



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/22308/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 March 2018

Decision & Reasons Promulgated
On 28 March 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IMRAN AZIZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Home Office Presenting Officer

For the Respondent: Mr R H Rashid of Counsel instructed Marks & Marks Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Pakistan born on 15 February 1983, as the appellant herein.
2. The appellant appeals the decision of the Secretary of State on 8 September 2016 to refuse indefinite leave to remain in the United Kingdom based on long residency.

3. The appellant arrived in this country on 6 July 2006 as a student and his leave was extended on application until he was granted leave as a Tier 1 (General) Migrant until 21 March 2016. It is recorded in the immigration history that the appellant made a further application on 17 March 2016 which was discontinued on 24 June 2016 as the appellant had made a further application in Croydon.
4. The appellant's application was considered under paragraph 276B - lawful continuous residence for ten years. However the Secretary of State was of the view that inconsistent tax records had been put forward in relation to the appellant's claimed earnings in the tax year ending in 2011. In the appellant's application of 7 March 2011 it had been stated that he had previous earnings of £36,848 and an accountant's letter had been submitted in relation to those earnings. The appellant was accordingly awarded 20 points. However the decision continues:

"Information held on your earnings declared to HMRC for the tax year 2010/11 confirmed the following:

HMRC confirmed for the tax year ending April 2011 your income from all sources was £10,204. This comprised of only self-employed earnings, HMRC records show you had no other earnings during the 2011/12 tax year.

In the light of the inconsistency it was considered that the appellant had used deception in his previous application for an extension of leave in 2011."

5. The Secretary of State took the view that the appellant had not declared his earnings correctly and his application was accordingly refused under the general grounds of refusal (paragraph 276B(iii) and paragraph 322(5)). The appellant appealed against the decision and his appeal came before a First-tier Judge on 12 July 2017. The appellant was represented by Mr Rashid and the Secretary of State was represented by a Home Office Presenting Officer (M Hussain). The judge records in paragraph 6 of his determination that the appellant gave evidence in English and identified his statement at pages 1 to 4 in the appellant's bundle and that the contents of the statement were true. The judge further records that the appellant was not cross-examined on this material. In paragraph 7 the judge set out the submissions of the parties as follows:

"7.1 I heard a submission from the Home Office Presenting Officer, which I have recorded in my notes from the proceedings. Information received from the HMRC differed to that from the appellant.

7.2 The appellant's deception had been proved by the HMRC witness statement from dated 20 August 2016 of the appellant's details for the Tax Year 2010/11 which stated:

Tax Year	Description of Trade	Accounting Period Ending	Turnover/Sales/Gross Profit	Taxable/Net Profit after Expenses/Tax
----------	----------------------	--------------------------	-----------------------------	---------------------------------------

				Adjustments
2010-11	IT Consultant	05/04/11	£10204.00	£6848.00

I produce at SMITH-0001-SA Calculations - **AZIZ Imra** Screen Prints of the Tax Calculation details for Tax Years 2010-11 to 2012-13.

- 7.3 I heard submissions from the appellant's representative, which I have recorded in my notes of the proceeding.
- 7.4 My attention was drawn to the appellant's name, which is Imran Aziz. The name under the HMRC details shows **ASIZ Imra** (see paragraph 7.1 above). One might only speculate whether this accounts for the inconsistency."
6. Having reviewed the reasons for refusal in the context of the evidence before him and the submissions made the judge concluded his determination as follows:
- "8.4 The appellant's bundle includes an HMRC form SA302 (page 13 in the appellant's bundle) which was sent by HMRC to the appellant by letter dated 11 October 2011 (page 12 in the appellant's bundle). This shows the appellant's profit for the year ended 5 April 2011 from self-employment as £36848.00 a deduction of his personal allowance of £6475.00 making the net sum on which tax was due as £30373.00. It also shows Income Tax and Class 4 National Insurance contributions of £8565.24.
- 8.5 I have considered whether the evidence supports the respondent's case.
- 8.6 The information received by the respondent from HMRC (Section F and G in the respondent's bundle) and the appellant's evidence (pages 12-18 in the appellant's bundle) do not agree. Both cannot be right.
- 8.7 The best evidence from the previous application made on 7 March 2011, which stated the earnings of the appellant as £36848 for the period 1 May 2010 to 12 February 2011, is the original application itself which the respondent has not produced.
- 8.8 I assessed the evidence in the round and assessed the appellant's credibility. The appellant's evidence in a [sic] straightforward. The appellant was not cross-examined. His evidence was not challenged.
- 8.9 The consequence of the immigration decision will be to expel the appellant from the United Kingdom until he secures entry clearance under appendix FM to the immigration rules. In the same way that it is in the public interest to exclude people who do not meet the immigration rules so that effective immigration controls can be maintained, there can be no public interest in excluding someone who does meet the requirements because to do so would be to introduce arbitrariness contrary to the rule of law.

8.10 Mr Hussain's submissions were limited – see 7.1 and 7.2 above. He was not authorised to concede the appeal.

8.11 I find that the Secretary of State has not discharged the evidential burden of proving dishonesty on the appellant's part.

8.12 I accept the appellant's analysis and evidence.

8.13 This is a case where the appellant meets all the requirements of the immigration rules. The evidence and legal argument that I have accepted show the appellant met and meets all the criteria for indefinite leave based on long residency."

7. The judge accordingly allowed the appeal under the Rules.
8. The Secretary of State appealed arguing that the First-tier Judge had given inadequate reasoning for his decision. He had failed to resolve the conflict between the appellant's evidence and the respondent's evidence. The judge had noted that the appellant's previous application had not been produced but the Presenting Officer had applied for an adjournment to produce the application as it was not on the file. The Presenting Officer's minute was referred to. This adjournment request had not been noted. No proper reasons had been given for refusing the adjournment request.
9. In ground 4 it was argued that the judge had given no reasons for accepting the appellant's analysis and evidence in paragraph 8.12. It was difficult to understand why the appellant had won his case and why the respondent had lost in the light of the lack of reasoning and the brevity of the decision. Clear findings should have been made. Permission to appeal was granted by a Designated Judge of the First-tier Tribunal. A comment was made on paragraph 5.1 of the decision where the judge had said that the appellant had entered the UK in 2016 as a student which could not give rise to long residence. There had been no reference to the relevant legal framework.
10. Mr Mills relied on the grounds and submitted that there had been a complete lack of reasoning and there was procedural unfairness in that the application for the adjournment had not been recorded. Reference was made to the Presenting Officer's minutes.
11. Counsel pointed out that the judge had had the benefit of the appellant's witness statement. The appellant had not been cross-examined on that statement. The facts were undisputed. The reference to 2016 for the date of arrival of the appellant was clearly a mistake and reference to 2006 was plainly intended. It was not the appellant's recollection that there had been an adjournment application at the first

hearing. Counsel recognised the difficulty about giving evidence of what had occurred at that hearing.

12. Mr Mills referred to the Presenting Officer's minute which it is convenient to set out here:

"App present and adopted his WS.

Rep stated that HO have not provide a copy for the 2011 application made by app, I said form not on this file but we can have matter adj to obtain and serve that form, judge said we can deal with the matter without the form

Subs made on HMRC WS and submitted appellant has used deception, app not meet 10 years residency as he has used deception in previous application to HO. Fees

Reps argue that the HMRC WS is not correct as its figure do not tally up. The WS states his gross profit as £10204.00 and appendix g which is SA302 shows £6848.00. they also say that HMRC is not clear where they got figures."

13. Reference was made to an accountant's letter of 6 June 2016 in which the accountant said that they had prepared the financial statement for the year ending in February 2011.
14. The accountant stated

"We understand that Mr Imran has given correct figures (£36,848) about his income to HMRC 2011. Please see HMRC's SA302 of 2011. We further understand that Mr Imran has paid proper tax on his declared income.

The reason for this letter is to confirm that Mr Aziz's income were incorrectly calculated and submitted by us mistakenly after he declared his correct income of £36,848 to HMRC. We investigated the matter and found that this was due to a software as well as human error. Error was made by one of our 'sub-contractor employee' at that time. He mixed his both year expenses in one year. Actually error was made during my absence due to my annual leave.

After that required procedure was followed to rectify the error and Mr Imran's records (income/payment of all taxes) are now updated with HMRC.

I further confirm that Mr Aziz was not in any way at fault and we (our sub-contractor) had made an administrative error when submitting his online tax returns. Therefore, Mr Imran has not previously been dishonest in his dealings with HMRC and/or UK Visas and Immigration. ..."

15. Mr Mills acknowledged that if the judge had accepted the accountant's letter he could have allowed the appeal but he was unclear why it had not reached HMRC.
16. Counsel referred to the witness statement. A mistake had occurred for which the appellant was not responsible. The accountant's letter set out the position. It had been open to the Presenting Officer to cross-examine the appellant and no submissions had been made about the accountant's letter.
17. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law. Although the decision is a short one the judge makes it clear that he had had regard to the material before him and had considered the submissions made both orally and in writing. In granting permission to the Secretary of State the Tribunal referred to what is clearly a typographical mistake in paragraph 5. It is clear in paragraph 5.1 that the reference to the appellant's arrival in 2016 rather than 2006 was merely a typographical mistake.
18. The key complaint is that the determination is inadequately reasoned. While it is brief, in my view it is none the worse for that. The judge refers to the material before him and reminds himself of the burden of proof in cases where the respondent alleges deception.
19. I have had regard to the Presenting Officer's note. However it does appear that the appellant was not cross-examined by the Presenting Officer: the contrary is not stated in the note provided. I am unable to see any procedural flaw or unfairness in this case. The note raises the question of an adjournment but appears to fall short of recording a formal application for one which may explain why the appellant has no recollection of it. In any event it was up to the Secretary of State, the burden being on the Secretary of State, to provide the Tribunal with the material on which reliance was placed. It would have been open to the Presenting Officer to cross-examine the appellant and this was not done. I am not satisfied there was any procedural unfairness and in recording the fact that the Presenting Officer was not authorised to concede the appeal I see no misrepresentation of the position. In cases where the burden is on the Secretary of State a failure to cross-examine the appellant on his detailed witness statement is not unlikely to have the outcome that occurred in this case. As Counsel submits the judge accepted the appellant's analysis of the evidence and the evidence itself. The appellant's account includes a detailed critique of the Secretary of State's approach. The appellant makes it clear that on 17 March 2016 he submitted an application for indefinite leave to remain and that he varied this application in person on 24 June 2016 paying a fee of £2,375 to get a decision that day. The appellant was not contacted thereafter despite a letter having been written by the appellant on 8 July 2016. The appellant had made no false representation to the Home Office or any government department. An error had occurred in the past which was an error of his accountant. He had not submitted an accountant's letter with his application as such a letter was not required under the particular Rule. He would have submitted the letter had he been asked for it.

20. It is quite clear that the judge accepted the appellant's evidence and he was not challenged in cross-examination. The judge's approach was not unfair. It was open to the judge to find on the evidence before him that the Secretary of State had not discharged the burden of proof. Although the determination is short it is clear in my view why the Secretary of State lost and why the appellant was successful.
21. The appeal of the Secretary of State is refused and the decision of the First-tier Judge is confirmed.

Anonymity Order

The First-tier Judge made no anonymity order and I make none.

TO THE RESPONDENT
FEE AWARD

The judge made a whole fee award of £140 which is confirmed.

Signed

Date 27 March 2018

G. Warr, Judge of the Upper Tribunal