IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/52941/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 February 2015	**On 23 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

SHAHEN SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Davidson, Counsel, instructed by Ammal Solicitors
For the Respondent: Miss A Everett, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Pakistan born on 15 March 1979 and was refused, on 29th November 2013, an extension of a Tier 1 (General) visa on the basis that he had submitted in support of his original application for Tier 1 leave, a false income which he had not earned.

2. The appellant first entered the UK on 15 April 2012 with leave to enter as a student and subsequently his leave appeared to have been extended until 22 October 2010. He was then given leave to remain as a Tier 1 (Post-Study Work) Migrant on 6 April 2011 until 6 April 2013.

3. On 20 March 2013 the appellant applied for an extension of his Tier 1 leave and that application was refused as the respondent asserted she had contacted the HMRC and whereas the appellant had claimed, on 14th September 2010 (in a previous application) earnings of £37,000 in between 2009 and 2010, checks at the HMRC confirmed he had only earned £6,290. As such the Home Office concluded that refusal was appropriate under paragraph 322(2) of the Immigration Rules as false representations had been made in an earlier application.

4. First-tier Tribunal Judge Seelhof dismissed the appellant's appeal under the Immigration Rules and an application for permission to appeal was made by the appellant's representative.

5. The application for permission to appeal included the following grounds. A single reason was given by the respondent in the decision of the respondent for refusal and this was not supported by any evidence. The burden and standard of proof as described in the respondent's own published guidance referred to the burden of proof being on the respondent and was to a 'higher standard' of probabilities. The only reason for refusal, that the appellant only earned £6,290 was abandoned by the respondent as it was an unsupported allegation. The only document adduced was a witness statement from HMRC dated 10th October 2013 showing income only from employment. The document was not complete as it did not contain information regarding income from self employment which was known to the HMRC at the time of making the statement for which the appellant was paying tax. The only error by the appellant was in miscalculating his tax which he later rectified. It is only where the appellant had deliberately and dishonestly made a false statement in an application that the rule applied.

6. In the further grounds to the Upper Tribunal it was asserted that the burden of proof was entirely that of the respondent and the appellant was not required to rebut anything.

7. The judge had further erred in relation to his approach to discretion and stated at [6] of his decision

   'in this case because the alleged deception related to a previous application the refusal is discretionary but it is clear from the decision that the Secretary of State has recognised that and has chosen to exercise a discretion to refuse the application'.

8. It could be concluded from this that the judge considered that as long as the Secretary of State had exercised the discretion it was not reviewable by the Judge and that was incorrect. The exercise of discretion was *within* one of the Rules and covered by Section 84(1)(f) of the Nationality Immigration and Asylum Act 2002. The Judge failed to exercise his own discretion which was an error.

9. It was also alleged that there was improper reasoning as the judge found there were two possible outcomes that either the appellant had deceived the respondent or alternatively misled the HMRC. The conclusion that the appellant had misled the respondent was based on speculation and the judge also relied on evidence not before the Tribunal.

10. Permission to appeal was refused by First Tier Tribunal Judge Nicholson but renewed to the Upper Tribunal and granted by Upper Tribunal Judge Storey on the grounds that improper reasoning was arguable.

Conclusions

11. In paragraph 6 the First-tier Tribunal judge stated

> "In cases where the Secretary of State alleges dishonesty on the part of an applicant she is under a duty to provide evidence capable of supporting that assertion and provided she does so then it is open to an appellant to provide evidence in rebuttal. I can accept that there is no condition precedent which may have been an error but I do note that the Tribunal continued to state that it was for the Tribunal to assess on the balance of probabilities whether there has in fact been deception."

12. This is incorrect further to **NA (Cambridge College of Learning)** Pakistan [2009] UKAIT 00031 which at [98] set out as follows.

> In JC (part 9, HC 395 – burden of proof) China [2007] UKAIT 00027 the Tribunal reconfirmed its view that in respect of the general grounds of refusal **the burden of proof rests on the respondent**. That is also the position that the respondent takes, as can be seen from the IDIs, Section 4, Chapter 9: see above para 71. However, in JC although the Tribunal cited with approval the statement of Richards LJ in R (AN & Anor) v Secretary of State for the Home Department [2005] EWCA Civ 1605 that there is only a single civil standard, it also approved an earlier Tribunal decision which had made reference to allegations of deception or other criminal conduct requiring a standard of proof "at the higher end of the spectrum of balance of probability". In the light of the recent decisions of the House of Lords in Re: B (Children) and Re: Doherty **the reference to a "spectrum of balance of probability" must be seen as incorrect, since it wrongly suggests that the civil standard of proof is a variable one**. As their Lordships have clarified, citing with approval the same reference by Richards LJ in R (AN & Anor) to "a single standard of proof … flexible in it application", the only way in which the greater seriousness of the allegation or of the consequences is of relevance is in relation to the necessary quality of the evidence. Just as JC must now be read with this correction, so must the Home Office IDIs which at para 4.11 currently state (wrongly):
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> > "Whilst the standard of proof rests on the balance of probabilities, for matters of false representation and documents it is a higher balance of probabilities than normal."

13. That said, as I conclude below, it also would appear that the respondent had not produced the evidence which supported the claim that the appellant had only earned £6,290 and ignored further evidence.

14. I do however also find an error of law in that the judge relied on evidence that was not before the Tribunal.

15. At paragraph 29 the judge stated:

> "I am conscious that it has become public knowledge amongst immigration advisors over the past two years that the Home Office is routinely going back and checking tax records for previous years and applications when applicants apply for extension of Tier 1 visas. I am aware of immigration discussion forums on the internet and other places where this is discussed publicly. Although I acknowledge there is some there is some speculation in this I do consider that it is plausible that the appellant could have found out about these checks prior to applying to extend his visa, and that he had then taken steps to ensure that his HMRC records would reconcile with what he had clamed had been the situation in 2010."

16. The fact is that this was not put to the appellant.

17. I note Miss Everett's riposte to the challenge that the judge had not exercised his discretion and it appeared the judge was of the view that as long as the respondent had addressed her mind to the existence of the discretion the exercise of the discretion was not reviewable by the judge. Although it does not appear from [6] and a reading of the decision, that the judge actually exercised his powers in relation to the discretion under paragraph 322(2), but merely couched his finding in respect of what the Secretary of State might do in relation to paragraph 322(5), that is historic conduct, the judge would not have, on his findings have exercised the discretion differently. However, that argument and the argument in relation to improper reasoning is redundant in view of my other findings above.

18. I set aside the decision for the errors identified and which would have made a material difference to the outcome. At the subsequent hearing before me, a decision was produced from the First-tier Tribunal, that is a decision dated 18 March 2011of Judge A E Walker in relation to the appellant's previous appeal. This recorded that the appellant made an application on 14 September 2010 for leave to remain as a Tier 1 (General) Migrant under the points-based system and this was refused on 10 January 2011. His appeal was allowed.

19. The judge noted that two pieces of evidence, being an accountant's letter and a set of financial accounts which the appellant produced to the respondent, did not corroborate each other, but nonetheless, referred to earnings in the region of £37,000 which were accumulated over a period of twelve months from 1 August 2009 to 27 August 2010.

20. The fact is that in relation to the earnings of the appellant from 2009 to 2010 he *subsequently* and after a delay submitted to HMRC that he earned £37,586. Evidence from the HMRC shows that some time in early 2013 he alerted the HMRC and an assessment was sent to him dated 8 May 2013 confirming that tax due on 31 January 2011 was £12,481.08.

21. At the date of his appeal hearing for his 2011 application the appellant would have known the extent of his profit for 2009 to 2010 his tax declaration was delayed but equally there was a letter on file with HM Revenue and Customs in relation to a trading loss for the year to 2011 of £40,027. I note that the dates given for the appellant's previous earnings in his new application range from 8 March 2012 to 7 March 2013.

22. The appellant's explanation for the delay in accounting for tax on his 2009-2010 financial period, was that he had instructed someone who was not a qualified chartered accountant and who had failed to advise him that he needed to pay the tax. When he did discover this he promptly paid his tax. The question remains that the appellant submitted accounts showing that in the period 1 August 2009 to 27 August 2010 that he had earned in excess of £37,000. Subsequently, he was assessed to have owed this tax on 31 January 2011. Thus by the time of his refusal on 10 January 2011 and certainly by the time of the Tribunal hearing in March 2011 the appellant was aware that he had earned the sum of in excess of £37,000 and on which he relied for his Tier 1 Migrant visa, and on which he needed to pay tax and yet did not declare this to HMRC until 2013. That said, he explained his delay by way of his accountant and this explanation cannot be discounted.

23. I put directly to the appellant that the First-tier Tribunal Judge Seelhof had suggested that he had read on forums on the internet about the Secretary of State checking visa applicants' tax records and effectively the necessity to get one's tax affairs into order and he denied specifically that this was the case.

24. The difficulty with the respondent's case is that in the refusal letter dated 29 November 2013 it was stated that on 14 September 2010 the appellant claimed earnings of £37,000 but after checks with HMRC they confirmed he only earned £6,290. The fact is that this figure was not borne out in the documentation submitted by the HMRC to the Home Office and submitted in evidence. Indeed a witness statement was submitted by someone by the name of Phillip Morris in the documentation who stated on 10 October 2013 in relation to the appellant's tax year 2009 to 2010 that the appellant in employment only had earned ***£18,660*** an entirely different figure from that on which the refusal of September 2013 was based.

25. Further and in particular, documentation produced by the appellant even to the First-tier Tribunal appeared to confirm that on 7 May 2013, HM Revenue and Customs acknowledged that the appellant had written to them on 12 February 2013 noting that a liability of £12,481 arose for 2010. This was before the respodnent's decision was given in November 2013. This was evidence that was not taken into account in the decision of the respondent in assessing the matter further to Paragraph 322.

26. I conclude that dishonesty or deception is needed **AA (Nigeria) v SSHD [2012] EWCA Civ 1113,** albeit not necessarily that of the appellant himself, to render a false representation or a non-disclosure of material facts to be dishonest and the burden of proof is on the respondent. The evidence provided in this case by the respondent

was contradictory and did not satisfy me on the balance of probabilities that the appellant had been dishonest.

27. That said I note that on this occasion the Secretary of State had not carried out full verification checks on the documents submitted as the application fell for refusal on other grounds as outlined. I note from the refusal letter that the Secretary of State states that they reserve the right to carry out this assessment in any challenge of this decision or in future applications. I cannot conclude that the remainder of the Immigration Rules have been satisfied.

28. In addition the appellant by the time of the hearing before me stated that he had ten years continuous residence in the UK and both the representatives confirmed that further to 276B the matter should be returned to the Secretary of State for a lawful decision in that regard. As such I return the matter to the Secretary of State in order that she might exercise her discretion in that regard and for a lawful decision.

29. I find there is an error of law and I set the decision aside the decision in relation to the Immigration Rules for the reasons given above and I remake the decision. The matter should be remitted to the Secretary of State for a decision in accordance with the law.

Decision

Appeal Allowed to the extent that the matter is remitted to the Secretary of State for a decision in accordance with the law.

Signed Date 20th March 2015

Deputy Upper Tribunal Judge Rimington