Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01063/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 16th May 2017	**On 19th May 2017**

Before

Mr Justice Nicol
Deputy Upper Tribunal Judge Chapman
Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MASOOM MUSAVER ALI
(no anonymity order made)

Respondent

Representation:

For the Appellant: Ms A. Holmes, Home Office Presenting Officer
For the Respondent: Mr P. Richardson, counsel instructed by Pasha Law Chambers

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department ('SSHD') against the decision of First-tier Tribunal Judge ('FtTJ') Ms Boylan-Kemp who, in a decision dated 11th November 2016 allowed the appeal of the Respondent, Mr Masoom Musaver Ali, against the decision of the SSHD on 31st December 2015 to refuse the Respondent's application for indefinite leave to remain.

2. Permission to appeal was granted by FtTJ Omotosho on 28th March 2017.

3. At the conclusion of the appeal we announced our decision. We allowed the appeal. We remitted the matter to the First-tier Tribunal for a hearing *de novo*. We said we would give our reasons in writing. This we now do.

4. The Respondent is an Indian national who was born on 4th May 1984.

5. The Respondent was granted entry clearance from 22nd December 2005 to 31st May 2007. He came to the UK on 19th January 2006. He was granted leave to enter as a student. Leave to remain in that capacity was subsequently extended to 30th April 2009. He applied unsuccessfully for leave to remain as a Tier 1 Post Study Worker. However, a second application for leave to remain, also as a Tier 1 Post Study Worker, was grated valid from 15th June 2009 - 15th June 2011. In 2011 he applied for, and was granted, leave to remain as a Tier 1 General Migrant. That was granted until 17th June 2013. On 7th June 2013 he applied for this leave to be extended and his application was granted so that his leave as a Tier 1 General Migrant continued until 17th June 2016.

6. On 31st December 2015 the Respondent made a human rights application for indefinite leave to remain on the basis of 10 years long residency in the UK.

7. No issue seems to have been taken with the Respondent having been in the UK for 10 years. However, the SSHD referred to paragraph 276B(iii) which required that the applicant did not fall for refusal under general grounds of refusal. The SSHD said that the Respondent did fall for refusal under paragraph 322(2) and (5). These say:

> '322 grounds on which leave to remain should normally be refused…
>
> (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave…
>
> (5) the undesirability of permitting the person concerned to remain in the UK 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'.

8. In essence the SSHD said that these rules were engaged because of discrepancies between information which the Respondent had supplied to the Home Office in support of his application for an extension as a Tier 1 General Migrant in 2011 and

for the further extension in 2013 [the refusal letter said 2011, but in context that must be a typographical error] on the one hand and information which he provided in his tax returns to Her Majesty's Revenue and Customs ('HMRC') on the other.

9. To the Home Office he said that from March 2010 to February 2011 he had earned £36,087.39. £22,700.00 of this was said to have come from self-employed earnings made through Masoom Ltd. When he applied in 2013 for an extension as a Tier 1 General Migrant, he said he had earned £36,738.33 between June 2012 and May 2013. Again the bulk of this, £20,795.00 had been from self-employed earnings. This time they were made through Ali Engineering Associates.

10. The reporting periods did not precisely match the tax years, but the figures reported initially to HMRC were as follows:

    Tax year 09/10 total income £16,610

    Tax year 10/11 total income £12,705

    Tax year 11/12 total income £12,320

    Tax year 12/13 total income £10,716

    Tax year 13/14 total income £30,874.

11. These figures cast doubt on the figures which had been reported to the Home Office.

12. The on-line filing records of HMRC showed that on 29th December 2015, and so 2 days before the application was made for indefinite leave to remain, amendments were made to the tax returns. The Respondent explained to the Home Office that he had wished to add in money which he had had from employment with Lidl. In a later telephone call, he said that he had spoken to his present accountants who had told him that he also needed to report to HMRC his self-employed earnings. The respondent told the Home Office that he had not previously been aware of the need to declare such income. He said his previous accountants had not told him he had to do so. The Home Office was not satisfied with this explanation. It thought that it was implausible that someone who had genuinely owned 2 businesses over a 5 year period earning at least £20,000 profit would have been unaware of the need to declare self-employed earnings to HMRC. It therefore concluded that the Respondent had made false representations in his application to obtain leave to remain in the UK and the present application should therefore be refused under paragraph 322(2).

13. The SSHD took the view that the Respondent had used deception to obtain leave to remain in the UK and his actions were in direct conflict with the maintenance of effective immigration controls and the public interest more generally. His presence in the UK was not conducive to the public good because his conduct made it undesirable to allow him to remain in the UK. His application for indefinite leave was therefore also refused under paragraph 322(5).

14. The Home Office considered whether he was nonetheless entitled to be granted leave to remain as a result of Article 8 of the European Convention on Human Rights ('ECHR') and decided that he was not.

15. On 5th January 2016 the SSHD also curtailed the Respondent's remaining leave to remain in the UK.

16. In his grounds of appeal to the FTT, the Respondent said in essence that he had not used deception.

17. The Respondent gave evidence before the FtTJ. The FtTJ, in her determination at [14] said she did not find the Respondent to be 'particularly credible'. She added,

> 'I also did not accept his assertion that his accountants were professionally negligent as he has failed to report them to any professional body and has not pursued any further action against them, despite their alleged involvement in the dissolution of his two companies; I find that this lack of action undermines his allegations on these matters. I further do not accept as credible his evidence that he was unaware of the need to declare his self-employment income for taxation purposes until he appointed his new accountants, as he has been a business man in the UK for the past five years and so would be likely to be aware of the basic taxation laws and requirements of the UK as a result. Finally, I am in agreement with Mr Sarwar [the HOPO] in his submission that the appellant's actions in contacting the HMRC on 29 December 2015 was most likely a direct result of his receiving immigration advice in October 2015, and so I find that this was done so as to ensure that his affairs were in order before submitting his application on 31 December 2015.'

18. It seems, although it is not entirely clear, that the FtTJ found that there had been no deception *of the Home Office* because the Respondent had earned the sums which he told them in his applications of 2011 and 2013. Without apparently any comment from counsel representing the Respondent, the FtTJ went on to consider whether the Respondent's dealings with *HMRC* justified refusal of his application for ILR. Before us, Mr Richardson for the Respondent accepted that, in the circumstances, the Respondent could not now complain that the area of debate had widened in that respect. The FtTJ concluded that they did not justify refusal.

19. Her reasons seem to have been as follows:

    a. HMRC had not taken any action against the Respondent because of his late disclosure of his earnings and a payment plan had been agreed for the recovery of the remaining outstanding monies. HMRC had imposed no penalty because of the tardiness in declaring the earnings. The matter had not been referred to the police.

    b. On the date of the application for ILR, the Respondent's tax affairs were thus in order.

c. She said at [16] 'there is insufficient evidence to discharge the burden of proof that the [respondent's] failure to make previous disclosures to the HMRC was dishonest or equated to an offence of tax evasion, or that it was done with the intention of obtaining leave to remain as he declared his earnings to the [appellant] in these applications and these earnings have been accepted by the HMRC. Therefore, I find that on the evidence before me paragraph 322(2) is not satisfied.'

d. She said at [17] 'Mr Coleman [counsel who then appeared for the Respondent] submitted that the late payment of income tax cannot cross the necessary threshold for his provision [We assume, without demur from the parties before us, that this is a typographical error for 'this' provision referring back to paragraph 322(5) which the FtTJ was addressing in this paragraph] as the general guidance is that a short custodial sentence is unlikely to satisfy this threshold. Therefore, as the [Respondent] has declared his income and as the HMRC have taken no further action and have agreed to an ongoing payment plan in order to recover the outstanding amount, then I am in agreement with Mr Coleman that despite the [Respondent]'s previous behaviour not being as transparent as it should have been that this, in itself and in light of his actions to remedy the situation prior to submitting his application, is not sufficiently serious so as to meet the threshold.'

e. Paragraph 322(5) was a discretionary exclusion and it was not fair to exercise it against the respondent.

20. The FtTJ also held at [20] that, since the Respondent had lived in the UK for 10 years and had a family and a business here, Article 8 was engaged, the Respondent satisfied the Immigration Rules and refusal of the application by the SSHD would be disproportionate.

21. The SSHD submits that the decision of the FTTJ was infected by error of law.

a. There was no guidance or judicial authority to justify the comment that a short custodial sentence was insufficient to satisfy the threshold of the rule. On the contrary, the relevant Home Office guidance says that a person does not need to have been convicted of a criminal offence for the provision to apply.

b. The judge gave no consideration to paragraph 276B(ii) which says,

> 'having regard to the public interest, there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his….(c) personal history, including character, conduct ….'
>
> The SSHD submits that, even if the Judge was right to find that the respondent's evasion of tax was not sufficiently serious to engage paragraph 322(5), then it was still relevant to what is submitted to be the

lower test in paragraph 276B(ii) and the Judge erred by not considering this aspect of the rule.

22. Under cover of a letter dated 4th May 2017 the Respondent's solicitors submitted a Rule 24 response. Relevant to the grounds of appeal, this submitted as follows:

    a. The guidance to which Mr Coleman and the FtTJ referred was 'General Grounds for Refusal: Section 4 of 5: considering leave to remain' published on 10th April 2017. Paragraph 322(5) is considered at page 34 and says,

    > 'the main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans. A person does not need to have been convicted of a criminal offence for this provision to apply. When considering whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control.'

    b. The Respondent argued that there was nothing comparable in his behaviour.

    c. Since paragraph 22(5) did not apply, nor, too, could paragraph 276B(ii) which uses very similar language. The Respondent did not accept that paragraph 276B(ii) set a lower test.

    d. The FtTJ had not found tax evasion by the Respondent, only late payment of tax.

23. In our judgment the r.24 notice and the Guidance to which it refers does not meet the first ground of appeal. In her decision the FtTJ referred to Mr Coleman's submission that, 'as the general guidance is that a short custodial sentence is unlikely to satisfy this threshold' and she then appeared to adopt or agree with the submission. The plain fact is there is no such guidance. On the contrary, a custodial sentence of any kind (short or long) is not a necessary condition for applying paragraph 322(5). Indeed, a conviction is not a necessary condition. The FtTJ had therefore been led into error. She either misdirected herself as to the scope of the rule or took into account an irrelevant consideration (namely guidance which did not exist). On this basis alone, the FtTJ's decision included an error of law.

24. We have to decide whether it was a *material* error of law. Mr Richardson accepted that in deciding this issue, we must consider whether her decision would inevitably have been the same, even if there had been no such error.

25. He argued that it would have been the same. She had found that the respondent had not been dishonest in his dealings with HMRC. In paragraph 20 she had

referred to his dealings with the Revenue as 'tax indiscretions …not sufficiently serious to warrant any further action to be taken in respect of them taking the evidence in the round.' Mr Richardson submitted that if the proper guidance is considered then the Respondent's 'tax indiscretions' simply are not comparable.

26. We do not agree. We cannot be sure (even on the balance of probabilities) that her decision would have been the same but for the error of law. Mr Richardson was entitled to stress that the FtTJ did not find the Respondent to have been dishonest in his dealings with the Revenue. However, as we have also set out above, she also rejected his evidence that he was unaware of the need to declare his self-employed earnings. It is not entirely easy to reconcile those two factual findings. Mr Richardson is right to say that there is no distinct ground of appeal based on the incoherence of the factual findings. However, we are entitled to take the whole of the decision into account in asking ourselves whether she would inevitably have come to the same conclusion absent the error of law.

27. Our view is that we cannot find that that is the case.

28. Mr Richardson also argued that the FtTJ's decision could still stand on Article 8 grounds. However, in our view that cannot rightly be seen as a free standing basis for her decision. It was, after all in this paragraph of her decision that she cross referred to her previous findings about the 'tax indiscretions'.

29. In our view the decision of the FtTJ was affected by a material error of law. It had to be quashed.

30. In these circumstances, it is not necessary for us to deal with the second ground of appeal or decide whether there is any difference in the application of paragraph 322(5) and paragraph 276B(ii)(c).

31. Nor did we feel able to redecide the remake the decision on the appeal against the SSHD's refusal of leave ourselves. The difficulty of reconciling the different findings of fact did not allow this. We therefore concluded that the only course was to remit the matter to be heard *de novo* by another FtTJ.

Signed Date 18 May 2017

Mr Justice **Nicol**