondent for the purpose of his application to vary his leave, the appellant failed entirely to inform HMRC as

to any earnings from self-employment for the tax years ending 2012 and 2013. His sole declarations related to gross earnings from employment; amounting to £18,378 for the tax year ending 2012 and £19,926 for the tax year ending 2013. We are satisfied that the respondent has proved to the requisite standard that the appellant was dishonest either by means of the 2012 application for further leave to remain in this country, in which he relied upon his self-employed earnings, or by his declaration to HMRC when filing his 2012 and/or 2013 tax returns. The respondent's decision to refuse the appellant's application for leave to remain under paragraph 322(5) was lawful.

37. We have taken care to detail the nature and extent of the appellant's evidence above. We are in agreement with the Judge that the appellant's purported self-employment is not genuine. We are satisfied, to the requisite standard, that the appellant has exercised a crude mechanism of circulating money belonging to friends and associates through his accounts so as to provide a veneer to his assertion that he is a self-employed businessman, in circumstances where his true earnings were from his employment with several companies. His evidence, both written and oral before the Judge, contains numerous inconsistencies and retreats from previously adopted positions, such as whether or not he enjoyed a business relationship with D.P.M. Fernando. We are in agreement with the Judge that the appellant did not meet the requirements for further leave to remain as a Tier 1 (General) Migrant when granted such leave in 2013. Having made his initial application for leave to remain in this category, whilst enjoying leave to remain as a student, in January 2010, the applicant was required to be earning in excess of £35,000 to secure 40 points in his 2012 application. He was unable to meet the earning requirement on the basis of his employment and so would not have secured his variation of leave in 2013. We find that since this time he has benefited from his deception by being permitted to remain in this country and work.

Notice of decision

38. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 8 January 2020

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 8 January 2020