



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13106/2015

THE IMMIGRATION ACTS

Heard in Manchester
On 5 June 2017

Decision & Reasons Promulgated
On 14 June 2017

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR NAVEED ANWAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel instructed on a direct access basis

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason, no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant appeals the decision of First-tier Tribunal Judge J Austin promulgated on 7 November 2016 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against a decision dated 26 November 2015 refusing the Appellant's human rights claim. As this appeal post-dates the coming into force of the amendments to the Nationality, Immigration and Asylum Act 2002, the Appellant's appeal is limited to human rights and protection grounds. There is no protection claim in this case.
2. The Appellant is a national of Pakistan. He initially came to the UK on 9 March 2006 with entry clearance as a Tier 4 student with leave to remain. His leave to remain was extended in various categories until 15 April 2015. Prior to expiry of his leave on that occasion, the Appellant applied for indefinite leave to remain ("ILR") as a Tier 1 migrant ("the April 2015 application"). Prior to the April 2015 application, the Appellant had leave to remain as a Tier 1 (General) Migrant dating back to 2010 and extended in 2013. The April 2015 application was refused on 4 August 2015 for reasons which I deal with at [3] and [4] below. The refusal was maintained on 2 September 2015 following an administrative review. There is no right of appeal against either of those decisions. However, on 7 September 2015, the Appellant applied for indefinite leave to remain based on ten years' lawful residence ("the ILR application"). It is the refusal of that application which is under appeal.
3. Although the Appellant has no right of appeal against the refusal of the April 2015 application, the refusal of that application is relevant to the refusal of the ILR application. The Respondent refused the April 2015 application due to a discrepancy between figures provided to the Respondent in an application in 2013 when compared with figures declared to HM Revenue and Customs ("HMRC"). In short summary, the Applicant failed to disclose to HMRC dividend payments made to him by his company, Naveed Ltd, in his self-employed capacity. Those related to the tax year 2012-13 and were in the gross sum of £9,111. The Appellant has since rectified that omission. There is no tax consequence of the failure to declare due to the taxation treatment of dividends and tax credits in that regard.
4. The Respondent refused the April 2015 application as a result of the discrepancy on two bases. First, she did not accept that the Appellant's earnings as declared to her on the previous occasion were genuine. If the Appellant's self-employed earnings reflected in the dividends were left out of account, the Appellant would not have scored sufficient points for earnings in the 2013 application. The Appellant did not therefore score points for his earnings in the April 2015 application as the Respondent did not accept that the earnings relied upon were genuine. Second, because of the discrepancy between the figures declared to the Respondent and those declared to HMRC, the Respondent refused the application under paragraph 322(5) of the Immigration Rules ("the Rules") on the basis that

the Appellant's character and conduct was such as to render his presence in the UK undesirable.

5. When refusing the Appellant's ILR application, the Respondent decided that it would be undesirable for the Appellant to be granted ILR (relying on paragraph 276B(ii) of the Rules) and that the application fell to be refused on general grounds (applying paragraph 276B(iii) and due to the rejection of the April 2015 application). The ILR application was also considered under paragraph 276ADE but rejected on the basis that the Appellant had not resided in the UK for the requisite period and there are no very significant obstacles to his integration in Pakistan.
6. The Judge in the Decision upheld the Respondent's finding that the Appellant had exercised deception previously and therefore that the Respondent had correctly refused the April 2015 application applying paragraph 322(5) of the Rules. In consequence of that finding, he dismissed the appeal, finding that ILR should be refused because of the Appellant's previous conduct and because paragraph 322(5) of the Rules applied.
7. The Appellant appeals the Decision on four grounds. Grounds one to three focus on the Judge's finding that the Appellant exercised deception in the April 2015 application. First, the Appellant submits that the Judge failed to consider that the Appellant had no reason not to declare the correct income to HMRC as there were minimal tax consequences arising from the error (in fact there were none). Second, it is said that the Judge failed to consider that paragraph 322(5) is a discretionary ground for refusal and to consider whether discretion should have been exercised in the Appellant's favour, particularly since the Appellant secured no financial advantage from his failure to declare the dividend income. Third, the Judge failed to consider whether the alleged deception was aimed at securing an immigration advantage (relying on the headnote in Ozhogina and Tarasova (deception within para 320(7B) - nannies) Russia [2011] UKUT 00197 (IAC)). In short summary, the Appellant submits that the Judge should not have found that the Appellant exercised deception in the April 2015 application and should not therefore have found that paragraph 322(5) applied and that it would be undesirable to grant the Appellant ILR.
8. The fourth ground is that the Judge misunderstood the Appellant's evidence in his finding that one of the answers the Appellant gave when interviewed by the Respondent about the April 2015 application contradicted an answer he gave later in the same interview.
9. Permission was granted on all grounds by First-tier Tribunal Judge Gibb on 20 March 2017 on the basis that all grounds are arguable. The matter comes before me to determine whether the Decision involved the making of an error of law and if so either to re-make it or remit the appeal to the First-tier Tribunal for re-making.

Discussion and conclusions

10. As I indicate at [2] above, the Respondent's decision to refuse the April 2015 application was not one which could be appealed. The Appellant could have challenged that decision by way of judicial review but chose not to do so. The reason why the April 2015 application was refused though is central to the reason why the ILR application failed and for that reason, the Judge was right to focus on that issue.

11. I can deal briefly with the Appellant's fourth ground. When interviewed by the Respondent's officer about the April 2015 application, the Appellant was asked the following question:-

"[12] You mentioned your own business - Naveed Limited - are you claiming earnings from this company for your settlement application?"

The Appellant replied that he was not. He was then asked the following question:-

"[17] What dividends did you receive from Naveed Limited - do you recall?"

The Appellant said that it was "Around £8,000"

12. The Judge dealt with what he said was an inconsistency at [20] of the Decision as follows:-

"...At question 12 he said that he was not claiming earnings from his own business in support of his settlement application. He said again that he was not claiming any self-employed income in support of his application. He said that the limited company had started in September or October 2012 and had been closed down in August 2013 because of the overwhelming workload from his employment. It was then at question 17 of the interview that the appellant reversed his earlier position and disclosed that he had in fact received a dividend of approximately £8000 from Naveed Limited."

13. The Appellant is right to point out that there is no inconsistency between the answers given as the former question was dealing with the April 2015 application whereas the latter question was a response about the earnings declared in the 2013 application. I agree with Mr Kotas' submission, though, that this error is not a material one. In fact, as appears from [23] of the Decision (cited at [17] below), the Judge understood that the discrepancy in relation to the dividend payments arose from the 2013 application and not the April 2015 application. There is no finding that the Appellant is not credible on the basis of the inconsistency in the Appellant's answers or at the very least it is not the sole reason for finding his evidence not to be credible.

14. I turn then to deal with the remaining three grounds. The focus of those is on reasons given by the Judge for finding that the Appellant exercised deception by failing to declare the dividend to HMRC.
15. The Appellant's explanation for the failure to disclose the dividends to HMRC is that he left his tax affairs to accountants and trusted that they would provide the correct information. He says that he gave his accountants the right information and therefore that the failure to disclose the dividends was their fault. The Judge recounts that explanation at [5] of the Decision. The Judge then deals with the reason why the Respondent rejected the April 2015 application at [6] and [7] as follows:-

"[6] The respondent considered (and it is agreed) that the application would have failed without the declared income of the dividends from Naveed Ltd, as the declared income would have been too low to meet the requirements.

[7] The respondent considered that it was not clear that the appellant had in fact received the dividends claimed, as there was no evidence of the same other than the appellant's claim. It was therefore unclear whether the dividends were earned but not declared, or not earned in the first place and merely created to create a false impression of a level of income that would support the application for indefinite leave to remain."

16. The crux of the Appellant's case is set out at [17] of the Decision as follows:-

"The tribunal was asked to consider paragraphs 8 and 9 of the appellant's statement at pages 6 and 7 of the appellant's bundle. This was the crux of the appellant's appeal. He never had any intention to mislead any government authority, be it the Revenue or the Home Office. His argument that the only reason that anyone would have failed to make a return in the way he had done so would be to evade tax, and it was clear that no tax was being avoided other than a very small amount; it was more probable that the omission arose because of a mistake rather than by an attempt at financial gain arising out of an attempt at tax evasion. The allegation of the appellant having intentionally misled is not supported by cogent evidence. The appellant was shocked at the time of his interview that the dividend had not been accounted for. He had given all his documents to the accountants and had paid them for their services. His spontaneous response when he discovered it was shock that his tax return had not been filed with the Revenue and there was no intention to mislead either agency of the government. He submits that the dividend was a real one and his bank account show that it was paid. The respondent has found him to be a person of unsuitable character for the purposes of his application for indefinite leave to remain over the non-payment of £1.60 tax, whilst ignoring the £14,074.70 that the appellant has paid over the last few years to the Exchequer."

17. The Judge rejected the Appellant's evidence in relation to the reason for the non-declaration of income at [19] to [22] of the Decision before making the following findings:-

[23] I find from the evidence that the appellant is a highly educated information technology analyst and consultant who has worked for a number of highly reputable and well-known organisations. In 2012 he chose to start his own limited company which he closed down in 2013. In 2013 he was making an application for indefinite leave to remain. One of the most significant aspects of his application as far as he was concerned was in demonstrating a level of income which would score points sufficiently to support his application. The appellant must have been keenly aware of the significance of the income requirements for his application. He said that he was. It is agreed that without the additional income from his claimed dividend from the limited company his application would have failed on the points system that applied to income.

[24] I find that the appellant was familiar with the revenue system in United Kingdom. During his interview when he claimed to have been surprised to be told that he had not accounted to the Revenue for his dividend he demonstrated that he had an intimate knowledge of the tax that he had paid both as an individual and through the limited company and the corporation tax. In fact, he sought to explain that he had not been concerned about the lack of any documentation or tax demand from the Revenue by the fact that he considered that he had already paid sufficient corporation tax. I find that the appellant did have an awareness of the requirements of him as a company director and as an individual to account for tax. He had been employed as an IT analyst by several highly regarded firms of solicitors where the highest standards of propriety would be expected from all employees. I disagree with the submission that allowance should be made for the appellant not being good with figures and dates. The circumstances of his education and employment suggest the complete opposite. I find that it is more likely than not that he was aware that he had failed to account to the Revenue for his dividend. I also find that the appellant did fall into the category of person whose previous character and conduct in making his application for indefinite leave to remain and claiming to have received a dividend which he had not accounted for in a tax return, meant that he fell to be refused under paragraph 322(5) of the Immigration Rules. Although the applicant later submitted a tax return to the Revenue on 4 August 2015 to rectify their records, I find that the previous deception which is a finding in regard to the appellant's character and conduct in misleading government departments in relation to his previous income means that the decision to refuse his application for indefinite leave to remain under the immigration rules was correct.

Based on those findings, the Judge found that the Appellant failed to qualify for ILR.

18. The Appellant's first three grounds and Mr Eaton's submissions focus on the allegation of deception on the basis that this deception was practised against HMRC. As Mr Kotas pointed out, though, this was not the Respondent's case nor was it the way in which the Judge found against the Appellant. The essence of the finding against the Appellant (particularly in light of what is said at [23] of the Decision) is that the deception was practised against the Respondent by inflating the earnings in the 2013 application. As such, the grounds which argue that there was no tax advantage resulting from the non-declaration and that discretion should have been exercised in the Appellant's favour because of the minimal tax

effect are misconceived. Similarly, ground three which suggests that the Judge did not find that the Appellant was seeking to mislead the Respondent is misplaced. Although I accept that the finding at [24] of the Decision is not as clear as it might be, when [23] and [24] of the Decision are read together, it becomes clear that the Judge found that the Appellant stood to benefit from the dividend income in support of his 2013 application as, without it, he would not have met the earnings threshold. The fact that the Appellant did not declare this dividend to HMRC cast doubt on whether the dividend was genuine income and therefore the Appellant had exercised deception in relation to his income.

19. However, as it became clear in submissions that the Appellant's grounds focussed on the wrong target, Mr Eaton made a further submission which leads me to the conclusion that the Decision does contain a material error of law. This relates to the other evidence which was before the Judge as to the genuineness of the dividend income. As Mr Eaton pointed out, there are in the Appellant's bundle bank statements from the Appellant's personal account and the business accounts of Naveed Ltd. Those accounts show withdrawals from the business accounts on dates between January and March 2013 and corresponding credits to the Appellant's personal account. The total of those debits and credits equate to £8,200. Although the amount of the dividends which the Appellant should have declared to HMRC is £9,111, as the accountant's letter dated 2 April 2013 makes clear that is the gross dividend and the net amount is £8,200.
20. Although the Judge did refer at [17] of the Decision to there being evidence of the payments of dividends into the Appellant's account, the Judge did not consider this evidence when reaching his findings. That is a material error. A Judge might be entitled to reach a finding that the Appellant inflated his income in order to secure the necessary points even taking into account that evidence (if for example there was a finding that the money transfers did not represent genuine earnings). However, on the face of those documents, and the coincidence of amounts claimed, another Judge may well reach the view that those earnings were genuine. Bearing in mind that the Appellant does not derive any benefit (financial or otherwise) by failing to declare that income to HMRC, that may well impact on the finding that the Appellant did exercise deception in the 2013 application (and therefore the April 2015 application). A finding that the Appellant did not exercise deception would be central to the outcome of the appeal against the refusal of the ILR application.
21. Mr Eaton and Mr Kotas agreed that if I found an error of law, the appeal should be remitted to the First-tier Tribunal. The focus of the appeal is the deception alleged against the Appellant. I have found that the Judge materially erred in his finding that the Appellant exercised deception. Since the Appellant's credibility is in issue, it is appropriate for the appeal to be remitted to the First-tier Tribunal for re-making of the decision by a different Judge.

DECISION

I am satisfied that the Decision contains a material error of law for the reasons given above. The decision of Judge J Austin promulgated on 7 November 2016 is set aside. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Austin. I do not preserve any findings.



Signed
Upper Tribunal Judge Smith

Dated: 13 June 2017