Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05059/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	**On 05 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD ABDULLAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Mr J Dhanji, Counsel instructed by Awan Legal Associates Limited

DECISION AND REASONS

Background

1. The appellant in this appeal is the Secretary of State and the respondent is Mr Abdullah. However for the purposes of this decision I refer to the parties as they were before the First-tier Tribunal where Mr Abdullah was the appellant.

2. The appellant, a citizen of Pakistan born on 20 December 1977 appealed to the First-tier Tribunal against a decision of the respondent dated 9 February 2018 to refuse the appellant's human rights application.

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3. In a decision promulgated on 30 October 2018, Judge of the First-tier Tribunal I F Taylor allowed the appellant's appeal on human rights grounds, taking into consideration **TZ (Pakistan) and PG [2018] EWCA Civ 1109** in particular paragraph 34 that:

> "Where a person satisfies the Rules ... this will be positively determinative of that person's Article 8 appeal, provided their case engages Article 8(1), for the very reason that it would be disproportionate for that person to be removed."

4. The issue in this appeal was the respondent's reliance on paragraph 322(5) of the general grounds for refusal which provides:

> "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused [include] 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."

5. The respondent refused the appellant's application under paragraph 322(5) because, as part of the appellant's Tier 1 (General) leave to remain application of 23 March 2011, the appellant claimed to have an income of £57,159 from all sources between 3 March 2010 and 20 February 2011, from self-employment. On this basis the appellant was awarded 35 points under the previous earnings category towards the ultimate total of 80 points in order to be granted leave to remain under Tier 1 (General).

6. The respondent noted that the tax calculation for 2010/2011 showed that the appellant actually declared a total income of £29,039 from self-employment and the respondent noted that the appellant's application would have been refused if he had declared that income or submitted this level of earnings in his Tier 1 application.

7. The Judge of the First-tier Tribunal ultimately concluded that the respondent had failed to meet the burden of establishing dishonesty. The Secretary of State appeals with permission on the grounds that the judge erred in making a perverse or irrational finding that the appellant had not employed dishonesty in declaring his earnings to the respondent in circumstances where the judge found that the appellant had employed an element of creative accounting; and had made a material misdirection of law in finding the threshold for invoking 322(5) of the Rules was not met.

Error of Law Discussion

8. Paragraph 322(5) of the General Grounds for Refusal provides:

> 'Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused [include] 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;'

9. The judge set out the respondent's arguments in the refusal letter together with the appellant's explanation. The appellant acknowledged that there appeared to be a discrepancy; it was the appellant's argument, at paragraph 14 of his witness statement, that he did earn £57,159 in the tax year 2010/2011 which is why he declared that as his income when he applied for leave to remain on 23 March 2011. However, as he had made a loss of £28,120 in the tax year 2009/2010 his first year of trading he was, under HMRC rules, permitted to carry that loss forward and reduce his taxable income for the purposes of his 2010/2011 tax return. This resulted in a taxable income for 2010/2011 of £29,039.

10. The appellant relied on the documents provided in his bundle including his tax return of 2010/2011 (at pages 19 to 27) and this notes, at page 25 under paragraph 20 of the tax return, that his business income profit was £57,159. The appellant set out how he had subsequently taken off the loss in the previous year, leaving taxable profits of £29,039.

11. The judge took into consideration a letter from the appellant's accountant Sam & Co at pages 30 to 31 of the bundle which confirmed that the appellant had made a financial loss in the year 2009/2010 to the tune of £28,120 and under HMRC rules he was allowed to carry this forward in the following fiscal year when he made a net profit of £57,159. The letter confirms that "Although the taxable profit was £29,039 the business' profit was £57,159".

12. The judge went on to find as follows:

> *"12. The issues before me are clearly complex and it is a matter of some significance that the only evidence from a firm of accountants is provided by the appellant. The respondent relies upon a document dealing with Appendix A – attributes of the Immigration Rules which states, amongst many other things, in a paragraph headed "earnings" at paragraph 15 the following. "Where the earnings are the profits of a business derived through self-employment or other business activities the earnings that will be assessed are the profits of the business before tax. It was suggested by the respondent during the hearing that this does not include losses carried forward which is permitted by HMRC.*
>
> *13. It is not entirely clear to me whether that is so or not but even if it were the case that previous year's losses could be carried forward in respect of HMRC, but as far as the Immigration Rules are concerned could not, in any event this falls substantially short of the legal burden which is upon the respondent in the circumstances and it doesn't go anywhere near establishing fraud or deception. Similarly (it wasn't argued) but it could have been, the appellant was under a duty to reveal that previous losses had been carried forward, however, taken individually or collectively would not reach anywhere near the required level. As stated by the appellant it must be of some significance that the claimed income of £57,159 would be sufficient to obtain indefinite leave to remain whereas the declared income of £29,039 would not. It may be, and I go no further than that, that in this case there may be an element of creative accountancy which nonetheless is not unlawful."*

13. The judge concluded, at [16], that for the reasons given the respondent had fallen a long way short of meeting the burden upon them.

14. Mr Lindsay attempted to introduce additional grounds, including in arguing that the judge materially erred in law in referring to the document Appendix A – Attributes as "a document dealing with Appendix A" whereas this was part of the Immigration Rules. Even if this new ground were properly before me, which I am not satisfied it was established it was, I am not satisfied that any error in the characterisation of the document was material as the judge fully considered this document.

15. Mr Lindsay further suggested that the grounds included the argument that the judge had erred in what he said at the end of [12]; it was Mr Lindsay's submission that the judge had failed to apply paragraph 15 of the "Appendix A – attributes of the Immigration Rules". Contrary to Mr Lindsay's submission, the ground alleging irrational findings at ground 1 related specifically to an assertion that the judge, in finding that the appellant had employed "creative accountancy", reached irrational findings in going on to find that he had not been dishonest. I am not satisfied that there was any ground before me in relation to a failure to properly apply paragraph 15 of Appendix A – attributes of the Immigration Rules, despite Mr Lindsay's attempts to shoehorn such arguments into the existing grounds. Even if there were, such was not made out.

16. Mr Lindsay could not say what it was that the judge had failed to apply and I take into consideration that the judge specifically considered the evidence from the accountant that the "business profit was £57,159". This is in line with what is said in paragraph 15 of Appendix A – Attributes, that the earnings that will be assessed "are the profits of the business before tax".

17. As correctly identified by the judge it was for the respondent to identify that the prima facie case of dishonesty had been established and then for the appellant to provide an innocent explanation. It was open to the judge to find a prima facie case had not been established including in relying, as the judge did, on all of the evidence including the appellant's oral evidence and the evidence of his accountant, as reflected in his tax return, that the business profit was £57,159.

18. I am not satisfied in addition that there was any material error, as further asserted by Mr Lindsay (in another issue not previously raised by the Secretary of State) in failing to resolve the meaning of paragraph 15 Appendix A – Attributes. It was for the respondent to discharge the burden of proof in relation to dishonesty and the judge gave adequate reasons for being satisfied that that burden had not been discharged.

19. In relation to the grounds that were before me, although much was made of the judge's statement that "in this case there may be an element of creative accountancy" the judge went on to state that this "nonetheless is not unlawful". The judge's use of the phrase "creative accountancy" is somewhat unfortunate, particularly as the judge did not actually definitively find that there was "creative accountancy" and was quite clear in his findings that there was no dishonesty in this case and the potential. Reading the decision fairly and holistically, the reference to creative accountancy,

coming as it did after a discussion of whether the appellant was entitled for tax but not immigration purposes to carry forward losses, would appear to be referring to the appellant's ability, in his tax affairs, to use his previous tax losses to reduce his future tax liability (which the appellant had demonstrated was permitted by HMRC) rather than, as characterised by the respondent, an attempt to mislead the respondent in relation to his immigration applications.

20. I do not agree with Mr Lindsay's assertion that this mere reference to possible creative accountancy indicates that the judge considered that the appellant had acted dishonestly, when in fact the judge made the opposite finding. Such findings were open to him on the evidence including, the appellant's evidence which the judge accepted, his tax returns, and the evidence of the accountant.

21. Even if the judge was wrong, as argued in the respondent's second ground, in concluding that the prima facie case for dishonesty had not been made out, which I am not satisfied has been established, any such claimed error could not be material as it is evident from the judge's findings that he accepted, as honest, the appellant's explanation as to why a taxable income of £29,039 had been declared for 2010/2011 including that this was supported by the documents including the appellant's tax return and the evidence from his accountants. Such an approach, in the alternative, in finding an innocent explanation (and the judge refers to such an 'innocent explanation' at [10]) is in line with current guidance (see **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384)**.

22. Whilst the judge's comment on "creative accountancy" may not have been particularly helpful it is not an error of law and looking at all the evidence, as the judge did, it was not a case of the appellant failing to declare the income or of falsely inflating his income but rather that having made a business income of £57,159, he used a previous loss to reduce his tax liabilities, which the judge accepted the evidence showed he was permitted to do for tax purposes. That is a separate issue. The judge was entitled to find, for the evidence-based reasons he gave, that the respondent had failed to establish that the appellant's conduct fell within paragraph 322(5).

23. I am not satisfied that the grounds are made out. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed Date

Deputy Upper Tribunal Judge Hutchinson