



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00601/2016
HU/20570/2016
HU/24751/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2nd November 2017

Decision & Reasons Promulgated
On 21st November 2017

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MMMS (FIRST APPELLANT)
SMM (SECOND APPELLANT)
AM (THIRD APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Skinner, Counsel instructed by ATM Law Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. On 25th April 2015 the first-named appellant made an application for leave to remain under the provisions of paragraph 276B of the Immigration Rules, on the basis that he had spent ten years continuously and lawfully in the United Kingdom. The other appellants are dependants upon that claim. The application was refused on 15th December 2015 on the basis that his presence in the United Kingdom was not conducive to the public good because his conduct made it undesirable that he remain in the United Kingdom.

2. The conduct complained of was essentially that, in a previous application to be a Tier 1 Migrant made in 2011, the first-named appellant inflated his earnings so as to deceive the immigration authorities as to his overall earnings, alternatively that he had failed to declare significant earnings to Her Majesty's Revenue and Customs. In the decision of 15th December 2015 his conduct was considered in the alternative. It was the view of the respondent in that decision that on either view the conduct was such that it would be undesirable for him to remain in the United Kingdom.
3. In essence the first-named appellant claimed that his earnings from 1st February 2010 to 31st January 2011 were some £50,547. That was made up of his employment with DNC UK Services and with McDonald's which came to approximately £18,257. There was further employment from self-employment by way of receiving dividends from shares which amounted to £32,290. That employment had been of limited duration and was not repeated. What was declared to Her Majesty's Revenue and Customs for the requisite period was in the order of £17,000 to £18,000 to reflect a slight overlap between accounting years. The explanation offered by the first-named appellant for that matter was that he had given the papers to his then accountant to prepare the necessary tax returns and the omission to declare the £32,290 to Her Majesty's Revenue and Customs was entirely due to the accountant. Shortly afterwards the accountancy firm went out of business, as can be shown from the company records, and accordingly it has not been possible to find that accountant or to clarify the situation. The first-named appellant however made contact with HMRC and by agreement has made good the outstanding tax on that sum.
4. The first-named appellant sought to appeal against the decision, which appeal came before First-tier Tribunal Judge Turnock for hearing on 1st December 2016. In a determination of 6th January 2017 the appeal was dismissed, essentially on the basis set out in paragraph 49 of the decision, that the earnings provided to the Home Office in support of the application in February 2011 were false and were deliberately misleading. The grounds of challenge contend that there was an erroneous finding of dishonesty that the Judge had not fully considered all matters. Indeed, it was contended that the Judge erred in simply finding matters on one basis without considering the alternative basis.
5. Permission to appeal was granted on the basis that there was no indication that consideration had been given to the further payment to HMRC of the additional tax and findings on the documents submitted. Thus the matter comes before me to determine the issue.
6. The argument which was advanced before me at the hearing is the lack of clarity in the reasoning as to why the Judge found one version of dishonesty to exist and did not thereafter consider the other version, to determine whether that would have made any material difference to the issue of dishonesty and to conduct such as to defeat the application made.

7. It seems to me that there is merit in the argument as advanced that there were distinct issues to be considered in relationship to what was done by the first-named appellant which were perhaps not fully considered by the Judge.
8. The first proposition, which is advanced by the respondent in the decision, was that essentially the first-named appellant deliberately inflated his earnings. In terms of his earnings from employment, they are set out in the decision letter as declared to Her Majesty's Revenue and Customs for the tax years ended 2010, 2011, 2012 and 2013. For the first three years they were in the order of £17,000 to £20,000, rising in 2013 to some £28,449.
9. Thus it is reasonable to conclude on that scenario that it was the declarations of dividends of £32,290 which was presented as inflating earnings. It would seem from reading the decision that in 2011 documentation was submitted to support the various earnings and self-employment. If the first-named appellant submitted false and/or inaccurate documentation to deceive the immigration authorities as to that amount, it cannot conceivably be anything other than a most serious offence. The first-named appellant, of course, seeks to blame the accountant, but it is difficult in that scenario to even imagine how the accountant comes into the picture. If the accountant was submitting earnings from DNC and McDonald's to Her Majesty's Revenue and Customs in line with those that were subsequently submitted, it is difficult to conclude otherwise than the accountant was merely doing what he was required to do, and properly so. It is totally nonsense to blame an accountant for not putting in a document that was entirely false and the sums fictional. If the first-named appellant presented the document falsely it is difficult to conclude otherwise than that he acted wholly dishonestly, and as I have said, the explanation for the blame to be passed to the accountant has really no bearing upon the matter.
10. If however the £32,290 was in fact a fiction, it is perhaps somewhat surprising that the first-named appellant has sought to pay tax upon that to Her Majesty's Revenue and Customs thereafter.
11. On the alternative view, the first-named appellant had indeed earned £32,290 but had failed to declare it to Her Majesty's Revenue and Customs. It is in that scenario that clearly his explanation that he trusted the accountant to put that in has some relevance. Equally, as argued on behalf of the first-named appellant by Mr Skinner, the fact that he has repaid that which was owing may be a mitigating factor for the overall deception, if indeed deception was found to exist.
12. Mr Skinner submits that there is potentially a material difference in seriousness from someone who deliberately produces false documents to the immigration services in order to obtain status to remain and one who evaded the payment of proper tax to the Revenue and Customs but who has subsequently done so.
13. It seems to me that there is merit in that contention, although that is not to say necessarily that on either scenario the first-named appellant would succeed.

14. The difficulty it seems to me, having read the decision, is to understand how it was that the Judge came to one view of the facts as opposed to the other. The Judge at paragraphs 43 to 48 considers the explanation offered by the first-named appellant as to why the sum was not disclosed to Her Majesty's Revenue and Customs. The Judge rejects the explanation that the first-named appellant is not to be blamed for the under-declaration and indeed remarks that mistaken advice is not accepted and that the first-named appellant as an intelligent man would be aware of the regime for dealing with dividends taken from the company. It was noted there were no statements from anyone to confirm the introduction to the accountant or of efforts made to trace the accountant. The Judge concludes in paragraph 49:-

"I do not accept he earned the amount he claimed and I conclude that the figures for his earnings provided to the Home Office in support of his application in February 2011 were false and were deliberately misleading. I find that his actions were, accordingly, dishonest".

At no stage does the Judge indicate why it is that that situation exists as opposed to the under-declaration. As I have indicated, much of the consideration by the Judge is looking at whether or not it is reasonable to accept the account that the accountant was at fault. Of course if the earnings were entirely fictitious then there would be nothing to blame the accountant for, nor any reason at all why the accountant should have become involved.

15. The first-named appellant and appellants indeed are entitled to know the reasoning behind the finding that was made as to why the Judge chose one version over the other.
16. The practical difficulty in this case is that it is an appeal against the decision of the respondent, who seeks to deal with matters in the alternative. It would seem that the documents as to the earnings were submitted, although copies have not been requested, nor are they in the possession of the first-named appellant. There is little hard evidence to indicate whether the claim for the dividends was entirely manufactured or whether there was a basis in the documentation for the same.
17. It seems to me a matter of fundamental fairness and importance that both variants of the allegation are properly considered. If one is to be preferred over the other then some reasoning to justify that should be given. If it impossible to distinguish one from the other then the culpability of the first-named appellant in relation to each needs to be specifically considered and findings made as to whether the refusal on the basis of conduct is reasonable and proportionate in all the circumstances.
18. As I have indicated I find there is, to some extent, a muddling of thought in relation to the two possible scenarios which has the tendency to blur the proper considerations that are to be applied. If it be a deliberate presenting of false documents to deceive it would be surprising indeed if that were not sufficient to

denote dishonesty. If it were a failure to declare, a decision maker needs to determine whether that was by mistake or by design, even if by design whether the subsequent actions of paying back are such as to reduce the seriousness that would otherwise be applied.

19. I consider that the lack of reasoning to justify one version as opposed to the other to be an error of law, such that I should set aside the decision to be remade.
20. Given the findings as to credibility are to be made and evidence to be called, I deem it appropriate in accordance with the Senior President's Practice Direction to remit the matter to the First-tier Tribunal for a de novo hearing on the issues.

Notice of Decision

21. The decision of the First-tier Tribunal should be set aside to be remade by a further hearing in the First-tier Tribunal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed

Date 9 November 2017

Upper Tribunal Judge King TD