



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05597/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18th January 2019

Decision & Reasons Promulgated
On 15th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR MUHAMMAD BILAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel, Ilford Law Chambers
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 17th January 1981. The Appellant has an extensive immigration history, having first arrived in the UK on 21st September 2006 with a student visa. On 18th October 2016 the Appellant applied in time for indefinite leave to remain on the grounds of ten years' continuous residence in the UK. That application was refused by Notice of Refusal dated 9th February 2018.
2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Mulholland sitting at Taylor house on 2nd October 2018. In a decision and reasons

promulgated on 16th November 2018 the Appellant's appeal was allowed on human rights grounds.

3. The Secretary of State on 16th November 2018 lodged Grounds of Appeal to the Upper Tribunal. Those grounds contended firstly the judge had made a material misdirection of law in that the judge materially erred by absolving the Appellant of any blame for the discrepancies which amounted to over £11,000 in his self-employed income both to UKVI and HMRC, instead accepting the Appellant's account that his accountant was to blame for the failure to correctly declare his income for several tax years.
4. Secondly, it was contended that the judge had failed to give reasons or any adequate reasons for findings on material matters in particular that the judge had failed to provide any adequate reasons to support the findings at paragraph 23 of the determination that "I find it perfectly feasible that he would not have noticed this until 2015 the error in his tax returns". Considering this included a failure to declare any self-employed income at all as well as under-declaring his income by several thousand pounds the Secretary of State did not consider such a finding to be sustainable.
5. On 5th December 2018 First-tier Tribunal Judge Doyle granted permission to appeal. Judge Doyle noted that the First-tier Tribunal Judge did not take guidance from two authorities *Samant v SSHD [2007] UKAIT URR/6546* and *Khan v SSHD [2018] UKUT 00384 (IAC)*.
6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel Mr Biggs. Mr Biggs has also provided to me a most useful skeleton argument in support of the Appellant's opposition to the appeal. I have considered the skeleton argument. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Case Law

7. I have taken note, in particular the guidance given in the authority of *R (on the application of Khan) v the Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)*. This is a decision of Mr Justice Martin Spencer. Considerable guidance is to be found in the headnote to that decision:
 - “(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. Such an inference could be expected where there is no plausible explanation for the discrepancy.

- (ii) 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 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) 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, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty.
- (v) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):
 - 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."

Submissions/Discussion

8. Mr Bramble relies on the Grounds of Appeal and on the authority of *Khan*. He submits the two grounds are self-explanatory and effectively roll into each other. He submits that the judge has failed to approach the case in accordance with the guidance given in the headnote (cited above) of *Khan*. He specifically takes me to paragraph (iv) of the headnote pointing out that the judge must take account of the process that was being undertaken and to paragraph (v) (submitting that in this case why did the Appellant not realise that an error had been made because his tax liability was considerably less than he expected.) He takes me to paragraph 19 of Judge Mulholland's decision and the fact that it is accepted therein that the Applicant bears personal responsibility for his tax returns. It is Mr Bramble's submission that

the judge has not properly engaged with the circumstances and the approach to be adopted as set out in *Khan* and that the decision is lacking in findings.

9. He also questions whether the judge has properly assessed the timelines in this matter pointing out that it is recited at paragraph 20 that it was not until 2015 that the Appellant took any action with regard to the erroneous tax returns he had previously submitted. He submits that on a reading of paragraphs 20 to 23 of the judge's decision the appropriate approach has not been followed and that the judge has failed to give reasons for reaching his conclusions.
10. Mr Biggs in response submits that if it is found that the first submission of the Secretary of State is not well-founded then the second limb of the Secretary of State's attack falls away. He submits that the judge has adequately addressed the law and given legally adequate reasons for her findings at paragraph 23. He points out:-
 - (i) That none of the authorities referred to by the Secretary of State concern statutory appeals and did not in any event need to be referred to expressly by the judge. In any event, irrespective of this, he submits that the judge's approach and reasoning has been consistent with the authorities cited and that overall the judge applied the correct approach to the issues before her. By considering and deciding whether in the light of Mr Bilal's evidence it could be concluded that the Secretary of State had proven that he had acted dishonestly. He submits that the judge's reasoning is plainly adequate because the parties can be in no doubt why the judge allowed the appeal. He submits that given the judge's reasonings to be found at paragraphs 15 to 23 there is no substance in the Secretary of State's assertion that the judge's statement that "I find it perfectly feasible that he would not have noticed this until 2015" is a finding that is not based on fact.
 - (ii) He submits that the whole thrust of this case turns on whether or not there has been any dishonest intent and the Tribunal needs to apply the evidence accordingly and that the First-tier Tribunal Judge has done this and applied that approach.
11. Mr Biggs addresses the authority of *Khan* and that the judge has accepted the appellant's explanation which has been supported by an expert accountant's report and that that is the model that *Khan* indicates needs to be followed. *Khan* looks, he submits, at how the Upper Tribunal should address "*Wednesbury* challenges" and therefore there is no reason to expressly refer to these principles. He accepts that you cannot just simply blame the accountants and that *Khan* is authority for this and that the judge has done so. He submits that there is no material error of law and asked me to dismiss the appeal.
12. Mr Bramble agrees that a principle is established in *Khan* that it is not possible to rely on an Appellant's mistake in order to put forward an argument of dishonesty but he takes me to paragraph 34 of *Khan*:

"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 would be not merely entitled

but obliged to consider the evidence in each direction and, in her decision, justify her conclusion by reference to that evidence.

...

Thus, whilst it would normally be the case that an Applicant would soon become aware of the error because of his unexpected lack of a liability to pay tax, if the Applicant could show that he was so distracted by other matters – here the serious illness of a child undergoing life saving brain surgery with subsequent treatment, rehabilitation and chemotherapy – then the Secretary of State would have to consider very carefully whether that did in fact afford a good reason for the Applicant’s failure to appreciate that his tax liability was less than expected and therefore notify the authorities sooner than he had done so.”

Consequently, Mr Bramble emphasises that there is a responsibility on the Appellant to put forward reasons as to why he has not responded to the error sooner.

13. Mr Biggs submits that he has in fact done so and that as there were substantial discrepancies the judge went on to assess Mr Bilal’s innocent explanation. He submits that the judge gave clear and detailed reasons as to why this explanation was accepted and that this was not a case where Mr Bilal had simply blamed his accountant. He submits that he had provided detailed evidence which was corroborated by contemporaneous documents explaining that he provided accurate documents to his accountants before they prepared the relevant tax returns and addressing the background as to why he did not become aware of the incorrect declaration sooner. Further, Mr Biggs takes me to paragraph 16 of the judge’s findings which note that Mr Bilal had also put forward credible evidence from accountants which explained how an innocent error could have arisen.
14. Briefly in response Mr Bramble submits that his challenge is not so much with paragraph 19 of the judge’s decision which relates to the Appellant’s start up business in self-employment but the manner in which the judge was addressed in paragraph 14 the Appellant’s PAYE period and the period generally between 2011 and 2013. He submits that the failure to address those issues is substantial and that insufficient reason has been given.
15. Mr Biggs points out to me that he considers that this argument put forward by Mr Bramble constitutes a completely new ground and one that is not pleaded. Mr Bramble merely disagrees with that analysis.

The Law

16. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
17. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law

for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

18. This is one of an ever increasing number of cases that appear to be coming before the Immigration Tribunal where reliance is placed on paragraph 322(5) of the Immigration Rules to refuse applications of this nature.

Paragraph 322(5) states:

“Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused -

322(5) 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.”

19. Mr Justice Martin Spencer had set out the guidelines to be followed in this sort of case. The question arises as to whether or not those guidelines have effectively been followed by the First-tier Tribunal Judge even though the authority of *Khan* is not recited by him and whether the judge has given sufficient reasons for showing that the Appellant has given an explanation as to why he did not note that he was making a false declaration as to his tax liability earlier.
20. I am satisfied that the judge has addressed this matter properly. The starting point is that historically the Appellant has a justifiable Article 8 claim for protected private and family life. The judge then addressed the appropriate questions of fact and submitted that Mr Bilal's removal would, without the allegation that was made, be disproportionate. Consequently, the question to be addressed was why he would not obtain indefinite leave to remain, given the allegation of dishonesty and the conclusion that on the basis of that allegation his presence in the UK was undesirable pursuant to paragraph 322(5). I am satisfied that in addressing the question that therefore was before the judge the judge did apply what is put to me as being “the evidential pendulum” that had been held to apply when general Grounds of Refusal are relied upon. The judge had to decide whether there was a discrepancy in income declared to HMRC and to the Secretary of State which was sufficient to discharge the

evidential burden on the Respondent to advance evidence of sufficiently reprehensible conduct that could justify the conclusion that he was undesirable, which in this context required evidence of dishonesty.

21. It was therefore necessary for the judge to consider whether the Respondent had proven dishonesty, having regard to the innocent explanation provided and importantly the evidence provided. I am satisfied that a full and comprehensive analysis of the First-tier Tribunal Judge's decision shows that she did adopt this approach.
22. This is not a case where the Appellant simply blames his accountant and as I have referred to above and is put to me by Mr Biggs, Mr Bilal provided detailed evidence corroborated by contemporaneous documents explaining that he had provided accurate documents to his accountants before they prepared the relevant tax returns and addressing the background as to why he did not become aware of the incorrect declaration sooner. All these were factors that were considered by the judge.
23. There is nothing perverse in the decision. The judge has carried out a proper analysis and approach. The judge has made reasoned findings which, on a proper interpretation of the law, she was entitled to. In essence the submissions of the Secretary of State ultimately amount to a mere disagreement in the weight given to evidence by the judge. The judge heard the facts and has made findings that she was entitled to. In such circumstances the decision discloses no material error of law and the Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

Notice of Decision

24. The decision of the First-tier Tribunal Judge discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.
25. No anonymity direction is made.

Signed

Date: 11 February 2019

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date: 11 February 2019

Deputy Upper Tribunal Judge D N Harris