Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04446/2018
HU/04448/2018
HU/05841/2018
HU/05842/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2018	**On 20 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR JUNAID TAHIR
MRS TABASSUM NAJMA
MASTER A Z
MASTER A A
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms P Solanki, Counsel instructed by Law & Co solicitors
For the Respondent: Mr J McGirr, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Pakistan and a family. The first Appellant first entered the UK on 25 June 2006 with leave to enter as a student. That leave was subsequently extended and varied to that of a Tier 1 (Post-Study) Migrant and then to a Tier 1 (General) Migrant. On 26 June 2016, he made an application for indefinite leave to remain with his wife and two children as his dependants. That application

was refused by the Respondent in a decision dated 26 January 2018 against which he appealed. His appeal came before the First-tier Tribunal for hearing on 13 July 2018 in Birmingham. In a decision and reasons promulgated on 2 August 2018 First-tier Tribunal Judge Grimmett dismissed his appeal.

2. Permission to appeal was sought to the Upper Tribunal on the following bases: firstly, that at [13] the judge had reached conclusions which were either irrational or inadequately reasoned on the basis that there was a discrepancy between the profits claimed of £50,844 in the application for further leave made in September 2013 and the tax returns for the period which the judge found covered a two year period of 2012 to 2014 and amounted to £48,160. It was submitted that in fact the Appellant's profit over that period was based on the tax calculation of £57,411 and that this was an amount that had been declared to HMRC; secondly, the judge erred in conflating at [19] the accountants who prepared the 2012 to 2013 accounts whom the Appellant had been able to contact for an explanation and the accountants who had prepared the 2011 to 2012 accounts and the judge repeated this error at [22]; thirdly, that the judge had misinterpreted legal rules on the complex analysis of accounting methods on which the evidence was based and further failed to state in a decision notice the method of reasoning followed to arrive at her decision and the judge erred in concluding that she did not believe that there were previous accounts in light of the factors at G1 of the Home Office appeal bundle and where there is reference to a letter from HMRC to Premier Accountants and Tax Advisers.

3. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Lambert in a decision and reasons dated 16 October 2018.

Hearing

4. When the appeal came before the Upper Tribunal for hearing, Ms Solanki on behalf of the Appellants sought to rely on a skeleton argument. She submitted that there were three errors contained in [13] of the decision of the First-tier Tribunal, which provides as follows:

> "*I am satisfied that the Respondent has shown grounds for concern about the tax returns. The Appellant claimed a profit of £50,844 from PAYE and self-employment just over the figure required to allow the Appellant leave to remain for the tax year 11 October 2012 to 9 September 2013 when he sought leave to remain. However, his gross income declared to HMRC for the two years from April 2012 to April 2014 was only £48,160.*"

5. Ms Solanki submitted that the first error is that the judge had got the material dates wrong and the point taken by the Respondent related to the tax year 12 September 2009 to 11 September 2010 rather than 11 October 2012 to 9 September 2013. This was because when making an application for further leave to remain UKVI require that the application is based on earnings within the previous twelve months. Ms Solanki indicated that the profit declared to HMRC from a combination of the Appellant's PAYE and self-employment was £57,954.55. The second error made by

the judge was in stating that the gross income declared to HMRC for the two years from April 2012 to April 2014 was £48,160 and the third error was claiming that the profit claimed i.e. £50,844 was just over the threshold for making an application for leave to remain as a Tier 1 Migrant whereas when calculated correctly the profit figure was £57,954.55 which was well over the upper threshold for qualification of £55,000.

6. Ms Solanki submitted the judge had further erred at [19] to [20] which provide as follows:

> "*19. In his oral evidence the Appellant said he could not remember the name of the original accountants. He did not meet them and never had any contact with them they were simply recommended by his immigration consultant who dealt with all matters for him. There is a letter from TaxLounge, the Appellant's current advisers dated 1 February 2016, saying they have written to the Appellant's old accountants asking for an explanation about the incorrect tax returns. The Appellant does not explain how his accountants have managed to do that when he says it is not possible for him obtain the tax returns completed by the original accountants because he never met them and did not know their name or address.*
>
> *20. There is a letter at page 147A from the current accountants saying they have concluded that the Appellant's tax return for 2012 to 2013 was submitted on 31 January 2014 and thus on time. Their client realised there was an error and told his accountants and that he was then emailed a copy of the amended return and advised to pay £600 to bring his account to date. However, the amended return was not submitted by the accountants for reasons unknown but the appellant paid the £600 on 21 March 2014. There is no mention of who the accountants were or how TaxLounge arrived at the conclusion they did*."

7. Ms Solanki drew my attention to letters written by TaxLounge at pages 147 to 150 of the Appellant's bundle. She acknowledged that TaxLounge do not name the accountants to whom they have written, however, at page 110 of the Appellant's bundle is a letter from the previous accountants and a set of management accounts. This firm of accountants who were representing the Appellant in 2013 are the Accountancy Advisory Service.

8. At [22] the judge held as follows:

> "*22. I was not satisfied that the Appellant was telling the truth. There is no evidence to show the previous accountants exist. There is no evidence to show he had an immigration advisor. He has not explained how he could have believed he had an income of over £50,000 in a 12-month period when it was in reality, according to the information he gave to the respondent, his income was less than £20,000 per annum. He said his accounts were amended long before his application for leave to remain was made but that application was lodged on 16 June 2016 and HMRC received the outstanding tax on 7 March 2016*."

9. Ms Solanki submitted that there were further errors in this paragraph: firstly, in respect of the judge's finding that there was no evidence that the previous accountants exist, this was contrary to the evidence in the Respondent's bundle at G1 which is a letter from HMRC dated 18 November 2013 stating that a copy of the notice had seen sent to Premier Accountants and Tax Advisers. Therefore, they clearly existed and clearly acted for the Appellant. Secondly, the Appellant has never said to the Respondent that his income was less than £20,000 per annum, this is simply wrong. Thirdly, the judge erred in respect of her understanding of the dates as to when the amendments to the Appellant's tax return were made. There is no dispute that the Appellant amended his tax return in November 2013 and what the judge is referring to is to the final date when the Appellant paid his tax according to a payment plan, thus the last payment was made on 7 March 2016. The Appellant's application for indefinite leave to remain was made on 16 June 2016, three months after the final payment in the payment plan had been made and that payment plan having been arranged far in advance with HMRC.

10. Ms Solanki further submitted that the judge had failed to determine the issues that she was asked to do. Given that paragraph 322(5) of the Rules is a discretionary basis of refusal, it is clear from the Home Office guidance that it was not envisaged it would be used in such a case as this given that it was generally it was used for eg. war crimes, because the test is whether it is undesirable to expect the person to remain in the United Kingdom. It is clear from the jurisprudence eg. Ngouh [2010] EWHC 2218 (Admin) that the threshold is a high one and that positive and negative factors have to be balanced. Ms Solanki submitted there was nothing in the Tribunal's decision that indicated any form of balancing exercise had been carried out. On the contrary the judge stated simply at [23]: "*I was not satisfied therefore the discrepancies in the figures come from an innocent mistake. I am satisfied that the Appellant has sought to mislead the Respondent and his application fails on grounds of suitability*."

11. Ms Solanki set out in her skeleton argument a detailed list of the material factors which are as follows:

    (a) The Appellant's tax returns from 2010 to 2013 have been amended in 2013, long before any ILR application was made.

    (b) The Appellant was at no stage prompted to make amendments by HMRC;

    (c) The Appellant's tax returns from 2013 onwards have not been criticised at all. The Respondent is supposed to look at the matter on the balance of probabilities.

    (d) The Appellant has paid his tax in full.

    (e) The Appellant pays accountants to deal with his tax affairs. Whilst the Appellant has a responsibility to check his tax affairs one would expect an accountant to deal with the same diligently and responsibly. At the time the Appellant was new to self-employment and his income was also split over two

accounting years. The Appellant had no reason to suspect his accountants and was paying them to provide a service.

(f) The Appellant has had a complex employment situation balancing employment and self-employment. The Appellant's accountants also made errors in reporting employment income despite having access to payslips and P60s.

(g) The Appellant states he was stressed and going through difficult times with his family.

(h) The Respondent has not had regard to the relevant accounting periods and had not sought to consider the Appellant's income against this and the different periods required for applications for leave to remain. It is evident the Respondent has not found any actual discrepancy.

(i) The Respondent failed to consider that the Appellant is an individual who has always resided in the UK with leave to remain.

(j) The Appellant has complied with the terms of his visas completing his relevant studies and working as permitted.

(k) There is no suggestion by the Respondent that his employment or self-employment were anything less than genuine.

(l) There is no history of the Appellant ever having used deception.

(m) The Appellant has been in the UK lawfully and continuously for twelve years.

(n) The Appellant's character is exemplary and this was attested to by friends, colleagues and employers.

(o) The Appellant resides in the UK with his wife and two children who are in settled education. There was no regard to the best interests of his minor children when considering paragraph 322(5).

(p) Even if the Appellant made errors that were not innocent in some way many years ago, the question remains whether that was sufficient to make out the high threshold reached for paragraph 322(5) and the discretionary basis of refusal.

12. Ms Solanki further submitted that consideration had to be given to the fact that HMRC did not impose a penalty on the Appellant but simply interest for the late payment and that this is clear from pages 24 to 26 of the Appellant's bundle.

13. In his submission Mr McGirr asserted looking at [13] of the judge's decision, that it was unclear where the figures there had come from, but looking at the Appellant's bundle it was also unclear where the Appellant's figures have come from. At page 108 this sets out the SA302 in respect of the Appellant's PAYE income for 2012 to

2013 of £17,561 and at page 145 his PAYE income for 2013 to 2014 of £39,850. He submitted it was unclear what other evidence had been provided by the Appellant to the Tribunal in order to show his income and that it may be that he did not meet the financial threshold for the application based on his income for 2011 to 2012. Thus, his submission was that the judge may have been right but for the wrong reason. Mr McGirr submitted that a similar lack of clarity arises at [19] and [20] in respect of the Appellant's former accountants. The judge makes clear that her finding is based on the oral evidence of the Appellant at the hearing and that may explain the confusion that has arisen.

14. In relation to the fact that HMRC did not take any punitive action against the Appellant, he submitted that the way one government department conducts business may not be the way that business is conducted by other government departments and that this was not significant. Mr McGirr submitted that although the judge's figures are confusing in part this does not mean that the judge's conclusions are wrong. He submitted it was telling that the judge found there was no evidence to show that there was an immigration adviser who was a fall-back guy for the Appellant, nor that he had an income of over £50,000 in the twelve month period when the evidence before the judge showed a PAYE figure of less than this and there was no oral evidence to show that the figure was as high as the Appellant maintained. He submitted on the basis of the facts regarding the Appellant's declared income, the judge was quite entitled to raise the suspicions that she did and not to have regard to any action HMRC took and to consider whether or not there was an innocent explanation for this given that the Appellant was in a position to give evidence to provide an innocent explanation and failed to do so. He asked that the judge's decision be maintained and the appeal dismissed.

15. In reply, Ms Solanki submitted that Mr McGirr's submissions demonstrated how easy it was to fall into error. Looking at page 108 of the Appellant's bundle, contrary to his submission, this does not show £17,561 for PAYE but £17,561 for everything. At page 145 there is reference to £17,385 for his employment and £22,465 for self-employment which in total made up £39,850 for the April 2013 to April 2014 tax year. She submitted that both these tax calculations were before the judge at pages 94 to 107 and 129 to 146 of the Appellant's bundle. These also show his expenses and his P60s in relation to his employment.

16. In respect of the submission that the Judge's findings at [19] and [20] in respect of the Appellant's former accountants were based on the Appellant's oral evidence, it is clear from his witness statement at page 29 of the bundle, [19] that he declared a total income of £50,844 and that his new tax return was submitted by Accounting Advisory Services, who were the second accountants. Ms Solanki submitted that the letters from TaxLounge were very clear: these are at page 147 and are referring to the 2012 to 2013 tax return submitted in January 2014 and that they had assisted in making amendments.

17. In respect of the issue of government bodies acting inconsistently, Ms Solanki sought to rely on the judgment in *Bapio Action Ltd and Another v Secretary of State for the Home Department* [2007] EWCA Civ 1139 where the court found that when one government body acts in a particular way that is informative in respect of any other government body *cf.* [25] of her skeleton argument.

Decision and Reasons

18. I find material errors of law in the decision of First-tier Tribunal Judge Grimmett for the reasons set out in the grounds of appeal expanded upon by Ms Solanki in her skeleton argument of 27 November 2018 and in her oral submissions. It is apparent that the judge was confused both by the differing figures for employment and self-employment and the distinction between profit and tax liability. This was, in part, based on the fact that in the refusal decision the Respondent made errors in relation to the Appellant's income. The basis of the refusal was that there was a discrepancy between the tax paid in relation to the 2009/2010 income, albeit in light of the amended calculation in November 2013 his earnings declared to HMRC were brought more in line with those to UKVI.

19. I find that it is crucial for a proper determination of this appeal that the details and clear analysis of the tax paid *vis-à-vis* the income declared for the purposes of making an application to UKVI are set out and findings based on the correct figures. I further find that the judge fell into error at [19] to [22] in relation to the Appellant's accountants. Whilst it would have been helpful if the Appellant's current accountants, TaxLounge, had indicated in their letter at page 147 of the Appellant's bundle, to which firm of accountants they were referring, when this letter is read with the letter at page 110 from the Accountancy Advisory Service, it is clear that that is the firm to whom they are referring. Consequently the judge failed to take into account material evidence *viz* the letter from Accountancy Advisory Service at page 110 of the Appellant's bundle.

20. I further find the judge erred materially in her assessment of the date when the Appellant made his tax amendments, it not being disputed by the Respondent and indeed contained in the refusal decision which is recorded by the judge at [5] of her decision, that the tax amendments were made in November 2013, whereas his application for indefinite leave to remain was not made until June 2016.

21. I further find there is merit in the submission that the judge did not set out and analyse all the factors that required consideration when considering overall whether the Respondent had acted correctly in refusing the application with reference to 322(5) of the Rules and failed to take into consideration the fact that HMRC did not impose a penalty on the Appellant but simply charged him interest for the outstanding amount of tax.

22. For these reasons and given that the Appellant's evidence and credibility was not accepted by the judge, I set aside the decision of the First-tier Tribunal Judge and remit the appeal for a hearing *de novo*.

Signed *Rebecca Chapman* Date 12 December 2018

Deputy Upper Tribunal Judge Chapman