IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37609/2014

THE IMMIGRATION ACTS

Heard at Field House (Taylor House)	**Decision & Reasons Promulgated**
On 6 October 2015	**On 19 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR KAREEM SULE FUSEINI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam, Counsel instructed by Hartley Bain Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Rowlands sitting at Richmond Magistrates' Court on 8 April 2015) dismissing his appeal against the decision by an Immigration Officer to refuse to grant him leave to enter the United Kingdom, and to cancel his continuing leave as a Tier 1 (General) Migrant. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

The Grant of Permission to Appeal

2. On 14 July 2015 First-tier Tribunal Judge Grant-Hutchison granted the appellant permission to appeal for the following reasons:

> "2. It is arguable that the Judge has misdirected himself by (a) not placing the burden of proof on the Respondent in allegations of false representations and (b) failing to consider that the amended tax returns under which a large liability for tax was acknowledged showed that the Appellant was genuinely liable for that tax which in turn mean that he genuinely earned the money claimed.
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> 3. It is further submitted that the Judge erred in law by failing to address the need to consider not whether there are exceptional circumstances but whether there were compelling circumstances not sufficiently recognised under the Immigration Rules to address Article 8. Bearing in mind the decision of the Upper Tribunal in Ferrer [2012] UKUT 304 (IAC) although this ground is weaker I am disinclined to exclude it."

The Relevant Background Facts

3. The appellant is a national of Ghana, whose date of birth is 8 August 1974. He first entered the United Kingdom on 7 November 2009 with valid leave as a Tier 4 (General) Student Migrant.

4. According to the explanatory statement, the appellant's leave in this capacity ran until 31 January 2012. According to the appellant, he was granted leave to remain as a Tier 1 Migrant in 2010, and the first grant of leave to remain as a Tier 1 Migrant ran until October 2012.

5. It is however common ground that in August 2012 the appellant applied for leave to remain as a Tier 1 Migrant, relying on claimed previous earnings of £73,687.12 earned during the period 12 August 2011 up to 6 August 2012. These earnings were from three sources: (1) earnings from employment with Spencer and Arlington of £23,822, earned between 31 August 2011 and 31 July 2012; (2) earnings from Temp Exchange Ltd of £4,875.42 earned between 27 November 2011 and 27 May 2012; and (3) self-employment earnings of £53,830 gross, earned between 19 August 2011 and 15 July 2012. On the strength of the evidence provided with the application, the appellant was granted leave to remain as a Tier 1 Migrant for a three year period running from 12 February 2013 until 12 February 2016.

6. As set out in a detailed explanatory statement which was issued in response to the appellant's grounds of appeal, the appellant was interviewed by Border Force officers on 19 September 2014 at Heathrow Airport, Terminal 4, having flown in from Accra via Amsterdam. He was questioned about his employment history. He had been employed on a long-term basis as a support worker with Spencer and Arlington since March 2010 with earnings of between £23,000 and £24,000 per annum. He had been self-employed as a business consultant from September 2011 until April 2012. He had earned between £60,000 and £65,000 from this self-employment. It was a consultancy business relating to the start up of businesses in Ghana.

7. Following enquiries with local sources available to the United Kingdom Border Force, questions arose concerning the levels of income which the appellant had claimed for the purposes of obtaining a Tier 1 (General) Migrant residence permit. Records indicated that he had registered himself as self-employed on 23 August 2011 as a business consultant/tutor, but he had failed to submit returns to HMRC for which a penalty had been levied against him.

8. At a second interview, the appellant said he had travelled to Ghana with his family as his wife had health problems with her pregnancy and required care. So she was now with extended family in Ghana with their son. The only employment he currently had was as a support worker with people with mental disabilities. This was his employment by Spencer and Arlington. He was asked why, if he was able to earn £60,000 from self-employment within an eight month period, he was now working for only £24,000 per annum. The appellant said he needed to make that level of income to keep his status, so he had to venture into that business. He used a freelance accountant that he had found on the internet, and he was unable to recall any tax that had been paid on his earnings from self-employment. He admitted the penalty notice had been issued to him by HMRC. He said it was for a sum of a little over £1,000 but he did not need to pay. This was because he contacted an accountant that he had found online, who helped him to waive the fine as he had ceased self-employment.

9. The appellant was granted temporary admission until 29 September 2014 in order to submit further documents. At an interview on 29 September 2014, he gave further details about his self-employment, and confirmed that two named clients were his only clients. He said he charged between £200 and £400 per hour for his services, and he had started his business in September 2011 and had continued his business until July 2012. He did not carry on with his business as he had started his Masters programme. When asked by the interviewing officer why he had withdrawn large sums of money soon after payments were made into his account, he said that this was a coincidence.

10. On 29 September 2014 a Chief Immigration Officer at Terminal 4 Heathrow Airport served the appellant with a notice of refusal of leave to enter. The notice stated as follows:

> "To: Kareem Sule Fuseini
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> You were given notice of leave to remain in the United Kingdom as a Tier 1 General Migrant on 12/02/13, but I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave, or there has been such a change of circumstances in your case since the leave was granted that it should be cancelled. I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance.
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> I have reached this decision with the regard to the fact that your residence permit was issued to you on the basis of documents supporting your application which showed that you had earnings of £73,687.16 from 01/08/11 to 31/07/12 for which you were awarded 40 points. As well as working as a support worker for Spencer and

Arlington, you state that you worked as a self-employed consultant providing business advice and providing tour referrals to people who wanted to go to Ghana. You claimed to have earned approximately £57,000 per annum. You were unable to explain in detail what the work involved. You claimed to have only clients by the name of Abdullah Majeed and Tajul Mohammed.

Contact was made with Mr Abdullah Majeed who stated that you provided him with building and housing advice, but was very vague and could not clearly explain what work you carried out for him. Mr Majeed could not recall how much money he had paid you for your services, but believed it was around £10,000. Several attempts were made to contact Mr Tajul Mohammed but the phone number provided was not a valid number. You also stated that Mr Tajul Mohammed was currently in Ghana.

Your bank statements show payments made from Mr Majeed and Mr Mohammed, but your account also shows large amounts of cash withdrawals within a couple of days after the money was deposited by your clients.

Our records also show that you have not paid any tax on your self-employment earnings. You stated that your accountant Gordon Addo made an error. Several attempts were made to contact Mr Addo but there was no response.

For the reasons above, I am satisfied that our self-employment earnings were inflated in order to obtain your residence permit.

You have not sought entry under any other provision of the immigration rules.

I therefore refuse you leave to enter the United Kingdom/I therefore cancel your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance. The cancellation of your leave will be treated for the purposes of the Immigration Act 1971 and the Nationality, Immigration and Asylum Act 2002 as a refusal of leave to enter at a time when you were in possession of a current entry clearance."

The Hearing before, and the Decision of, the First-tier Tribunal

11. At the hearing in the First-tier Tribunal, the appellant gave oral evidence and relied on the documents which had been assembled in a bundle by his solicitors.

12. The bundle of documents included a letter dated 13 August 2012 from Gordon Addo and Associates addressed to the UK Border Agency. As accountants for the appellant, they could confirm his self-employment income for the accounting period ended 31 July 2012. His gross income from self-employment was £53,830. After deduction of expenses, his net income from self-employment was £44,989.

13. At page 74 of the bundle was a revised tax calculation for the tax year ended 5 April 2012. It is apparent from the table that the profit from self-employment previously declared to HMRC, and thus assessed by them, was zero for the year to 5 April 2012. What was now being declared was a profit from self-employment in the relevant tax year of £29,993. Accordingly, whereas the appellant had previously been assessed as having a total income on which tax was due of £9,577, he was now declaring a total income on which tax was due of £51,040. This meant that the income tax due for the tax year had risen from £1,950.40 to £13,416 (a difference of £11,500).

14. In the witness statement, which he adopted as his evidence-in-chief, the appellant said that the cancellation of his continuing leave had raised concerns in his mind with regards to the accuracy of the returns that had been submitted by his previous accountant. So he presented the information to a different accountant who saw the documents and advised that the tax returns should be amended as they were not entirely accurate. With regards to the Border Force not being able to make contact with Mr Addo, he could not comment on that. He had approached Mr Addo to enquire about the same, and Mr Addo had simply told him that he had not received any calls from the Home Office.

15. As is apparent from paragraphs [5] to [9] of the judge's subsequent decision, the appellant was cross-examined on his evidence. He said he did not think that there was anything odd about him not having paid any tax at all on his self-employed earnings because the accountant said that the tax could be carried over.

16. The judge's reasons for finding against the appellant were set out in paragraphs [12] to [21] of his subsequent decision, and I reproduce these paragraphs below:

> "12. This is an appeal under the provisions of Section 82(1) of the Nationality, Immigration and Asylum Act 2002, which states that where an immigration decision is made in respect of a person he may appeal to an immigration judge. The onus of showing that he can comply with the Immigration Rules lies with the Appellant. He must do so on the balance of probabilities. As far as any breach of his human rights are concerned it is for him to show that there is a reasonable likelihood that there would be a breach if he were removed or not allowed entry clearance.
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> 13. The Appellant has not really challenged the factual basis of the Respondent's decision. The Residence Permit issued to him was on the basis of his claimed earnings of £73,687. Enquiries revealed that there was now some real doubt about that claimed income. This was brought about by consultation with HMRC which showed that, despite the claimed self-employment income, nothing had been paid in income tax. The Appellant's evidence is that he still has not paid any tax.
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> 14. The Appellant claims that he was told by his accountant that this was normal and it was alright for him not to pay out that income. He has now appointed another accountant and has notified HMRC of his income and his tax liabilities properly recalculated although not paid. He was extremely vague about the details of his original accountant and as yet no contact has been made with him. Effectively, he is saying that he was let down by his accountant and mislead.
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> 15. I totally reject this argument by the Appellant. I do so because the Appellant is clearly a successful business man in Ghana, he has been studying for a Masters in Law and already has a degree. I do not believe that someone of his level of intelligence would not know that tax would be liable on that kind of income and I certainly do not accept that he has been duped in the way that he claims. I believe the truth is that the Appellant knew full well that there would have been some tax liability and that he has actually co-operated with the accountant in preparing false accounts in order to try, successfully as it was, to persuade the Respondent that his income was such that he met the requirements to be issued with a Tier 1 (General) Migrant Residence Permit.

16. I am satisfied that having then been found out about the falsity of the accounts he has compounded the situation by having other accounts prepared showing that he has a tax liability knowing full well that he would not able to pay the tax in any event.

17. The Appellant claims to have earned these significant amounts and yet at the same time given all that up in order to earn a relatively low income working for Spencer Arlington Limited. His explanation as to why he should do that frankly lacks any credibility. I believe that the truth is that he never had the claimed self-employed income and that the large sums paid into his account were simply put there in order to make it look as if he had the income whereas in fact it was being removed from his accounts within a very short period of time. Contact with the people he was supposedly doing business with ended up with suggestions that there had been little contact with the Appellant in the two years preceding the claim was made that Abdullah Majeed had received some housing and building work supply but no further information was provided. Nothing had been paid in the last two years. No contact was made with the other.

18. I am satisfied on the basis of the enquiries made by the Immigration Officers that the Appellant did not receive the income claimed from self-employment.

19. Another reason for doubting the Appellant's claim concerning the self-employment is his lack of credible explanation as to why he would give up such lucrative self-employment in order to continue with his work with Spencer Arlington Limited. It makes no sense for anyone to give up a job bringing in £50,000 or more to concentrate on work as a Carer for about £24,000. I am satisfied that the evidence shows that the Appellant was not receiving the income as claimed and that the Tier 1 (General) Migrant leave was properly cancelled.

20. The Appellant has tried to argue that his leave should not have been cancelled either as this would be contrary to his Article 8 rights in the United Kingdom. I have considered the facts of the case and reach the conclusion that the Appellant does not fulfil any of the immigration rules.

21. I have gone on to consider the circumstances and take the view that there are no exceptional circumstances in this case which could lead to consideration of his right to remain in the United Kingdom under Article 8 outside the immigration rules. The fact that he has used false accounts in order to obtain leave would count against him in any issue of proportionality and as I have stated there are no exceptional circumstances."

The Hearing in the Upper Tribunal

17. At the hearing before me, Mr Aslam submitted there were a number of errors. Firstly, the Home Office bundle before the First-tier Tribunal had not included the appendices to the explanatory statement. So the Secretary of State had not provided the evidence necessary to sustain her case, and the judge should have so directed himself and found that there was no case to answer.

18. Secondly, he submitted the judge had adopted the wrong approach. He did not remind himself of the grounds of refusal, but had in effect acted as if he was re-deciding the merits of the application made in 2012. He thus asked himself the wrong question. He had asked himself whether the appellant had proved that he

had earnings from self-employment of £53,380 gross, rather than whether the case put forward by the respondent as justifying the cancellation of his leave was made out.

19. Thirdly, with reference to paragraph [16], the judge failed to direct himself that the appellant was seeking to remain in the United Kingdom; if he was successful in that endeavour he would leave himself exposed to civil or potentially criminal proceedings by HMRC for the unpaid tax to which his amended returns made him liable. It was wholly illogical to suggest that he had created a tax liability which he knew he would never have to pay. The only logical inference from the submission of amended tax returns under which a large liability for tax was acknowledged was that the appellant was genuinely liable for that tax, which in turn meant that he had genuinely earned the money he claimed.

20. I asked Mr Aslam to address me on the alternative case run by the Chief Immigration Officer that there had been a material change of circumstances justifying the cancellation of the appellant's leave. The material change of circumstances was the appellant's professed cessation of self-employment from July 2012, with the consequence that he had been only earning one third of the amount each year which he had claimed to be earning in order to be awarded 40 points on his Tier 1 application. Mr Aslam submitted that this was irrelevant. The appellant only needed to show that his previous earnings had been at a particular level. It did not matter that he had not been earning anything like the same level as his previous earnings during the currency of his Tier 1 visa.

21. I asked Mr Aslam what should happen to the appeal if I was persuaded that an error of law was made out. He agreed with Mr Whitwell that I could remake the decision on the documents, without the need for a further hearing. In that event, Mr Whitwell invited me to take account of the appendices to the explanatory statement that were in his possession, and which I had arranged to have copied. Mr Aslam did not object to my taking the appendices into account in the event that I decided to remake the decision.

Discussion

22. The first point argued by Mr Aslam was not raised in the grounds of appeal.

23. My bundle did not contain the appendices, so he is probably right in his assertion that the First-tier Tribunal Judge did not have sight of the appendices. But the appellant was legally represented before the First-tier Tribunal, and it does not appear that the legal representative applied for an adjournment or submitted that the judge could not take into account the contents of the explanatory statement in the absence of the supporting documents contained in the appendices. I accept that as a general rule the Secretary of State ought to serve on the appellant all the evidence on which she relies. But it does not appear from the grounds of appeal or from the appellant's witness statement that he challenged the facts recorded in the explanatory statement. It was thus open to the judge to direct himself at the beginning of paragraph [13] that the appellant had not really challenged the factual

basis of the respondent's decision. Since the factual basis of the respondent's decision was not challenged, it was immaterial that the evidence underpinning the explanatory statement (such as the interview transcripts) had not been served on the appellant. Essentially, the line taken by way of appeal was one of confession and avoidance, not denial. The appellant accepted that he had not paid any tax on his claimed earnings from self-employment, and blamed this on his former accountant.

24. I consider that the decision is most vulnerable to attack on the first ground pleaded in the grounds of appeal, which was that the judge misdirected himself as to the burden of proof. At paragraph [12], the judge ought to have directed himself that the burden rested with the respondent to prove her case, and that the refusal under 321A(2), which is where "false representations were made or false documents were submitted …, or material facts were not disclosed, in relation to the application for leave", required dishonesty on either the appellant's part or on the part of someone else involved in the relevant application.

25. Ordinarily, the judge's misdirection would translate into a material error of law. But in this case it does not. As stated in the grounds of appeal, a decision under paragraph 321A(2) raises a burden on the respondent to prove any *contested* precedent facts. But in view of the stance taken by the appellant by way of appeal, there were no contested precedent facts at the appeal hearing. It was not disputed that, on the facts set out in the notice of refusal of leave to enter, the respondent had raised a prima facie case of fraud. So although the legal burden always rested with the respondent to prove her case, the evidential burden had shifted to the appellant to rebut the prima facie case of fraud. Thus the judge was right to approach his fact-finding exercise on the basis that the core issue was whether the appellant had provided a credible explanation for the discrepancies in the evidence relating to his claimed self-employment.

26. In **The Queen (On the application Of Bijendra Giri) v Secretary of State [2015] EWCA Civ 784** Richards LJ reviewed two reported decisions of the Upper Tribunal on the issue of standard of proof at paragraph [35] onwards. The Upper Tribunal had been wrong in **JC (Part 9 HC 395 - burden of proof) China [2007] UKAIT 0027** to hold that the standard of proof in relation to a question of deception will be at the higher end of the spectrum of balance of probability. The law had been correctly stated in **NA and Others (Cambridge College of Learning) Pakistan [2009] UKAIT 0031**. The seriousness of the consequences did not require a different standard of proof, citing Lord Hoffman in **Re B Children [2008] UKHL 35** where he said at paragraph [15]:

> "... there is only one rule of law, and only the occurrence of the fact and issue must be proved to be more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities"

27. The same accountant who had produced the accounts relied on for the purposes of the Tier 1 application had, according to the appellant, prepared a tax return for the

tax year ended April 2012 which did not declare any earnings from self-employment in that tax year – and the appellant saw no problem with this.

28. As a matter of common sense and inherent probabilities, the First-tier Tribunal Judge was fully entitled to find that this was preposterous, and that the appellant would not have been duped by his accountant into believing that he was not liable to pay any tax on his self-employed earnings for the tax year April 2012.

29. It was thus open to the judge to find, for the reasons he gives in paragraph [14], that the appellant co–operated with the accountant in preparing a false set of accounts to persuade the respondent that his income was such that he met the requirements to be issued with a Tier 1 (General) Migrant residence permit.

30. The second pleaded ground of appeal is that the judge's finding at paragraph [16] is illogical, and instead the judge ought to have found that the appellant's recent dealings with HMRC showed that his claimed earnings from self-employment were genuine.

31. I do not consider that the judge's finding at paragraph [16] is illogical or perverse. On the evidence before the judge, the appellant was not earning enough from his employment as a support worker to be able to pay the tax which he was now claiming to owe HMRC. Moreover, it is not true that the only inference that can reasonably be drawn from the appellant's recent dealings with HMRC is that his claimed earnings from self-employment are genuine. A belated declaration of a liability to pay tax on earnings from self-employment is also consistent with the appellant having to do what is necessary in order to win his appeal. It is not implausible that the appellant, whom the judge found to be dishonest, would be willing to inflate his true tax liability by some £11,500 (see paragraph 13 above) in order to secure his future in the UK.

32. Ground 4 is that the judge misdirected himself in asking whether there were exceptional circumstances which could lead to a consideration of his right to remain in the United Kingdom under Article 8 outside the Immigration Rules, as opposed to asking himself whether there were compelling circumstances not sufficiently recognised under the Immigration Rules which made the decision appealed against disproportionate.

33. Although the judge has not used the form of words approved by the Court of Appeal in **SS Congo**, I note that in **Agyarko & Ors, R (on the application of) v SSHD [2015] EWCA Civ 440** at [51] Sales LJ said:

> "There was no arguable case that Mrs Ikuga could show that *exceptional circumstances* (my emphasis) existed to support the conclusion that Article 8 required that she should be granted leave to remain."

34. Context is key. If a judge uses the "exceptional circumstances" test in a way which implies that the applicant has to surmount a higher threshold than the "compelling circumstances" test, this will be an error. But if its use does not imply a higher threshold, there is no error.

35. The judge's form of words does not disclose an error. No compelling circumstances were identified in the grounds of appeal as being in play. The appellant's partner and child were in Ghana at the time that he was refused leave to enter, and it was not suggested that the effect of the decision appealed against was to impact on the appellant's family life in the UK. While questions 1 and 2 of the **Razgar** test would have to be answered in his favour with regard to the establishment of private life in the UK, questions 3 and 4 of the **Razgar** test had to be answered in favour of the respondent. On the issue of proportionality, the appellant's use of false accounts in order to obtain leave would plainly reinforce the public interest in the appellant's exclusion. In **AM (S117 B) Malawi [2015] UKUT 260 (IAC)** the UT held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever his degree of fluency in English, or the strength of his financial resources.

36. As noted by Mr Whitwell, the appellant gave no evidence in support of an Article 8 claim in his witness statement, and so the judge's finding on proportionality required no further elaboration.

Notice of Decision

The decision of the First-tier Tribunal dismissing the appeal under the Rules and on human rights grounds does not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson