



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/13894/2018
HU/11103/2018
HU/11104/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 12 February 2019**

**Decision & Reasons
Promulgated
On 05 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**RAJASEKARAN [N]
PADMA [M]
[N R]
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondents: Mr M Biggs, Counsel, instructed by Singhania & Co Solicitors

DECISION AND REASONS

The appellant in this case is the Secretary of State and the respondents are as noted above. However, for the purposes of this Decision and Reasons, I refer to the appellants as they were before the First-tier Tribunal where the Secretary of State was the respondent.

The three appellants are Indian nationals, father, mother and daughter, who appealed to the First-tier Tribunal against the decision of the respondent refusing their applications for leave to remain in the United Kingdom pursuant to Article 8 with reference to the UK Immigration Rules. The respondent had also refused the appellants' appeals pursuant to paragraph 322(5) of the Immigration Rules in respect of the desirability of permitting the person concerned to remain in the United Kingdom in the light of misconduct, character or associations. This relates specifically to the tax returns of the first appellant.

In a decision, promulgated on 29 November 2018, Judge of the First-tier Tribunal Greasley allowed the appellants' appeals (it being conceded on behalf of the respondent at the First-tier Tribunal, that the appeals would succeed if the judge were to find no evidence of dishonesty on the part of the first appellant).

The Secretary of State appealed with permission on the grounds that:

Ground 1

The judge's assessment of paragraph 322(5) of the Immigration Rules materially erred in law in incorrectly viewing the lack of punitive action by the HMRC as determinative of the appeal;

Ground 2

The judge materially erred in concluding that the HMRC had assessed the appellant's actions in relation to his tax affairs as not involving dishonesty;

Ground 3

It was argued that the view of the HMRC regarding the treatment of arrears is not relevant to assessments under paragraph 322(5) of the Immigration Rules and in any event does not address the possibility that the original tax records were correct but the appellant had falsified higher earnings in order to qualify under Tier 1.

Error of Law Discussion

Mr Jarvis conceded that ground 1 was not pursued. His case, at the highest, was that the judge erred in his assessment in the latter half of [24] of the Decision and Reasons and that the judge took into consideration the absence of proceedings by the HMRC as a weighty factor. Mr Jarvis argued that the absence of such proceedings was not something that can be positively taken into consideration as rebuttal in the assessment of dishonesty. Mr Jarvis accepted that the judge had correctly set out the proper approach to follow **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384**. It was his submission, however, that the decision was materially infected by the approach to the absence of HMRC proceedings.

I do not agree. As conceded by Mr Jarvis, the judge followed the correct approach recommended in **Khan**. The key issue, and the only one in dispute, was whether the first appellant's application was correctly refused on the basis that his presence in the UK was undesirable on the basis of there being a mismatch between the income that the first appellant had declared to HMRC in a number of tax years, on the one hand and that declared to the Secretary of State when the first appellant had successfully obtained further leave to remain on a previous occasion.

The appellant had accepted that there was a mismatch but vigorously denied acting dishonestly and had explained, in his evidence before the First-tier Tribunal, that he had relied upon his accountants and did not realise there were errors for some time and pointed to specific circumstances as to why this was the case. The judge summarised the evidence before him, in some detail, from [11] to [20] of the Decision and Reasons and no quarrel is taken with that assessment.

The judge, following the approach in **Khan**, found that the Secretary of State had initially produced prima facie evidence of dishonesty but found that the appellant had rebutted such an inference and demonstrated through "both oral and documentary evidence, that he did not in fact act dishonestly".

The judge went on to give detailed reasons why he accepted the appellant's innocent explanation and in light of this found that the Secretary of State could not prove dishonesty and therefore paragraph 322(5) did not apply.

As indicated above, Mr Jarvis quite properly did not pursue ground 1 as it is abundantly clear that the judge did not view the lack of punitive action by the HMRC as determinative of the appeal.

In respect of ground 2, although the respondent contended that the judge erred in concluding that the HMRC had assessed the appellant's actions in relation to his tax affairs as not involving dishonesty this was not what the First-tier Tribunal found, which was as follows, at [24] of the determination:

"The appellant has, in essence, stated that he relied solely upon the expertise and abilities of accountants. I accept that he has no specific direct evidence of tax affairs either in India or in the UK and that it would be reasonable and plausible find to seek rely upon (sic) professionals in this area. I also accept there is credible evidence that the appellant immediately sought to correct such details by contacting HMRC. It is further credible in my mind, that there is no evidence seeking to suggest that HMRC sought to impose any financial penalty in relation to the discrepancies highlighted, or indeed to consider any form of prosecution. Had there been clear evidence of dishonesty, in the circumstances, I find it likely that HMRC would not have hesitated to consider such proceedings."

It was not Mr Jarvis's case that there was any "clear evidence of dishonesty" available to the HMRC, and this is the case relied on by the appellants. I am not satisfied that there is any error in the judge concluding that the HMRC

would have acted on “clear evidence of dishonesty”. Indeed, as highlighted in submissions by Mr Biggs, the respondent’s own guidance indicates that HMRC will take action against an individual or business where there is “clear evidence of dishonesty” (Review of applications by Tier 1 (General) Migrants refused under paragraph 322(5) of the Immigration Rules). No error is disclosed in ground 2.

In respect of ground 3, I accept Mr Biggs’s argument that if, for example, the HMRC had formed the view that the first appellant was dishonest, this would have been a relevant consideration in any assessment by the First-tier Tribunal as the HMRC is the expert in tax regulation and had legal authority to police tax affairs. The same underlying principles explain why the HMRC’s views are entitled to be considered by the First-tier Tribunal.

The judge accepted, at [24], that the HMRC would have acted on clear evidence of dishonesty (in line with the respondent’s own guidance) regarding a tax return and observed that there was no evidence seeking to suggest that any financial penalty had been imposed or any form of prosecution. It is not the case that the judge was saying that he considered that HMRC had assessed the appellant to not be dishonest or otherwise.

The judge reached his findings, that the appellant had provided an innocent explanation, in the round, considering a series of factors (summarised from [23] to [26]) the absence of proceedings by the HMRC being just one of those factors. Mr Jarvis’ limited submission, that the judge gave undue weight to the absence of HMRC proceedings, is not made out. Although the respondent relied on the judicial review cases in **R (on the application of Samant) v Secretary of State for the Home Department [2017] UKAITUR JR/6546/2016** and **Abbasi JR/13807/2016**, both of which were considered in the more recent judicial review of **Khan**, that was in relation to a different assessment. In essence, the judicial reviews came to the conclusion that the fact that the HMRC had decided not to take further action, in those cases, did not indicate that the Secretary of State’s decision, to find that those appellants had been dishonest, was irrational.

That is a different assessment to the fact finding assessment that the Judge of the First-tier Tribunal had to carry out. Although it is correct to say that the HMRC cannot comment on whether the respondent was lied to and the HMRC does not address the possibility that the original tax records were correct but the appellant had falsified higher earnings in order to qualify under Tier 1, the judge assessed all the factors and gave adequate, sustainable, evidence-based reasons for reaching the findings he did that the appellant had provided an honest explanation. The judge noted that the respondent considered that the appellant may in the alternative have falsified higher earnings to enable him to qualify under Tier 1 (paragraph [7]). The judge’s findings considered holistically, including that the judge found the appellant and his wife to be of good character with no other evidence that they had sought to contravene criminal or immigration laws in the UK (paragraph [27]), demonstrate that the judge had addressed this alternative possibility but rejected it for the reasons given. No error of law has been established in ground 3.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law and shall stand. The appeal by the Secretary of State is dismissed.

No anonymity direction was sought or is made.

Signed

Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT **FEE AWARD**

I maintain the fee award made in the First-tier Tribunal.

Signed

Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson