



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/14606/2019 (V)

**THE IMMIGRATION ACTS**

Heard at Field House (by remote video means)  
On 20 October 2020

Decision & Reasons Promulgated  
On 26 October 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TASAWAR YASIN  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Officer presenting Officer

For the Respondent: Mr J Gajjar of Counsel, instructed by Briton Solicitors

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Skype. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The documents were available in paper format on the court file.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Young-Harry promulgated on 5 November 2019, in which Mr Yasin's

appeal against the decision to refuse his human rights claim (for indefinite leave to remain on the grounds of long residence under paragraph 276B of the Immigration Rules) dated 14 August 2019 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Yasin as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Pakistan, who first entered the United Kingdom with entry clearance as a student on 27 March 2009, with leave to remain as such to 30 June 2010. The Appellant was subsequently granted leave to remain as a Tier 1 (post-study work) and then as a Tier 1 (General) migrant, up to 21 June 2016. The Appellant applied for indefinite leave to remain as a Tier 1 migrant on 18 June 2016 which was initially refused on 18 January 2018, but that decision was subsequently withdrawn following an application for Judicial Review. The application then became outstanding again and was varied to an application for indefinite leave to remain on the grounds of long residence on 15 March 2019.
4. The Respondent refused the application under paragraph 276B(ii) and (iii) of the Immigration Rules, with reference to paragraph 276D and 322(5) of the same. In essence, the Respondent found that the Appellant had been dishonest, either in overinflating his earnings in an application for leave to remain or in under-declaring his earnings to HMRC so as to avoid tax liability. This was identified from significant discrepancies between the Appellant's declarations to the Respondent and subsequent tax returns to HMRC. In the tax year 2010/11, the Appellant had claimed to the Respondent to have self-employed earnings of £32,075 but in his original declaration to HMRC, claimed that he had only and £19,718 from self-employed earnings. He later amended this return with HMRC to show earnings of £31,248. The Appellant claimed to the Respondent to have self-employed earnings of £36,146 covering the two tax years, 2012/13 and 2013/14 but in his original tax returns to HMRC he declared a total of £17,666 across both tax years; again later amended to show a higher amount.
5. Judge Young-Harry allowed the appeal in a decision promulgated on 5 November 2019 on the basis that the Appellant did not act dishonestly and therefore a grant of leave to remain would not be undesirable due to his conduct and he met all of the requirements of paragraph 276B of the Immigration Rules; such that his appeal was allowed on human rights grounds. The totality of the First-tier Tribunal's consideration of and findings in relation to dishonesty are contained within paragraphs 12 to 17 of the decision as follows:

*"12. The appellant argues that he qualifies for leave to remain based on his 10 years lawful continuous residence in the UK. The respondent however argues that the appellant failed to disclose the correct self-assessment tax calculations between 2010 and 2014. The appellant appears to have under-inflated his income for that period, such that the respondent alleges he did so either to gain a tax advantage or immigration advantage for the purpose of his student extension application figures.*

*13. By way of explanation the appellant stated that the fault lies entirely with A&H Accountants, his former accountants. He noticed there was a discrepancy*

*in 2014, however he failed to act because it had not caused many problems. However he decided to notify HMRC and send amendments sometime in 2018. It was at this stage that the appellant apparently contacted A&H Accountants to lodge a complaint. However he did not get a response, neither has he followed it up.*

14. *He further claims that he could not immediately amend the figures because the paperwork recording all his sales and invoices, were stolen from his car. He claims he later had to contact all his customers in order to retrieve the information.*

15. *The appellant argues that when he contacted HMRC about the discrepancies, they simply asked him to pay a penalty, however they did not allege dishonesty.*

16. *The appellant explained that he failed to mention A&H Accountants among the list of his accountants, on the respondent's tax questionnaire because he misunderstood the question.*

17. *Although some aspects of the appellant's explanation are questionable, I accept his explanation as reasonable. I find the respondent has not done enough to establish dishonesty. I note also that the respondent has failed to rebut or challenge the appellant's reasonable explanation, with any further supporting evidence."*

### **The appeal**

6. The Respondent appeals on four grounds as follows. First, that the First-tier Tribunal has materially erred in law by applying the wrong standard of proof to the question of whether the Appellant acted dishonestly, which is on the balance of probabilities and there is no standard of whether the Appellant had given a reasonable explanation, as referred to in paragraph 17 of the decision. Secondly, that the First-tier Tribunal materially erred in law in concluding that the Appellant did not act dishonestly when there was sufficient evidence before it to conclude otherwise. Thirdly, that the First-tier Tribunal materially erred in law by irrationally concluding that the Appellant had given a reasonable explanation of the discrepancies in his earnings declarations. Fourthly, that the First-tier Tribunal did not take into account the lack of any evidence to substantiate the claim that an accountant was entirely to blame for the discrepancies, the relevance of which is set out in R (Shabaz Khan) v Secretary of State for the Home Department [2018] UKUT 00384 which emphasises that mere assertion such a fault is not sufficient.
7. At the oral hearing, Mr Clarke relied on the grounds of appeal and focused in his oral submissions on the irrationality of the First-tier Tribunal's findings with particular reference to the evidence before it. By way of example, Mr Clarke drew attention to the evidence which identified the Appellant's accountant responsible for both his accounts submitted with his application for leave to remain to the Respondent and for his tax returns to HMRC as Ashton Cooper & Co Accountants up to 2014, referred to in the reasons for refusal letter (from the original applications to the Respondent), the Appellant's response to a questionnaire about his earnings and the

Appellant's own written statement. This was contrasted to the Appellant's later reliance on mistakes made by A&H Accountants and a complaint made to them in March 2018 in relation to the tax year 2013/14. This is the Appellant's explanation recorded in paragraph 13 of the First-tier Tribunal's decision but could not on any view be an explanation for discrepancies relied upon by the Respondent in three earlier tax years, up to 2012/13, when there was no suggestion of A&H Accountants being involved at all with the Appellant's income or tax affairs until after the relevant period relied upon by the Respondent. It is noteworthy that there was no evidence of nor any claim that there was a complaint against Ashton Cooper & Co Accountants, a point not considered at all by the First-tier Tribunal.

8. In addition, Mr Clarke highlighted that in paragraph 17 of the decision of the First-tier Tribunal the Judge applied the wrong standard of proof and accepted what he considered to be an explanation which was in some respects questionable, to nonetheless be a reasonable one. It was submitted that this was wholly irrational on the evidence before the First-tier Tribunal, failed to contain adequate reasons and was not supported by evidence from the Appellant, even taken at its highest.
9. On behalf of the Appellant, Mr Gajjar opposes the appeal on the basis that there were no material errors of law in the decision of the First-tier Tribunal. As a preliminary point, he questioned whether the submissions made by Mr Clarke orally were actually covered by the grounds of appeal upon which permission was granted, in which no specific reference was made to the evidential matters relied upon at the hearing, even with a generous reading of the grounds of appeal.
10. On the substance of the appeal, Mr Gajjar accepted that on first reading the Appellant's evidence was complicated but in essence, his case was that A&H Accountants were to blame for the error in his tax returns and he had provided an explanation as to why they were not identified on the questionnaire from the Respondent in oral evidence before the First-tier Tribunal. It was submitted that there was no need for the First-tier Tribunal to refer to each and every part of the evidence before it, particularly as the Respondent attended the hearing and heard the evidence. In these circumstances it was submitted that sufficient reasons for finding that the Appellant had not been dishonest were given in paragraphs 16 and 17 of the First-tier Tribunal decision and were sufficient for the Respondent to understand the reasons why the appeal was allowed.
11. Mr Gajjar made detailed reference to some pieces of the evidence which supported the Appellant's claim and his appeal being allowed, but accepted that this was not straightforward, in some respects was on its face inconsistent or incorrect (as in the Appellant's own written statement, for example in paragraph 5) but that the correct meaning could nonetheless be inferred in the Appellant's favour. Mr Gajjar accepted that his own submission that there was a need to untangle the evidence, may support the finding that there was an error of law in the First-tier Tribunal's decision, but when one does untangle the evidence, it was submitted that any error could not be material to the outcome of the appeal.

12. A similar submission was made in relation to what was accepted to be a factual error in the paragraph 13 of the decision of the First-tier Tribunal, as to the date of amendment of tax returns with HMRC, which were in fact two years earlier and there was therefore no significant delay in the amendments being made once the errors had been identified.
13. As to the burden and standard of proof applied by the First-tier Tribunal, Mr Gajjar submitted that the First-tier Tribunal correctly followed the ping-pong approach to be applied to cases involving allegations of dishonesty, whereby the initial evidential burden is on the Respondent, following which the burden shifts to the Appellant to establish an innocent explanation to a minimum level of plausibility and then reverts to the Respondent to establish on the balance of probabilities that the Appellant had been dishonest. The First-tier Tribunal identifies and accepts that the initial burden has been met by its reference in paragraph 12 of the decision to the Respondent's case and if anything, has only satisfied itself of a higher threshold than necessary in relation to the Appellant's explanation by finding a reasonable explanation rather than an innocent explanation to the minimum level of plausibility. Finally, the First-tier Tribunal refers to the Respondent's failure to rebut the explanation and failing to satisfy the final burden to establish dishonesty.
14. In relation to reasonableness, Mr Gajjar relied on paragraph 74 of the Supreme Court's decision in Ivy v Genting Casinos [2017] UKSC 67, that what is important when considering dishonesty is to ascertain the actual state of an individual's knowledge or belief as to the facts and the reasonableness or otherwise of such a belief is a matter of evidence going to whether it was genuinely held rather than reasonably held.
15. In reply, Mr Clarke submitted that the Appellant's claim that any error would not be material must fail on the basis that the explanation given only related to the latest tax return which identified a discrepancy and not the earlier ones, which the argument fails to engage with at all. Further the reliance only on paragraph 74 of the decision in Ivy fails to engage with the second part of the test which was that it must be shown that the belief was genuine by the standards of ordinary people and it cannot be shown that this was considered by the First-tier Tribunal at all.

### **Findings and reasons**

16. The decision of the First-tier Tribunal is, even relatively speaking, extremely brief given the nature of the issues raised in the appeal and the extent of the evidence before it. There is no identification at all of the relevant burden or standard of proof to be applied in cases where there is an allegation of dishonesty, nor is there any reference at all to relevant authority on cases such as this involving discrepancy of earnings, including in particular the main authority from the Court of Appeal in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673, nor the Upper Tribunal's decision in R (Shabaz Khan) v Secretary of State for the Home Department [2018] UKUT 00384.

17. The First-tier Tribunal's decision refers in summary to the documentary evidence before it (by way of list of types of documents only) and the fact that there was oral evidence by the Appellant. The Judge states that all of the documents have been carefully considered even if specific items are not referred to within the findings. There is however little or no reference to any of the specific evidence before the First-tier Tribunal save for the very broad brush general summary of the respective cases of the Appellant and Respondent in paragraphs 12 to 16 of the decision, set out above. The decision lacks any detail of the nature and extent of the discrepancies in multiple tax years relied upon by the Respondent, nor any conclusion that this was sufficient to meet the initial evidential burden for dishonesty. Even on the most generous reading of the First-tier Tribunal's decision, what is essentially a summary of the Respondent's decision in paragraph 12 this regard, contains no factual findings whatsoever and contains no reference to even whether a prima facie case has been established.
18. As to the Appellant's explanation, this is again recorded in the decision in only very brief terms, with no reference at all to any specific documents supporting the explanation (nor any recognition that in numerous respects there were no such supporting documents). The summary in paragraphs 13 to 16 of the decision contains no analysis of the Appellant's explanation or evidence, nor does it contain any findings on it whatsoever. At its highest, it is only in paragraph 17 of the decision that there is anything which could be identified as a finding of fact in relation to dishonesty and not a single reason is given for the finding that it has not been established that the Appellant was dishonest, nor is there any reference at all to the relevant legal test or how it was (or was not) satisfied by the parties in this case.
19. The First-tier Tribunal refers to some aspects of the Appellant's explanation being questionable, without any identification of which aspects are questionable (or why), nor any reasons given as to why nonetheless the explanation was found to be reasonable, or on what basis. The decision of the First-tier Tribunal simply failed to engage at all with the correct test to be applied or the evidence before it, with no analysis of that evidence and no findings beyond a simple conclusion which was wholly unexplained. Whilst it is trite that it is not necessary for the First-tier Tribunal to refer to each and every piece of evidence, it is necessary to have some specific reference to it and make clear findings on the same. There is no basis upon which any reader of the decision could understand why the appeal was allowed, whether or not they were at the hearing before the First-tier Tribunal and perhaps even more so for the parties who were present given the acceptance of the complicated nature of the evidence that was before the First-tier Tribunal.
20. In circumstances where the First-tier Tribunal had recorded only a single explanation for all of the discrepancies, amounting to no more than mere assertion of error by an accountant not previously identified by the Appellant as having any involvement with either his accounts or tax returns in the three relevant tax years in which there were significant discrepancies between earnings declared to the Respondent and to HMRC; it is impossible to discern from the decision of the First-tier Tribunal any rational basis for the conclusion that the Appellant had given an innocent

explanation even to the minimum level of plausibility, let alone a reasonable explanation (which is not in any event the correct test), nor that overall the Respondent had not established dishonesty. Even if the First-tier Tribunal had accepted the entirety of the Appellant's explanation as credible and plausible, including his oral evidence that he had misunderstood the question on the Respondent's tax questionnaire and without supporting documentary evidence for the core of the Appellant's account; the explanation of an error by A&H Accountants and complaint to them in 2018 did not address discrepancies in the earlier tax years relied upon by the Respondent. On any rational view, this explanation, on the evidence before the First-tier Tribunal, did not address all of the prima facie case relied upon by the Respondent and could not therefore have amounted to an innocent explanation even to the very low threshold of the minimum level of plausibility for the totality of the significant discrepancies over a three-year period.

21. For these reasons, I find multiple errors of law in the decision of the First-tier Tribunal, as to the burden and standard of proof applied; as to the almost complete failure to engage with, analyse or make any findings whatsoever on the evidence before it; as to the failure to give any reasons whatsoever for the bare conclusions reached and overall making findings which were not rationally open to it on the evidence. As such, it is necessary to set aside the decision of the First-tier Tribunal and for the decision to be remade de novo.
22. It is understood that the Appellant's wife currently has an outstanding human rights appeal before the First-tier Tribunal which had been stayed pending the outcome of the present appeal before the Upper Tribunal and that as a matter of practicality and efficiency, this appeal should be remitted back to the First-tier Tribunal such that consideration can be given to linking the two appeals and hearing them together.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and remit the appeal to the First-tier Tribunal for a de novo hearing before any Judge except Judge Young-Harry.

It is expected that the First-tier Tribunal will give further directions as to the determination of this appeal, as foreseen in the directions of First-tier Tribunal Judge Dixon on 23 July 2020, and in particular as to whether it will be linked with the Appellant's wife's appeal in HU/17040/2019.

No anonymity direction is made.

Signed *G Jackson*  
Upper Tribunal Judge Jackson

Date 21<sup>st</sup> October 2020