IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: JR/9440/2016

The Upper Tribunal
Field House
15-25 Breams Buildings
London
EC4A 1DZ

1 August 2017

Before:

UPPER TRIBUNAL JUDGE GLEESON

Between:

PARVEEN AND SALEEM

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

MR M BIGGS appeared on behalf of the Applicant
MR Z MALIK appeared on behalf of the Respondent

JUDGMENT

UTJ GLEESON: The applicants are a husband and wife from Pakistan. They have permission to challenge by way of judicial review the respondent's decision to refuse their application for indefinite leave to remain in the United Kingdom as a Tier 1 migrant, and the respondent's subsequent decision by way of administrative review to uphold that decision.

2. The respondent's decision is based on the evidence and conduct of the principal applicant (hereafter 'the applicant'). Her husband is her dependant in this application and his right to remain stands or falls with that of the applicant.

3. The basis of the respondent's refusal to grant indefinite leave is that there was a substantial discrepancy in 2011 and 2013 between the amount of self-

employed income reported by the applicant to HMRC for tax purposes, and that declared by her for the purpose of the applications she made in those years for further Tier 1 leave to remain, such that when she made her indefinite leave application, she was relying on two years in which her leave had been obtained by deceit or deception.

4. The respondent considered this conduct to engage paragraph 322(5) of the general grounds for refusal, which is among the grounds on which leave to remain in the United Kingdom should normally be refused. That implies a discretion, which the applicant says the respondent did not exercise, and should have exercised in her favour.

Immigration history

5. The applicant's immigration history is set out in her original grounds for review. The nub of the deception relied upon by the respondent when refusing indefinite leave was a significant under-declaration made in her tax returns for 2011 and 2013, which conflicted with the income figures she gave in historic visa applications:

   (a) On 31 March 2011, the applicant claimed 20 points for earnings of £38092.79 for 3 February 2010 – 4 February 2011, being earnings from employment of £14234.49, and from self-employment of £23,849. In her declaration to HMRC for the same period, the self-employment income was declared as £2013, not £23,849.

   (b) On 11 May 2013, the applicant made a further application, with similar difficulties. This time, her employed income on the visa application was £7680.96 and her self-employment income was £32,340. On her HMRC return, the applicant declared only £694 for self-employed earnings. The applicant failed to file a tax return at all for the year ended April 2014.

6. In May 2016, when the applicant and her husband were preparing for their indefinite leave to remain application, pressed by their solicitor to clarify matters, they visited the accountant who admitted to filing two incorrect returns. It is their case that the accountant did not then tell them that he had filed no return at all in 2014: in that year, the applicant had a child and had done no self-employed work, on her account. The parties filed amended tax returns for all 3 years, which were acknowledged in a letter received from HMRC dated 18 May 2016. They did not make good the underpayment at that stage but waited for the new tax calculation to be sent, with penalties as HMRC considered appropriate.

7. The applicants employed Sky Solicitors to prepare their indefinite leave applications. They used the premium service, and took with them to the appointment a covering letter, which did not refer to the amendment of the tax returns, or the underpayment of tax.

8. The applicant took with her to the appointment the May 2016 HMRC letter

acknowledging receipt of the amended returns but it was not included in the application pack or mentioned in the covering letter. The applicant now asserts that she was advised by her solicitors that she need not make any disclosure of the discrepancy on the application or in the covering letter, but should mention the HMRC issue at her premium service appointment only if the caseworker raised it, at which time, she was to hand over the HMRC letter of 18 May 2016 and explain what had happened.

9. The applicant did not make any disclosure of the income under-declaration for 2011 and 2013 either in her application, or at her appointment. It was not mentioned in the solicitors' covering letter which she took with her to the appointment. On the contrary, the applicant made an untruthful response to a questionnaire which she was asked to complete at her premium service appointment. One of the questions on that questionnaire was this:

> "Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income?"

The applicant answered 'Yes', although she was well aware that in 2011 and 2013, that was not the case, and although she had with her the letter which purported to explain why her tax was underdeclared in those years and not declared at all in 2014.

10. In the event, the caseworker did not raise the question with the applicant before making a decision on the application. The caseworker relied on the documents handed in by the applicant, the questionnaire responses, the covering letter, and the information on the HMRC database, which was available to the caseworker online. The respondent rejected the applicant's application on the sole basis of the HMRC discrepancies, the respondent considering that the applicant had been 'deceitful or dishonest in [her] dealings with HMRC and/or UK Visas and Immigration by failing to declare your claimed self-employed earnings to HMRC at the time and/or by falsely representing your self-employed income to obtain leave to remain in the United Kingdom'.

11. The respondent did not accept that the errors by the accountant were genuine. The refusal letter contained a standard paragraph so stating, and added 'It is noted that you have stated you have since declared these claimed self-employed earnings to HMRC'. It is the applicant's case that that paragraph was inaccurate, because she had not made any statement about the errors before the decision letter was handed to her. On receipt of the letter, however, she made just that statement. She gave her prepared explanation and produced the May 2016 HMRC letter, showing that the position had been put right about a month before the application was made. The applicant stated that she was shocked by the outcome.

12. On 7 June 2016, HMRC sent amended assessments, amended tax calculations, and late filing penalties, amounting in total to £15,198.90. The applicant did

not pay in full and still has not done so. She paid £3000 on account and set up a payment plan for £100 a month to pay the outstanding amount.

13. On 13 June 2016, the appellant's accountants wrote a letter to be produced to the Home Office, taking full responsibility for the under-declaration. The reason given was that 'as a consequence solely of failures of the systems in place in our company, incorrect data was entered into the self-assessments of the said years and submitted to the Revenue by way of the online system'. The accountants stated in their letter that a member of their staff might have erroneously inputted incorrect data to their computer system or when the returns were completed. The accountants recognised that the alleged errors were potentially serious, had apologised to the appellants and agreed to pay all penalties and interest arising out of the under-declaration and consequent under-payment of tax, and to negotiate with the Revenue on a *pro bono* basis on the applicant's behalf.

14. The accountants stated that they were considering what action to take in respect of the accountant who prepared the returns and who, they say in their letter, assured the applicant that correct returns had been filed. They had assured the appellants that the corrected returns were now accurate and they considered that on 2 June 2016 at her appointment, the applicant was in a position to say, truthfully, that the self-assessment tax returns submitted to HMRC accurately reflected her self-employed income, by reason of the 5 May 2016 corrective declaration.

Refusal letter

15. On 2 June 2016, the respondent refused indefinite leave to remain. She did so on the basis that the applicant had answered in the affirmative the question regarding the accuracy HMRC returns for her previous self-employment. The respondent considered that to be deceitful or dishonest, applying paragraph 322(5) of the Rules.

16. The respondent acknowledged that she had a discretion under paragraph 322(5) whether to refuse indefinite leave to remain. She was not satisfied on the evidence submitted that the applicant's failure to declare to HMRC in 2011 and 2013 the self-employed earnings which were declared, in those years, with her application for further Tier 1 leave to remain was a genuine error. The respondent noted a clear benefit to the applicant, either by failing to declare her true earnings to HMRC in 2011 and 2013, or in falsely representing that income in her applications for further Tier 1 leave to remain in those years.

17. The respondent stated in her letter that the explanation that the earnings had since been declared was 'not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest on your dealings with HMRC' (in fact, no such explanation had yet been given, but the respondent correctly anticipated the explanation later provided). Applying paragraph

245CD(g), and Appendix A paragraph 19, the respondent indicated that she doubted the genuineness of the claimed self-employment income declared in to UKVI in 2011 and 2013.

18. The applicant sought an administrative review of that decision. She provided representations settled by Counsel, a witness statement and further evidence, characterising as 'entirely unfounded' the respondent's assessment that she had been deceitful and/or dishonest in her dealings with HMRC. She enclosed the letter from her accountants, taking the blame for the under-declaration and argued that the respondent had not yet exercised her discretion under paragraph 322(5), which would be a public law error.

19. On 18 July 2016, the respondent in her administrative review decision refused to overturn the decision to refuse indefinite leave and gave notice of liability to enforced removal pursuant to section 10 of the Immigration and Asylum Act 1999 (as amended). The passports of the applicant and her husband were retained.

20. The applicant engaged with the respondent in the Pre-Action Protocol process. The respondent in her Pre-Action Protocol reply dated 2 August 2016 but maintained her decision, noting that she had taken account of all representations submitted on the applicant's behalf, but had not exercised evidential flexibility to admit the new evidence which accompanied the administrative review application.

Permission for judicial review

21. The applicant sought judicial review. The judicial review grounds are lengthy. Permission was refused on the papers, but granted after an oral hearing before Upper Tribunal Judge Perkins. The arguments in the grounds for review were that:

    (a) The respondent's decision that the applicant had used deception was irrational, there being no evidence capable of justifying a finding of deception; alternatively

    (b) The respondent had failed to apply the correct burden of proof in asserting that it was the applicant's responsibility to make sure her returns to HMRC were correct, and she did not need to be given an opportunity to respond. The applicant relied on the respondent's *Tameside* duty and the respondent's own guidance on the general grounds for refusal. She relied on R on the application of *Semeda v Secretary of State for the Home Department* (statelessness: *Pham*) [2015] UKSC 19 applied) IJR [2015] UKUT 00658 at [17], a commentary on the *Tameside* duty. The applicants had paid for a personal interview and were entitled to expect to be asked about any matters which concerned the caseworker, before a decision was made. Had she done so, the applicant submitted that the respondent might well have concluded that paragraph 322(5) was not made out, and the failure to

allow her to explain was procedurally unfair;

(c) The respondent had not considered the exercise of her discretion not to refuse, even if paragraph 322(5) was engaged. In particular, and applying the general grounds guidance, the respondent had not considered what the applicant gained from her deception. The applicant would have to pay the outstanding tax in the end. There was no direct evidence of deception and the applicant's conduct was not serious: refusing indefinite leave to remain was disproportionate on the facts.

(d) The respondent had erred in refusing in the administrative review to exercise her residual discretion outside the Rules and/or refusing to take account of the additional material submitted with the application. By the date of application, the applicant had filed correct accounts and there was no basis in law in which it could sustainably be held that she had been deceitful or dishonest, having regard to the letter from her accountant, taking all the blame.

22. Upper Tribunal Judge Perkins, when granting permission, considered that the respondent had arguably erred in failing to have regard to the accountant's letter and that the applicant ought to have been given an opportunity to explain what had happened before the decision was made. He considered that the respondent, in relying on paragraph 322(5), may have overlooked the provisions of paragraph 322(2), which were also relevant to the facts of this application. None of the pleaded grounds were excluded from consideration in the substantive judicial review hearing.

Detailed grounds of defence

23. The respondent applied for, and was granted, an extension of time to file detailed grounds of defence. Her detailed grounds, when filed, carried the subheading, "The Secretary of State proposes to adopt these detailed grounds as her skeleton argument at the substantive hearing of this claim". The applicant did not object to that subheading until the day of the hearing.

24. The detailed grounds set out the history and the relevant law, arguing that the applicant's contentions are without merit, and that the respondent's decisions under challenge are lawful and rational. At [19], the respondent argued that the substantial under-declaration of tax, coupled with the applicant's answer 'yes' to the question 'Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflected your self-employed earnings' was sufficient to engage paragraph 322(5). There would have been a 'clear benefit' to the applicant in seeking to mislead HMRC or the respondent in that way and her character and conduct was such that it was undesirable for her to be given indefinite leave to remain.

25. The respondent noted that the principal applicant's under-declaration of self-employed income in 2011 and 2013 totalled £53,482 and that it was not for the

respondent to search for a possible innocent explanation. The applicant had been given an opportunity to declare the issue and explain it in the questionnaire which she completed at her appointment, but had opted not to do so. There was no reason to exercise discretion in her favour. The respondent relied on the decision in *R on the application of Giri v Secretary of State for the Home Department* [2015] EWCA Civ 784 which held that no question of precedent fact arose in the exercise of the respondent's discretion.

26. The respondent argued that it had been open to her to conclude that the earnings claimed were not genuine: there was no duty on the respondent to seek further evidence or to invite the applicant to explain the discrepancy. As to the *Tameside* duty, the respondent relied on the observation of Lord Diplock at 1065b: the question for the reviewing Court or Tribunal was 'did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly'. That was what she had done.

27. The respondent also relied on the judgment of Lord Justice Sales in *EK (Ivory Coast) v The Secretary of State for the Home Department* [2014] EWCA Civ 1517 at [20]: the points-based system set out what had to accompany an application, to enable the respondent to process high volumes of applications in a fair and reasonably expeditious manner, according to clear objective criteria. At [31] in his judgment, Sales LJ observed that 'application of the duty of fairness should not result in the public benefits associated with having such a clear and predictable scheme operating according to objective criteria being placed in serious jeopardy'. The gist of the evidence relied upon was in the refusal letter and that was sufficient to discharge the fairness obligation.

28. As regards post-decision evidence, the applicant appeared to consider that the decision was in reality taken under paragraph 322(2) not 322(5). That was a misplaced submission: the respondent's refusal was made under paragraph 322(5) and the fact that paragraph 322(2) might also be applicable was immaterial. Nor was there any obligation on the respondent to consider granting leave to remain outside the Rules at the administrative review stage. Her decision not to depart from the Immigration Rules was rational and was not so fettered.

29. The new evidence produced would not have changed the outcome: the claim that the under-declaration was the responsibility of the applicant's accountants was incredible. The applicant was responsible for ensuring that correct information was given to HMRC about her earnings, and the explanation about 'failures in systems' by the accountants was no explanation at all. It was just unbelievable that the applicant would not have noticed the difference when she paid her tax for 2010-2011 and 2012-2013.

30. There was no material public law error in the respondent's decisions and the reviewing Tribunal therefore had no power to interfere. The applicant's character and conduct fell within paragraph 322(5), on any view, and the

application should be dismissed.

Rule 15(2A) application

31. On 14 June 2017, the applicant applied for permission to amend her grounds and to adduce further explanatory and/or exculpatory material, obtained after the commencement of these judicial review proceedings. Upper Tribunal Judge Jordan refused permission for the post-issue materials. However, he granted the applicant permission to advance the arguments at [9]-[30] in the proposed amended grounds, as they were not novel.

32. The contents of that application had been known to the respondent since the judicial review application was made, and the application was renewed at the oral permission hearing, but the new evidence was not admitted and is not summarised here, as it remains outside the scope of these proceedings.

33. The applicants' amended grounds for review at [9]-[30] reframe their arguments in the following way:

(a) The applicants contend that the respondent has misapplied and misinterpreted paragraph 322(5), and misapplied her own policy as set out in her modernised guidance, General Grounds for Refusal, Section 4, v 26.0, which requires any decision to refuse under paragraph 322(5) to be approved by a senior caseworker. Decision makers must give specific reasons, not include vague generalisations about a person's character, conduct or associations, refer only to the specific reason why the application was being refused, and omit any reference to national security in the refusal notice. Decision makers are required to be alive to the possibility of an innocent explanation for the giving of incorrect information to other government departments such as HMRC;

(b) The applicants submitted that the paragraph 322(5) threshold was high; that the respondent required clear and reliable evidence of sufficiently reprehensible conduct to support the undesirability of a person's presence in the United Kingdom; and that such a decision was a serious one, which should be taken after careful scrutiny. The respondent was then required to consider whether, having regard to the evidence before her, it was reasonable and appropriate in all the circumstances to invoke paragraph 322(5). The welfare of any minor children, and any apparent human rights issues, should be taken into account at this stage. In brief, the applicants' contention was that the conduct identified in the refusal letter was insufficiently reprehensible.

(c) The applicants contended that the administrative review decision did not suggest that the principal applicant had been dishonest in her dealings with HMRC, although the original refusal letter did so suggest; and that primary authority for policing tax matters lay with HMRC and they had not imposed any penalty after accepting the revised tax returns, save to

seek to collect the tax due. It is their case that HMRC accepted that the error was one of negligence, not dishonesty, and that HMRC's approach, if not binding on the respondent, should carry weight in the respondent's assessment of the exercise of her own discretion under paragraph 322(5).

(d) The June 2016 refusal letter contained standard paragraphs, at least one of which was inaccurate, as the principal applicant had not yet given the respondent any explanation of her under-declaration to HMRC, as she continued to characterise it. The respondent had fettered her decision making, acting unreasonably and potentially in bad faith.

34. The rest of the amended grounds was not admitted and I am not concerned with that in these proceedings. The applicants have been aware since his decision on 28 July 2017 that Judge Jordan considered that items [2] to [5] of the proposed amended grounds set out in the application of 14 June 2017 were not within the permissible scope of judicial review proceedings and that he refused leave to amend in that way. Judge Jordan's grant of leave to remain is expressly limited to [9]-[30] of the Reply and Further Grounds.

35. The respondent responded to the application to amend. Given Judge Jordan's decision, and the contents of the response, I do not need to deal with that document in detail.

36. That was the basis on which the application came before the Upper Tribunal on 1 August 2017.

Respondent's breach of directions

37. Upper Tribunal Judge Perkins' grant of permission directed the respondent to submit detailed grounds within 35 days, and a skeleton argument not less than 7 days before the hearing. The respondent did not make any paid application to vary the order that she file a skeleton argument before the hearing. However, she did not comply with the directions: instead, she filed detailed grounds which were stated to stand also as her skeleton argument.

38. I have considered whether that is a breach engaging rule 7(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). I am satisfied that it is. There should have been detailed grounds and a separate skeleton argument. I also note that the applicants did not take the point until the substantive hearing before me.

39. I remind myself that the respondent's failure to comply with the Upper Tribunal's direction does not of itself render the proceedings, or any step taken therein, void (rule 7(1) of the Rules). I may, however, take such action as I consider just under rule 7(2), including but not limited to waiving the requirement, requiring the failure to be remedied, striking out a party's case under rule 8, or restricting a party's participation in the proceedings, 'except in …an asylum case or an immigration case'. The definition of 'asylum case' and 'immigration case' is restricted to proceedings before the Upper Tribunal,

in each case, 'on appeal against a decision'. Judicial review is not an appeal and this application is not an immigration case.

40. The Upper Tribunal's directions are to be respected and obeyed by the parties: there is a difference between the function of detailed grounds and that of a skeleton argument. On this occasion, I consider it just to waive the requirement for a skeleton argument and allow the detailed grounds to stand as such.

41. I do not consider it appropriate to restrict the respondent's participation in the hearing in this instance, but I will hear submissions on any costs implications arising from her breach of directions.

Paragraph 245CD of the Immigration Rules

42. The applicable paragraph of the Rules, so far as material, reads as follows:

> **"245CD Requirements for indefinite leave to remain**
>
> To qualify for indefinite leave to remain, a Tier 1 (General) Migrant must meet the requirements listed below. If the applicant meets these requirements, indefinite leave to remain will be granted. If the applicant does not meet these requirements, the application will be refused.
>
> Requirements: …
>
> (b) The applicant must not fall for refusal under the general grounds for refusal (except that paragraph 322(1C) shall not apply if the applicant meets the conditions in (f)(i)-(iii) below), and must not be an illegal entrant.
>
> (c) The applicant must have spent a continuous period as specified in (d) lawfully in the UK, of which the most recent period must have been spent as a Tier 1 (General) Migrant, in any of the following categories:
>
> (i) as a Tier 1 (General) Migrant, …
>
> (d) The continuous period in (c) is …
>
> (ii) 5 years, in all other cases."

43. The respondent relies on the general grounds for refusal, and in particular on paragraph 322(5) of those grounds. So far as relevant to these proceedings, the general grounds are as follows:

> "322 In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave, except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.

> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom *are to be refused*** …
>
> (1A) where 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. …
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom *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 United Kingdom 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;" [*Emphasis added*]

Submissions

44. For the respondent, Mr Malik relied on the Upper Tribunal's guidance in *R (SA) v Secretary of State for the Home Department* (human rights challenges: correct approach) IJR [2015] UKUT 536 (IAC). The relevance of that decision is not clear: the decision concerns the distinction between public law grounds and human rights grounds, but human rights are not in issue here.

45. Mr Malik reminded me of the *Tameside*[1] formulation: did the decision maker ask herself the right question and take reasonable steps to acquaint herself with the relevant information to enable her to answer it correctly? At [31] in the judgment of Lord Justice Sales in *EK (Ivory Coast) v Secretary of State for the Home Department* [2014] EWCA Civ 1517, the Court of Appeal held that application of the duty of fairness 'should not result in the public benefits associated with having such a clear and predictable scheme [as the points-based system] operating in accordance with objective criteria being placed in serious jeopardy'.

46. *R (Kaur) v Secretary of State for the Home Department* [2013] EWHC 1538 (Admin) extended the gisting obligation to the Secretary of State. It was not suggested that the gist of the evidence was not known to the applicant at the material times. The Secretary of State was entitled to have mandatory and inflexible immigration rules and to apply them consistently (see *R (Thebo) v Entry Clearance Officer* [2013] EWHC 146 (Admin)), and to prefer one rule to

[1] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC1014, at [1065b] in the speech of Lord Diplock

another, where several of the general grounds applied (see, by analogy, *RK (Nepal) v Secretary of State for the Home Department* [2009] EWCA Civ 359 and *Patel and others v Secretary of State for the Home Department* [2013] EWCA Civ 72).

47. For the applicants, Mr Biggs in the amended grounds relied on what he characterised as a requirement for a heightened standard of *Wednesbury* review, as extrapolated from the opinion of Lord Mance JSC at [51]-[54] in the decision of the Supreme Court in *Kennedy v The Charity Commission* [2014] UKSC 20 and at [32] in the judgment of Lord Justice Richards in *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, when he said that a finding of dishonesty was a finding that deception had been used, and that it 'should be scrutinised very carefully'. The appellant contended that every factor which might tell in her favour should be taken into account (see [24] in the judgment of Lord Justice Carnwath (as he then was) in*YH (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 116). The respondent's refusal to allow the applicants to respond to her concerns was procedurally unfair and this was not a simple points-based system case.

48. Mr Biggs submitted that the respondent was bound to consider the further evidence advanced with the administrative review application, even though it was post-decision and did not form part of the material before the caseworker when she made her decision. There was no evidence that the decision of the first caseworker had been approved by a senior caseworker as the respondent's own guidance required. Mr Biggs relied on the high standard set for paragraph 322(5) in the respondent's casework guidance entitled *General Grounds for refusal section 4* v 26.0:

> "…A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding 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 enter or remain in the United Kingdom. … If you are not sure the evidence to support your decision is reliable, then speak to your line manager or senior caseworker."

49. HMRC had accepted the amended tax returns, imposed penalties and agreed a payment schedule with the applicants. Mr Biggs wished me to draw the conclusion that HMRC did not consider that the appellant had used deception and that it was therefore not open to the respondent to do so. Unallayed suspicion was not sufficient. The respondent could have asked HMRC for its view of the applicant's *bona fides*: it was open to her to make that enquiry but she had not done so.

50. The respondent's GCID notes did not indicate that the caseworker had consulted a senior caseworker before making the decision not to exercise discretion in the applicants' favour under paragraph 322(5). Mr Biggs argued, in effect, that failure to record in GCID that a senior caseworker had been

consulted, was a material procedural irregularity rendering it *ultra vires* the caseworker to refuse to exercise discretion in the applicants' favour in relation to the under-declaration of tax (as they say it was).

51. Mr Biggs contended that these applicants should have been given an opportunity during the application process to make submissions on the deception/under-declaration issue. The respondent had unlawfully fettered her decision making by failing to ask the applicants whether they had an innocent explanation. In so doing, Mr Biggs contended that the respondent had acted unreasonably, and potentially in bad faith. The applicant had paid all tax on her employed income, at all times, albeit her self-employed income had been incorrectly declared in 2011 and 2013. It had not been open to the respondent to conclude that the higher income was a fiction, to enable the applicant to make the present application and score sufficient income points.

52. Mr Biggs' skeleton argument followed much the same scheme. He argued that the applicant had produced a statement from herself, and a detailed letter from her accountant in which they accepted complete and sole responsibility for the under-declaration of tax in 2011 and 2013, and the failure to file a tax return at all in 2014. The respondent had erred in failing to admit this evidence to the administrative review consideration, as the caseworker's finding that leave should be refused for one of the general grounds for refusal was a caseworking error. The applicants' case was that they had committed no dishonesty.

Discussion

53. The circumstances in this application are not as complex as Mr Biggs for the applicants seeks to make them. The principal applicant bears personal responsibility for her tax returns. She would have been aware that she paid much less tax than would normally have been due on such a large amount of self-employed income.

54. The difference in her claimed income is not marginal, nor is the difference in liability to tax. The additional tax to be paid is over £15,000 and the applicant has gained a benefit by her conduct: so far, she has paid only £3000 down and perhaps £1200 in instalments, and is being permitted to pay the rest over 9 years. That is a significant financial and fiscal advantage.

55. In addition, the applicant, once aware of the circumstances, consciously withheld the information from the respondent's caseworker. The questionnaire which she completed at her appointment was her opportunity to furnish an innocent explanation, but she did not take it. The applicant was in full possession of all the material facts then, whatever the position in the past.

56. The assertion that the questionnaire could be answered truthfully by the principal applicant in the manner set out above will not bear scrutiny, and no

weight is added to that by the accountants' assertion to the contrary. When asked, "Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income?", the applicant could have said that her returns were incorrect in the past, but had been corrected, and produced the explanatory letter she had with her. That would have been an honest response. A simple 'Yes' was a deceitful response and one on which the respondent was entitled to rely.

57. The respondent chose to apply paragraph 322(5) of the general grounds for refusal, which is one of those for which leave to enter or remain 'should normally be refused'. That implies a discretion to grant leave in appropriate circumstances, but on this occasion, the respondent by her caseworker decided not to exercise discretion in the applicants' favour.

58. The respondent's primary conclusion appears to be that the applicant lied, either to the respondent (to gain more points for earlier applications) or to HMRC, to save or delay the payment of the tax due on her self-employed income. On the evidence, the respondent was unarguably entitled to conclude that the applicant had used deception, certainly to the respondent, and perhaps also to HMRC, depending on whether she actually earned the money now the subject of the additional declaration.

59. It could be argued that the applicants' conduct also engages paragraph 322(1A) and paragraph 322(2) but I am not concerned with those provisions: it is a matter for the respondent to decide which sub-paragraph she relies upon in any decision, and judicial review applies only to the decision she took, not a different decision which she might have taken.

60. As regards the administrative review decision, Mr Biggs errs in considering that it was open to the respondent to take into account post-decision evidence. The administrative review is a review of the original decision, on the evidence before the original caseworker, as the statute and the Rules make clear. That would have been the case if the decision had been made under paragraph 322(1A) or 322(2) of the Rules, but it was not. The list of caseworking errors in paragraph AR2.11 of Appendix AR of the Immigration Rules does not stretch to include post-decision, or post-issue evidence of the type on which the applicant seeks to rely.

61. Even if the new evidence had been admitted, it would not have absolved the applicants of their responsibility, and that of the principal applicant in particular, to declare all income earned, employed and self-employed, in each tax year, and to pay tax on it as required. It is beyond credit that the principal applicant could have mistaken the amount chargeable to tax for the small self-employed income she declared for the correct tax charge for the large income now relied upon, however incompetent her accountants may have been.

62. It is right that the respondent's GCID record does not state expressly that the respondent's caseworker consulted a senior caseworker before deciding to

refuse this application under paragraph 322(5). The guidance states that it is not necessary for a person to have been convicted of a criminal offence for paragraph 322(5) to be applicable. The respondent's guidance requires the caseworker to do so, and to give specific reasons to refuse under this sub-paragraph: absence of evidence in this respect is not evidence that the consultation did not occur.

63. Nor, even if such an error occurred, am I satisfied that it was material to the outcome of this application. It was unarguably open to the respondent to find that the applicants intended to deceive, not just by acceptance of the enormously reduced tax liability which followed from the under-declaration, but also in the principal applicant's considered decision to withhold any disclosure of that under-declaration to HMRC on the day of her appointment, unless she was asked for it. I have regard to the incorrect answer which the principal applicant gave in the questionnaire she completed, which again failed to disclose the past under-declaration. I am not persuaded that the question asked could be truthfully so answered, despite her accountants' assertion to that effect.

64. There was no public law error by the respondent in her handling of this application. Judicial review is a discretionary remedy and is inappropriate here.

65. I refuse judicial review of the respondent's decision, or of the administrative review decision.

Costs

66. For the applicants, Mr Biggs argued that, in the light of the respondent's late submission of her detailed grounds and failure to file any skeleton argument or costs schedule, detailed assessment of costs is disproportionate and unfair.

67. For the respondent, Mr Malik submits that costs should follow the event. The respondent has successfully defended the present claim, and should not be penalised for her attempt to assist the Upper Tribunal by combining the detailed grounds and skeleton argument in a single document (see [38] above).

68. The applicant had not objected to this approach before the hearing, nor had it been suggested that she was prejudiced by the lateness of the detailed grounds or their standing as the respondent's skeleton argument. No new points were raised at the hearing which went beyond the scope of the detailed grounds/skeleton argument and Mr Biggs had not suggested at the hearing that the appellants were prejudiced or unable to deal with the matters raised therein.

69. I agree. The applicants will pay the respondent's costs of these proceedings, to be assessed if not agreed.

Application for permission to appeal

70. For the applicants, Mr Biggs seeks permission to appeal to the Court of Appeal. He contends that my judgment goes beyond what is required for judicial review, and that it was not open to me to conclude that even had the additional evidence been admitted in the administrative review, it would have made no difference. In particular, he considers that I should not have taken notice of the direct untruth told by the applicants in response to the questionnaire. The respondent did have regard to that deception at page 3 of 6 in the refusal letter for the principal applicant. I have explained in my judgment why I consider the deception in the questionnaire response to be material: by that time, the applicant was aware of the under-declaration and even had with her an exculpatory letter from her accountants, but still chose not to disclose that the 2011 and 2013 self-assessment returns were inaccurate.

71. Mr Biggs asserted in his grounds of appeal, that at the hearing, I indicated that all of the amended grounds considered by Upper Tribunal Judge Jordan could be argued, on a proper reading of Judge Jordan's order. That is not correct. Judge Jordan's order is plain on its face and the only matters which were before me were those set out at [9]-[30] of the amended grounds. The excluded arguments concern the applicants' assertion that the respondent had applied paragraph 322(2) not paragraph 322(5), and therefore should have admitted the exculpatory material thereunder; that it was procedurally unfair not to allow the applicants to respond to the paragraph 322(5) allegations of deception and undesirability; and that the respondent should have considered new evidence during the administrative review, pursuant to her *Tameside* duty.

72. As set out above, it is not open to the applicants to choose which sub-paragraphs of the Rules are relied upon by the respondent. In a judicial review application, the Upper Tribunal reviews the decision actually made, rather than that which the applicants submit that the respondent might have made. The paragraph 322(2) argument is irrelevant for that reason, as is the assertion that the exculpatory material is admissible where, as here, it was obtained after the issue of these proceedings, and the exhaustion of the Pre-Action Protocol. Judge Jordan rightly excluded those arguments and I did not admit them at the hearing.

73. In addition, the applicants continue to rely on the lack of confirmation in the GCID record that the respondent's caseworker consulted a senior caseworker before refusing to exercise discretion in the applicants' favour under paragraph 322(5) of the Rules. For the reasons given above, this is a plain case of deception and that procedural step, whether or not taken, would not have resulted in a different outcome.

74. Mr Malik for the respondent argues that there is no point of law in this application which merits the Court of Appeal's attention and no other compelling reason for the Court of Appeal to hear it. He invites me to refuse

permission to appeal.

75. I refuse permission. I am not satisfied that the proposed grounds of appeal disclose any properly arguable error of law in my judgment.
