Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08724/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 September 2021	**On 14 October 2021**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SAMI UR REHMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. M Biggs, Counsel, instructed by ATM Law Solicitors
For the Respondent: Ms. A Everett, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of Judge of the First-tier Tribunal Monson ('the Judge') sent to the parties on 18 February 2021 by which the appellant's appeal against the decision of the respondent to refuse him indefinite leave to remain on long-residence grounds under the Immigration Rules, or alternatively leave to remain on human rights (article 8) grounds was refused.

2. By a decision dated 17 May 2021 Upper Tribunal Judge Reeds granted the appellant permission to appeal on all grounds advanced.

3. Unfortunately, this appeal has a lengthy history. After several adjourned hearings the First-tier Tribunal initially dismissed the appellant's appeal by a decision dated 29 October 2019. The appellant secured permission to appeal to this Tribunal and the decision of the First-tier Tribunal was set aside by Upper Tribunal Judge Blundell on 24 September 2020. The matter was remitted to the First-tier Tribunal sitting at Taylor House and heard by the Judge on 3 February 2021.

Background

4. The appellant is a national of Pakistan and is presently aged 39.

5. He entered the United Kingdom on 26 July 2006 with valid entry clearance as a visa student. His leave to enter expired on 3 March 2006. His leave was subsequently varied by in-time applications so that he enjoyed leave to remain as a student until 31 October 2009 and as a Tier 1 (Post-Study Work) Migrant until 2 March 2011.

6. On 28 February 2011 the appellant applied for leave to remain as a Tier 1 (General) Migrant and he was granted such leave until 1 April 2013. Consequent to an in-time application he secured further leave to remain in the same category until 9 May 2016.

7. He applied for indefinite leave to remain as a Tier 1 (General) Migrant on 6 May 2016. The application was varied to indefinite leave to remain on long residency grounds under the Immigration Rules on 30 November 2016.

8. The respondent refused the application by means of a decision dated 27 July 2017. The respondent concluded, *inter alia*:

> '... the self-employed profit declared for tax years 09/10 and 10/11 combined does not match the income from self-employment declared in your visa application dated 28 February 2011, and the self-employed profit declared for tax years 11/12 and 12/13 combined does not match the income from self-employment declared in your visa application dated 25 March 2013. Therefore, your claim that the discrepancy is because your income period is over 2 HMRC tax years is not borne out in the evidence quoted above. It was your responsibility to ensure that your tax return was submitted on time with the correct information.
>
> Were it accepted that the figures declared to the Home Office were an accurate representation of your self-employed earnings between 31 January 2010 and 31 December 2010 and between 01 April 2012 and 26 March 2013, your actions in failing to declare your earnings in full to HM Revenue & Customs would lead your application to be refused under paragraph 322(5) of the Immigration Rules based on your character and conduct.
>
> …
>
> Your application has therefore been refused under paragraph 276D as the requirements of paragraph 276B(iii) have been met, with reference to paragraph

276ADE(1)-CE of the Immigration Rules, and outside the Rules on the basis of exceptional circumstances.'

First-tier Tribunal decision

9. The appellant's appeal came before the Judge sitting at Taylor House on 3 February 2021.

10. In dismissing the appeal, the Judge determined, at [51] - [53] of his decision:

> '51. It is not credible that the exclusion of the sub-contracting invoices from the bundle of documents that the appellant handed to Mr. Meraj was an innocent oversight. The appellant must have known at the time that he asked Mr. Meraj to prepare the management accounts for the 2013 application that he was in possession of a significant number of invoices from sub-contractors relating to work that had been carried out during the relevant period, and that disclosure of these invoices to his account would greatly reduce his gross profit, and hence net profit for the relevant period.
>
> 52. It is not credible that the appellant honestly believed that he could ignore the sub-contractor invoices either because they were unpaid or because they related to ongoing projects. If the information given in MS2 is true, the appellant had already paid in cash a significant proportion of the fees owed to sub-contractors by 26 March 2013. He identifies cash withdrawals for this purpose as follows: £2,000 on 10 April 2002; £2,000 on 30 April 2012; £1,500 on 14 May 2012; £2,000 on 9 November 2012; £1,500 on 1 March 2013; £950 on 6 March 2013 and £1,000 on 23 March 2013. He appears to have advised Mr. Meraj at the time that the withdrawal of £950 on 6 March 2013 was to cover a cost of sale but not to have alerted him to any other costs of sale, even though he must have known that he had paid his sub-contractors much more that £950 over the relevant period.
>
> 53. In light of the above, I find that the respondent has fully discharged the burden of proving that the appellant dishonestly inflated his self-employed income by well in excess of £10,000 in his Tier 1 application made in 2013.'

11. At [64]-[66] and [69]-[71] the Judge concluded:

> '64. Accordingly, I find that the respondent has discharged the burden of proving that the appellant dishonestly caused to be inflated the amount of his net profit in his application of 2011 by withholding from his accountant, and hence UKVI, information about the cost of sales in the amount of £5,374, assuming in the appellant's favour that the remainder of the total sub-contracting costs of £7,978 genuinely arose from sales transactions entered into after 31 January 2011 (albeit that this means that the appellant simply broke even in the period from 1 February to 5 April 2011),
>
> 65. Mr. Hodgetts' fall-back argument is that no intention to deceive can be shown by the fact that the appellant would have satisfied the Immigration Rules, showing the necessary £35,000 threshold of income, if he had relied on all of

his employed income. He submits that there was a sum of £4,736 which had been earned from additional employment with "Buy a Gift" and "DCL", as confirmed in HMRC records adduced by the respondent at D6. Similarly, Mr. Hodgetts submits that there was no motive for the appellant to inflate his self-employed income in his 2013 application by excluding self-contracting fees of £13,376 when he had additional employment income in the relevant period of £16,967 from an employment contract with "World Tech" and from part-time employment with the Ministry of Justice via "Brook Street Agency".

66. While I am prepared to find that the appellant would have nearly met the £35,000 threshold in the 2011 application by relying on additional employment income from the two sources identified by Mr. Hodgetts, and that the appellant would have met the £35,000 threshold in the 2013 application by relying on additional employment income of £16,967, this does not change the fact that the appellant knowingly caused to be inflated the net profit figures in both applications. However, I accept that the evidence relating to the unclaimed employment income constitutes positive material which must be taken into account in the balancing exercise. In *Tahir Yaseen v. SSHD* [2020] EWCA Civ 157, the Court of Appeal affirmed that the assessment of undesirability under paragraph 322(5) requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. This will include such matters as any substantial positive contribution to the UK made by the applicant and also the circumstances surrounding the misconduct in question, such as that it occurred a long time ago.

…

69. Of much greater significance in my judgment is the evidence that the appellant nearly met the required earnings threshold in 2011 taking into account the unclaimed employment income of £4,736 (which, when set against the figure of £5,374, produces a short fall of only £638), and that he met the required earnings threshold in 2013 taking into account the unclaimed employment income from his employment income from his employment by World Tech and his agency employment by the Ministry of Justice. The consequence is that the appellant was not unjustly rewarded with a grant of FLR in 2013 to which he was not entitled, and arguably the same applies to the earlier grant of FLR in 2011 as the shortfall was only £638. I consider that this is a very positive factor which, while it does not excuse the reprehensible conduct proven by the respondent, substantially mitigates the reprehensible conduct in terms of its effect.

70. The difficulty for the appellant is that he has not placed this argument at the forefront of his case since first being confronted by the respondent in 2016 with the discrepancies that have been proven to be real, not illusory. Instead, the appellant has sought to defend the indefensible for the past four years, particularly in respect of the 2013 application where the evidence of dishonesty in overwhelming. Whereas his bad conduct could be said to lie in the relatively distant past, the same cannot be said of the appellant's bad

character. In conclusion, I find that the appellant has not shown that the discretion arising under paragraph 322(5) should be exercised in his favour.

71. Looking at the matter through the prism of the five-point *Razgar* test, questions 1 and 2 of the *Razgar* test must be answered in the appellant's favour with regard to the establishment of private life in the UK as a result of long lawful residence since 26 July 2006, over 14 years. Questions 3 and 4 of the *Razgar* test must be answered in favour of the respondent. On the issue of proportionality, none of the public interest considerations arising under s117B of the 2002 Act tip the balance in the appellant's favour. I find that the balancing exercise comes down in the respondents' favour, for the reasons given in paragraphs [68] to [70] above. I consider that the decision appealed against strikes a fair balance between, on the one hand, the appellant's rights and interests, and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, which is the maintenance of firm and effective immigration controls.'

Grounds of appeal

12. The appellant's grounds of appeal were drafted by Mr. Hodgetts, Counsel, and run to 5 pages.

13. Four grounds of appeal are identified:

    i) Mistake of fact

    ii) Want of reasoning

    iii) Error of law in failing to take 'motive' into account in assessment of dishonesty - 'putting the cart before the horse'

    iv) Paragraphs 70 and 77 of decision – assessment of discretion.

14. In respect of Ground 3, the grounds of appeal detail at paras. 5.1 to 5.3 that motive is a key material factor going to whether the *mens rea* of dishonesty has been proven and '*it was submitted on behalf of the appellant that he did not have a dishonest motive in failing to provide his accountants with sub-contracting costs since he could have established the financial threshold for a grant of Tier 1 leave in both 2011 and 2013 based on the lower figures provided to HMRC.'*

15. Complaint is made that the Judge put the cart before the horse: not considering motive when assessing dishonesty, and then only taking it into account as a 'fall-back' argument going to the issue of undesirability. Such approach is said to be contrary to the proper approach identified by the Court of Appeal in *Balajigari v. Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 W.L.R. 4647, at [42]:

'42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. A discrepancy between the earnings

> declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; **but even in that case** the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.' [Emphasis added]

16. Grounds 1 is closely related to Ground 3 in addressing the judicial approach to 'motive'.

17. In granting permission to appeal UTJ Reeds reasoned, *inter alia*:

> '1. It is arguable that the FtTJ erred in the calculation of the figure representing the shortfall in relation to the 2011 application by reference to the amount and also by the calculation of the figure relevant to the 2011 assessment (see grounds one and two).
>
> 2. Whether the errors are material to the outcome will have to be address in the light of the JFtT's analysis set out at paragraph [66-69].'

Decision on error of law

18. Ms. Everett confirmed at the outset of the hearing that Ground 3 identified a material error of law. The assessment of motive was properly to be undertaken in respect of the assessment of dishonesty; not merely reduced as a relevant factor in the consideration of 'undesirability' and discretion under paragraph 322(5) of the Immigration Rules. She further accepted that Grounds 1 and 2 were interrelated with Ground 3. In the circumstances the respondent accepted that the only proper course of action was for the decision of the Judge to be set aside with no preserved findings of fact.

19. Unsurprisingly, Mr. Biggs agreed with such course of action.

20. Having read the papers in this matter, I am satisfied that the approach adopted by the respondent is entirely appropriate. The approach adopted by the Judge as to 'motive' was erroneous in law and has adversely infected the reasoning contained within the decision.

21. In the circumstances, the decision of the Judge is to be set aside with no preserved findings of fact.

Remittal

22. Both representatives agreed that the proper course of action is for this matter to be remitted to the First-tier Tribunal so that fresh findings of fact can be made.

23. I expressed hesitancy at the hearing as to such course of action. This appeal concerns a decision of the respondent dated 27 July 2017 which is now almost 4½ years of age. It has been heard twice in the First-tier Tribunal and on both occasions the respondent has accepted before this Tribunal that the decisions contained material errors of law requiring that they be set aside.

24. However, I have considered the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, and in particular to para. 7.2(b), and conclude that the nature or extent of any judicial fact finding which is necessary in order for the decision in this appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

25. Mr. Biggs requested that I issue directions in respect of the remitted appeal. I declined to do so. Case management of the remitted appeal is for the First-tier Tribunal alone. I am satisfied that the Tribunal will be aware that this will be the third time it will consider this appeal.

Notice of Decision

26. The decision of the First-tier Tribunal, dated 18 February 2021, involved the making of a material error on a point of law and is set aside.

27. No findings of fact are preserved.

28. This matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal Khawar and Judge of the First-tier Tribunal Monson.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 16 September 2021