Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09666/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th of April 2018	**On 13th of April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR KRISHNA CHAITANYA KODALI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Harris of Counsel
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of India born on 22nd of January 1984. He appeals against a decision of Judge of the First-tier Tribunal Hussain sitting at Birmingham on 26th of April 2017 who dismissed the Appellant's appeal against a decision of the Respondent dated 14th of April 2016. That decision was to refuse the Appellant's application for indefinite leave to remain on the basis of long residency pursuant to paragraph 276B of the Immigration Rules. The Appellant entered the United Kingdom on 19th of July 2004 as a student with leave to enter valid until 31st of October 2006. This was subsequently extended on a number of occasions until 20th of April 2016. Shortly before this leave was due to expire the Appellant made his

application for indefinite leave to remain the refusal of which has given rise to these proceedings.

Immigration Rules Relevant to the Appellant

2. Paragraph 276B sets out the requirements for an applicant to be granted indefinite leave to remain on the grounds of long residence. An applicant must have had at least 10 years continuous lawful residence in the United Kingdom. There must be no reasons why it would be undesirable for the applicant to be given leave to remain on that basis taking into account age, strength of connections to the United Kingdom, personal history including character, conduct, associations, employment record, domestic circumstances, compassionate circumstances and any representations made on the applicant's behalf. Further the applicant must not fall for refusal under the general grounds for refusal.

3. Paragraph 322(5) is one of the general grounds for refusal. It provides that applications should normally be refused (thus providing for an element of discretion) where it is undesirable to permit a person to remain in the United Kingdom in the light of their conduct, character or associations.

Explanation for Refusal

4. The application was refused because the Appellant had not declared his earnings correctly to either the Respondent or HMRC. The detailed reasons were summarised by the Judge at [2] of his determination. There had been a review of the Appellant's last application made on 19th of April 2013 when the Appellant had submitted an in-time application for leave to remain as a Tier 1 general migrant which had been granted until 20th of April 2016. In that application he had shown earnings for the tax year 2012/2013 of £39,161.69. This earned the Appellant 20 points in the context of his application but checks carried out with HMRC showed that the actual declared earnings for that same period were only £10,411.73 p. If the Appellant had only had the earnings he declared to HMRC he would not have obtained the 20 points and would not have been granted leave to remain on that occasion. The Respondent therefore refused the application on general grounds under paragraph 322(5) of the Immigration Rules.

The Decision at First Instance

5. The Appellant's case on appeal to the Judge was that he blamed his previous accountants, SJD, an accountancy firm located in Edinburgh for under declaring his income to HMRC. He did not dispute that his earnings declared for immigration purposes when applying as a Tier 1 general migrant were higher than those declared to the HMRC. He provided copies of letters he had written to SJD indicating he had written to them to complain on three occasions. The Judge noted that the Appellant had made no complaints against SJD either to the regulatory body or a financial ombudsman. He had not issued legal proceedings or chased the accountants for a response to his last letter (dated 13th of April 2016) even though as the Judge observed at [3] that letter was sent more than a year ago. The Respondent

argued that this inaction undermined the credibility of the Appellant's complaints about SJD.

6. The Judge held that this delay was not in keeping with someone who because of a catastrophic error by his accountants potentially stood to lose his hard-sought right to ILR. The Respondent's position was that either the Appellant's actual income was declared to HMRC or alternatively that he had under declared his income for income tax purposes. Either way the Appellant had tried to deceive the authorities and therefore his application fell to be refused under Paragraph 322(5).

7. The Appellant had produced a letter from his current accountants, a company called ORM Accounting Services Ltd, dated 19th of April 2017. They indicated they had been instructed to refile the Appellant's tax returns for two financial years 2010/2011 and 2012/2013. The tax return for 2010/2011 had not figured in the Respondent's refusal but the Judge noted at [5] that the contents of the tax return for that period further undermined the Appellant's case. This was because the tax return for 2010/2011 also contained an inaccurate declaration of income and the rectification resulted in a substantial payment of tax for that year in the sum of £6576.59.

8. The Judge drew the conclusion from this evidence that the additional payment of tax for 2010/2011 established a pattern of the Appellant's conduct of deceiving the authorities which could not be laid at the feet of SJD as they had not been instructed then. The Appellant's claim that he had not checked the tax return for 2012/2013 filed on his behalf by SJD was not plausible. He was an employee of a company Sree Infra Ltd ("SI Ltd") for whom SJD were the corporate accountants when the 2012/2013 tax return was made. It was unlikely that accountants engaged on behalf of the company would manage the personal tax returns for the company's employees particularly where the employee in question, the Appellant, was there for less than a year and left the company's employment before the end of the tax year in question.

9. If SJD had filed the Appellant's tax return(s) they would have provided the Appellant with copies of his records and it was implausible that he had not asked for such copies. No accountants had been identified as responsible for the 2010/2011 error. The Judge was satisfied that the Appellant had deliberately overinflated his income for immigration purposes alternatively he had under declared his income for tax purposes. Either way the Appellant fell foul of Rule 322 (5). The Respondent, the Judge held, was right to refuse the application.

The Onward Appeal

10. The Appellant appealed against this decision arguing that HMRC had accepted the Appellant's amended tax return for 2012/13 without any financial or other penalty being imposed. The Respondent ought to accept that there had been no deliberate financial deception employed by the Appellant for that period and that an honest mistake had been made or at least the Appellant should have been given the benefit of the doubt. The Appellant's income derived from a small salary and a larger

dividend from his employment. The declaration of income to the Respondent at the time of the Tier 1 application included both salary and dividend payments whereas the tax return for 2012/13 had erroneously only showed the income from his salary.

11. The Respondent had drawn the conclusion that the Appellant had been dishonest but this failed to take proper account of a letter from SJD which stated that the Appellant was both a director and a 50% shareholder of SI Ltd and took both dividends and salary from the company. When SJD filed the Appellant's tax return they omitted to include the dividend payments made to the Appellant. That was the basis of the Appellant's complaint about them and why he engaged another firm of accountants (ORM) to handle his financial affairs.

12. The Respondent had not refused the application under any of the other sections of paragraph 322. The Judge had omitted to show that the Appellant's letter to the complaints manager at SJD bore a recorded delivery slip and should be taken as evidence of posting. The Judge had made findings against the Appellant in relation to the tax return for 2010/11 even though that had been not raised in the refusal letter. The Appellant was not cross-examined about the matter by the presenting officer or the Judge. The new accountants had submitted a tax return for the period 2010/11 which had resulted in a notice of amended assessment on 20th of May 2016.

13. The Appellant had demonstrated his diligence and ability being awarded degrees in Bachelor of Engineering and Electronics and Communications Engineering on 8th of September 2005, Master of Science in Computer and Network Engineering on 15th of October 2008 and a certified tester at foundation level on 6th of August 2011. He may have been financially naïve in not checking his financial and tax affairs closely enough but he was not dishonest. The decision to refuse the Appellant's application for ILR did not demonstrate a proper exercise of the Respondent's discretion.

14. The application for permission to appeal came initially before Judge of the First-tier Tribunal Mailer on 13th of November 2017. He refused permission to appeal stating that the Appellant's lengthy grounds merely sought to re-argue the case. Even though the Judge's finding that there was no evidence of posting letters of complaint to SJD was unsafe the Judge had also noted that the Appellant had written to them on three occasions but made no complaints against them nor had he chased the firm for a response to his last letter even though that was sent more than a year before. The First-tier Judge had undertaken a detailed and careful assessment of the evidence and his findings were not outside a range of reasonable responses to the evidence.

15. The Appellant renewed his application for permission to appeal on seven grounds. The 1st dealt with the issue of the certificate of posting of the 3rd complaint letter written by the Appellant to SJD. The Judge's incorrect conclusion that the letters of complaint produced by the Appellant were likely to be fabricated as they were not accompanied by any proof of posting was bound to lead to an adverse view of the Appellant's credibility generally.

16. The 2nd ground argued that the Judge should have made a finding whether the Appellant did or did not deliberately overinflate his income for immigration purposes and should have made a separate finding whether the Appellant under declared his income for tax purposes. An under declaration of income to the Inland Revenue was not necessarily a deliberate falsehood. It might be an honest error or an oversight by the taxpayer or his accountant.

17. The 3rd ground argued that it would be surprising for a working graduate IT specialist to be only earning £10,411.73 per annum, the amount declared to HMRC, as that was less than the minimum wage.

18. The 4th ground argued that the Judge had failed to take notice of the fact that being self-employed through a controlled company was highly tax efficient because of the lower tax rates on dividends. The under declaration to HMRC by the Appellant only resulted in an adjustment of £91.20 a very small sum. It was far-fetched to suggest the Appellant had deliberately made a false declaration to avoid paying this sum. This aspect of the case had not been considered at all by the Judge and it was likely that a miscarriage of justice had occurred in the attribution of deliberate deception to the Appellant by the Respondent in relation to this sum. That this underpayment was so small undermined the adverse inference drawn by the Judge from the failure of the Appellant to complain to the regulatory body against SJD.

19. The 5th ground argued it was wrong for the Judge to rely on the Appellant's 2010/ 2011 tax return as that had not been the basis of or even mentioned in the refusal letter. The fact that the Appellant had also applied for an amended assessment for that period only came to light because it was disclosed through the accidental inclusion of the amended notice of assessment in the Appellant's hearing bundle.

20. The 6th ground argued in the alternative to the 5th ground that the 2010/2011 amended tax return did not in fact show deliberate deception. The adjustment in relation to that period was £5825.08 but this included late payment interest for a period of 4 years from 2012 to 2016 which must have formed a substantial part of that sum. An allegation of deception had to be proved the high civil standard. Given the very small amount of the underpayment in 2012/2013 and the uncertainty over the amount of the underpayment in 2010/2011 any reasonable Tribunal should conclude that accident or carelessness was more likely than deception in relation to the 2010/2011 underpayment. The 7th ground argued that it was wrong to categorise a person who had made an under payment of an unknown but relatively small amount of tax as being a person whose removal was conducive to the public good.

21. In a brief decision on 18th of January 2018 Upper Tribunal Judge Blum granted permission to appeal stating that given that there was evidence that the Appellant had posted his complaint to his previous accountant it was arguable that the First-tier Judge had failed to take account of relevant evidence. Judge Blum saw little merit in ground 7 but he was persuaded that the other grounds which criticised the Judge's approach to the issue of deception were arguable.

The Hearing Before Me

22. At the hearing before me counsel for the Appellant sought to amend the grounds of onward appeal by enlarging on the 7th ground for which permission to appeal had not been granted. This sought to argue that the refusal of the Appellant's application requiring him to leave the United Kingdom was a disproportionate restriction of his right to a private life under Article 8. The refusal letter had stated that consideration had been given to whether the Appellant's application for leave to remain raised any exceptional circumstances but the letter had stopped there and the result of the consideration had not been stated. The amended ground sought to argue that there was no doubt that requiring the Appellant to leave the country where he had lived for the previous 12 years engaged Article 8.

23. In refusing the application to amend the grounds to argue this point I indicated to the parties that the Judge had specifically stated at [11] that the only issue that the parties had required him to deal with was whether the Appellant had or had not been dishonest in his declarations to the HMRC and the Respondent. Article 8 had not been raised as a separate issue. This was confirmed by the Judge's manuscript note of the case which was on the court file which showed that at the outset of the hearing before the Judge on 26th of April 2017 the solicitor for the Appellant had stated that the "only issue [was] false returns by former accountants he has rectified the matter. Only issue is credibility of the Appellant." Article 8 had not been raised before the Judge and I therefore refused permission to amend the grounds of appeal to argue that point.

24. In oral submissions counsel relied on the remainder of his grounds, 1 to 6. In relation to ground 1, mistake as to proof of posting of the letter of complaint, it was argued that page 15 of the Appellant's bundle had the number of the recorded delivery slip which had been overlooked by the Judge. That the Appellant could corroborate his claim to have sent a letter of complaint to the accountants would, if understood correctly, have impacted on the Judge's other findings. Ground two, failure to differentiate between deception of the Respondent and HMRC, complained that the Judge's finding at [11] that the Appellant either deliberately overinflated his income for immigration purposes or under declared his income to HMRC was too much of a broad-brush approach.

25. The Appellant relied on the Upper Tribunal decision of **JC [2007] UK AIT 27** that in relation to the general grounds contained in part 9 of the Immigration Rules (which includes the relevant paragraph in this case, 322 (5)) the burden of proof rested on the Respondent to establish any contested precedent fact. This included the obtaining of previous leave to enter or remain by deception. It was incumbent upon the decision maker to say what it was that the Appellant had done wrong. It was too much of a leap to say that because the Appellant's tax returns were inaccurate he had defrauded HMRC or the Respondent. Something more than just an underpayment of tax needed to be shown to demonstrate deception.

26. As to ground 3, the failure to have regard to the evidence as to the deception and the earnings of the Appellant, given the Appellant's qualifications it would be unlikely that he would be working below the minimum wage. He was therefore telling the truth when he said his accountant had only declared the salary he received. Ground 4 was that the underpayment of £91.20 p was so small because the tax due on the dividends had already been deducted by the company.

27. Ground 5 complained that it was wrong for reliance to be placed on the Appellant's 2010/2011 tax return. I queried with counsel how it was that the Judge had come into possession of that tax return and whether once it was before the Judge he was entitled to ask questions about it. Counsel replied that the tax return had not been before the Respondent and it was procedurally unfair to draw conclusions from it. There had been no prosecution of the Appellant in relation to the 2011 tax return. In the alternative was ground 6 that the tax return of 2010/2011 did not show deliberate deception. The Appellant would bring a considerable public benefit to this country by being granted leave to remain here. The Respondent did not prove misconduct.

28. In response the Presenting Officer indicated that the Appellant's grounds for all their length were simply a disagreement with the findings of the First-tier Tribunal. Although there was a recorded delivery slip stuck onto the April 2016 letter such slips were readily obtainable from any post office and importantly there was no evidence of delivery of that recorded delivery letter. That the Appellant had not complained to the regulatory body of the financial ombudsman was a significant point made by the Judge. The determination was sound and should be left to stand.

29. In response counsel argued that the Appellant was not simply disagreeing with the Judge, there were relevant matters to which the Tribunal did not have regard. This was not a borderline situation. There was no reason why the Appellant should have written letters of complaint to the regulatory body because the underpayment was only £91, that was not a catastrophic error as the Judge had put it. I queried whether it had been argued at first instance that there was no need for the Appellant to complain about his accountant's actions because the underpayment was only £91. Counsel did not refer me to anything specific but reiterated that at [3] of the determination the Judge had referred to the fact that the Appellant did not dispute that his earnings for immigration purposes were higher than those declared to the HMRC. At the conclusion of submissions, I reserved my decision on the issue of a material error of law which I now give in this determination.

Findings

30. The burden of proof in this case was on the Respondent to establish that the Appellant came within the provisions of paragraph 322 (5) of the Immigration Rules. If the Appellant did come within that paragraph (and discretion should not be exercised in his favour) it followed that the Appellant would fall for refusal under the general grounds. That in turn would mean that he would not be able to

succeed under paragraph 276B of the rules even if he could show 10 years continuous lawful residence in the United Kingdom.

31. Paragraph 322 (5) refers to the undesirability of permitting the person concerned to remain in the United Kingdom in the light of their conduct, character or associations. The conduct complained of was that the Appellant had said one thing to the Home Office when applying in an earlier application for leave to remain and a very different thing to HMRC when he had to declare his income for tax purposes. For the tax year 2012/2013 the Appellant had declared income of £10,411.73 whereas for the same period when applying to the Respondent for leave to remain he had stated that he had previous earnings of £39,161.69. That covered the period 1st of June 2012 to 31st of March 2013 and not 1st of April 2012 to 31st of March 2013 and related to when the Appellant started with the employer SI Limited.

32. The two figures given to HMRC and the Home Office were clearly very different and inevitably aroused suspicion. While the burden of proof was on the Respondent the discrepancy required some explanation. The standard of proof is the civil standard of balance of probabilities but the more serious the allegation the more cogent needs to be the evidence that supports it. The Judge did not find the Appellant's explanation that it was all the fault of SJD to be credible. He relied on two factors for finding dishonesty. Firstly, the Appellant had made very little of his complaint against SJD in terms of not following up letters of complaint assuming he had written them at all. Secondly, another tax return disclosed by the Appellant, accidentally or otherwise, showed that the Appellant had also under declared his income to HMRC for an earlier tax year before he had instructed the accountants about whom he was now complaining.

33. The Judge's view was that this indicated a pattern of behaviour by the Appellant of not informing HMRC of his true earnings. The Appellant's appeal against the Judge's decision seeks to minimise what the Appellant has done by stating that he is not been prosecuted by the Inland Revenue for the under declaration. I do not consider that any weight attaches to that argument, the issue is not whether HMRC has prosecuted the Appellant the issue is whether the Appellant told HMRC the truth. The 2nd argument the Appellant makes is that even if the Appellant did under declare his income to HMRC, when it was fully declared and because a lot of tax had already been paid on the undeclared income it did not result in very much of a further tax payment.

34. I do not consider that argument carries much weight either. The issue is not one of a de minimis breach of the Immigration Rules rather it is a question of the state of mind of the Appellant. As the Judge pointed out before the tax return in question could have been sent to the Inland Revenue it would have had to have been shown to the Appellant for his approval. He knew that the return was either correct and he had lied to the Respondent or was wrong and he was deceiving HMRC. There is nothing to indicate that the Appellant thought he would have to pay next to no tax on a sum as large as £30,000 approximately and therefore was not bothering to

declare it. This argument was not raised at first instance and has only come into existence in the grounds of onward appeal.

35. The letters of complaint to SJD, by contrast, stated that "it later became transparent" to the Appellant that the correct information was not submitted to HMRC. The Judge did not believe that explanation that the Appellant only found out about the under declaration later, for the reasons he gave (that the Appellant would have seen the tax return etc). I am bound to say that nothing was said to me in argument which dealt with that central concern of the Judge. The Judge was sceptical about whether the Appellant had really complained about SJD not least because of the lack of follow-up when SJD did not reply. That still left the issue of how it was that the incorrect tax return could have gone off to HMRC. No satisfactory explanation was given to the Judge and nothing was said in submissions to me that dealt with the lack of follow up. Whether or not the Judge ought to have inferred that the letters were not sent (given the lack of evidence that the letters were actually delivered) is in any event less important than the failure by the Appellant to follow up his complaint, this is the inaction referred to by the Respondent and cited at [3]. [3] of the determination certainly does not cause the Judge's adverse credibility findings to unravel as claimed in the grounds of onward appeal.

36. Assuming that the third letter of complaint dated 13th of April 2016 was a genuine letter written to SJD it does not appear from the tenor of that letter that the Appellant regarded the matter as so trivial he need not take it any further. He very much made the point in that letter that he had been unable to secure his immigration status in the United Kingdom. The Judge had used the word catastrophic to describe this situation the Appellant found himself in. On the Appellant's case it was a serious error by SJD. The argument that it was such a small breach it was not worth pursuing to the regulatory body is not one which I consider has any weight at all.

37. The Judge was criticised for his finding in the alternative at [11] of his determination that either the Appellant had deliberately overinflated his income for immigration purposes or under declared his income to HMRC. The Appellant's argument appears to be that there was an under declaration of income to HMRC. It would have been speculation on the Judge's part for him to have concluded that the Appellant had committed one or the other default thereby indicating that the other amount in question was correct. The point was that there had been a default, the two figures the one submitted to the Respondent the other to HMRC sharply differed and there was no reasonable explanation why that should be. The Appellant needed to know why he had lost the appeal and the Judge gave cogent reasons why that should be so.

38. It was also argued that the Judge had been procedurally unfair in considering the tax return for 2010/2011 because that had not been considered by the Respondent, as the Judge himself noted. Under certain Immigration Rule based applications only the evidence submitted at the time of application can be considered and post application evidence is not admissible. The issue here was a rather different one

since what was being alleged by the Respondent was dishonesty on the part of the Appellant. In those circumstances there was an obligation on the Tribunal to consider all relevant matters since it would be highly unfair to an Appellant faced with an allegation of dishonesty who had exculpatory evidence to be told that evidence could not be put in to the Tribunal because it had not been submitted at the time of the application. Section 85(4) of the Nationality Immigration and Asylum Act 2002 provides that the Tribunal may take into account all evidence relevant to the decision including matters arising after the date of decision, in this case the disclosure by the Appellant of his 2010/2011 tax return. at the date of hearing.

39. There was nothing procedurally unfair about the Judge considering evidence which had been submitted by the Appellant himself. That the evidence did not assist the Appellant's case was hardly the fault of the Tribunal. It was a matter for the Judge whether to draw an inference that the Appellant had a history of under declaring his income to HMRC. The evidence pointed in that direction and it was open to him to make such a finding. Although the Appellant argues it was unfair to refer to the tax return in the determination no reasonable explanation has been given at any stage, including in submissions to me, to explain how it was that the Appellant underdeclared his income for 2010/2011. The Appellant on his case has had to pay a significant amount of penalty interest indicating some wrong doing on the Appellant's behalf. The Judge rightly took this evidence which was in effect an admission of previous wrong doing into account in his overall assessment of the Appellant's honesty.

40. No good reason was given why the Appellant had under declared his income to HMRC and the facts spoke for themselves. The Appellant had been able to state a figure to the Respondent and thus was aware of what his claimed earnings were said to be for the relevant period. The Appellant had a history of under declaring his income to HMRC and having to pay what may have been substantial interest as a penalty. There was ample evidence of dishonesty on the part of the Appellant. His attempts to either blame his accountants SJD (when they had not been responsible for the problem with the 2010/2011 tax return) and or to minimise the extent of his default with the HMRC do not assist the matter. There was no merit in the argument that HMRC ought to have suspected that the Appellant was earning too little for someone of his abilities. There is no reason at all why HMRC should have assumed that a tax payer was under declaring his income or that he ought to be earning more. This argument does the Appellant no credit.

41. The Judge found that the Respondent had exercised her discretion correctly in deciding that paragraph 322(5) applied and there was no material error of law in such a finding. For all the length of the grounds in this case they amount to no more than a disagreement with the decision of the Judge. As such they do not disclose any material error of law and I dismiss the Appellant's appeal against the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5th of April 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

The appeal was dismissed and therefore there can be no fee award.

Signed this 5th of April 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge