OUTER HOUSE, COURT OF SESSION

[2018] CSOH 127

P223/18

OPINION OF LORD TYRE

In the petition

COLLINS OJI (AP) and ISHOMA OJI (AP)

Petitioners

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Byrne; Drummond Miller LLP
Respondent: Pugh; Office of the Advocate General

27 December 2018

Introduction

[1] This petition is concerned with the refusal by the respondent of applications by both petitioners for indefinite leave to remain ("ILR") in the United Kingdom. The petitioners are spouses. The second petitioner is a dependent upon the first petitioner's application, and the outcome of this petition as regards the first petitioner will determine the outcome for the second petitioner. I shall accordingly follow the approach of the parties by referring in this opinion to the first petitioner as "the petitioner".

[2] The petitioner is a Nigerian national who had, by 25 January 2016, accumulated five years' lawful residence in the UK as a Tier 1 General Migrant. This entitled him to apply for

ILR, which he did on 19 February 2016. On 3 November 2017 his application was refused. The principal ground of refusal, in terms of paragraph 322(5) of the Immigration Rules, was that in light of his character and conduct the respondent considered that it would be undesirable to allow him to remain in the UK. That conclusion was based upon a finding that the petitioner had, during the period when he had had leave to remain ("LTR"), declared different amounts of income to HM Revenue and Customs ("HMRC") and to UK Visas and Immigration ("UKVI") respectively. The respondent further concluded that because of the above discrepancy the petitioner had not proved what earnings he had genuinely had during the previous 12 months, which resulted in him being treated as having had no earnings, and therefore as having insufficient points to qualify for ILR. A request for administrative review of the respondent's decision was refused on 6 December 2017.

[3] The petitioner seeks reduction of both decisions. The application came before me for a hearing along with another case (reference P222/18) raising the same legal issues and with a similar but not identical factual background. Much of what is contained in this opinion is common to my opinion in the other case.

The Immigration Rules

[4] Paragraph 322 of the Immigration Rules is entitled "Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave". Paragraphs 322(1) to (1C) contain "grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused". Paragraphs 322(2) to (9) contain "grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused": in other words, these paragraphs cover circumstances in which the

respondent reserves a discretion in determining whether an application should be refused.

One of the discretionary grounds of refusal, in paragraph 322(5), is as follows:

> "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".

[5] The Home Office has published guidance provided to its officers on the interpretation of paragraph 322. As regards paragraph 322(5), the guidance states *inter alia* as follows:

> "The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.
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> 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 UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control. If you are not sure the evidence to support your decision is reliable, then speak to your line manager or senior caseworker."

The respondent's decision

[6] In the respondent's decision letter dated 3 November 2017, the petitioner's immigration history was narrated as follows. He entered the UK with a student visa on 7 October 2007. On 16 January 2009 he applied for LTR under Tier 1 Post Study rules, which was granted until 13 February 2011. On 25 January 2011 he applied for LTR as a Tier 1 General Migrant which was granted until 10 March 2013. On 29 January 2013, he applied for LTR as a Tier 1 General Migrant which was granted until 21 February 2016. On 19 February 2016 he applied for ILR.

[7] The respondent referred to paragraphs 19(i) and (j) of Appendix A to the Immigration Rules, which list factors that may be taken into account when assessing, on balance of probabilities, whether the earnings claimed by an applicant for ILR are genuine. Those include (head (i)) the evidence the applicant had submitted, and (head (iv)) verification of previous earnings claims with declarations made in respect of the applicant to other government departments, including declarations made in respect of earnings in previous applications.

[8] The petitioner claimed earnings of £55,220 for the period from 1 February 2015 to 31 January 2016. This was made up partly of salaried earnings and partly of self-employed earnings. The respondent noted that in the petitioner's LTR application dated 25 January 2011 he had claimed total earnings of £56,140 (including £37,380 self-employed earnings) for the period 1 March 2010 to 10 January 2011, and that in his LTR application dated 29 January 2013 he had claimed total earnings of £56,331 (including £34,300 self-employed earnings) for the period from 21 January 2012 to 20 January 2013. The decision letter continued:

> "However, checks with Her Majesty's Revenue & Customs (HMRC) show that your self employed net profits declared to them initially by you for tax year 2010/11 and 2012/13 are as detailed below:
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> - £5,310.00 for 2010/11
> - £5,350.00 for 2012/13
>
> HMRC checks show that you submitted amendments to your declared self employed net profits and the revised figures are as detailed below:
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> - £37,379.00 for 2010/11
> - £34,300.00 for 2012/13"

[9] Having noted the discrepancy between figures submitted with the petitioner's LTR applications and the figures initially submitted to HMRC (but later corrected), the respondent's letter stated:

> "Having decided to work as self employed in the United Kingdom it is your responsibility to ensure the correct declaration of earnings are made to HMRC at the correct time. The onus is on you to ensure that the correct figures are submitted.
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> Your amended tax return to HMRC is noted, however, you would have had sight of and signed your tax returns before they were submitted to HMRC. The fact that you did not notice any errors before their submission is of concern and casts doubt on your credibility and on any self employed earnings in your previous and current applications.
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> …
>
> We are satisfied that, based on your actions in declaring different amounts of income to HMRC and UKVI, you have either misrepresented your earnings to HMRC in order to reduce your tax liability or provided false information about your earnings to UKVI in order to obtain leave to remain, or both…"

In view of the above, the respondent was not satisfied that the self-employed earnings claimed in the petitioner's previous and current applications were genuine.

[10] The letter set out the terms of paragraph 322(5) and concluded:

> "Your actions in declaring different amounts of income to HMRC and UKVI lead to the conclusion that in light of your character and conduct it would be undesirable to allow you to remain in the United Kingdom… Whilst a refusal under paragraph 322(5) of the Immigration Rules is not a mandatory decision, it is considered your actions in declaring different income to HMRC and UKVI would mean that a refusal under paragraph 322(5) is appropriate."

[11] The decision letter went on to consider the points requirements for ILR under paragraph 245CD of the Immigration Rules, noting that an applicant had to have 80 points. Because the respondent was not satisfied that the previous earnings claimed by the petitioner were genuine, no points were awarded for previous earnings. Because the respondent could not corroborate the petitioner's earnings during the 12 month period prior to the application, no points were awarded for UK experience. The consequence was that the petitioner's points totalled 40, and for that reason also his application for ILR was refused.

[12] At this stage it should be noted that on 30 November 2016, the petitioner attended an interview by one of the respondent's officers. The form recording the interview is headed "Temporary Migration Credibility Interview Template (Tier 1 General)". According to the form, the petitioner was asked and answered 37 questions about, among other things, his sources of income, the nature of his employment duties and his self-employed work, the organisation of his business, and the name and address of his accountant. He was not asked any questions which challenged the amount of any employed or self-employed earnings declared to UKVI. He was not asked about discrepancies between amounts declared to UKVI and to HMRC. The interviewing officer assessed the petitioner as credible. His recommendation summary stated: "Credible based solely upon interview. Requires caseworker to place answers into context with rest of application in order to make full credibility assessment." In the respondent's decision letter it was noted that the petitioner had been invited to an interview, but no further reference was made to it.

[13] The petitioner applied for an administrative review of the decision. On 5 December 2017 the respondent refused to reverse the decision. It is accepted by the respondent that the administrative review considered only whether there had been a case-working error in the original decision, and that the judgment in these proceedings on the merits of the original decision will also govern the administrative review.

Relevant case law

[14] The circumstances of the present case are by no means unique. In the course of the hearing I was referred to a number of decisions of the Upper Tribunal in England and Wales, in each of which the applicant had sought judicial review of a decision by the respondent to refuse ILR under paragraph 322(5) because of a discrepancy between his

income as declared to HMRC and as declared to UKVI. These included *R (Varghese)* v *Secretary of State for the Home Department* JR/5167/2016; *R (Parveen and Saleem)* v *Secretary of State for the Home Department* JR/9440/2016; *R (Abbasi)* v *Secretary of State for the Home Department* JR/13807/2016; *Kadian* v *Secretary of State for the Home Department* HU/11723/2016; and *R (Chowdhury)* v *Secretary of State for the Home Department* JR/7/2018. The Upper Tribunal Judge (Jackson) in *Chowdhury* referred in turn to the cases of *R (Samant)* v *Secretary of State for the Home Department* JR/6546/2016 and *R (Khan)* v *Secretary of State for the Home Department* JR/3097/2017. I was informed that other cases are pending. The Upper Tribunal decisions cited are not entirely reconcilable with one another, and each case turned to some extent on its own facts. They do, however contain guidance of more general application that I have found to be of assistance.

[15] In *Samant* it was argued on behalf of the claimant that paragraph 322(5) could not apply to conduct of this kind, but applied rather to conduct at a higher level of seriousness as instanced by the reference in the guidance (above) to a threat to national security. This argument was rejected by Collins J at paragraph 10:

> "…[Counsel for the applicant] submits too that when one looks at the terms of 322(5) and the guidance that is applied, the conduct relied on must be at a high level in order to justify a finding that it was non-conducive to an individual to remain. The references are to character or associations and convictions, but it is made clear that the existence of a conviction is not necessary, and a threat to national security, and there was no question of that arising in this case. But if a false tax return, or indeed any false information has been given knowingly to the Secretary of State or to another Government body for any purpose, that would suffice, but it is necessary to establish that it was done deliberately and was not simply a mistake or a result of poor advice."

This dictum was referred to with approval by Judge Jackson in *Chowdhury* at paragraph 67, and it appears to have been accepted in all but one of the other cases cited above. The exception is *Kadian*, in which the Upper Tribunal judge held that "not declaring all relevant

income, whilst highly regrettable, cannot properly be described as conduct such as that set out in the policy guidance". I find no support for this opinion in any of the other decisions cited to me and, for my part, I prefer the majority view.

[16] In *Khan*, at paragraph 37, Spencer J provided the following general guidance to avoid the trap into which he considered that the respondent or those acting on her behalf had fallen in that case (ie of making a finding of dishonesty without properly carrying out the decision-making process):

> "(i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.
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> (ii) However, where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.
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> (iii) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the 'balance of probability', a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences.
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> (iv) However, for an applicant simply to blame his or her accountant for an 'error' in relation to the historical tax return will not be the end of the matter: far from it. Thus, the Secretary of State is entitled to take into account that, even where an accountant has made an error, the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.

(v) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.

(vi) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

(i) Whether the explanation for the error by the accountant is plausible;
(ii) Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;
(iii) Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;
(iv) Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.

(vii) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the Applicant has been deceitful/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.

(viii) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached."

I respectfully agree with these observations and have adopted them in reaching my decision in the present proceedings. In so far as certain of the decisions mentioned above (for example *Varghese* and *Abbasi*) might be read as requiring any lesser degree of inquiry by the respondent, I prefer the view expressed by Spencer J in *Khan*.

[17] Reference was also made during the hearing to the judgment of Foskett J in *R (Ngouh)* v *Secretary of State for the Home Department* [2010] EWHC 2218 (Admin), another paragraph 322(5) case, but with very different facts. At paragraph 120, Foskett J observed:

> "…It seems to me that where reliance is placed upon this provision (which contains very general words such as 'undesirable', 'character', 'conduct' and 'associations') it is important to look closely at the context in which it is being deployed and to see the reasoning which leads to its deployment. Where reliance is placed, at least in part, on one previous conviction then a number of factors will be relevant including the intrinsic seriousness of the offence, the circumstances generally and the risk of its repetition. Those matters will assist in informing the question of whether it is 'desirable' to permit the applicant for ILR to remain in the UK indefinitely. As I have observed previously…, in some instances the offence may be so serious that little by way of explanatory justification for relying on this paragraph may be required: the answer may be obvious. Where, however, the offence is in a different part of the criminal spectrum, certainly if very much at the lower end, then far greater justification would be required, particularly if it is the only occasion where the person concerned has broken the law. That does not mean that it would not be open to the Secretary of State, in some circumstances, to treat a relatively minor first offence as justifying recourse to this paragraph. However, it does mean that the reasoning would need to be focused and compelling. It would need to demonstrate that both the positive and negative aspects were weighed up fully and fairly, not merely the positive and negative aspects of the offence, but also other (potentially positive) factors that would make it 'desirable' that the applicant should be permitted to remain in the UK…"

It is important to read this passage in the context of the facts of the case, which concerned an applicant for ILR with an otherwise distinguished Army career that was blemished by an admitted sexual assault. The passage emphasises that the respondent must, in such circumstances, adopt a balanced approach in determining whether it is desirable to grant ILR. It does not, however, in my opinion, cast doubt on the entitlement of the respondent to reach the view, in a particular case, that it is not desirable to grant ILR to an applicant who has deliberately submitted false information regarding his income to either HMRC or UKVI.

Argument for the petitioner

[18] On behalf of the petitioner it was submitted, firstly, that on an ordinary and correct reading of paragraph 322(5), the petitioner's conduct did not rationally fall within the scope of the rule, because it did not meet the threshold of seriousness. Culpability in failing correctly to declare one's income to HMRC was not of the same character as the examples in the guidance. *Ngouh* demonstrated that a distinction had to be drawn between undesirable conduct and the question whether, in the whole circumstances, it was undesirable to grant ILR. The respondent had failed to apply the test in the correct way. A holistic assessment had to be made. The respondent provided three possible hypotheses, one of which was that the petitioner had under-declared his income and then rectified the error. That should be treated as a neutral factor, regardless of why the error occurred. In any event an incorrect return did not *per se* establish intention to deceive. There was therefore no rational explanation of why it was not desirable to permit the petitioner to remain. Further, the respondent had failed to give weight to the fact that the petitioner had corrected his tax return and paid the tax.

[19] Secondly, it was submitted, the respondent had not discharged the burden of proving wrongdoing on the part of the petitioner. The standard of proof was the balance of probabilities, but cogent evidence was necessary to establish a serious allegation with serious consequences. The decision ought not to be taken on the basis of speculation as to the petitioner's intention.

[20] Thirdly, it was contended that the decision was procedurally unfair. The petitioner had not been given an opportunity to respond to the allegation of wrongdoing before the decision was reached. The respondent had the chance to put the allegation to the petitioner at the credibility interview, but no question was asked about it. If it had been, the petitioner

would have had an opportunity to provide an explanation and any supporting evidence. The respondent had not been entitled to conclude that it was not desirable to grant ILR without advising the petitioner of her concerns and inviting an informed response.

[21] As regards paragraph 245CD of the Immigration Rules, the respondent's conclusion that the petitioner's self-employed income could not be relied upon was arrived at because of her conclusion that he had been engaged in deception. If the finding of deception was vitiated, so too must be the decision pursuant to paragraph 245CD. In any event the rejection of the material provided in support of the ILR application was inconsistent with the finding at interview that the petitioner was credible.

Argument for the respondent

[22] On behalf of the respondent it was submitted that it could not be said that the decision was unreasonable or irrational. It was based on evidence of significant and unexplained discrepancies in the petitioner's income declarations, and took account of the correction submitted to HMRC at about the time of the making of the ILR application. The petitioner's behaviour fell within paragraph 322(5) because it called into question his character and conduct. No evidence was provided to explain the discrepancy. Mere assertion was insufficient. The respondent was not required, by interview or any other particular procedure, to search for an explanation for a discrepancy, especially where it was as large as this one. There was no absolute duty to put the matter to the applicant for comment before making a decision.

[23] The circumstances of the present case fell within paragraph 322(5). It was not possible for the respondent to be satisfied as to which of the conflicting sets of income figures submitted by the petitioner had been correct, and the fact that the figures submitted

to HMRC had been amended did not make it any more likely that the amended figures were the correct ones. The *Ngouh* case had concerned very different circumstances, and a great deal more information had been available than was provided by the applicant in the present case.

[24] Refusal of leave under paragraph 245CD did not stand or fall with the refusal under paragraph 322(5). The respondent's finding that the declaration of earnings in the petitioner's ILR application was not genuine was self-standing and did not depend upon any finding regarding character or conduct.

Decision

[25] In considering whether the respondent erred in law in deciding that it was undesirable to grant ILR to the petitioner, the court must apply *Wednesbury* principles: cf *R (Giri)* v *Secretary of State for the Home Department* [2016] 1 WLR 4418 (CA) at paragraph 30. In accordance with the majority of the English authorities cited above, I reject the petitioner's submission that the circumstances of the present case are not capable of falling within paragraph 322(5) because they are of insufficient seriousness. There is nothing in the wording of paragraph 322(5) itself to restrict the respondent's discretion in this way. There is no "type" of case to which the paragraph is restricted. The reference at the end of paragraph 322(5) to a threat to national security does not, in my view, colour the approach that must be taken to the more general notions of conduct, character or associations which precede it. Viewing the matter through a *Wednesbury* lens, it would not, in my opinion, be appropriate for a court to hold that it is necessarily unreasonable or irrational for the respondent to decide that it is undesirable for an applicant to remain in the UK because he has deliberately submitted false information about his earnings to either HMRC, with a view

to evading his income tax liability, or to UKVI, with a view to providing false information in support of his application.

[26] Nor, in my opinion, would it be appropriate to treat the respondent's guidance to her own officials as restricting the scope of paragraph 322(5). The description of "the main types of cases" that an official might need to consider for refusal does not exclude the possibility of there being others. In any event, on the wording of the guidance, deliberate tax evasion involves criminality even if it is more commonly dealt with by the imposition of financial penalties than by prosecution in a criminal court.

[27] All of the above assumes, however, that the falsification of one or other declaration of income was intentional. Where, in contrast, an incorrect income tax declaration was made because of carelessness or inadvertence, very different considerations would apply. A decision by the respondent to refuse ILR because an incorrect tax return had been inadvertently submitted would be much more difficult to justify. That is why, as Spencer J observed in *Khan*, it is necessary for the respondent to conduct a proper fact-finding process in order to be satisfied that there has been intentional wrongdoing. A conclusion that a person has attempted either to evade tax or to falsely inflate his income for ILR purposes is a serious one, with potentially grave practical consequences if it results in refusal of leave. The respondent must therefore be satisfied, on the balance of probabilities, that an incorrect declaration (whichever of the two it might be) has been intentionally made. Where no plausible explanation is offered for the discrepancy, the respondent might reasonably conclude that there has been an intentional under-declaration of income to HMRC. The fact that the under-declaration has subsequently been corrected will not necessarily tip the balance in favour of the applicant, especially if the correction took place at or around the same time as the submission of an application for ILR. As mentioned earlier, Appendix A to

the Immigration Rules gives express notice that the respondent may carry out a process of verifying previous earnings claims with declarations made to other government departments. The respondent might well form the view, in a particular case, that it was the prospect of such a verification exercise that prompted the correction, rather than a belated and unconnected realisation that an error had previously been made.

[28] I do not accept the petitioner's analysis, derived from Foskett J's judgment in *Ngouh*, that the respondent must in all cases conduct a two stage process of, firstly, deciding whether there has been undesirable conduct and then, secondly, considering whether there are positive factors that outweigh the conduct and render it desirable to grant leave to remain. Provided that the respondent has properly considered the evidence and reached a rational conclusion that there has been a fraudulent attempt to evade tax, the decision whether that is sufficient to render it undesirable for an applicant to be granted ILR is a matter for the respondent, and is not to be impugned by the court.

[29] I turn now to apply the foregoing analysis to the respondent's decision in the present case. As can be seen from the narrative earlier in this opinion, the decision letter set out, in turn, (i) the earnings claimed by the petitioner in the preceding 12 months; (ii) the salaried and self-employed earnings claimed by the petitioner in previous applications to UKVI; and (iii) the significantly lower self-employed earnings declared to HMRC for similar periods. The letter noted that it was the petitioner's responsibility to ensure that earnings were correctly declared to HMRC. The view was expressed that the fact that the petitioner had not noticed any errors before the initial submission of the returns cast doubt on his credibility and on the earnings reported to UKVI. On the foregoing basis, the writer of the letter concluded that the petitioner had intentionally misrepresented his earnings to either HMRC or UKVI.

[30] In my opinion the mere fact that different amounts were declared to HMRC and to UKVI did not constitute a sufficient basis for the conclusion that the petitioner had acted dishonestly and that it was accordingly undesirable to grant him permission to remain. The letter does not contain any indication that the respondent addressed her mind to the question whether the discrepancy indicated inadvertence on the one hand or intentional wrongdoing on the other. No reason is given for the conclusion that there was a deliberate under-statement or over-statement of income in one or other of the declarations. In the circumstances of the present case, one would have expected the respondent to explain why an inference of dishonesty was to be drawn despite not having afforded the petitioner an opportunity to explain how it came about that he declared such small amounts of self-employed income by comparison with the amounts declared to UKVI and subsequently to HMRC when the amendments were submitted.

[31] The fact that the petitioner was assessed as credible following an interview at which the discrepancy was not put to him reinforced the need for a balanced assessment in the light of all of the evidence, including any explanation offered by the petitioner. The respondent was not, of course, bound to accept any such explanation as plausible or satisfactory. But the difficulty with the decision letter is that it does not demonstrate that any consideration was given to these matters at all. In the absence of any assessment of whether there was evidence of deliberate misdeclaration as opposed to innocent error, the decision was, in my opinion, unreasonable according to *Wednesbury* principles. It must therefore be reduced.

[32] It remains to consider whether the respondent's separate decision under paragraph 245CD that the petitioner had insufficient points to qualify for ILR can stand. In my opinion it cannot. As the petitioner submitted, the respondent's conclusion that she

could not be satisfied that the figures submitted by the petitioner in respect of both previous years' earnings and his total earnings for the year to 31 January 2016 were genuine was based upon suspicions created by the discrepancy between his declarations in those earlier years. The decision under paragraph 245CD is also therefore vitiated by the respondent's failure to consider whether that discrepancy could be explained in a way which did not cast doubt upon the genuineness of the figures submitted in the petitioner's ILR application. Accordingly it too must be set aside.

Disposal

[33] For these reasons I shall grant the petitioner's motion to reduce the decision dated 3 November 2017 and the administrative review decision dated 6 December 2017. I shall also reduce the corresponding decisions in relation to the second petitioner.