



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14481/2017

THE IMMIGRATION ACTS

Heard at North Shields
On 23 November 2018
Prepared on 26 November 2018

Decision & Reasons Promulgated
On 10 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

R. D.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Hashmi, Mamoon Solicitors
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, an Indian national, entered the United Kingdom legally in September 2007 with leave to remain as a student. His leave to remain was then extended on a number of occasions, in different capacities. On 16 June 2016 he made in time, an application for a grant of indefinite leave to remain on the grounds of his long residency. This was refused

on 31 October 2017 with reference to paragraph 322(5) of the Immigration Rules. In short, the Respondent was satisfied that the Appellant had declared significantly different earnings figures in the course of previous applications for leave to remain, to those which had been declared to HMRC from time to time for the same periods when declaring his income for taxation purposes.

2. The Appellant's Article 8 appeal against that decision was heard on 21 March 2018, and it was dismissed by First Tier Tribunal Judge Gumsley in a decision promulgated on 28 March 2018.
3. It was not in dispute before Judge Gumsley that the Appellant had declared to both the Respondent and to HMRC that he had enjoyed an income in both the tax years 2010/11, and 2012/3, as both an employee, and as a self employed person. Nor was it in dispute that he had declared to the Respondent and to HMRC substantially different figures by way of taxable income for the same tax year; thus a discrepancy of £37,704.92 for the tax year 2010/11, and a discrepancy of £32,501.43 for the tax year 2012/3.
4. Judge Gumsley concluded that the Respondent had established that the Appellant had deliberately acted dishonestly, and gave reasons for that conclusion. Thus, although the Appellant had established that his "private life" in the UK was sufficient to engage Article 8, he concluded that this private life had been established at a time when his presence in the UK was lawful but precarious; Rhuppiah [2018] UKSC 58. He concluded that there was an enhanced public interest in the Appellant's removal as a result of his dishonesty, and the decision to refuse his application for indefinite leave to remain was a proportionate response by the Respondent. The Appellant could return to live in safety in India, where his wife and his immediate family had always lived, and build on his relationships with them. With the benefit of the education and work experience he had gained in the UK he could anticipate good prospects for his future employment, and earning capacity in India.
5. The Appellant was granted permission to appeal by decision of 24 July 2018 of First tier Tribunal Judge Bird because it was considered arguable that since HMRC had imposed no penalty upon the Appellant the Judge's decision was not open to him, and/or was inadequately reasoned.
6. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before me.

The hearing

7. Ms Hashmi provided a skeleton argument to support the grounds, which made no reference to the decision of Spencer J in R (Khan) v SSHD (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384, promulgated on 3 May 2018. When I drew that decision to her attention,

and volunteered to stand the appeal down the list in order to give her time to read it, she declined the offer on the basis that she had read it, and did not need a further opportunity to do so.

The Appellant's challenge

8. Ms Hashmi, who appeared below, and who drafted the grounds, took three points in the grounds;
 - First, that although no such application was made by her on behalf of the Appellant, it was incumbent upon the Judge to adjourn the hearing and to require the Respondent to provide further documents in evidence to disprove the Appellant's evidence [#5].
 - Second, that the Respondent failed to discharge the burden of proof that lay upon him to prove the Appellant's dishonesty, and indeed the Judge had effectively reversed the burden of proof so as to require the Appellant to prove his innocence [#5].
 - Third, that there was no evidence before the Judge that would permit him to find that the Appellant's explanation of innocence was untrue [#4].
9. Although the grounds did not take the point, Ms Hashmi's skeleton argument argued that the Judge had failed to heed, and apply the content of the relevant IDIs (published January 2018) insofar as they gave guidance upon the application of paragraph 322(5). That guidance noted expressly however that conviction of a criminal offence was not necessary for the application of paragraph 322(5), and advised that the key consideration for the decision maker was whether reliable evidence existed to support the conclusion that the individual's behaviour called into question their character and conduct to the extent that it was undesirable to allow them to remain in the UK. This element of the skeleton argument was not pursued in oral submissions, was not the subject of a grant of permission, and in any event in my judgement had no merit in the light of Khan.
10. Ms Hashmi's closing oral argument was to accept that the Appellant had been negligent in his handling of his personal tax affairs, but to argue that there was no documentary evidence that pointed directly and conclusively to deliberate dishonesty on his part. In common parlance there was no "smoking gun". Thus she argued in reliance upon AA (Nigeria) [2009] EWCA Civ 773 that mere negligence, or an innocent mistake, was not to be equated with dishonesty, and asserted that the Judge had done precisely that. However when pressed she was unable to identify to me any passage within the Judge's decision that supported that contention. Again this was an argument without merit.

Decision

11. There is no merit in the first complaint advanced in the grounds, and indeed Ms Hashmi did not seek to advance it before me. I need say no more about it. In my judgement the other complaints can properly be taken together.

12. The Appellant is neither naïve, nor uneducated. As an engineer it can properly be inferred that he is more than averagely numerate. He would of course know in broad terms what he earned gross as a self employed man from month to month, and from year to year. Indeed it was always his obligation to keep proper records of his income and expenditure in the course of that self-employment, and thus maintain and prepare accounts which would accurately disclose the profits of that self employment. Equally he would receive from his employer payslips and P60s, that would record accurately both what he earned gross, and net of tax deductions, as an employed man from month to month, and from tax year to tax year, and thus he would always know what his income from employment was.
13. As I understand it, there was no dispute about any of that before the Judge, and no suggestion by the Appellant that either the payslips or P60s that he had received from time to time in the course of his employment were inaccurate in their recording of his earnings as an employed man, and the deductions that had been made from them by his employer.
14. It was also not in dispute that the Appellant had declared to both the Respondent and to HMRC that he had enjoyed an income in both the tax years 2010/11, and 2012/3, as both an employee, and, as a self employed person. (The claim that was made in the Appellant's witness statement [ApB p13 #3] was inconsistent with the concession made on his behalf by Ms Hashmi before Judge Gumsley that he had declared to the Respondent and to HMRC substantially different figures by way of taxable income for the same tax year. The Judge was entitled to accept the concession and discount the inconsistent claim.)
15. Thus there was a discrepancy of £37,704.92 for the tax year 2010/11, and a discrepancy of £32,501.43 for the tax year 2012/3, between the incomes declared to the Respondent and to HMRC. On any view these were significant sums, and the inference drawn by the Respondent was (and remains) that they were either the result of a dishonest attempt to reduce a tax liability, or, a dishonest attempt to inflate income for immigration purposes, but in either event they were the product of a deliberate deception by the Appellant rather than carelessness or an innocent mistake.
16. As I understood Ms Hashmi to ultimately accept, the scale of the discrepancy between the financial information provided to the two different bodies for the two different purposes was such as to discharge the evidential burden that initially rested upon the Respondent to demonstrate a prima facie case of dishonesty. That must be right; the scale of the discrepancy was such as to shift the evidential burden to the Appellant to provide an apparently credible innocent explanation for what had occurred. If he were able to do so, that would in turn give rise to an evidential burden upon the Respondent to establish that the explanation proffered was untrue. That was certainly the President's

analysis of how the evidential burden of proof could shift between the parties during an appeal Muhandirange (section S-LTR.1.17) [2015] UKUT 675.

17. There is of course only one standard of proof applicable: the civil standard of the balance of probabilities. It is quite clear from his decision that the Judge applied throughout the correct standard of proof, and indeed Ms Hashmi accepted before me that this was the case. In the course of argument she abandoned any suggestion to the contrary, and suggested that the real substance of her complaint lay in the argument that the Judge had failed to give adequate reasons for rejecting the Appellant's evidence. That is not an argument that is readily distilled from her grounds, and for the reasons set out below I am satisfied that it has no merit.
18. What then was the innocent explanation proffered by the Appellant for the discrepancies in the income figures given to the Respondent and to HMRC? The Appellant blamed the discrepancies between the figures that were given to the Respondent and to HMRC for his taxable income in each of the tax years of 2010/2011 and 2012/13 upon the two different firms of accountants that he had used to prepare those tax returns. He said the figures given to the Respondent were accurate. He said that he had used different firms for each of the two tax years that were the subject of the Respondent's concerns, and denied that he had ever seen the tax returns submitted on his behalf for those tax years, and thus had been denied the opportunity to identify the mistakes the two firms had made. The Appellant asserted that he had made a formal complaint to the Professional Conduct Department of the ICAEW against them both on 10 June 2016 [ApB p40], although he produced no acknowledgement by the ICAEW of such a complaint, and accepted in oral evidence that he had never received any response to it, or request for further information to support that complaint. The Appellant also accepted in evidence that he had obtained no admission of fault from either firm of accountants. He offered no correspondence between himself and his accountants that would shed light upon the advice that he received, or the instructions that he gave, at the time. He relied instead upon the assertion that HMRC had raised no penalty against him for his under-declaration of tax.
19. There were therefore a number of elements to the explanation of innocence that he advanced, as follows;
 - i) The Appellant knew nothing of taxation and could not be expected to have the knowledge of an accountant
 - ii) The Appellant had never received any direct communication from HMRC - every communication had been between HMRC and the accountants he had retained from time to time
 - iii) The Appellant had never seen or approved the calculations of his profit from self employment relied upon as the basis for the taxable profit from that business for disclosure to HMRC

- iv) The Appellant had been in India when tax returns had been submitted on his behalf for the two tax years in issue
 - v) The Appellant had never seen or approved the tax returns submitted to HMRC on his behalf by his accountants from time to time
 - vi) The Appellant never had any reason to question the amounts he was advised that he was required to pay to HMRC by way of tax upon his earnings from self employment
 - vii) The two different firms of accountants retained by the Appellant to deal with his tax affairs in the two tax years in issue had each been negligent, and had as a result each significantly under calculated his income for tax purposes
 - viii) The Appellant had made a formal complaint in relation to each firm of accountants with the ICAEW, although had never received a decision upon that complaint
 - ix) HMRC had not levied any penalty against him, and had therefore accepted that there had been an innocent mistake rather than a deliberate attempt to reduce tax
20. The Judge engaged with each of those limbs, and made the following findings;
- i) The Appellant was not an accountant but equally his denial of any knowledge of taxation was implausible. He was an engineer who had studied a business management module [18]. It was not plausible that he would have failed to question why he was being asked to pay so little by way of tax, given the income that he claimed to believe he was generating through self employment in addition to his earnings from employment [20].
 - ii) The Appellant did receive direct communication from HMRC; self assessment documents in evidence were addressed to his home [19]. Thus communication had not solely been between HMRC and the accountants he had retained from time to time, as he had claimed [19].
 - iii) There was no obvious reason why the Appellant would not have seen and approved the calculations of his profit from self employment relied upon as the basis for the taxable profit from that business for disclosure to HMRC. It was unlikely that none of his accountants would have required him to do so, when they could have been sent to him electronically where-ever he was at the time [19 & 21].
 - iv) On the dates the Appellant had given in oral evidence for when he had been in India, he had been in the UK when tax returns had been submitted on his behalf for the tax years 2010/11, 2011/12, and 2012/13 [21].
 - v) The Appellant had failed to provide any reliable evidence from either firm of accountants to show the nature of the advice he

received from them or the nature of the instructions he gave to them [22]

- vi) The Appellant did have reason to question the amounts he was required to pay to HMRC by way of tax because he would have realised that they were too low in the light of his earnings by some margin [20]
 - vii) It was not plausible that two different firms of accountants retained by the Appellant to deal with his tax affairs in the two tax years in issue had each been negligent, and had each as a result significantly under calculated his income for tax purposes [25]. He had a clear incentive to either under-declare his income for tax purposes, or over-declare his income for immigration purposes [26].
 - viii) Although the Appellant had produced in evidence a document that he claimed was a copy of a formal complaint he had made to ICAEW in relation to each firm of accountants on 10 June 2016, he had not in fact made such a complaint [24]
 - ix) HMRC had not levied any penalty against him [17].
21. There was no evidence material to the issue of the Appellant's honesty that Ms Hashmi was able to identify to me as having been overlooked. The complaint that the Judge had failed to take into account the failure of HMRC to impose a penalty upon him is simply wrong: that was a factor that was specifically considered as being in his favour [17]. The failure of HMRC to levy such a penalty did not however mean that either the Respondent or the Tribunal were obliged to accept that the Appellant had been honest in his dealings with HMRC, rather than dishonest. It was only one of a number of factors that had to be considered.
 22. It is clear that the Judge's findings were open to him on the evidence before him, and thus the challenge set out in the fourth paragraph of the grounds that there was no evidence before the Judge that would permit him to find that the Appellant's explanation of innocence was untrue falls away.
 23. Equally those adverse findings were each adequately reasoned; MD (Turkey) [2017] EWCA Civ 1958. Notwithstanding the assertion that the Judge failed to give cogent reasons, the reality is that he gave ample reasons.
 24. The Appellant had claimed in evidence that he was never given the opportunity to sign off his tax returns as accurate, or to sign off his accounts as accurate, or to sign off the tax calculations prepared by his accountants as accurate. The Judge concluded that this central plank of his case was untrue. He noted that the Appellant had failed to corroborate this element of his claim with any evidence from either of the firms of accountants who acted on his behalf at the material times. Although postal, courier, email, and fax communication, was always available between the UK and India, the explanation for his inability to

approve these documents was based upon the Appellant's claimed presence in India at the material dates for the submission of his self assessment forms. It was said in consequence that he was unable to communicate with his accountants as a result of that geographical separation. The Appellant had also said that he was unable to provide corroboration of the dates when he was in India, because he could not produce his passport, since it had been retained by the Respondent when he made his most recent application for leave to remain. Whether his passport was retained, or not, rather missed the point. First, in oral evidence he gave dates for his travel to India, which if accurate showed that he was in the UK at the relevant dates for the submission of his tax returns. Second, there were other ways the Appellant could have corroborated his claim to have been in India, using the records of the purchase of the air tickets he used to travel to and fro. Third, whether or not he was able to establish that he was in India at any material date, was not the key issue. The key issue was whether he had approved the submissions that had been made to HMRC in his name. His tax records, and the files maintained by his former accountants were always available to him, but as Ms Hashmi accepted before me, he made no attempt to corroborate his evidence to the Judge by reference to them.

25. The Judge also noted that for the Appellant's explanation to be true would have required him to have been the victim of incompetence by two different firms of accountants in relation to two different tax years. Each of them would have been required to have made very large errors that had resulted in a significant under-declaration of income, and thus a substantially reduced liability to tax. The Judge did not consider this plausible.
26. As set out in Khan it is appropriate to draw an inference of dishonesty if a claimant fails to provide a plausible explanation for the discrepancy between the disclosures made to the Respondent and to HMRC. Whether the Judge's decision should be analysed as in reality a conclusion that the Appellant had failed to discharge the evidential burden upon him of raising a plausible innocent explanation, or, as he stated was his conclusion, that the Respondent had discharged the evidential burden of showing that the proffered explanation was untrue [28] is in my judgement ultimately immaterial. It is quite clear that the Judge's adverse findings of primary fact were well open to him on the evidence, and that they were properly reasoned. He did then stand back to look at the evidence in the round, and it was well open to him to conclude that on the evidence before him the Appellant had been deliberately dishonest, not once, but twice. It is in my judgement quite clear that the Judge's express conclusion was that the Respondent had discharged the burden of proof of establishing that the Appellant's behaviour was deliberately dishonest [28].
27. Thus the Judge did follow the correct structure, and properly applied Royal Brunei Airlines v Tan [1995] UKPC 4, to distinguish between mere

carelessness and dishonesty. Indeed, although the Judge made no express reference to the approach in Ivey v Genting Casino Ltd [2017] UKSC 67, it is plain that his approach was to seek to focus not upon whether the Appellant's claimed beliefs were reasonably held, but whether they were genuinely held, before looking at the position objectively in order to determine whether there was dishonesty. The overall conclusion of deliberate dishonesty was well open to him on the evidence before him, and it was more than adequately reasoned.

28. In the circumstances, and as set out above, I am satisfied that the Judge did not err in law when he dismissed the Article 8 appeal, notwithstanding the terms in which permission to appeal was granted. In my judgement the grounds fail to disclose any material error of law in the approach taken by the Judge to the public interest that requires his decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 28 March 2018 contained no material error of law in the decision to dismiss the Appellant's human rights appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 26 November 2018

