



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02819/2014
IA/02816/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 24th July 2014

Determination Promulgated
On: 30th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

GM
JM

Appellants

and

Secretary of State for the Home Department

Respondents

For the Appellant: -

For the Respondents: Mr Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are both nationals of Zimbabwe. They are husband and wife. They have permission to appeal against the decision of the First-tier Tribunal (Judge Hindson) who on the 27th March 2014 dismissed their linked appeals against decisions to refuse to vary their leave to remain, and to remove them from the United Kingdom pursuant to s47 of the Immigration, Asylum and Nationality Act 2006.
2. The Appellants had applied for indefinite leave to remain on the 13th July 2013. They had both been lawfully in the United Kingdom since 2008. The focus of this appeal is Mr M; his wife is his dependent. He had initially been granted leave to enter as a Highly Skilled Migrant and on the 9th April 2010 applied to vary that leave so as to gain

further leave to remain as a Tier 1 Highly Skilled General Migrant. That application was successful and on the 21st July 2010 he was granted a further three years leave to remain. He was in possession of that leave when on the 10th July 2013 he made his application for settlement.

3. The application was refused by way of letter dated the 19th December 2013. Therein the Respondent states that when Mr M applied to extend his leave as a Highly Skilled Migrant in 2010 he had claimed to be earning £50,386 net from his self-employment. On the basis of those earnings the Respondent had awarded him 45 points. During the consideration of the present application the Respondent had conducted checks with HMRC and found that the Appellant had failed to submit any tax returns for the period 2008-2009, the period under consideration in the 2010 application. It was therefore considered that the Appellant had made false representations in the course of his 2010 application, and that meant that this application had to be refused with reference to paragraph 322(2) of the Immigration Rules.
4. When the appeal came before the First-tier Tribunal it was on the papers. Both Appellants had lodged lengthy grounds of appeal dealing with the allegation of deception, the merits of the present application, and Article 8. In respect of this last matter there was for instance a statement from Ms M explaining that she has lived here since she was 16 years old, has numerous family members here, that she has been educated in this country to Masters level and has held a series of executive positions including latterly with Coco-Cola as a procurement manager. In respect of the allegation of deception, Mr M agreed that he had been tardy in submitting his tax returns but submitted that he had told the truth about his self-employed income in 2010 and had now sent in all the returns. Although he blames a "tax consultant" named Mr W, whom he had instructed for not filing the returns, he does accept that the statement from HMRC relied upon by the Respondent is factually correct.
5. The First-tier Tribunal deals with the deception issue as follows:

"the appellant claims now he is taking the necessary steps to correct the position. He says that all of his tax returns have now been submitted to the tax authorities. He has provided documents which have been downloaded from HMRC which are not entirely clear but which do seem to support his contention that he has now submitted tax returns for the years 08/09, 09/10, 10/11, 11/12, and 12/3. However the appellant has not provided me with copies of his actual tax returns.

I therefore have no evidence to support the appellant's contention that he earned a net income in excess of £50,000 from self-employment prior to making the application in 2010. Given that this is fundamental to the reasons for refusal, I would have expected the appellant

would have provided the evidence, if such evidence actually exists

Drawing all the evidence together, I make the following findings. I do not believe the appellant's story about the mysterious Mr W. I am satisfied that the appellant deliberately did not submit tax returns. This is because he was not in fact earning what he claimed from self-employment. I am therefore satisfied that the application was rightly refused under the provisions of paragraph 322(2) and consequently under paragraph 245CD(b)"

6. The grounds of appeal, drafted by the Appellants, argue that the First-tier Tribunal made a number of factual errors, failed to consider relevant evidence and erred in its approach to the deception allegation. In particular the Appellant submits that when he elected for his appeal to be disposed of on the papers he had presumed that all of the relevant documents, supplied with his 2010 application, would be provided with the Respondent's bundle. He knew that to include, amongst other things, two separate sets of accounts signed by members of the Institute of Chartered Accountants of England and Wales. He had thought that this would be sufficient to show that he had not lied at all about his claimed income.
7. In response the Respondent maintains that the HMRC statement showing no tax paid in respect of the Appellant's self-employment was sufficient to demonstrate deception on his part.

Error of Law

8. The burden of proof rests on the Appellant to show that he today qualifies for settlement in the UK. The only ground for denying him that grant of indefinite leave to remain is the allegation that he deceived the Home Office in 2010 when he told them that his net income from his business was £50,386. The burden of proof in establishing that deception lies on the Respondent, and the standard of proof is the balance of probabilities. The Respondent must produce cogent evidence to discharge that burden.
9. Before the First-tier Tribunal the only evidence relied upon by the Respondent was a statement by HMRC which shows that although registered for tax, the Appellant submitted no tax returns in respect of his self-employment for the years under consideration. All that shows is that he did not submit his tax returns. Whilst that is in no way to be condoned, I struggle to see how that demonstrates that he was lying when he told the Home Office that he earned £50,386 in the relevant year. Lots of people earn money without submitting their tax returns on time; they have still earned the money. It may be that with more evidence the burden could be discharged, for instance if the application form submitted in 2010 showed the Appellant to have asserted that he had paid the tax on time, or if the rules under which he applied expressly required him to have done so. However none of that evidence was produced. The Judge appears to

have given no consideration to the fact that the Respondent had granted leave in 2010 and must therefore have been satisfied that the Appellant merited his 45 points under Appendix A. This strongly suggests that the Appellant must have submitted some evidence of his earnings – for instance in the form of certified accounts and/ or bank statements. I find that the HMRC statement was not in itself sufficient to discharge the burden of proof in showing deception – as opposed to late payment of tax - and for that reason the First-tier Tribunal erred in law.

10. This matter should be re-made in the First-tier Tribunal. If the Respondent wishes to maintain the refusal under paragraph 322(2) she will no doubt wish to adduce further evidence to support her contention that the Appellant exercised deliberate deception in 2010. If the Respondent fails to discharge the burden of proof in respect of the false representations, the burden will fall to the Appellant to show that he qualifies for leave to remain.

Decisions

11. The decision of the First-tier Tribunal contains an error of law and it is set aside.
12. Due to the extent of judicial fact finding required the matter is remitted to the First-tier Tribunal.

Deputy Upper Tribunal Judge Bruce
25th July 2014