Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26099/2015
IA/26102/2015
IA/26103/2015
IA/26104/2015
IA/26107/2015
IA/26109/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 24 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLOLADE TAIWO ABULATAN
DAVID OLANIRAN ABULATAN
DANIEL BOLUWATIFE ABULATAN
SOLO MON ABULATAN
SAMUEL OLUWASEYI ABULATAN
ESTHER TEMILOLUWA ABULATAN
(ANONYMITY DIRECTIONS NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondents: Mr A Adewoye of Prime Solicitors

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Amin promulgated on 30 November 2016 allowing each of the appeals of the Appellants

© CROWN COPYRIGHT 2017

against decisions of the Respondent dated 7 July 2015 refusing indefinite leave to remain and making removal directions pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Although before me the Secretary of State is the Appellant and the members of the Abulatan family are the Respondents, for the sake of consistency with proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and the members of the Abulatan family as the Appellants. Indeed, for the main part I shall be making reference to the First Appellant as the issues in this appeal as they presently stand essentially focus around her circumstances and her economic activity: accordingly references below to the Appellant are to the First Appellant unless otherwise indicated.

3. The personal details of the Appellants are a matter of record on file and it is unnecessary for me to set them out in detail here.

4. The principal Appellant, accompanied by her family, entered the United Kingdom in January 2010 with entry clearance as a Tier 1 (General) Migrant with leave valid until 24 September 2012. On 12 September 2012 she made an application for further leave to remain which was granted on 13 February 2013 valid until 13 February 2015. The other Appellants were granted leave in line. On 4 February 2015 the Appellant applied for indefinite leave to remain. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 7 July 2015 with reference to paragraphs 245CD(b), 322(1A), and 322(2) of the Immigration Rules. The other Appellants were refused 'in-line' with reference to paragraph 319J of the Immigration Rules.

5. The basis of the Respondent's decision in respect of the Appellant related to the information that she had provided in connection with the application for variation of leave made on 12 September 2012. It was noted in the RFRL that in the context of that application she had stated that her previous earnings for the period from 1 September 2011 to 31 August 2012 totalled £35,059.43. The Appellant had submitted an accountant's letter, profit and losses accounts and other documents including invoices, national insurance payments, bank statements and payslips. In particular, in support of her declaration of income the Appellant had submitted accounts prepared on her behalf by a firm of accountants under cover of letter dated 10 September 2012. Those accounts are drafted in a form consistent with the Appellant's declaration and, as stated in the RFRL "*showed that you had total income of £17,646.00 from self employed earnings*"; the RFRL also observes "*the payslips and bank statements showed employed earnings of £17,413.43*".

6. The Respondent, however, in the course of considering the current application made checks with Her Majesty's Revenue & Customs in respect of the Appellant's declared earnings. The HMRC checks turned up the following information. For the tax year from 6 April 2011 to 5 April 2012 the Appellant declared to the Revenue an income from employment of £17,010 and income from self-employment of £292, making a total of £17,302. For the tax year 6 April 2012 to 5 April 2013 she declared to the Revenue an income of £17,368, but a loss in respect of her self-employment of £812. Putting these two sources of information in respect of the tax declarations together, the Respondent reached the conclusion that it could not possibly have been the case that the Appellant had earned from self-employment in the period 1 September 2011 to 31 August 2012 £17,646 as claimed. Indeed, for the whole of the 24 month period between April 2011 and April 2013 she only declared profits of £292 from self-employment, and additionally had declared a loss of £812.

7. In consequence the Respondent came to this conclusion:

> *"It is considered that the self-employed earnings on your previous Tier 1 application were fabricated to present yourself as someone eligible to meet the requirements of the Tier 1 Rules."*

8. In those circumstances the Secretary of State invoked paragraph 322(2) in respect of the past application. The Respondent also took the view that in such circumstances no reliance could be placed on the materials now presented in support of the current application for indefinite leave to remain and accordingly invoke paragraph 322(1A) in respect of the information submitted with the current application.

9. In the context of the issues that now arise in the appeal, in my judgement it is important to be clear as to the implication - or the role - of both the HMRC returns for 2011/2012 and 2012/2013 in the Respondent's analysis and reasoning. It may be seen that if it were to be assumed that the £292 declared in the 2011/2012 tax returns had all been earned during the period covered by the Appellant's declaration for 1 September 2011 to 31 August 2012, i.e. from 1 September 2011 to 5 April 2012, then it would have been necessary for the Appellant to have earned an additional £17,354 in the remaining period from 6 April 2012 until 31 August 2012 to bring her up to her declared total of £17,646. Yet for the whole of the twelve month period from 6 April 2012 the Appellant declared a loss of £812. If it were to be assumed that she did indeed earn something from self employment during 2012/2013 but later made a loss, it would be necessary for her in effect to show that she had made a loss of £18,166 between 31 August 2012 and 5 April 2013 to be able to make a declaration to the Revenue of a loss over the tax year of £812.

10. As I say, the relevance of both of the HMRC returns is critical to the Respondent's reasoning: reasoning which on its face stands up to scrutiny.

11. The Appellant lodged an appeal against the decision of the Respondent. In her grounds of appeal she offered the following by way of explanation for the apparent discrepancy between the declaration made in her application in 2012 and the declarations she had made to HMRC. It was pleaded:

> *"Appellant earned more money after the tax returns and so could not be included in the tax calculations to the HMRC".*

12. I quite simply do not understand that pleading. If it was the case that the Appellant had earned more money after her 2011/2012 tax return, then that would have shown in the subsequent tax return for 2012/2013 - but it quite simply does not given that the figures are as I have indicated.

13. Before the First-tier Tribunal the Appellant relied in part upon a letter from her accountant identifying that the period of the declaration in the 2012 application was not congruent with the tax year. That is factually correct; but again it seems to me that when both tax years are viewed in combination that such an explanation does not begin to explain the discrepancies in the figures.

14. Be that as it may, the Appellant succeeded on her appeal before the First-tier Tribunal under the Immigration Rules. In such circumstances the First-tier Tribunal Judge declined to give consideration to Article 8, which had been raised in the alternative.

15. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 12 June 2017 by First-tier Tribunal Judge Grant-Hutchison stating in material part: *"It is arguable that the Judge has erred in law by failing to make any findings in relation to the tax year 2012/13."* Indeed, Mr Adewoye on behalf of the Appellants today during the course of submissions ultimately accepted that the Judge had indeed made no findings on, or indeed reference to, the Revenue accounts for the tax year 2012/2013. It seems to me that this is a significant concession because, as I have indicated above, the basis of the Respondent's reasoning is premised upon a combination of considering the Revenue returns for both 2011/2012 and 2012/2013.

16. To that extent, and in any event, in my judgment there is a clear error at paragraph 12 of the decision of the First-tier Tribunal. In material part that paragraph is in these terms:

> *"In refusing the current application the Respondent reviewed a previous application dated 12 September 2012 where the Appellant had stated that she had earnings of £35,059.43 but the documentation submitted with that application showed that the Appellant only had an income of £17,646 from self-employed work and £17,413.43 from employed work. On this basis the Appellant was awarded 40 points for total earnings. However, a HMRC check showed that the actual income for the period 1 September 2011 to 31 August 2012 was £17,010 from employment and £292 from self-employed work. The Respondent was not satisfied in the light of these previous declarations that the Appellant had made true declaration of her income on the current application."*

17. The HMRC check did not show that the actual income for the period 1 September 2011 to 31 August 2012 was £17,010 from employment and £292 from self-employment. It is absolutely clear that the Judge has fundamentally misunderstood the basis of the Respondent's reasoning in this regard. This is both evidenced by and compounded by the failure to make any reference to the HMRC return for 2012/2013. Necessarily this means that the consideration of the appeal by the First-tier Tribunal was on a fundamentally erroneous footing, and I find that that circumstance in itself would warrant the setting aside of the decision of the First-tier Tribunal.

18. The Judge then goes on at paragraph 13 to refer to the letter from the Appellant's accountant in respect of the different periods upon which the declaration and the tax returns were based and states that the letter *"clearly sets out why the different accounting periods led to the discrepancy"*. For the reasons I have already given it seems to me that the different accounting periods in no way explain the discrepancy. I find that the Judge's misunderstanding of the nature of the case has clearly been material in the erroneous analysis set out at paragraph 13.

19. Again, at paragraph 14 the Judge makes reference to the tax returns for the period 2011/2012 and sets those against the Appellant's declaration for earnings from 1 September 2011 to 31 August 2012 - but fails to identify the relevance of the subsequent tax year to the reasoning of the Respondent. The Tribunal thereby failed to identify matters to which it should properly have had regard in conducting its own independent evaluation of the appeals.

20. I am further satisfied that the Judge fell into further error over the course of paragraphs 15 and 16 of the decision. Those paragraphs are in these terms:

> *"15. In addition, I have seen the audited accounts from the accountants for the period 1 September 2011 to 31 August 2012 which certifies that the Appellant's income from this period was £35,059.43.*
>
> *16. On the basis of this information I am satisfied that the Appellant did not make false declarations in her 2012 application. There are clearly two different accounting periods in play. The Appellant has provided audited accounts for the period in question; her payslips; HMRC tax returns; P60s and her bank statements to corroborate the income she stated she earned."*

21. The audited accounts from the accountants for the period 1 September 2011 to 31 August 2012 referred to by the Judge at paragraph 15 are the very accounts that the Appellant had submitted with her application in 2012 which the Respondent now implicitly rejected as being part of the Appellant's fabrication of her income at that time. In such circumstances, the very accounts that are in substantial issue in these proceedings cannot in and of themselves stand as probative as to their own validity. The Judge clearly took these accounts into favourable consideration because he states at the beginning of paragraph 16 that it was *"[o]n the basis of this information"* that he was satisfied that the Appellant did not make false declarations. Moreover, later on in paragraph 16 in setting out the materials provided by the Appellant he again reiterates that she provided audited accounts for the period in question. This is a fundamental and serious error such as to warrant the setting aside of the decision.

22. The Judge's reasoning at paragraph 16 is, in my judgment, further unsustainable in the following respects. It is to be noted that the real contentious issue here was in respect of the Appellant's self-employment. As such the payslips which were from employment were not probative one way or the other in respect of the issue of self-employment; nor were the P60s. As far as the bank statements that were before the First-tier Tribunal it is apparent that those bank statements related to the year 2014 and had been submitted in the context of the current application. They were not bank statements that related to the contentious period for which the Appellant had made her declaration in her 2012 application. Accordingly they were of no relevance in determining the particular issue in this appeal. The Judge placed reliance on materials that were not relevant to the issue.

23. That only then really leaves the Judge's reference to "*HMRC tax returns*". The First-tier Tribunal's Decision is silent in respect of any reasons as to how such returns supported the Appellant's case. Nonetheless I note that in this regard it is said that

the Appellant has, since the Respondent's decision, made retrospective declarations to the Revenue seeking, it is said, in effect to correct misdeclarations made previously for the periods 2011/2012 and 2012/2013. This necessarily begs the question that is at the heart of this appeal rather than answering that question.

24. The Appellant's claim in respect of the retrospective declarations to the HMRC might rightly be considered with some suspicion in light of the substance of the Respondent's decision and their timing. Her case has now become that she had misdeclared her income to the Inland Revenue in the years 2011/2012 and 2012/2013. Her case was not remotely formulated in this way in her original grounds, and to that end would require substantially more by way of supporting evidence in order to establish that she had misdeclared her income to the Revenue rather than misdeclaring her income to the Home Office.

25. Moreover the substance of the Appellant's case - that she had correctly declared her income to the Respondent in her application of 12 September 2012 but had wrongly declared her income to the HMRC – formed no part of the First-tier Tribunal Judge's reasoning. Nor were any independently verifiable materials in respect of her self-employment between 1 September 2011 and 31 August 2013 before the First-tier Tribunal.

26. I am entirely satisfied notwithstanding the forceful urging of Mr Adewoye that the First-tier Tribunal fundamentally misunderstood the basis of the Respondent's decision and thereby erroneously had regard to irrelevant matters and failed to consider relevant matters in evaluating the Appellants' case.

27. The inevitable consequence is that the decision of the First-tier Tribunal must be set aside. The decision in the appeal therefore requires to be remade. I have reached the conclusion that it would be appropriate to remake the decision before a different Judge of the First-tier Tribunal with all issues at large. This will allow the Appellant a further opportunity to file all relevant supporting evidence in respect of her economic activity and in particular her self-employment during the period 1 September 2011 and 31 August 2012 that might support her contention that she made a genuine declaration to the Respondent as to her income. It may also afford the Appellant the opportunity to provide further clarification as to the basis upon which she made successive misdeclarations to HMRC. In this context it might, for example, be helpful to see what materials she provided to her accountants in each of those tax years if they were involved in assisting her in preparing her returns. It is equally relevant to consider what material she provided to her accountants in support of the audited accounts submitted in the application of September 2012.

28. Although the focus here has been in respect of the 2012 application, it is not to be forgotten that the Respondent has also raised issues in respect of the genuineness and authenticity of the Appellant's declarations as to income in the context of the 2015 application. This will also need to be addressed in a similarly rigorous manner, both by way of the filing of evidence and the careful consideration by the First-tier Tribunal.

29. In circumstances where the appeal is to be remitted it is of course then available for the Appellant again to pursue the Article 8 arguments in the alternative. As I have noted above, the First-tier Tribunal gave no consideration to this aspect of the appeal and made no findings. Indeed it is the absence of any consideration to this aspect of the appeal that persuades me that the First-tier Tribunal is the appropriate forum for remaking the decisions in the appeals.

30. I do not propose to make any specific Directions in the appeal: standard directions will suffice. However, the Appellant is on notice of the need to provide independently verifiable evidence of her claimed level of earnings from self-employment i.e. evidence that goes beyond any self-reported figures offered to her accountants and HMRC, such as contracts, correspondence with clients/customers, invoices and receipts, bank statements etc.. The Appellant should be aware that it is open to the Tribunal in remaking the decisions in the appeals to draw adverse inferences from any failure to provide supporting evidence that might reasonably be expected to be available to her.

Notice of Decisions

30. The decisions of the First-tier Tribunal contained material errors of law and are set aside.

31. The decisions in the appeals are to be remade before any Judge of the First-tier Tribunal other than First-tier Tribunal Judge Amin with all issues at large.

32. No anonymity directions are sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **23 July 2017**
Deputy Upper Tribunal Judge I A Lewis