OUTER HOUSE, COURT OF SESSION

[2018] CSOH 128

P222/18

OPINION OF LORD TYRE

In the cause

RUSSELL DADZIE (AP) and RHODA PARKER-WILSON (AP)

Petitioners

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners: 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 second petitioner is the first petitioner's partner and is a dependent upon his application. 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 national of Ghana who had, by 8 June 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 8 June 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 5 December 2017.

[3] The petitioner seeks reduction of both decisions. The application came before me for a hearing along with another case (reference P223/18) 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.
>
> 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 22 September 2007. On 14 January 2009 he applied for LTR under Tier 1 Post Study rules, which was granted until 27 June 2011. On 18 March 2011 he applied for LTR as a Tier 1 General Migrant which was granted until 14 June 2013. On 3 June 2013, he applied for LTR as a Tier 1 General Migrant which was granted until 18 June 2016. On 8 June 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 £53,258 for the period from 1 May 2015 to 30 April 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 3 June 2013 he had claimed self-employed earnings of £14,157 for the period from 6 April 2012 to 5 April 2013. She further noted, however, that the petitioner had submitted a self-assessment income tax return form to HMRC which initially showed a net profit from self-employment of £1,640 for the tax year 2012-13, but which was amended in 2016 to the figure of £14,157 prior to the making of the ILR application.

[9] The letter continued:

> "We wrote to you on 16 March 2017 enclosing a questionnaire which you completed and returned, signed 04 April 2017.
>
> With reference to the questionnaire, questions 12-14 you were asked the following;
>
> Q12: Did you review, check and sign each tax return in the financial year(s) stated in your answer to question 2 before it/they were submitted to HMRC? If not please list those you did not check and sign and provide reasons why you did not do so.
>
> A: Yes.
>
> Q13: Are you satisfied that the tax return(s) submitted to HMRC in the financial year(s) stated in your answer to question 2 accurately reflected your income from self employment, or that of your limited company?

A: Yes.

Q14: Have you ever needed to correct or resubmit your tax returns for the financial year(s) stated in your answer to question 2?

A: Yes.

(a) Please provide details and the reason why the tax return was incorrectly submitted?

A: 2012-13 tax return had to be corrected due to errors that were later detected.

(b) When and how did you discover that you had made an error in your tax return?

A: Error was discovered on January 30, 2016. On 30 January 2016 I had logged onto my HMRC online account to file my tax return for the 2014-15 financial year. I took the chance to review my tax returns for the previous financial years and discovered an error in the tax return for 2012-2013 financial year.

(c) What was the cause of the error?

A: Error due to oversight.

(d) What action did you take on discovering the error?

A: As it is my responsibility to ensure my tax records are correct and up-to-date, on discovering the error,

- I got in touch with my accountants (ie Regis & Co) to also review the 2012-13 tax return and all my previous tax returns. After reviewing these returns, my accountants also confirmed that, indeed, there were errors not just in my self-employment income for 2012-13 financial year but also in my income from employments for that same financial year.
- Based on the above information from my accountant, I phoned HMRC on 8 February to request my employment history.
- Upon receiving records of my employment history… I realised that one of my employments in the 2012-13 financial year was not captured, though my last payslip from that employer [named] showed my gross pay at the time of leaving that company.
- I therefore instructed my accountants to correct the errors on my behalf…"

[10] 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 continued:

> "…The Secretary of State notes that in your answers to the questionnaire you have offered no credible reason (other than 'oversight') to account for why this significant discrepancy occurred in the first place, nor for what reason you 'took the chance' to review a tax return filed in a previous period.
>
> It is your responsibility to ensure that the requisite tax is paid on your self employed earnings, and it is questionable that neither yourself nor your accountant did not identify this substantial discrepancy at the time of submitting the return. It is not credible that a professional accountant would make such fundamental mistakes when declaring taxes to HMRC, as the accounts would have been prepared based on the evidence and information provided by you.
>
> It is therefore not accepted that you could have been unaware of the discrepancies between the earnings declared to UKVI and to HMRC. Based on the information you have provided in the questionnaire and the information you have provided to HM Revenue and Customs, we are not satisfied that you have been able to credibly account for why the earnings declared to HM Revenue and Customs were significantly less than the earnings you had declared in your immigration applications."

In view of the above, the respondent concluded that the petitioner had either misrepresented his earnings to HMRC in order to reduce his tax liability or provided false information about his earnings to UKVI in order to obtain LTR, or both.

[11] 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."

[12] 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 self-employed earnings claimed by

the petitioner were genuine, no points were awarded for those earnings. The consequence was that the petitioner's points totalled 55, and for that reason also his application for ILR was refused.

[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, while 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.

(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.

(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.

(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.

[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. No consideration had been given to evidence in the petitioner's favour or the fact that the underdeclaration was relatively small. The decision letter was further flawed in referring to and rejecting an explanation (error by an accountant) which had not been put forward by the petitioner.

[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 questionnaire sent to and completed by the petitioner had not disclosed the respondent's concerns as it ought to have done.

[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.

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 unexplained discrepancies in the petitioner's income declarations, and took account of the correction submitted to HMRC prior to the making of the ILR application. The petitioner's behaviour fell within paragraph 322(5)

because it called into question his character and conduct. The petitioner had been given an opportunity to provide a satisfactory explanation for the discrepancy but had failed to do so. Mere reference to "oversight" was not enough. The respondent was not required to take any further steps to alert the petitioner to her concerns or to investigate the reasons for the "oversight".

[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 figure submitted to HMRC had been amended did not make it any more likely that the amended figure was the correct one. 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 self-employed earnings claimed by the petitioner in a previous application to UKVI; and (iii) the lower self-employed earnings declared to HMRC for a similar period. The letter then quoted the

petitioner's answers to the questions put to him in the questionnaire. 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 for one particular period 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. Although the petitioner had earnings from self-employment in other years, nothing is said about these. The discrepancy is relatively modest. The subsequent correction took place at the time of submission of a tax return and not at the same time as the application for ILR.

[31] 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 these factors and the petitioner's statement that the under-declaration had been due to oversight. The respondent was not, of course, bound to accept that statement 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. It is further vitiated by the reference to an error by an accountant: no such excuse had been put forward by the petitioner and there is nothing in the papers to indicate that an accountant was involved in the submission of the incorrect return. 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 his previous earnings from self-employment were genuine was based upon suspicions created by the discrepancy between his declarations in an earlier year. 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 5 December 2017. I shall also reduce the corresponding decisions in relation to the second petitioner.