IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08807/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 September 2021	**On 11 October 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

GAFFAR AHMED MIRZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Gajjar, Counsel (no instructing solicitor)
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Microsoft Teams (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

2. The appellant is a citizen of India born on 6 August 1982 who has lived in the UK since 2008. He is appealing against the decision of Judge of the First-tier Tribunal Cartin ("the judge") promulgated on 6 May 2020 dismissing his human rights appeal.

Background and the decision of the respondent dated 8 August 2017 ("the refusal decision")

3. On 24 March 2016 the appellant applied for indefinite leave to remain (ILR) as a Tier 1 (General) migrant. On 8 August 2017 the application was refused. Four reasons were given by the respondent for refusing the application:

    a. First, there was a discrepancy between the income declared by the applicant to the respondent in an application for leave made in 2011 and the income he declared to HMRC in the corresponding tax years. I will refer to this as "the 2011 discrepancy";

    b. Second, there was a discrepancy between the income declared by the applicant to the respondent in an application for leave made in 2013 and the income he declared to HMRC in the corresponding tax years. I will refer to this as "the 2013 discrepancy";

    c. Third, the applicant failed to declare a police caution; and

    d. Fourth, the applicant had been absent from the UK for lengthy periods which were inconsistent with the requirements of paragraph 245AAA(c) of the Immigration Rules.

4. The judge accepted the appellant's explanation for the first and third reason identified in paragraph 3 above. As there is no cross-appeal from the respondent on these issues they will not be considered further.

5. The decision of the respondent in respect of the second reason (the 2013 discrepancy) and the fourth reason (absence from the UK) will need to be considered further.

The 2013 discrepancy

6. In a Tier 1 application made on 17 May 2013, the appellant claimed to have self-employment net profit of £20,331 for the period 1 May 2012 to 30 April 2013. This corresponds to the 2012/13 and 2013/14 tax years. However in his 2012/13 tax return the appellant declared £10,972 self-employment income and he did not declare any self-employed net income for 2013/14. He subsequently, in 2016, amended the 2012/13 tax declaration to show self-employment income of £20,331 (i.e. a figure which matches that which he provided in respect of the Tier 1 application).

7. In the refusal decision, the respondent noted that there was a difference of £9,359 between the declarations to HMRC and the respondent. The respondent

observed that the appellant had stated, in a completed questionnaire submitted on 30 March 2017, that he had made a mistake and "misinterpreted the details" of the tax return. The respondent stated that the onus was on the appellant to submit correct figures and she was not satisfied he had given a credible account for the "clear discrepancy". The respondent also stated that if the earnings declared to the respondent had been consistent with those declared to HMRC he would not have been granted leave to remain.

Absences from the UK

8. Paragraph 245AAA(c) of the Immigration Rules stipulates that any absence from the UK must have been for a purpose that is consistent with the appellant's basis to stay in the UK, including paid annual leave or for serious or compelling reasons. In the refusal decision, the respondent stated that paragraph 245AAA(c) was contravened because the appellant was outside of the UK for two substantial periods: one of 46 days excluding weekends and another of 42 days excluding weekends. The respondent observed in the refusal letter that the appellant's absences were not verified by an employer as being part of his annual leave.

Decision of the First-tier Tribunal

9. A representative for the respondent did not attend the hearing. The judge directed himself to the Surendran Guidelines, which are appended to the decision in *MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005. As observed by the judge in paragraph 27 of the decision, the Surendran Guidelines provide guidance to judges on how to proceed when the respondent is not represented.

10. As noted above, the judge rejected two of the respondent's four contentions in the refusal decision: (i) that the appellant acted dishonestly in respect of the 2011 discrepancy; and (ii) that the appellant failed to disclose a police caution. However, the judge agreed with the respondent in respect of two others: that the appellant (i) had been dishonest in respect of the 2013 discrepancy; and that (ii) he had failed to adequately explain his absences from the UK for the purposes of paragraph 245AAA(c).

The 2013 discrepancy

11. The appellant's explanation for the 2013 discrepancy before the First-tier Tribunal was entirely different to that which he gave to the respondent in the 30 March 2017 questionnaire response. In the questionnaire response, he claimed that the discrepancy was due to a mistake he had made. In contrast, before the First-tier Tribunal he argued that there had not in fact been a mistake and the apparent discrepancy was explained by (i) a refund to a customer made after the 2013 application was made; and (ii) income received between 6 April 2013 and 30 April 2013, which was subsequently, in the 2013/14 tax return, offset by a loss arising because of expenses incurred after

the application. The appellant claimed that he was mistaken (as a result of poor advice) when he made the "corrections" to his 2012/13 tax return, as there was in fact nothing wrong with the return.

12. The judge rejected the appellant's new explanation for the discrepancy. The judge found there to be multiple flaws in the appellant's explanation. These include that:

    a. It was unlikely that the appellant would have made such a substantial refund (paragraph 53);

    b. There was contradictory information about when the payment, for which the refund was said to have been given, was made (paragraph 54).

    c. The document relied on by the appellant to show that he paid a refund could easily have been forged and he had not submitted a complete set of bank statements which would more authoritatively show that the refund had been paid. The judge described the absence of complete bank statements as "telling" (paragraph 55).

    d. As complete bank statements were not provided, the full picture of the appellant's activity could not be seen and it appeared that the appellant may have engaged in "recycling of the same money to give the appearance of money received" (paragraphs 58 and 64).

    e. Several payments into the appellant's account showed the same reference number, and did not appear to come from bank accounts bearing the names of customers (paragraph 59).

    f. The appellant appeared to have "counted twice" some of the claimed income (paragraph 60).

    g. It is "surprising" that the appellant's income in 2013/14 tax year was all in the first month of the tax year and it "begs the question" as to why his expenses were so high for the remainder of the tax year (paragraph 61-63).

Absences from the UK

13. In respect of the appellant's absences from the UK, the judge found that a letter produced by the appellant, dated 24 December 2012, purporting to be from his employer, had not been submitted with the appellant's application and was not authentic. The primary reason given by the judge for finding that it was not authentic was that the date of the letter (24 December 2012) was "remarkably strange" given that the appellant would not have needed such a letter until his application in May 2013.

Grounds of Appeal

14. Multiple grounds were initially advanced. Permission to appeal was refused by both the First-tier Tribunal and Upper Tribunal. Following a judicial review application to the High Court, permission was granted on a single ground, which is that the judge erred by not "putting to" the appellant his concerns and therefore the appellant was deprived of the opportunity to respond to those concerns before adverse findings were made.

15. At the outset of the hearing, Mr Gajjar and Mr Whitwell agreed that the scope of the appeal before me was limited to this procedural fairness issue.

Analysis

16. There is a tension between, on the one hand, a judge not appearing biased by "entering the arena" and putting points to a party; and, on the other, the need for a party to know the case against him when a judge is minded to make findings adverse to him which have not been squarely put to him. This tension is particularly acute in this jurisdiction in cases where the respondent is not represented and therefore there has been no cross examination of the appellant.

17. This issue was addressed almost two decades ago in *WN (Surendran; credibility; new evidence) Democratic Republic of Congo* [2004] UKIAT 00213. In paragraphs 39 – 40 of *WN* Mr Justice Ouseley stated:

> "39. There is a tension, reflected in the [Surendran] guidelines, between fairness in enabling a party to know the points on which an Adjudicator may be minded to reach conclusions adverse to him where they have not directly otherwise been raised, and fairness in the Adjudicator not appearing to be partisan, asking questions that no-one else has thought it necessary to ask. This has proved troublesome on a number of occasions.
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> 40. The tension should be resolved, so far as practicable, by recognising the following:
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> (1) It is not necessary for obvious points on credibility to be put, where credibility is generally at issue in the light of the refusal letter or obviously at issue as a result of later evidence.
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> (2) Where the point is important to the decision but not obvious or where the issue of credibility has not been raised or does not obviously arise on new material, or where an Appellant is unrepresented, it is generally better for the Adjudicator to raise the point if it is not otherwise raised. He can do so by direct questioning of a witness in an appropriate manner.
>
> (3) We have set out the way in which such questions should be asked.
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> (4) There is no hard and fast rule embodied in (1) and (2). It is a question in each case for a judgment as to what is fair and properly perceived as fair.

> The Surendran guidelines and MNM should be read with what we have set out above."

18. Mr Gajjar submitted that the guidance enunciated in *WN* is not applicable in this case. He gave three reasons: first, he argued that, in contrast to *WN*, which was an asylum appeal, in this case the burden of proof was on the respondent; second, he argued that the allegation of dishonesty was more serious in this case; and third, he argued that there have been advances in the law. He relied, in respect of the latter argument, on *Balajigari and others v SSHD* [2019] EWCA Civ 673 and *Ashfaq (Balajigari: appeals)* [2020] UKUT 00226 (IAC), as well as *AM (fair hearing) Sudan* [2015] UKUT 00656 (IAC).

19. I disagree with Mr Gajjar on this issue. Firstly, *Balajigari* and *Ashfaq* concern an entirely different issue (the opportunity to respond to an allegation by the respondent) which has nothing to do with procedural fairness in a hearing, and *AM* is also concerned a different issue (independent judicial research). Secondly, in *WN* the honesty of the appellant was also in question. In that case, the appellant's account was not believed. The significance of not believing the appellant was, if anything, even more significant in WN than in this case, as a consequence was the refusal of his protection claim and potential removal to a country where, if he had been telling the truth, he would face a very serious risk. Thirdly, there is nothing in *WN* to indicate that it is limited to cases in which the burden is on the appellant and there is no reason in principle why that should be the case.

20. In my view, the guidance given by Justice Ouseley in paragraphs 39 – 40 of *WN* is authoritative and clear, is applicable to this case, and is not undermined by subsequent case law. In this respect, I agree entirely with Mr Whitwell, who drew my attention to *Muhandiramge (section S-LTR.1.7)* [2015] UKUT 00675 (IAC), where reliance was placed on the same passages in *R (on the application of Maheshwaran) v Secretary of State for the Home Department* [2002] EWCA Civ 173 that were cited in *WN*, which state:

> "4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post - hearing decision of the higher courts – requires it. However, such cases will be rare.
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> 5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be

> better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds."

21. In addition to making submissions about where, in principle, the balance lies between staying out of the fray and putting points to an appellant in an appeal where the respondent is unrepresented, Mr Gajjar and Mr Whitwell took me through several passages of the decision: with Mr Gajjar arguing that it was evident from these that the core reasons the judge did not accept the appellant's innocent explanation were not put to the appellant (and it was not possible for the appellant to have anticipated that these points would be taken against him); and with Mr Whitwell arguing that it was (or ought to have been) sufficiently clear to the appellant what points he needed to address.

22. Although I disagree with Mr Gajjar about the applicability of *WN*, I accept his argument that the decision is undermined by procedural fairness. In this case, the appellant was not (and could not have been) aware of the judge's core reasons for not accepting his explanation for the 2013 discrepancy, as they were not included in the respondent's refusal decision and were not put to him either before or at the hearing. The judge's reasons for not believing the appellant included that he appeared to have been "recycling money" to give a false appearance, counting income twice, and claiming money was from clients when it was not (as indicated by the same bank reference number appearing). These highly significant points were central to the reason the appellant was not believed, but the appellant would have had no idea, until he read the decision, that these points were being taken against him, and he had no opportunity to respond to them. Therefore, this case, in my view, is precisely the type of case envisaged by *WN* where fairness would require the appellant to be notified of the adverse points in order for him to have an opportunity to address them.

23. I reach the same conclusion in respect of the appellant's absences from the UK, as the judge found that the employer's letter adduced by the appellant was not authentic without the appellant being aware that the authenticity of the letter was at issue.

24. For these reasons, I find that the decision of the First-tier Tribunal is undermined by procedural unfairness and cannot stand. In the light of the nature of the error of law identified, it is appropriate in this case for the appeal to be remitted to the First-tier Tribunal to be made afresh by a different judge.

Notice of Decision

The appeal is allowed.

The decision involved the making of a material error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard afresh before a different judge.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Dated: 13 September 2021