Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04788/2018
HU/09592/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 April 2019	**On 16 May 2019**
Decision given orally following hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

MR VIKRAM ARVIND DESHMUKH
MRS HARSHA VIJAY DESHMUKH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant (Secretary of State):	Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent (Mr and Mrs Deshmukh):	Mr J Gajjar, Counsel, instructed by Direct Access

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Lucas. For ease of reference, I shall throughout this decision refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Mr and Mrs Deshmukh, who were the original appellants, as "the claimants" (and to Mr Deshmukh as "the first claimant").

2. The first claimant is a national of India born on 29 June 1980. The second claimant is his wife and her appeal stands or falls with his. Accordingly I shall throughout this decision be referring to the first claimant, and will not specifically make reference to his wife, the second claimant.

3. The first claimant arrived in this country in September 2006 on a Tier 4 Student visa valid until 31 January 2008 and his leave was then variously extended until 26 June 2016. All his applications were made in time and at least on the face of them he accordingly had permission to be in the UK which was obtained lawfully until on 16 September 2016 he made the claim with which this Tribunal is now concerned on the basis of ten years' lawful residence.

4. In the course of making visa applications on 4 April 2011 he made a Tier 1 visa application in which he claimed an income of £55,408.61 said to have been earned in the period from 27 March 2010 to 25 March 2011. This was said to be made up of £18,222.61 from employed income and £36,586 from self-employed income. However it is now the case (as is well known to many applicants who make applications now for indefinite leave to remain) that when applicants apply for ILR the Secretary of State makes enquiries with the Revenue in order to ascertain that there has been consistency between income declared for tax purposes in the past and income claimed when seeking a visa. In this case on enquiries that the Secretary of State made it turned out that at the same time as he was claiming an income of £55,000 odd for 2010 to 2011, including a figure of £36,586 in respect of his self-employment, he only declared an income to HMRC of £5,620, which as is now accepted on his behalf is a very significant discrepancy indeed. As is very common in cases of this kind, which are frequently before this Tribunal (although more often in judicial review cases) prior to making the ILR application this applicant put in amended figures to HMRC following which he agreed to pay increased tax of around £14,000 and also some interest. It appears that he also had to amend his tax returns for the following year. The HMRC did not impose any penalties for this late correction, which is a matter which will be discussed below.

5. Essentially because of this very significant discrepancy the Secretary of State decided to refuse the claimant's application for ILR on the basis of his character as set out in paragraph 322(5) of the Immigration Rules, the relevant part of which provides as follows:

> "**Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave**
>
> 322. In addition to the grounds for refusal of extension of stay … the following provisions apply in relation to the refusal of an application for leave to

remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave …

Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused …

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security …"

6. In this case the Secretary of State in his refusal letter of 5 February 2018 refused the application specifically on the basis of character under paragraph 322(5) of the Rules.

7. It is common ground, as found by this Tribunal in particular in a number of cases that in order for a refusal to be justified on grounds of character under paragraph 322(5) this must be justified on grounds of deliberate dishonesty by an applicant. It is not sufficient for the Secretary of State to rely on a very bad mistake which may have been made. So far as this decision is concerned, were it to be suggested that misconduct falling short of dishonesty would be sufficient, this Tribunal would have no hesitation in finding that it would not.

8. The claimant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Lucas, sitting at Taylor House on 13 November 2018. I record that although the claimant was represented at that hearing, for reasons which have not been given, but are presumably to regrettable lack of resources, the Secretary of State was not represented at that hearing. It would have been preferable in this case for the Secretary of State to have been represented, and I record the very clear opinion of this Tribunal that in the subsequent hearing there will have to be for the reasons which I shall give it would be inadvisable for the Secretary of State to be unrepresented again. Although this is a matter for the Secretary of State and this Tribunal has no power to order him to be represented, the administration of justice would not be assisted if he is again unrepresented.

9. As already noted above, the claimant succeeded in this appeal, the judge finding in favour of the applicant.

10. The Secretary of State now appeals against that decision pursuant to permission granted by First-tier Tribunal Judge Lever on 18 December 2018.

11. I have had regard to the grounds, and to the oral representations made on behalf of both parties and also to all the documents contained within the file, but it is not necessary for the purposes of this decision to set out in full what was said during the course of the hearing. I shall refer below only to such submissions and documents as are necessary for the purposes of this decision.

12. The first matter which immediately appears odd about Judge Lucas' decision is that nowhere within it does he state in terms that this is an appeal founded on the Article 8 rights of the claimant. It reads as if the challenge (which in effect it is) is to the decision under the Rules refusing his claim for ILR (made under paragraph 276B of the Rules). That decision is not appealable now and the only basis upon which the applicant can appeal is under Article 8. However, on the facts of this case perhaps little turns on this, because it is the claimant's case that the Tribunal would be entitled to consider whether or not that decision was justified because if it was not, then for Article 8 purposes the decision to remove him was not in the public interest because he would otherwise have a right to remain. In those circumstances his removal would not be proportionate. There is, however, a difficulty with this argument to this extent. At paragraph 27 of his decision, Judge Lucas stated as follows:

> "27. It is accepted in this case that the appellant has submitted inaccurate tax returns for the period 2010/11 and 2012/13. The significance of this is that he was able to benefit from further leave to remain in the UK on the basis of inaccurate financial information. There was therefore a clear benefit to him."

13. If indeed he was able to remain because the earnings which he claimed for the relevant years in question were in fact greater than was justified, such that he was granted leave to remain which he should not have been granted, it does not necessarily follow that it would not be proportionate to refuse to grant him further leave to remain based on lawful leave that should never have been granted in the past. However, for present purposes, I need do no more than note this.

14. The real reason that the judge allowed the appeal was that he was prepared to accept, albeit that he considered it an exceptionally marginal decision, that the discrepancies within the income figures returned to the Revenue on the one hand and the Secretary of State on the other, were genuine mistakes. He stated his conclusion in this way, at paragraph 33:

> "33. Bearing in mind all of the above [to which I will return in a moment] the Tribunal is – just – prepared to accept that the appellant has made genuine mistakes in this case."

15. However, when one actually looks at the reasoning behind this, it is difficult to find any proper reasoning justifying this finding. The judge noted at paragraph 30 what the issue was, as follows:

> "30. These types of 'tax cases' are always difficult. The respondent has asserted misconduct and the appellant has asserted an innocent mistake."

16. He also, at paragraph 31, states, correctly, that "there is no doubt that the appellant has made some glaring mistakes in this case. On their face, the discrepancies are relatively large in the two periods in question as reflected above".

17. However, the judge only gives four reasons for finding ultimately in favour of the claimant, and these are firstly (at paragraph 29) that "it is of significance that there is

no direct allegation of dishonesty in this case"; secondly (at paragraph 32) that it is of significance in the case that the errors were corrected by the appellant prior to the claim in this case; thirdly (also at paragraph 32) that "it is also, surely, relevant that HMRC have not imposed any financial or other penalty upon the appellant" and fourthly (still at paragraph 32) that "most pertinent of all, it is of note that the appellant has repaid all of the tax that was owing to HMRC".

18. It is simply on the basis of these facts that the Tribunal was "just" prepared to accept that the appellant "had made genuine mistakes in this case". No other reasons are given.

19. None of these reasons hold up. So far as the suggestion that there was "no direct allegation of dishonesty in this case". Mr Gajjar, both in the Rule 24 response which he settled and also in his oral argument, accepts that he could not justify this assertion. He went as far as to say that if this was his only reason he probably would not even be able to justify being here at this hearing today. In order to demonstrate why this assertion is untenable it is necessary to refer to the decision of 5 February 2018 directly. At page 5 (of 12) at the bottom of the second paragraph it is written as follows:

> "Therefore if the calculation sheets you have provided are correct you still owe £14,841.68 for the 2010/2011 tax year and £13,368.13 for the 2012/2013 tax year to HMRC. The delay of several years in correcting your declarations to HMRC indicates that you had little intention of correcting the errors promptly and as such show little respect for the UK tax laws."

20. In other words, what is being said is that this was deliberate dishonesty on the part of the claimant. This is not an allegation of a bad mistake.

21. Then, two paragraphs down, it is said as follows:

> "It is therefore not a credible explanation that you would not have noticed the considerable discrepancy between the sums declared to HMRC and on your Tier 1 General Application and the tax implications this would have."

22. Again, clearly this is an allegation of dishonesty.

23. Then in the following paragraph it is said that the Secretary of State:

> "Is satisfied that you have misrepresented your earnings at various times and from time to time have changed what you have represented in respect of your earnings to HM Revenue and Customs and/or UK Visas & Immigration for the purpose of reducing your tax liability or for the purpose of obtaining leave to remain or both."

24. It is clear from this that the Secretary of State is asserting here in terms that the claimant was dishonest either in under declaring his income for revenue tax purposes or for over declaring his income for visa and immigration purposes or both. What is alleged here is not an innocent albeit gross mistake but deliberate dishonesty

and cannot sensibly be read in any other way. This is made even plainer in the following paragraph:

> "It is acknowledged that Paragraph 322(5) of the Immigration Rules is not a mandatory refusal; however, the evidence submitted does not satisfactorily demonstrate that the failure to declare to HMRC at the time the PAYE and self-employed earnings claimed on your Tier 1 applications of 04 April 2011 and 09 April 2013 was a genuine error. It is noted that there would have been a clear benefit to yourself either by failing to declare your full earnings to HMRC with respect to reducing your tax liability or by falsely representing your earnings to UK Visas & Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant."

25. Then when referring specifically to what is required in order to succeed in an application under paragraph 276B of the Rules (that is on the basis of ten years' continuous lawful residence in this country), the Secretary of State's position is set out as follows:

> "She is satisfied that you have misrepresented your earnings at various times and from time to time have changed what you have represented in respect of your earnings to HM Revenue & Customs and/or UK Visas & Immigration for the purposes of reducing your tax liability or for the purpose of obtaining leave to remain or both."

26. In other words deliberate dishonest misrepresentation of earnings. There is no other meaning that these words can have.

27. Accordingly, the first reason given by Judge Lucas for justifying his finding that it was a mistake rather than deliberate dishonesty does not stand scrutiny.

28. The second reason as stated above is that it is of significance that the errors were corrected by the claimant prior to the claim in this case. Again this reason does not withstand scrutiny either. As noted above, it is well known that the Secretary of State now carries out checks to establish whether there has been consistency between income declared to the Revenue for the purpose of paying tax and income claimed to UK Visas when applying for extension of visas because it is a sad fact that it frequently becomes apparent that applicants such as this claimant do on occasions under represent their income for the purposes of paying their tax and over declare their income for the purposes of establishing their entitlement to a visa. Each case obviously has to be considered on its own merits, but it would be surprising if any intelligent applicant (and generally these are people who have in the past been students and are in other respects bright intelligent people) would not be aware that the deception that has been operated in the past has to be corrected for them to have any chance at all of now succeeding in their claim for ILR. It is not, in the judgment of this Tribunal, and cannot be of any significance at all, that the errors have been corrected prior to the claim in this case; they always are, and if they are not the claim would not even get off the ground.

29. So far as the third reason is concerned, that HMRC have not imposed any financial or other penalty on the claimant, Mr Gajjar notes that in this case, unlike for example the situation referred to by Collins J in his decision in *Samant JR/6546/2016*, in which the Revenue have made no enquiries at all, the Revenue it is said made a conscious decision not to impose a penalty. Mr Gajjar refers the Tribunal to a letter dated 16 November 2017 in which in line with HM Revenue and Customs guidelines the Revenue accepts an offer of £14,151.69 comprising the tax which had not been paid of £12,049.88 together with interest of £2,101.81, stating in terms that "we are not charging a penalty". However, one must look at this decision not to impose a penalty in the context in which it is made. As far as the Inland Revenue is concerned this is somebody who without any prior investigation on their part has discovered that there was a "mistake" in their previous income tax returns and has voluntarily disclosed this to the Revenue. In those circumstances, were this to be all, there is no reason why a penalty should be imposed. Of course what the Revenue did not appreciate, and would not have appreciated at the time, was the discrepancy between the income disclosed (on two separate occasions) on the one hand to themselves for the purposes of paying tax, and on the other hand to the immigration authorities (for whom the returns had to be significantly larger) for the purpose of claiming renewals of a visa. In these circumstances it is of no relevance at all that HMRC did not impose any penalty on the claimant.

30. Finally, it is also not "of note" or indeed relevant in any way, contrary to what the judge finds, that the claimant had repaid the tax that was owing to HMRC. The same reasoning applies as with regard to making the disclosure of the under declaration in the past; this was necessary in order to have any chance of succeeding in the claim for ILR.

31. No other reason has been given for the finding which the judge says he "just" made that this was a combination of "genuine mistakes". There has been no examination of the explanation given by the claimant for his "mistakes" which was that he had miscalculated his turnover and so on.

32. The claimant's case is, because the discrepancy is so enormous (and repeated) a difficult one to argue but having thought carefully about whether or not I could merely remake the decision now on the basis of the evidence which is before me and dismiss his appeal, I consider that that would not be the proper course to follow. Even if at first blush the claimant's case does not appear strong, he is entitled to make it and have it considered and therefore he must be allowed an opportunity of so doing.

33. Both parties were agreed that on the particular facts of this case, because there would have to be proper fact-finding, it would be appropriate for this appeal now to be remitted back to the First-tier for hearing by any judge other than Judge Lucas and I shall so order. For the avoidance of any doubt I repeat what I stated earlier, that this is a case where it is really in the interests of justice for the Secretary of State to ensure, regardless of resource implications, that he (as he now is) is represented at the new remitted hearing. Accordingly I make the following decision:

Decision

I set aside the decision of First-tier Tribunal Judge Lucas, allowing the claimant's appeal and remit the appeal back to the First-tier Tribunal sitting at Taylor House, to be reheard by any judge other than Judge Lucas, de novo. No findings of fact are to be retained.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 13 May 2019