**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/44517/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 18th July 2014** | **On 3rd October 2014** |
| **and 26th September 2014** | |

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**MR MUHAMMED ALI**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Balroop (18/07/2014) & Mr M Biggs (26/09/2014) (instructed by Khans Solicitors)
For the Respondent: Mr C Avery (18/07/2014) & Ms A Everett (26/09/2014) Senior Home Office Presenting Officers)

**DETERMINATION AND REASONS**

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant with regard to a determination of the First-tier Tribunal (Judge Mitchell) promulgated on 16th May 2014 by which he dismissed the Appellant's appeal against an Immigration Officer's decision to refuse him leave to enter the UK taken on 27th October 2013. The circumstances are that the Appellant, a citizen to Pakistan had leave to remain in the

United Kingdom is a Tier 1 General Migrant. He visited Pakistan and was on his return when questioned by an Immigration Office who decided that either false representations had been employed or material facts not disclosed when he obtained his leave to remain and on that basis took a decision to cancel his leave to remain.

2. The First-tier Tribunal upheld that decision and the grounds upon which permission to appeal was granted were that the First-tier Tribunal had not applied the correct burden of proof namely that it rested with the Respondent and that the Judge engaged in cross-examination which amounted to a procedural unfairness.

3. The First-tier Tribunal Judge who granted permission made the point that it would have been more appropriate for the Appellant's representative at the hearing before the First-tier Tribunal to have made representations with regard to questioning by the Judge rather than to leave it for an application for permission to appeal.

4. This matter first came before me on 18th July 2014 to decide whether the First-tier Tribunal had made an error of law and if so whether and to what extent the determination should be set aside. Having read the determination I do not find there was any procedural unfairness. The judge is entitled to question an Appellant to clarify the situation. It is for the Judge to determine the appeal and if the evidence to allow him to do that has not come out during the hearing then he is entitled to ask questions provided they are done in a neutral and non-aggressive way. In the absence of any objections or submissions to the Judge at the time I conclude that they were properly put.

5. However, I was satisfied at that hearing that the First-tier Tribunal made a material error of law in so far as the Judge appears to have reversed the burden of proof. The burden rests with the Secretary of State to show that false representations had been made or material facts not disclosed. It was not for the Appellant to prove a negative. I therefore set aside the determination and adjourned the matter for a resumed hearing. I did so because there was a dearth of evidence provided by the Secretary of State and I directed the Secretary of State to provide details of the application for leave to remain in which it was said the Appellant had made false representations or failed to disclose material facts.

6. At the resumed hearing before me on 26th September, although neither representative had the additional documents, they had found their way to the Tribunal file. Those additional documents were a copy of the landing card completed by the Appellant, the minutes taken by the Immigration Officer, the record of the interview with the Appellant and a copy of the application for leave to remain. I therefore gave both representatives copies of the documents and time to consider them.

7. The notice of refusal sets out the reason for the Immigration Officer's decision. It states that the Appellant held a residence permit which had the effect of leave to remain in the UK as a Tier 1 General Migrant. It said that the Appellant had failed to provide a coherent, consistent, credible account of his self-employed earnings from

MAM Marketing and Management Services which led him to conclude that they were not as the Appellant claimed for the purposes of obtaining his leave. The Immigration Officer noted that the Appellant's original application stated that he made £22,071 net profit of the period 1st August 2010 to 1 March 2011 (a seven-month period). He said that the Appellant had contradicted that before him by declaring that his turnover during that period was between approximately £12,000 and £15,000. That was further called into question because the Appellant now stated that his business expenses during that period totalled between £7,532 and £9,632 and thus his pre-tax profit would have been £7,468 only.

8. The Immigration Officer then said that unusually the Appellant was unable to specify an estimate of his self-employed earnings from 2011 to 2012 but claimed that his business turnover for the period 2012 - 2013 was between £20,000 and £22,000. The Immigration Officer said he was unable to specify the pre-tax profit that generated especially as he claimed that this was working for only three clients for between 49 hours and 74 hours in total. That represented earnings for the Appellant between £270.27 and £448.97 per hour and he had failed to satisfactorily explain why, given such high earnings, he was also in full-time employment at a supermarket earning only £9.63 per hour.

9. The Immigration Officer went on to state that to further explain how the Appellant managed to make those earnings he stated that for one of his clients, Unique Solutions Ltd (who provide catering and security staff) he had conducted a "strengths, weaknesses, opportunities and threats analysis". However he was unable to provide any detail as to how the company obtained their staff; a contradictory statement given the work he claimed he had done for them.

10. The Immigration Officer went on to say that the Appellant stated that the second of his clients in 2012 to 2013 was Fast Items Limited in Walthamstow to whom he sold computer peripherals and also received commission by selling computers although he could not say or even estimate how many computers he sold on their behalf.

11. The Appellant stated that his third and final client in 2012 - 2013 was AMF Limited in Ilford for whom he provided a report regarding their promotional strategies. His investigation concluded that they should be marketing themselves by using "word-of-mouth" yet he was unable to state what strategy they had used previously. He later claimed that they did not use any previous marketing strategies.

12. Given the contradictions surrounding the Appellant's self-employment the Immigration Officer was satisfied that he had misrepresented his self-employed earnings in order to obtain leave to remain in the United Kingdom and therefore cancelled his continuing leave in accordance with paragraph 321(A) of the Immigration Rules.

13. The Appellant had applied for his leave to remain as a Tier 1 General Migrant on the basis that he was working for Tesco Stores and additionally was self-employed. The

figures he gave for his income for the purpose of that application were figures for the tax year end April 2013.

14. The issue in the appeal is whether or not the Appellant was in fact self-employed in addition to working at Tesco's and whether the Immigration Officer was justified in his conclusions based on the Appellant's answers at interview. Included in the Appellant's bundle were documents from HMRC confirming his income from all sources. There is a tax assessment for the year to 5th April 2011 which shows self-employment income of £20,717 plus employed income of £14,365. There is then a tax calculation for the year ended April 2012 which shows employed income of £17,940 and self-employed income and dividends of £17,444. There is then a tax calculation for the year 2012 - 2013, the year relied upon in the Appellant's application for leave to remain, which shows earned income of £21,259 and self-employed income in the form of dividends of £19,055. The dividends represent income from his limited company. I am satisfied that he was both employed and self-employed for those three years.

15. The source of his income for the seven-month period in question and queried by the Immigration Officer derived from three different customers. There is a letter in the Appellant's bundle at page 68 from Unique Solutions Ltd, one of his clients, which lists three invoices which that company paid between November 2012 and January 2013. The Appellant produced original bank statements for the same period and pointed out the corresponding entries in his bank account representing payment of those invoices. On that basis I am satisfied that he was paid for work done for Unique Solutions Ltd.

16. I was then referred to the notes on the reverse of the landing card made by the Immigration Officer which states:-

> "Pax claimed earnings of £22,071 working in marketing company self-employed - very vague regarding what he did to earn this money- Pax claims he did not know how much tax he paid in 2011 for self-employed business - claims his accountant paid tax for 2011 - Pax currently on Tier 1 General and claims earnings of 18,000 self-employed for some media business "

17. It is of note that he claimed earnings of £22,071 which is precisely the figure recorded by his accountants as his self-employed income for the period 2010 - 2011. It is not correct therefore to say that he did not know this figure.

18. It is also recorded in the refusal that he did not know his pre-tax profits in the year 2012 - 2013. In his evidence the Appellant said that he was only asked about turnover. An examination of the Immigration Officer's record of interview at question 47 confirms in fact that the Appellant is correct. He was not asked how much his pre-tax profit was; he was asked how much money his company turned over in 2012 - 2013. He gave the answer of between £20,000 and £22,000 which is correct.

19. The situation in this case seems to have been that the Appellant alighted from a long haul flight from Pakistan to be asked extremely detailed questions about business figures over the previous three years. It is unsurprising that he could not remember the precise details of all of this. It is not information one carries around in one's head nor would he have the paperwork be about his person. However, overall it is clear that the answers that he gave at interview accurately reflect what he said when he made his application as a Tier 1 General Migrant and accurately reflects the documents that he submitted also in connection with that application. On that basis it is cannot be said that the Immigration Officer on behalf of the Secretary of State was justified in concluding that false representations had been made or material facts not disclosed for the purpose of the application. It is quite clear from the HMRC documents that the Appellant pays tax for both employed earnings and self-employed earnings.

20. Having set aside the determination of the First-tier Tribunal and reheard the appeal I am entirely satisfied that the Secretary of State has failed to establish the misrepresentation or failure to disclose required for the decision under paragraph 321 (A) and the Appellant's appeal is allowed.

21. The appeal to the Upper Tribunal is allowed.

Signed Date 3rd October 2014

Upper Tribunal Judge Martin

**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award as the decision of the Immigration Officer was not justified on the basis of the evidence before him.

Signed Date 3rd October 2014

Upper Tribunal Judge Martin