Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Nos: HU/05551/2018
HU/06445/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 March 2019	**On 13 May 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJESH BALA BELLAMKONDA
MRS D PATHURI
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondents: Mr M Biggs of Counsel instructed by Hilen Patel Solicitors

DECISION AND REASONS

1. The respondents (hereafter the claimants) are citizens of India. Since the appeal of the second claimant turns entirely on that of the first claimant, I shall hereafter refer to the first claimant. Having arrived in the UK with a student visa in August 2006 and obtained subsequent extensions first as a student then under Tier 1 (Post-Study) Migrant and Tier 1 (General) Migrant, the claimant applied in time for long residency

in October 2016. In a decision sent on 9 February 2018 the appellant (hereafter the Secretary of State or SSHD) refused his application. The Secretary of State applied a general ground of refusal, paragraph 322(5) of the Immigration Rules, in relation to the discrepancy between the claimant's declared income to HMRC in 2010 to 2011 tax year and his Tier 1 (General) leave to remain application made in March 2011. The SSHD states that in the tax questionnaire sent him he had stated that he had discovered an invoice in November 2015 which had been missed when submitting his tax declaration of 2010 to 2011 and with the help of his accountant this was amended and paid subsequently. The SSHD considered that based on the original earnings declared to HMRC he would have received 15 points for previous earnings under the Tier 1 Rules and so would have been 5 points short to obtain leave under his Tier 1 (General) application. The SSHD stated that it was acknowledged that paragraph 322(5) was not a mandatory refusal but that the evidence submitted by the claimant did not satisfactorily demonstrate that the failure to declare to HMRC at the time the PAYE and self-employed earnings declared on his Tier 1 application was a genuine error. It was noted that there would have been a clear benefit to him either by failing to declare his full earnings to HMRC with respect to reducing his tax liability, or by falsely representing his earnings to UKVI to enable him to meet the points required to obtain leave to remain under the Tier 1 (General) Migrant scheme. The appellant appealed. His appeal came before Judge Oliver of the First-tier Tribunal. In a decision sent on 7 January 2019 Judge Oliver allowed the claimant's appeal on human rights grounds.

2. The SSHD was successful in obtaining a grant of permission to appeal and levelled four criticisms of the judge's decision. It was contended that the judge had materially misdirected himself in law in:

   (1) disregarding the fact that the claimant did not satisfy the Rules;

   (2) wrongly portraying the claimant's errors as confined to the inadequate information provided in relation to his 2010–2011 tax affairs whereas there was also misconduct in relation to 2013;

   (3) failing to address the delay on the part of the claimant in seeking to resolve the discrepancies in his tax returns until he was preparing for his ILR claim; and

   (4) failing to make findings on the fact that the claimant subsequently blamed his accountant for errors that were clearly his.

3. I heard well-presented submissions from both representatives.

4. As regards ground 1, the Secretary of State's grounds take aim at paragraph 12:

> "12. I start by observing that, but for the errors which have been admitted, the appellant and his wife would appear to be prime candidates for indefinite stay under the rules. The respondent has made a clear allegation of deceit or dishonesty, a serious accusation, and it is therefore the respondent's duty to establish the charge on the balance of probability but with evidence of a strength commensurate with the seriousness of the allegation ***(R (AN & another) v SSHD [2005] EWCA Civ 1605)***. In answer to the allegation the appellant has not only given a very detailed witness statement and faced

> cross-examination, but has also submitted a corroborative statement from his accountant. The respondent has relied upon the reasons given at the time of refusal, but has not at any stage considered the possibility the innocent explanation put forward, but has rather reversed the burden of proof".

This was said to be a non-sequitur as the judge was simply stating that except for the period where the claimant did not satisfy the Rules he satisfied them. I see no force in this submission taken on its own. If the judge was right to find that the claimant had an innocent explanation for the discrepancy in his tax affairs, then it was correct to say that he would not have met with refusal of his ILR application.

5. As regards ground 2, it is correct to say that the judge's decision focused primarily on the error in relation to the 2010–2011 tax return. However, it is clear from paragraph 4 that the judge was aware that the Secretary of State in the refusal decision had alleged a further discrepancy noted in his Tier 1 application on 4 April 2013. Nevertheless, it is incorrect of the respondent to refer to this as a discrepancy since his tax return for 2013 showed a turnover of £9,000 which less expenses resulted in a net profit and taxable income of £8,123. On the Secretary of State's own reasoning, this figure corresponded with the amount he claimed to have earned between 1 March 2012 and 28 February 2013 in his Tier 1 (General) application of 4 April 2013. What the Secretary of State appeared to query was rather the inconsistency in the turnover figures expressed for the years 2012 on the one hand, and then the years 2014 and 2015 on the other. However, this was not further developed in the Reasons for Refusal Letter nor, as far as one can tell, was it advanced by the Presenting Officer at the hearing before Judge Oliver. In any event, it is clear that the judge accepted the claimant's detailed explanation of his tax affairs' history as set out in his witness statement.

6. Turning to ground 3. I see no merit in the contention that the judge failed to address the issue of the delay on the part of the claimant in identifying the discrepancies in his tax returns. Both in his witness statement and in his oral evidence the claimant explained that he had no reason to know that an error had been made until closing his self-employment account in 2015 (see paragraph 8 of the judge's decision). Hence, applying the guidance set out in the case of **Khan** [2018] UKUT 384 (IAC), it is clear that the judge considered the claimant's explanation for the delay and was clearly satisfied that the explanation given was an innocent one. Given (as the judge noted) that the burden was on the Secretary of State to prove the misconduct, it was open to the judge to find that the satisfactory innocent explanation sufficed to make paragraph 322(5) inapplicable.

7. A similar point arises in relation to ground 4. It is clear that the claimant sought to explain his error by reference to mistakes that were made at the time. However, it is not correct to state that the claimant "blamed his accountant for errors that were clearly his". The claimant's witness statement recognised that the primary error was his own, stating at paragraph 13:

> "13. My accountant compiled my tax return for 2010–11 but there was formula error as to total turnover in income summary that I printed and gave to him because when I added invoice of £5,150 of March 2011 in my old income summary sheet inadvertently it did not change total turnover that is there was totalling mistake in the income summary I prepared and gave to my accountant".

But he went on in the same witness statement to claim that there was some blame to be attached to the accountant. At paragraph 14 the claimant stated:

> "14. I can understand that it was my mistake to provide income summary which had formula error but I do expect that my accountant should not have relied on my income summary total and should have double checked my turnover total and had he done that my initial tax return would have been accurate. I do understand that my accountant would not have expected that I would have provided income summary sheet which had formula error as to total turnover".

The judge did not err in referring to there being error on the part of both parties. At paragraph 8 the judge noted that in oral evidence the claimant had said that his accountant should have picked up the difference between the raw material in the false income summary he had provided. It cannot be said to have been perverse of the judge to accept accountant error of this kind had happened.

8. I am not entitled to interfere in the decision of a judge unless it is flawed by a material error of law. Whilst the decision of the judge can be described as a generous one, it essentially based itself on a careful examination of the evidence of the claimant, both his witness statement evidence and his oral evidence together with the surrounding documentation. The judge was satisfied the claimant had provided an innocent explanation. In so deciding he judge made no legal error.

9. For the above reasons I conclude that the judge did not materially err in law and accordingly that his decision to allow the claimants' appeals must stand.

No anonymity direction is made.

Signed Date: 10 May 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal