



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09054/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2019

Decision & Reasons Promulgated
On 06 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KEVIN IFEANYI OSUJI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Home Office Presenting Officer

For the Respondent: Mr P Turner, counsel.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the applicant's appeal against the decision of 9 April 2018 refusing him indefinite leave to remain on long residence grounds under para 276B of the Rules on the basis that he fell within the provisions of para 322(5). In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Nigeria born on 16 June 1968. He first came to the UK on 7 October 2007 with valid leave to enter as a student until 31 January 2009. On 5 January 2009 he applied for further leave to remain as a Tier 1 General Migrant but his application was refused on 11 February 2009. His appeal against that decision was dismissed and he left the UK on 27 May 2009. He returned on 3 August 2009 with valid entry clearance until 16 June 2011 and was granted further extensions as a Tier 1 General Migrant following applications made in April 2011 and June 2013 until 6 June 2016. On 3 June 2016 he made another Tier 1 application but on 8 September 2017 he varied it to apply for further leave on the basis of 10 years lawful residence. His application was refused under the provisions of para 322(5) as it was the respondent's view that it was undesirable to permit him to remain in the UK in the light of his conduct, character or associations. In consequence, he could not meet the requirements of para 276B (ii) and (iii).
3. In reaching this decision the respondent relied on the following facts. In his Tier 1 application in June 2013, the appellant declared that between 1 May 2012 and 30 April 2013 he had earned £20,899.13 as an employee of ISS Ltd and that he had self-employment with his company Kelvino Infotech Consulting Ltd and between 1 May 2012 and 30 April 2013 he had earned £46,319, verified with invoices, accounts and other documents, giving him total earnings of £67,218.13.
4. However, when checks were made with HMRC for the tax year 2012-2013, the appellant had declared that he earned £20,405 with ISS and £15,000 in the form of dividends from his self-employment. This was considerably less than the £46,319 stated to the respondent. As the figures provided covered a period over two tax years, the respondent also looked at the figures for tax year 2013-2014, where the appellant again had declared £15,000 in the form of dividends. Even if these two figures were taken together at £30,000, they were still considerably less than the figure of £46,319. The appellant's actions in declaring different income figures to HMRC and in his application in June 2013 satisfied the respondent that the appellant had been deceitful or dishonest and that because of such conduct it would be undesirable to allow him to remain in the UK.

The hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the respondent was not represented. The appellant and his accountant gave oral evidence. The appellant also relied on documentary evidence set out in his bundle of documents (A1-152). The judge summarised the evidence at [11]-[13] of his decision. The appellant said that the respondent had made accounting errors as income from his company of £46,319 was his share of the profit before tax but dividends were paid from profit after tax. The amount of the dividends shown in the accounts submitted with this application was £36,500 and the tax return show dividends of £16,666 for each of the years ending 6 April 2013 and 6 April 2014. He said that he had not used deception but had followed the respondent's policy guidance (see [9] of the appellant's statement at A2).

The appellant then dealt with the subsequent tax amendments which were submitted after the company had resolved a dispute with its representative in Nigeria who appeared to have claimed excessive expenses. It was only after that matter was resolved and his representative issued a credit note on 31 March 2016 that amended returns were filed and accepted by HMRC.

6. The appellant's accountant, Mr Akinjirin, gave evidence adopting his letter of 20 August 2018 (A6-7). He confirmed the appellant's explanation of his tax affairs and said that the respondent had erred in regarding the profit before tax as a dividend. The dividend figure been payable over two years and there was no discrepancy.
7. The judge summarised his findings at [18]-[19]:

"I have given careful consideration to the evidence of the appellant and his accountant. I found them both to be credible and I found Mr Akinjirin to be particularly persuasive. I note his qualifications and that he has been the appellant's accountant for a number of years. I accept their explanation and I am satisfied that there was no dishonesty or even carelessness on the appellant's part. I note that there was documentary evidence of the trade dispute in Nigeria.

Against that background I find found that the respondent was wrong to refuse the application under the provisions of paragraphs 322(5) and 276B(ii)(c). The appellant therefore met the requirements of the rules and there is no public interest in the decision."

The appeal was allowed accordingly.

The Grounds of Appeal and Submissions

8. In the grounds of appeal the respondent argued that the judge failed to give adequate reasons for his findings on a material matter. It was not clear why the Tribunal found that the appellant was credible when he had claimed an income source of £46,319 as part of his 2012/13 Tier 1 application whereas for the same period the HMRC tax return showed income from this source of £15,000 as a dividend. It was not clear from the decision what this income was: if the £46,319 was not paid as a dividend, it should be clear what it was paid as and why. The Tribunal had said nothing on this and there was still a failure to explain the discrepancy in the accounts identified by the respondent.
9. Further, it was not clear what the £46,319 covered. In the application for further leave under Tier 1, it was for the period 1 May 2012 to 30 April 2013 which constituted 11 months in one tax year and one month in the following tax year but on that basis the appellant appeared to be claiming that nothing remained for the remaining 11 months of the second tax year.
10. Mr Lindsay adopted his grounds. He submitted that the judge had failed to give adequate reasons for his findings, and this indicated that he had not given anxious scrutiny to the respondent's claim that the appellant had been guilty of dishonesty. There were further issues which should have been explored. These related to whether the sum of £46,319 was a gross or net figure and whether it should all be

regarded as profit. The evidence from the accountant failed to explain these issues. There had been no clear findings on what the appellant's actual as opposed his declared earnings were. There was, so he submitted, a clear basis in the evidence for the respondent to find that the appellant had been manipulating his income and had not been acted honestly.

11. Mr Turner submitted that the judge had properly directed himself at [17] on the guidance set out in the judgment of Martin Spencer J in R (o.a.o. Shahbaz Khan) v Secretary of State Upper Tribunal JR/3097/2017 and had been entitled to find that the respondent had failed to discharge the onus of proving dishonesty. When the explanation set out in the appellant's witness statement and in the letter from the accountant of 20 August 2018 (A6-7) was taken into account, it was clear, so he submitted, that the judge had reached a decision properly open to him.

Consideration of whether the First-tier Tribunal erred in law.

12. The issue I must consider is whether the judge erred in law in his assessment of this appeal such that the decision should be set aside. Having considered the guidance given in Shahbaz Khan, the judge rightly said at [17] that the respondent was entitled to draw an inference of dishonesty where there was a significant difference in figures for annual income put by an appellant to the respondent and to HMRC. But if the appellant was able to present evidence that he was not dishonest but merely careless, there must be a fact-finding exercise to establish whether that was sufficient to displace the prima facie inference of dishonesty. In a statutory appeal as opposed to a judicial review application, it is of course for the judge to carry out that assessment and to decide whether the evidence is sufficient to displace the inference of dishonesty.
13. The judge found that the appellant was credible and that his accountant was both credible and persuasive. The respondent in the grounds argues that the judge failed to give adequate reasons for his decision as it was not clear what the £46,319 was paid as if it was not a dividend. If it was a dividend, why did it later appear as two sums of £15,000? The explanation given by the appellant, summarised at [11], was that the figure of £46,319 was his share of the profits before tax and that the dividends were paid from profit after tax (see [9] and [11] of his statement at A2). The total amount of dividends declared in his accounts was £36,500 from 4 May 2012 to 26 April 2013. The two tax returns referred to by the respondent showed gross dividends of £16,666 for tax years ending April 2013 and April 2014, totalling £33,332 (see [12] of his statement also at A2). These returns were accepted by HMRC.
14. The appellant explained that there had been a dispute with his agent in Nigeria about whether excessive expenses had been claimed and that it was only when that issue was resolved that his accountant submitted amended accounts for the period 28 February 2011 to 28 February 2015. Those amendments were agreed with HMRC. His accountant confirmed that the respondent was informed about the amended accounts, but no reasons had been given why that explanation was not accepted.

15. The appellant's explanation for the discrepancy in the figures submitted is confirmed in the letter dated 20 August 2018 from his accountant, in essence, repeating that dividends were only paid from profits after tax, that the amount of dividends declared in the accounts submitted was £36,500 and that the respondent had wrongly referred to the appellant's income as derived from self-employment when in fact he operated through a limited company and the earnings he received were as a director and shareholder.
16. I am satisfied that the explanations given by the appellant and confirmed by his accountant set out a proper basis on which it was open to the judge to find that there was an explanation for the apparent discrepancy in the figures submitted in support of his Tier 1 application in June 2013 and his tax returns. It was for the judge to decide on a balance of probabilities whether the evidence given was true and what inferences could properly be drawn from it. He found that the appellant and his accountant were honest and that there was no dishonesty or even carelessness on their part. I am satisfied that this finding was properly open to him on the evidence, bearing in mind that he did not have the benefit of hearing the witnesses being cross examined on their evidence in a case in which dishonesty was being alleged against the appellant.
17. In summary, there were grounds on which the respondent could properly infer that the appellant had been dishonest, but he provided an explanation, supported by his accountant, which the judge was entitled to accept. His findings were properly open to him for the reasons he gave. I am not satisfied that the judge erred in law.

Decision

18. The First-tier Tribunal did not err in law and the decision stands.

Signed: H J E Latter

Dated: 22 January 2019

Deputy Upper Tribunal Judge Latter