



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/01493/2014

THE IMMIGRATION ACTS

Heard at Field House  
On May 18, 2015

Decision and Reason Promulgated  
On May 20, 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JABER ALI MIR  
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)

For the Respondent: Mr Aslam, Counsel, instructed by Bedfords Solicitors

DETERMINATION AND REASONS

1. Whereas the original respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The Appellant is a citizen of India. On January 27, 2009 the appellant was granted leave to enter the United Kingdom as a student until August 31, 2010. On December 24, 2010 he was leave to remain as a Tier 1 (Post Study Work) migrant until December 24, 2012. On March 31, 2011 he applied to remain as a

Tier 1 (General) Migrant until March 31, 2013. On March 18, 2013 he applied to remain here as a Tier 1 (General) Migrant but the respondent refused this application under paragraphs 39B(c), 322(1A) and (2) HC 395.

3. The appellant appealed that decision on December 24, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002. The matter came before Judge of the First-tier Tribunal Pears (hereinafter referred to as the "FtTJ") on January 29, 2015 and in a decision promulgated on February 10, 2015 he allowed the appeal under the Immigration Rules and in the alternative he found the decision was not in accordance with the law.
4. The respondent lodged grounds of appeal on February 13, 2015 submitting the FtTJ had erred by failing to give adequate reasons for the finding the respondent had failed to demonstrate the appellant had acted dishonestly and secondly by making the alternative findings he did. Designated Judge of the First-tier Tribunal Murray found there was an arguable error in law for the reasons raised.
5. The matter came before me on the above date and the parties were represented as set out above.
6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order

### **SUBMISSIONS ON ERROR IN LAW**

7. Mr Avery adopted his grounds of appeal and argued the FtTJ erred in his whole approach to the issue of whether the appellant had been dishonest:
  - a. His approach to the issue of whether there was a deception was baffling because on the one hand the respondent was criticised for the way in which she made enquiries but she was then criticised for making those enquiries.
  - b. The appellant accepted the figures given to the HMRC on his tax returns were significantly lower than the income claimed by the appellant. In those circumstances the respondent examined his income from his self-employment in more detail and the respondent took steps to contact the appellant's clients but was unable to verify the information. The respondent demonstrated that the appellant had been dishonest in declaring his income and the FtTJ erred by failing to find that the appellant was dishonest.
  - c. The appellant may have provided his explanation but how credible was it the appellant would believe he did not need to declare an income that led to him having to pay an additional £17,242 in tax? Mr Avery submitted it lacked credibility that this was a misunderstanding and the FtTJ erred by accepting his explanation.

- d. The FtTJ had accepted in paragraph [34] that the respondent's conclusions were appropriate but then found the respondent failed to show reasonable cause to doubt the genuineness of the dispute invoices or that she had taken reasonable steps to verify the documents. These findings conflict.
  - e. The FtTJ failed to examine the seven invoices and only had regard to one of them and he then accepted, without any other consideration, the appellant's explanation. His findings in paragraph [36] of his determination are unsustainable and the FtTJ failed to give any explanation for his findings.
  - f. The FtTJ further erred in making an alternative finding that the decision was not in accordance with the law in circumstances when the FtTJ himself accepted the respondent's conclusions were appropriate.
8. Mr Aslam submitted the arguments advanced today went far and beyond the grounds of appeal. The only ground of appeal was that the FtTJ had failed to give adequate reasons for finding the respondent had not demonstrated the appellant had acted dishonestly. The FtTJ had addressed this issue in his determination in paragraph [34] when he accepted the appellant proffered an innocent explanation. The FtTJ gave his reasons and in the circumstances there was no merit to the ground of appeal pleaded. He submitted that Mr Avery was now seeking to challenge the FtTJ's approach to the whole issue when the respondent's challenge had been to the FtTJ's finding the respondent had failed to demonstrate the appellant was dishonest. As regards the disputed invoices the FtTJ considered the evidence and found discrepancies in the respondent's paperwork. The appellant had produced evidence that demonstrated his figures were accurate and he preferred the appellant's evidence.
9. I reserved my decision.

#### **CONSIDERATION AND FINDING ON MATERIAL ERROR OF LAW**

10. In considering whether there has been an error I remind myself of the grounds of appeal and the reason permission was given.
11. Paragraph [2] and [3] of the grounds read-
- "2. The S of S checked the income details with HMRC and found them to be at variance with HMRC records-see paragraphs 7 and 18 of the determination.
3. The Immigration Judge has made a finding at paragraph [34] that the appellant has not been dishonest and the S of S has failed to meet the burden on her to show that the appellant acted dishonestly. It is submitted that entirely inadequate reasons have been given for this finding. Such a failure to give adequate reasons is a material error in law"
12. In giving permission to appeal Designated Judge of the First-tier Tribunal Murray found there had been an arguable error because by "under-declaring"

his income to save tax the appellant had acted dishonestly and this amounted to an error.

13. Mr Aslam took issue with the permission on two grounds. Firstly the judge referred to the wrong paragraph and secondly, and more importantly, he submitted the appellant had never accepted he had under-declared his income to save tax.
14. There appears no dispute that the figures provided to the respondent on income were considerably higher than the figures provided to HMRC. The respondent refused the application under paragraph 39B(c) HC 395. This states-

“If the Entry Clearance Officer or Secretary of State has reasonable cause to doubt the genuineness of any document submitted by an applicant which is, or which purports to be, a specified document under these Rules, and having taken reasonable steps to verify the document is unable to verify that it is genuine, the document will be discounted for the purposes of this application.”
15. The respondent then went onto refuse the application under paragraphs 322(1A) because-

“... false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant’s knowledge), or material facts have not been disclosed, in relation to the application, or in order to obtain documents from the Secretary of State or a third party required in support of the application.
16. The respondent refused it under the discretionary ground contained in paragraph 322(2) which states leave to remain should normally be refused where

“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.”
17. Although the FtTJ was provided with additional material on the day of the hearing the decision he had to make centred on the appellant’s actions and his decision to provide the respondent and the HMRC with different figures. He had to decide whether the appellant had acted dishonestly.
18. He correctly reminded himself that the respondent bore the burden to show the appellant had acted dishonestly and she had to show this on the balance of probabilities.
19. The starting point for the FtTJ had to be the application form dated February 4, 2011. The appellant completed this form and stated at [K4] his source of income for self-employment purposes between October 4, 2010 and February 4, 2011

was £36,481. In support he produced his bank statements, accountant's letter and business invoices.

20. However, when the respondent checked his income with HMRC she discovered for tax year 2010/2011 he disclosed £4,634 from his self-employment at the Surgery and £1,731.42 from other employment. For tax year 2011/2012 he disclosed £6,114 from his self-employment at the surgery and £1,071 for other employment. These figures cast doubt over his declared earnings in his 2011 application form and of course it followed that if the HMRC figures were the correct figures he would not have scored the points claimed in [K7] on his 2011 application form.
21. The respondent considered the appellant's income and accepted the salary of £7,661.57 from the Surgery was accurate but she took issue with the £29,607.45 he claimed to have earned from his self-employment activity and gave her reasons why she only accepted his income as £19,017.45. In short, she had been unable to confirm some of the invoices and consequently she discounted them. The respondent ignored the disputed seven invoices under paragraph 39B HC 395 and the result was a reduced net profit of £17,793. This figure together with the salary of £7,661.57 gave a total of £25,454.57 and only entitled the appellant to 5 points.
22. The FtTJ recorded at paragraph [18] of his determination that the appellant did not dispute the respondent's claim he had submitted figures to the HMRC that were significantly lower. The FtTJ accepted in paragraph [34] that based on her enquiries with HMRC her conclusions were appropriate.
23. The respondent refused the application because she believed the appellant had submitted a false document.
24. However, in assessing whether there had been any dishonesty the FtTJ had to consider what the appellant submitted to the respondent as distinct from what had been submitted to HMRC.
25. On the evidence the FtTJ was satisfied the figure on the application form was correct. He explained his reasoning in his determination.
26. If the FtTJ had concluded the evidence submitted on or with the application form had been false then he would no doubt have reached a different conclusion.
27. The penalty for understating his income to HMRC was a financial penalty but as this was not something submitted to the respondent to support his application this is not a document the FtTJ had to concern himself with.
28. The FtTJ preferred the evidence of the appellant to that of the respondent as to the appellant's income. That was a conclusion he was entitled to reach. His finding is not perverse. He importantly accepted the appellant's income was as

claimed on the application form. There was nothing in the papers submitted to the respondent that indicated, based on the FtTJ's findings, the appellant acted dishonestly.

29. I accept the respondent quite properly refused the application when it was submitted because there were issues between the form submitted to her and that submitted to HMRC. The whole point of an appeal process is to deal with matters such as those raised in the refusal letter. The appellant addressed the concerns to the FtTJ's satisfaction and in doing so the FtTJ was entitled to reject the respondent's submissions that the application should be refused.

### **DECISION**

30. There was no material error. I uphold the FtTJ's decision.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

### **TO THE RESPONDENT FEE AWARD**

I make no fee award for the reasons given by the FtTJ.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis