



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03882/2018

THE IMMIGRATION ACTS

Heard at Field House
On 2 April 2019

Decision & Reasons Promulgated
On 22 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR MAURAN THIRUGNANASAMPANTHAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Papatiriou of Counsel
For the Respondent: Ms N Willocks-Briscoe

DECISION AND REASONS

Introduction

1. The Appellant, born on 23rd February 1983, is a citizen of Sri Lanka. The Appellant was represented by Mr Papatiriou of Counsel. The Respondent was represented by Ms Willocks-Briscoe, a Senior Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had arrived in the UK as a student in September 2007 and made various successful applications to remain until April 2013. On 9th May 2016 he made application for indefinite leave to remain and then on 11th October 2017 varied that application for settlement on the basis of long residence. The Respondent had made

enquiries with HMRC as part of their consideration of that application and had noted differences in income disclosed to HMRC and that to the Home Office. They had therefore refused his application under paragraph 322(5) of the Immigration Rules. They had also refused the Appellant's application on all grounds.

3. The Appellant had appealed that decision and his appeal was heard at Hatton Cross on 18th September 2018 by Judge of the First-tier Tribunal Ripley. The judge had allowed the Appellant's appeal. The Respondent thereafter made application to appeal that decision and permission was granted on 8th November 2018 on the basis that it was arguable that having found the Appellant was dishonest, and having rejected his explanation that he made a genuine mistake, the judge erred in failing to treat his conduct as capable of coming within the ambit of paragraph 322(5) of the Immigration Rules. It was also said that it was not a relevant factor that HMRC had not prosecuted him or sought to recover the unpaid tax. Directions were issued for the Upper Tribunal to firstly decide whether an error of law had been made in this case. In accordance with those directions the matter came before me on 20th December 2018. Having heard submissions and considered the evidence I found that a material error of law was made by the judge in this case for the reasons given in the decision promulgated on 12th February 2019.
4. Directions were issued for the decision of the First-tier Tribunal to be set aside and the matter reheard in the Upper Tribunal.

The Proceedings - Introduction

5. The matter came before me for a fresh hearing with the parties represented as indicated above. A notice under Rule 15(2A) dated 25th March 2019 had been sent on behalf of the Appellant including a list of evidence that was not before the original First-tier Tribunal hearing and the reasons why that evidence had not been submitted before the First-tier. For the sake of completeness, and as it complied with the Procedural Rules, I allowed in those documents. Essentially, Counsel on behalf of the Appellant accepted that documents listed 4 to 9 on the index to the Appellant's bundle had been in the original First-tier bundle and the documents at 10 to 66 had been available but had not been submitted before the First-tier Tribunal.
6. The documents before me consist as follows. The Respondent's bundle consists of the original bundle available before the First-tier Tribunal consisting of:
 - Immigration history.
 - Those documents listed at folios A to H on the index sheet.
 - Refusal letter.
7. The Appellant's documents consist of:
 - Skeleton argument.

- Those documents listed at numbers 1 to 66 on the index sheet to the Appellant's bundle.
8. Additionally, I had a Home Office document published 22nd November 2018 being a review of applications refused under paragraph 322(5) of the Immigration Rules.
- Dadzie [2018] CSOH 128, BT Nepal [2004] UKIAT 00311.
 - Government UK dividend tax rates on dividends before 6th April 2016.

The Proceedings - Evidence

9. The Appellant was called to give evidence. He identified his name. He identified his witness statement of 25th March 2019 as being true and correct and adopted that as his examination-in-chief.
10. In cross-examination he said that he had two accountants, namely Accountancy Group Ltd and Exto Accountants. He had instructed both. He said he provided instructions to the Accountancy Group in 2012. A few weeks later he had given them authority to contact HMRC. He said he did not have an online HMRC account. He expected his accountants to submit his tax returns. He did not know whether it would be done by post or online. He said that he received a number by post and passed that to the Accountancy Group.
11. He said when he moved to Ex Accountants he did not set up an online account. He said his current accountants were Iykons and he did not have an online account. He said his accountants did. At page 55 he noted that that was a document emailed to him from his accountant, he said that he had emailed his accountants back and he did not have anything else to do. He said before he got that document he had sent all his financial documents to the accountant. They did not give him a copy of his tax return when they emailed him as referenced at page 55. He said his tax return for the year ending April 2017 was completed by Iykons. At page 39 was a document relating to Exlents. He said he got that document in January 2015 and the accountant gave it to him in person. He did not do anything. He was told that his accounts had been submitted for 2012/2013 and it was confirmed that they had done that. He said that they submitted the documents and he did not have anything to do, they gave him a copy of the document after they had done everything. At page 55 it was pointed out that there was no evidence that he had authorised the accountants to submit documents. He said he had authorised them. He said he had a letter saying they were his authorised agents. He said he had difficulties with his first accountants, Accountancy Group. He had made no contact with HMRC during that period and he had not set up an online account to check what was happening. He had not asked anyone from Accountancy Group to attend at the hearing. He said they had provided him a letter. He said he had not provided a contract signed with Accountancy Group and he did not recall signing any contract, nor them giving him any terms and conditions. When he joined his second accountants, Exlents Accountants he did not sign any contract nor receive any terms and conditions. He was referred to paragraph 20 of his witness statement. He said his second accountants Exlents had submitted his accounts without his knowledge. He was told

that by his accountants Iykons Accounting. He said that he knew his accounts had been filed without his knowledge before he was told that by Iykons Accountancy. He knew in January 2015 that he had submitted accounts without his knowledge for the years 2012/2013 and 2013/2014. He did not know his accountants had submitted the tax returns in January 2015 and did not know how or when they were submitted. He did not give authorisation for the documents at page 39 and 55 nor did he sign those documents. When he submitted his 2017 tax return he got confirmation it had been sent. Iykons Accountants had contacted him before they submitted the forms, they then went through all the figures. He authorised the 2017 tax return to go through because Iykons did that. He did not sign any tax return with Iykons for 2017 but did authorise them verbally. He was referred to paragraph 31 of his witness statement. He said he had contacted HMRC on a regular basis and the first contact had been March 2016 and had been advised by his accountants to do that to amend his 2012/2013 return to add dividends. He said that amendment was not done by Exlents Accountancy but he did it with the help of Iykons. He did not go to the police about his former accountants. At page 70 he referred to the successful submission of his tax return in 2017. He had received no letter or communication from HMRC throughout his time with Exlents or Accountancy Group. He said he did receive once a letter for late payment of a fine which he gave to Accountancy Group who said he did not need to do anything. He received that fine notification by post and passed that to Accountancy Group by email. He said his amendment tax return for 2012/2013 was done by post and his brother did not directly involve himself with his tax matters. He was referred to pages 116 and 188 and 114 of his bundle. At page 94 he said he did not know that Exlents had submitted his accounts for 2012/2013 and 2013/2014 before 2015. He said the letter at page 94 was issued to him by HMRC at a previous address and dated 2014. He was aware his accounts were late. He thought that he had to chase that through the accountancy firm. In September 2014 he received, he said, another letter saying that he was getting a fine and that was referenced at page 15 of his witness statement. At page 121 he said this proved that he had taken action against Exlents Accountancy on 27th February 2019. He did it without either legal representation or other accountants. He had made the calculation of the damages himself. He accepted that he had no documents that had been sent in evidence in support of his claim and he did not know how much he was billing for his time.

12. He was re-examined on a number of points.
13. I next heard from the Appellant's brother. He provided his name and witness statement 25th March 2019 was identified as true and correct and he adopted that.
14. In cross-examination he said that he had been contacted by the Appellant in April 2016. He had not been involved with any documentation prior to 2016 nor seen any paperwork. He did not help him find Exlents Accountants or the last accountants. He said that the Appellant had taken advice from him as he tried to assist in finding out which firm had done what for the Appellant. He said he found it difficult to accept that an accountancy firm would miss the figures. He said his experience was in running a software company trying to prevent tax fraud. He said he had his own

accountancy firm at KPMG. He said that he had helped the Appellant with his County Court claim and guided him on an online website.

15. In closing I heard submissions on behalf of the Respondent who relied upon the refusal letter. I was referred firstly to the immigration timetable and the Appellant seeking to vary his ILR application in 2017. He said the Appellant's case appeared to rest on the premise that HMRC had never reminded the Appellant that they needed tax returns and payments. He further seems to claim that he had been entirely reliant upon others who had been negligent and had done nothing until March 2016. He blamed two separate firms of accountants. He said there was inconsistency in the Appellant's account. He said the recent civil action was simply done as a cover-up to cover the false evidence provided. Further, the Appellant appears to suggest that he had been poorly represented before the First-tier Tribunal and had a lot of available documents now before us but they had not been provided by the solicitor to the Tribunal. That, it was submitted, was a serious accusation against legal representatives but there was no evidence that such accusation had been put to them or an explanation provided. It was submitted that false figures had been given by the Appellant in order to gain visa points and he came clearly within the terms of paragraph 322(5).
16. In closing I heard submissions on behalf of the Appellant and I was referred to the skeleton argument. It was accepted there was a clear inference to be drawn by the disparity in the figures such that it was accepted the Respondent had passed the evidential burden of proof. It was said that the Appellant accepted failings but he had not acted dishonestly. It was said the Appellant was ignorant of all tax related matters and was dependent upon others who had been negligent. He said that the Appellant had provided all documents to his accountants but was unable to identify inconsistencies easily and had complete ignorance of all matters related to tax and it was unfortunate that other people he relied upon had turned out to be largely incompetent. He said that Exlents Accountancy were not in court because there was a dispute with the Appellant. It was said that the Appellant now realising the extent of the problem had sought redress in the Civil Courts recently. He said the previous legal representatives had not collected evidence and placed that before the First-tier Tribunal because those solicitors had relied upon the assertion that dishonesty could not form part of paragraph 322(5).
17. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

18. Since hearing the case I have read and considered the case of **Balajigari and Others [2019] EWCA Civ 673**. That case found the approach taken by the Home Office in this type of case to be flawed in two ways. Firstly, the court found it was unfair for the Home Office not to provide the Appellant with an opportunity to explain matters before making a finding of dishonesty/deception. Secondly, it was flawed to jump from that finding immediately to a refusal under paragraph 322(5) without consideration of all factors within the terms of suitability. However, in

circumstances where an Appellant can exercise a right of appeal under Section 82 of the 2002 Act then the unfairness can be cured as the Appellant has the ability to provide an explanation if necessary and all factors would need to be considered in the balancing exercise conducted under Article 8 of the ECHR (paragraph 14, 222 to 223).

19. I have carefully considered all the evidence in this case, in particular the evidence given by the Appellant and his brother. The Appellant's immigration history as set out within his own witness statement demonstrates he was no stranger to the immigration process regarding Tier 1 (General) Migrant matters. He applied for leave to remain in that capacity in November 2010. He then went through two reconsiderations of his original application before being granted leave for two years in April 2011. The Appellant applied for an extension of his leave on 11th April 2013. As part of that application the Appellant declared self-employment income of about £56,000 earned between 10th April 2012 and 9th April 2013. As a result of that application the Appellant successfully obtained further leave until May 2016 which in turn provided him with a sufficiency of time spent in the UK to then seek to remain indefinitely in the UK based on ten years' residence.
20. The Appellant's circumstances and financial position in 2012/2013 were therefore significant.
21. The Appellant's witness statement (6 to 10) suggests a number of factors occurring seemingly concurrently in that period. The Appellant refers to working for a number of companies before his Tier 1 visa ended in 2013. He refers to a period of illness. However, he also refers to earning £56,000 as a self-employed businessman and it appears the sole director of a company One Channel Ltd. It may be that company was short-lived because the Appellant refers to potential problems in the goods he imported, and refers to joining IPOS to install their systems as a self-employed contractor from early 2014.
22. The significant period therefore is 2012 to 2013 and the not insubstantial income declared by the Appellant as a start-up self-employed sole director. The Respondent noted that the Appellant declared £56,000 within the body of his visa application in order to obtain a time extension in the UK. However, in the tax year 2012/2013 and 2013/2014 the Appellant declared no self-employment income to HMRC. It was only later in March 2016 when the Appellant was first seeking to apply for leave to remain indefinitely in the UK that he, either on his own volition or with legal advice, sought to put together his financial records over the years as required by the Respondent. As a result of that he then provided HMRC with revised figures for his financial situation in that earlier period 2012/2013.
23. The Appellant's position and explanation is that he is essentially ignorant of financial/accounting matters and was wholly reliant upon professionals over a number of years and has been systematically ill served by such professionals. Hence, he claims that he is not dishonest and did not seek to dupe either the Respondent or HMRC but rather is a victim of poor advice.

24. It is further said that because a substantial part of the undeclared income was in fact dividends paid to the Appellant rather than a salary, then little or no tax was due and therefore the mistake has not resulted in a financial loss to HMRC. I find that latter point to have limited relevance.
25. The Appellant was a sole trader, having started One Channel Ltd in about 2012. To earn £56,000 at the start of such an enterprise as the sole director could infer some degree of success and business acumen. The Appellant as sole director/operator was essentially responsible for providing an accountancy firm with the raw data required to formulate his accounts. Accordingly, the provision of invoices, expenses of various kinds, bank statements, creditors, debtors, etc., was what the Appellant collated. I find it lacking in credibility that the Appellant was unaware of the general level of income/profit being generated by his company when he was the sole operator and was responsible for collecting that data. Further, if the Appellant, as he claims, was paying himself dividends from the company rather than a salary, then that further infers a degree of knowledge of the profit being generated and therefore that which he could afford to give himself.
26. The Appellant claims that two separate accountancy firms, Accountancy Group and Exlents Accountants were both negligent in their dealings with his accounts.
27. In respect of the first firm, the Appellant suggests a high level of negligence such that accounts were not filed with HMRC to the extent that the Appellant was fined by HMRC. He suggests that he took little or no action unilaterally to discover the position with HMRC in respect of his tax returns. He does not appear to have taken any action against Accountancy Group at that time or for some time later. There has been no attendance from Accountancy Group nor any full letter explaining matters or seeking to set out the potential errors or reasons for error. The Appellant has provided no contract or terms and conditions or any other such paperwork relating to his relationship with Accountancy Group. The letter dated 14th December 2018 allegedly from Accountancy Group postdates both the Home Office refusal letter and the initial First-tier Tribunal appeal decision. It is a short letter providing almost no information and provides a caveat that the information is provided without any responsibility. In respect of the second accountancy firm, Exlents, the Appellant suggests that they were also negligent. He suggests that they submitted his accounts without his knowledge or consent. I do not accept that as credible. I find it highly unlikely an accountancy firm would act in such a manner, and would on the face of it have nothing to gain in so acting or that HMRC would accept unsigned, unverified accounts. The Appellant claims that the documents at pages 39 and 55 of his bundle from the accountants requiring his signature and verification of accounts before being sent to HMRC were not in fact provided to him and that the accountants submitted accounts for the years 2012/2013 and 2013/2014 without his knowledge. He claimed in cross-examination that he was told this by his third accountants. However, he had also claimed to know his accounts were submitted without his knowledge before instructing his third accountants. I find no credibility in the Appellant's somewhat contorted and often confusing account that his second accountancy firm submitted accounts without his knowledge or authorisation.

28. I find the Appellant's attempt to blame two separate firms of accountants for the late and/or wrong filing of figures to HMRC to be entirely lacking in credibility and rather than providing an innocent explanation for the significant inconsistency of figures for 2012/2013 merely heightens the level of incredibility and points towards the Appellant's true behaviour and motives.
29. The Appellant, however, takes the matter further. He acknowledges that at the time of the hearing before the First-tier Tribunal in September 2018 almost all the documents in his current bundle were available and could have been presented as evidence before the First-tier Tribunal. He concedes, however, that only those documents at pages 19 to 37 were presented. He now presents a bundle that extends beyond page 37 to page 220. The explanation for such an original slender bundle is that his former Counsel had advised that the alleged dishonest behaviour of the Appellant fell outwith the remit of paragraph 322(5) which was essentially concerned with terrorist behaviour and therefore the case could be argued solely on that basis and therefore no such documentation would be needed. I do not accept that explanation given by the Appellant for the failure to present to the First-tier Tribunal a substantial body of documentation that was available at that time, according to the Appellant.
30. Firstly, there has been no attempt by the Appellant or current representatives to put that assertion to the Appellant's former representative and to produce a reply. Secondly, whilst the First-tier Tribunal decision discloses Mr Kannangara did indeed argue (successfully) that the Appellant's behaviour was outwith the remit of paragraph 322(5) I find it highly unlikely a representative would have relied upon that argument alone and to the extent of refusing to consider available documentation. Thirdly, the Appellant was essentially being accused of dishonesty by the Respondent. Irrespective of any concept of paragraph 322(5) I would expect an Appellant in that situation to be desirous of clearing his name. I find the explanation provided for the absence of documents before the First-tier Tribunal to be without credibility. The attempt to blame a former representative seems merely to be in line with the Appellant's attempt to blame two former firms of accountants.
31. I have considered the documents provided and I have also considered the brother's evidence, albeit that is of limited value. I have also looked at the Appellant's immigration history and the history over the years of his employment/self-employment. I am satisfied that the significant discrepancy between the income declared to the Home Office on the visa application in 2013 and that declared to HMRC in the same tax year to be highly suspicious, the Respondent thereby discharging the evidential burden of proof, and deserving of an explanation from the Appellant. I have regarded the features within the case of **Khan** as being examples of potential failures to innocently explain matters rather than a definitive checklist. I have also carefully considered the commentary in **Balajigari** in respect of the case of **Khan**. I find the Appellant has not provided an innocent explanation for the significant suspicion aroused by those differences in figures. Indeed, I find his explanation is in part confusing and inconsistent, in part simply an attempt to blame others.

32. I am satisfied the Appellant knowingly and deliberately hugely inflated his alleged earnings for the years 2012/2013 in his visa application in 2013 to seek to remain in the UK for a sufficiently lengthy period of time in order to then apply for indefinite leave to remain as he has now so done. I find his deliberate exaggeration on which a crucial and significant factor relating to immigration control was based to be a serious matter. I also note the commentary in Balajigari (paragraph 37) where it was said that in the context of an earning discrepancy case it is very hard to see how the deliberate and dishonest submission of false earning figures whether to HMRC or the Home Office would not constitute dishonest conduct.
33. I find the Appellant's conduct to be dishonest. I find it to be a serious case of its type, not just in relation to the significant difference in figures given but the persistence of the Appellant dishonestly over time seeking to blame others. There is a lot at stake for the Appellant in terms of his desire to live indefinitely in the UK and he has been prepared in my view to deploy a consistent and serious level of dishonesty to achieve that purpose.
34. I have considered all the evidence relating to the Appellant and his circumstances. I accept the length of time he has been in the UK and the employment he has had. I acknowledge his brother's presence and working life and have looked at the situation of the Appellant returning to Sri Lanka. The Appellant's bundle focuses almost exclusively in attempting to justify his financial claim and focuses very little on what may be regarded as his potential position in Sri Lanka or his private life in the UK. I find when balancing all the facts available the Home Office were entitled to refuse the Appellant's case under paragraph 322(5) of the Immigration Rules. I do not find that there would be any obstacles to the Appellant returning to Sri Lanka bearing in mind the length of time he lived there, his education, qualifications and potential for employment together with family still present in that country. I do not find therefore that the Appellant comes within the terms of the Immigration Rules leaving aside the issue of paragraph 322(5). When considering all the factors outside of the Rules under Article 8 the removal of the Appellant would not in my view be disproportionate. I bear in mind as I must, all aspects of Section 117B of the 2002 Act and the public interest in immigration controls. That factor should not be diluted in circumstances such as this case presents. A removal in my view would be entirely proportionate.

Notice of Decision

35. I dismiss this appeal.
36. No anonymity direction is made.

Signed



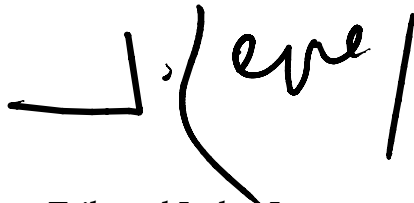
Date



Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed 
Deputy Upper Tribunal Judge Lever

Date 21/3/17