IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/53754/2013
IA/53756/2013
IA/53758/2013
IA/53755/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th December 2014	**On 14th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

S B
B J
N B1
N B2
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	Mr S B Pannikkai, instructed by Law & Lawyers Solicitors
For the Respondent:	Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of India born on 13th December 1977, 30th May 1976, 4th July 2000 and 13th July 2010. The appellants are wife, husband and children and they made applications for indefinite leave to remain on 9th April 2013, the first appellant making an application as a Tier 1 (General) Migrant and the remaining appellants as her dependants. In a refusal letter dated 29th November 2013 the respondent refused the first appellant's application under paragraph 322(1A) and (2) of the Immigration Rules which state:

> "*(1A) Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application,*
>
> …
>
> *(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave*
>
> …
>
> *the application must be refused."*

2. The application for the first appellant was also refused further to paragraph 245CD with reference to paragraph 39B(c) and paragraph 19(1) and 19(j) of Appendix A.

3. In particular the respondent stated that the first appellant had in a previous application for leave to remain as a Tier 1 (General) Migrant submitted on 15th May 2011 claimed £21,145 as net profit from her self-employment as an educational consultant T/A Imatt Consultancy for the period 1st April 2010 to 31st March 2011.

4. The Secretary of State had conducted further enquiries with HM Revenue & Customs which reported that in the tax year 2010 to 2011 between 20th April 2010 to 5th April 2011 the appellant had reported a turnover of £42,130 and a net profit of £1,995 only.

5. The Secretary of State was satisfied that the declared earnings of £42,130 in the application submitted to the Secretary of State was not consistent with the declarations made to HMRC in the relevant tax period. Her declared earnings for a similar period differed significantly and did not demonstrate

that the declaration of earnings to both the Home Office and HMRC was consistent.

6. In the current application the appellant has claimed gross earnings of £15,780 and a net profit of £11,398 with Search Engine Optimisation from 9th July 2012 to 25th March 2013 and having regard to the fact that her previous declarations did not corroborate her earnings claimed the Secretary of State was satisfied she had also made a false representation in her current application in order to facilitate her indefinite leave to remain in the UK.

7. The Secretary of State was satisfied that the appellant had made a false representation in her May 2011 application and in her current application and therefore her application was refused under paragraph 245CA (which stipulates that she must not be refused under the general grounds of refusal) with reference to paragraph 322(1A) and (2).

8. The appellant appealed on the basis that the appellant provided evidence from an accountant who was qualified as required by the Rules and her income in her previous application was assessed and certified by qualified accountants. Since the income for the previous application was assessed and evaluated by qualified accountants the income was true on the date of the application (that is 15th May 2011) and therefore the application of paragraph 322(1A) and (2) of the Immigration Rules was unwarranted. Chiefly the appellant should have been given an opportunity to explain the discrepancy through a qualified accountant before the invocation of paragraph 322.

9. The appellant contended that the discrepancy in self-assessment declared after nearly a year did not render the actual income declared before the Secretary of State as "disingenuous".

10. The appellant stated that neither the assessment of income before the Secretary of State nor the self-assessment tax return was done by her personally but through qualified professionals.

11. Judge Buckwell dismissed the appeal and an application for permission to appeal was made and granted by First-tier Tribunal Judge Levin, who stated that whilst the judge correctly stated that the burden of proof was upon the respondent his failure to consider the issue of dishonesty and to make findings thereon arguably amounted to an error of law (**Ahmed (general grounds of refusal – material non-disclosure) Pakistan [2011] UKUT 351 (IAC)**).

12. The grounds for the application for permission to appeal stated that the appellant had been conducting a genuine business but owing to unfortunate circumstances she had shut her business down with losses. The business

was closed in March 2012 and she was advised that a set-off was possible for the profits of previous years owing to the losses in subsequent years.

13. She submitted that she should have been given an opportunity to explain the discrepancy and the discrepancy after nearly a year did not render the actual income declared before the Secretary of State as disingenuous.

14. The deception allegation was never established by the Secretary of State and the burden of proof of dishonesty fell upon the Secretary of State.

15. Further the discrepancy was such that the appellant submitted an application on 5th April 2011 but the tax discrepancy arose in January 2012. There had been a discounted tax payment owing to a future loss. The appellant was acting in accordance with HMRC Rules and paying the discounted tax and this did not involve deception. The First-tier Tribunal was unfair in insisting that the appellant had not adduced further documents to disprove the allegation. The appellant should have been given an opportunity to explain the alleged false representation.

The Hearing

16. At the hearing before me Mr Pannikkai submitted that the Secretary of State had failed to establish a *mens rea* which was a vital test in dishonesty. There had been a revision of the appellant's account. The first appellant accepted that the figures were different and she accepted that the losses had occurred subsequent to April 2011 when the Immigration Rules changed.

17. It was conceded that the appellant had not referred the matter to the Home Office or written to them. If in any doubt the genuineness of the application could be checked by the Secretary of State and had not done so. No opportunity had been granted to the appellant to prove her innocence. She suffered losses following the change to the Immigration Rules. The Secretary of State should be slow to establish dishonesty. The burden of proof is on the respondent. She had money refunded in the following tax year. The appellant had not been dishonest and this was how accountancy worked, the tax was assessed later, and the Secretary of State had not discharged the burden to draw an explanation from the appellant. She had a provisional audit in 2011 and a final audit in January 2012.

18. Mr Melvin submitted that the appellant had nine months to produce evidence at the hearing before the First-tier Tribunal Judge and she did not do so. The accountants could have made representations when the figures changed and this did not occur. There was a huge discrepancy in the figures and the appellant has had ample opportunity to give the reasons from a professional accountancy firm and she had not done so.

Conclusions

19. I note from the application form made on 8th March 2013 that the appellant has given a signed declaration to state that:

> *"I confirm that if before this application is decided there is a material change in my circumstances or new information relevant to his application becomes available I will inform UKBA."*

20. No such representations had been made to the UKBA but at the hearing before Judge Buckwell and as recorded at paragraph 20 of his determination the appellant confirmed that the respective profit figures in the sums quoted by the Secretary of State in the letter of refusal were in fact correct. The judge recorded that the figures differed because she had been advised that she could offset her losses against her other income from profits.

21. As recorded by the judge at paragraph 21 of the determination the judge wrote:

> *"21. The First Appellant was asked why a figure given to the Home Office had been £20,145 but a lower figure of £1,995 had been given to HMRC. Asked to explain the difference in the figures the First Appellant referred to massive financial losses in her business. She then said that she had made profit amount to £20,145.*
>
> *22. Asked about refunds of immigration application fees the First Appellant said that they had related to admission fees for colleges. Some colleges had paid refunds to students but some had also charged an administration fee. Against profits there was an off-set of outstanding sums. The First Appellant said that HMRC had accepted a profit figure of £1,995. Thereafter the business was closed."*

22. The judge clearly set out at paragraph 31 that the burden with respect to paragraph 322 of the Immigration Rules shifted to the respondent.

23. In paragraph 32 the judge correctly cites that paragraph 322(2) refers to the making of false representations which may concern a previous variation of leave application.

24. The judge confirmed at paragraph 37 that he did not have concerns about the most recent documents but having recorded the significant discrepancy between the figures put in by the appellant to the Home Office and the figures put in to the HMRC, which the appellant accepted, the judge then stated:

> *"There has been seemingly no attempt to rebut the assertions made by or on behalf of the respondent in justifying the application of paragraph 322 grounds."*

Having acknowledged the fact that the appellant had put in significantly varying figures as the appellant accepted the judge then went on to state:

> *"There is a total paucity of evidence relating to any reasonable explanation for the discrepancies and differences in the figures put forward by the first appellant to the Home Office or to HMRC. There is a stark contrast between the absence of information in that regard and the detailed information and evidence which has been put before the Tribunal with respect to the more recent employment and earnings of the first appellant."* [38]

25. As the judge goes on to state at [39] the appeal process allowed the individual appellant to be able to respond to the assertions and having accepted the condition precedent that there was a marked discrepancy between the figures given to the Home Office and the HMRC and the fact that the respondent's views were clearly set out the judge would have expected the first appellant to have provided further information and

> *"confirmation by an accountancy firm or practice to explain the discrepancies. The discrepancies were such that they required an explanation. I find that no suitable explanation was provided."*

26. From this paragraph I conclude that the judge was not satisfied that the appellant had been acting honestly and although he has not spelt this out specifically I find that his reasoning and explanation is adequate. Indeed he goes on at paragraph 41 to state:

> *"Specifically no professional evidence was adduced to support the claim by the First Appellant that she was entitled to represent profit figures differently because she was permitted to offset financial losses from her previous business in one or more subsequent financial years. The absence of that evidence is critical."*

27. I would agree. It is not for the respondent having established that varying figures had been submitted and having notified the appellant of the issue taken with her previous application that there was an onus on the respondent to demand further explanation. I can accept that **AA (Nigeria) [2010] EWCA Civ 773** is clear that dishonesty is required but there was no evidence before the First-tier Tribunal Judge to the effect that the appellant was able to offset later losses from her profit figure given to the HMRC. Further she would have known by May 2011 when the application was submitted of the figures in relation to the accounting period 2010 to 2011 even though tax returns are made at a later date.

28. Even if the judge should have set it out more clearly, which I do not find he could, a document submitted to me from Jomy John McCom ACA, Johns Accountancy & Taxation and which was undated stated:

> *"Further as the client is an individual, tax law is not permitting to carry back the loss in 2011/2012 against profit in 2010/2011. It is possible in the case of a limited company."*

I therefore do not accept the appellant's contention that a loss that she accepts that she suffered in 2011 to 2012 could be backdated to reflect the profit submitted in 2010/2011 and those profits she knew as at the date of application.

29. I therefore find no error in the determination of Judge Buckwell and the determination shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date **8th December 2014**

Deputy Upper Tribunal Judge Rimington