



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03292/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19 March 2021

Decision & Reasons Promulgated
On 22 April 2021

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr G Hodgetts instructed by ATM Law Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of a Judge of the First-tier Tribunal allowing the appeal of Mr Ali against the Secretary of State's decision of 10 January 2018 by refusing his application for indefinite leave to remain on the basis of ten years lawful continuous residence. I shall refer hereafter to Mr Ali as the appellant, as he was before the judge, and to the Secretary of State as the respondent, as she was before the judge.

2. The judge noted that the appellant arrived in the United Kingdom on 11 January 2007 with a student visa and had further periods of leave up until 9 March 2017. On that date he made the application, the refusal of which was the subject of the appeal. The respondent refused the application under paragraph 322(5) of HC 395. She found that in the appellant's previous Tier 1 (General) application on 12 March 2011 he had claimed previous earnings of £55,309.99 from employment and self-employment between 1 February 2010 and 31 January 2011. The appellant had claimed to have earned £16,401.99 through employment and £38,908.17 through self-employment. He had submitted documentary evidence in the form of payslips, accountant's letters and invoices which showed him to have earned sufficient earnings to be awarded 35 points and he had accordingly been granted leave as a Tier 1 (General) Migrant.
3. Following that period of leave he submitted a further application as a Tier 1 (General) Migrant, on 23 April 2013. There he claimed his previous earnings of £55,323 covering the period between 11 April 2012 and 10 April 2013. He claimed to have earned £34,200 through self-employment and £21,123 through employment.
4. In respect of the current application the judge did not accept in respect of the answer at question 14 of the tax questionnaire that the appellant's accountant would have declared earnings considerably lower than the actual amount claimed by the appellant on his application. The respondent found it was the appellant's responsibility to ensure that the tax returns submitted by him had the correct information and that his failure to do so was deceitful and dishonest.
5. The respondent carried out checks with HMRC which confirmed that the appellant's total income from self-employment for the tax year ending April 2011 was £4,300 and his income from PAYE employment amounted to £16,318. With regard to the tax year ending April 2013 he had earned £21,123 from PAYE employment and no earnings for self-employment. In both cases the figures were significantly lower than the amounts in excess of £55,000 that the appellant had claimed to the respondent to have earned.
6. The respondent was not satisfied that the information declared to HMRC in relation to the self-employed earnings was genuine and considered that the appellant had misrepresented his earnings so as to meet the Tier 1 (General) Migrant requirements. His application for indefinite leave to remain on the basis of ten years unlawful residence was refused with reference to paragraph 322(5) of HC 395. In addition the application was refused in respect of paragraph 276ADE(1) of HC 395. The respondent did not find that there were exceptional circumstances to warrant the exercise of discretion to grant leave under Article 8 of the ECHR.
7. At the hearing before the judge the appellant adopted his witness statement which set out the earnings claimed for the respective periods. He said that he had not realised that his income for the tax years 2010/11 and 2012/13 had not been fully accounted for to the HMRC until the matter had come to light in January 2016. He

had informed the respondent that amendments had been made to the HMRC tax returns for those two years and maintained that these amendments had not been taken into consideration. His own accountants had submitted his amended tax returns to HMRC and in letters from the HMRC it was confirmed that they had received his amendments and the appellant had agreed to pay the outstanding tax liability through monthly instalments. HMRC had accepted his amendments and there had been no challenge to his explanation that the error had been an innocent mistake. He had instructed the new accountants as he had lost faith in the previous accountants, Nafiya, due to the fact that they had made a mistake in submitting incorrect figures on his self-assessment tax returns. He said that he had not checked the figures submitted by Nafiya Accountants to the HMRC as he had trusted that this would be done correctly, given that they were professional accountants.

8. He had only become aware of the error in the figures in January 2016. He explained that Nafiya had provided a letter acknowledging that the figures for 2010/11 had been incorrectly submitted due to an error made by a trainee, and the 2012/13 figures had also been incorrectly provided as Nafiya had failed to note that by 2012/13 the appellant had incorporated a private limited company and received his income by way of dividends. This might well have been the reason for Nafiya's failure to take into account his income in the form of the dividends and had given his employment earnings as nil. The appellant had explained that once he became aware of the mistake he took steps to rectify it. He had paid the outstanding tax liabilities and no penalties had been imposed.
9. In considering the issue of the appellant's alleged dishonesty the judge had regard to the HMRC letter of 21 March 2016. That showed that the appellant had not been penalised for the errors in submitting incorrect income figures. The judge noted the letter from Nafiya Accountants who had accepted the errors in submitting incorrect figures. Disclosure from the respondent showed that the appellant's self-employed income for 2010/11 was verified by the respondent as genuine. The disclosure also showed that the supporting evidence had been provided by the appellant corroborating his self-employed income for the two years.
10. The judge found that on balance the appellant had not been complicit in the submission of incorrect figures to HMRC. She accepted the explanations given by him in his witness statements which were consistent with his evidence and cross-examination as well as the admission of responsibility for the error by Nafiya Accountants that the error was made by mistake by them and not a deliberate attempt to deceive by the appellant. She noted findings of the Upper Tribunal in the case of Saman (26 April 2011). She found that this was a case where the appellant was careless, as the responsibility for checking to ensure that the tax return submitted by his accountants reflected the correct and accurate figures ultimately rested with him. He had relied on his accountants without double checking to ensure that the correct figures were submitted on his behalf. However she did not find that his carelessness in this regard could be deemed to constitute dishonesty or

intention to deceive. She set out the guidance in the Court of Appeal in Balajigari [2019] EWCA Civ 673.

11. The judge said that in the circumstances of the appellant's case she found that having regard to his oral evidence which she had found to be credible together with documentary evidence referred to above in her decision, that the evidence clearly demonstrated that the appellant's previous accountants had taken responsibility for the error in the figures provided by them in the tax return to the HMRC and the subsequent steps taken by them to amend and provide the correct figures were all factors that had not been challenged before her and to which she attached considerable weight. She therefore found that the appellant's submission of erroneous figures by way of the incorrect figures as set out in her decision were utmost careless mistakes by his accountants and the appellant himself. He clearly ought to have been more diligent in ensuring the self-assessment tax return submitted on his behalf was correct and accurate in its entirety. She found that the HMRC's letter confirming that no penalties had been imposed was relevant and did carry weight in showing that HMRC did not find any deception had been employed in the submission of the erroneous figures. She noted from the Home Office GCID - case record sheet that he would have attracted 20 points for earnings. She went on to conclude that on the totality of the evidence before her the appellant had satisfied the requirements of the Immigration Rules and qualified for indefinite leave to remain on the basis of ten years of lawful continuous residence in accordance with paragraph 276B(i)(a) of the Immigration Rules. She allowed the appeal under the Immigration Rules.
12. The Secretary of State sought and was granted permission to appeal against the judge's decision. Elements of the application made by the respondent are problematic in that they appear to refer back to findings made by a judge in a previous appeal made by the appellant, which decision was set aside by the Upper Tribunal. Reliance was placed on the decision in Samant [2017] UKAIT JR/6546/2016 and Abbasi JR/13807/2016 arguing inter alia that what HMRC did or did not do is not necessarily relevant to actions by the Secretary of State in deciding applications for indefinite leave to remain, but even if the accountant provided evidence of responsibility for a handling error this did not absolve the appellant of responsibility for his own tax affairs and that accordingly the decision was materially flawed. Permission to appeal was granted by a Judge of the Upper Tribunal.
13. In his submissions Mr Clarke argued that the challenge was twofold. First it was with regard to the judge's approach to HMRC's failure to prosecute the appellant for the difference in the accounts given and secondly with regard to the weight attached to the accountant's letter in which reliance was placed on what had been said by the Upper Tribunal in Abbasi [2020] UKUT 00027 (IAC).
14. The issues concerned the 2011 application and the 2013 application. It could be seen that the real figures as asserted to HMRC were significantly different from those provided to the respondent. With regard to what the judge said about this, it was

clear that the appellant had had a dialogue with the previous accountants. There was a reference to one set of accountants who had provided different figures to two different bodies. There was no real explanation as to the £35,000 difference between the figures provided for each year.

15. Reliance was placed on what was said at paragraphs 73 and 74 in Balajigari. There it was noted that HMRC might quite properly take the view that if a tax return had been amended it was content to collect the tax due and which was accepted by the tax payer was due and might or might not wish to expend the resources which would be required to enquire into a past tax return to see whether it was dishonestly or carelessly made and, if necessary, defend an appeal. Also there was nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate which signified there had been carelessness rather than dishonesty. That would be information which was within an applicant's own knowledge and they could draw this to the attention of the Secretary of State.
16. Mr Clarke understood from Mr Hodgetts that there was HMRC evidence in the appellant's bundle but it did not confirm there had been any investigation by HMRC into whether the appellant was dishonest. In light of that it could not reasonably be said as the judge had at paragraph 18 that what had been concluded by the HMRC carried weight because it did not find deceit in the absence of investigation.
17. With regard to ground 2 and the approach to the accountant's evidence it was argued on behalf of the respondent that even if evidence of an error had been provided it did not exempt the appellant from responsibility. Reference in this regard was made to what had been said in Shahbaz Khan [2018] UKUT 00384 (IAC) in the headnote, where it was said that for an applicant simply to blame his or her accountant for an error in relation to the historical tax return would not be the end of the matter given that the accountant would or should have asked the taxpayer to confirm that the return was accurate and to have signed the tax return. Furthermore the applicant would have known of his or her earnings and would have expected to pay tax thereon. If the applicant did not take steps within a reasonable time to remedy the situation, the Secretary of State might be entitled to include that this failure justified a conclusion that there had been deceit or dishonesty.
18. Clearly the appellant would have signed off on these accounts and it was odd that the same accountants provided different assertions to the Home Office and the HMRC that the appellant would not have noticed. This was relevant to the guidance in Balajigari. There had been a wilful shutting of the eyes. It was not a point in the grounds but it was relevant to the accountant's mistake and not enough to resolve the appellant from responsibility.
19. With regard to the criticism of Khan in Balajigari at paragraph 42 and paragraph 44, it should be noted that both were judicial review cases and directed to the Secretary of State's decision - making capacity as to whether there was dishonesty and that a

suspicion was not necessarily a rational conclusion that there had been dishonesty. Those paragraphs dealt with the Secretary of State's procedure and lack of a procedure allowing further evidence to be put in. This should be contrasted with the position in the instant case of an appeal with every opportunity to put in evidence. The reasoning as set out in Khan should therefore have been taken into account.

20. As regards the guidance in Abbasi, it was said there that where there was reliance on an accountant's letter admitting fault and the submission of incorrect tax returns to HMRC, the First-tier or Upper Tribunal was unlikely to place any material weight on that letter if the accountant did not attend the hearing to give evidence, by reference to a statement of truth, that explained in detail the circumstances in which the error came to be made, the basis and nature of any compensation, and whether the firm's insurers and/or any regulatory body had been informed. This was particularly so and the letter was clearly perfunctory in nature. Here there was no complaint or evidence against the accountants. It should have been clear in the circumstances that there were problems with the accountant's letter. A trainee was blamed but it did not explain away why they would get the figures right when they were provided to the respondent. As a consequence the judge should not have attached weight to it and if not it was questioned why she could find the case was not made out by the Secretary of State given the considerable discrepancy in the figures.
21. In his submissions Mr Hodgetts argued that the challenge was a matter of disagreement only. He relied on his written submissions of 16 November 2020 and 22 November 2020. The judge had assessed the oral evidence and that, as was argued on the appellant's behalf, was important. Caution should be exercised in setting aside a decision in such circumstances. The assessment of the oral evidence was key, for example at paragraph 15. The judge had made an overall assessment of how the appellant came across including in cross-examination. The accountant's evidence had been taken into account as corroborative evidence. Reliance was also placed on what the judge had said at paragraph 18. There was oral and written evidence which had been considered. The matter was taken holistically and in the round. The appellant had been concluded to be careless and not dishonest. She had criticised him but found the HMRC letter was relevant and carried weight but gave considerable weight to the oral evidence. It would be wrong to interfere with the judge's clear reasons. Reliance was placed on the authorities cited by Mr Hodgetts. Inappropriate weight had not been placed on HMRC's position. HMRC had considered culpability, as could be seen in the letter at page 35 of the bundle which the judge referred to and also at page 36 where the appellant's culpability was considered in the assessment of the penalties and the reference was made in submissions to various levels of culpability, so the matter had been considered by HMRC under the Taxes Act. The judge was correct to find as she did at paragraph 18 about the HMRC view. It had not been assumed that there had been a full HMRC investigation, but they had addressed their mind to the matter and came to a view on culpability. As a consequence the judge had not placed inappropriate weight on the HMRC evidence. It was regarded as relevant only, and supported the positive credibility findings the judge had already made.

22. With regard to the authority of Samant it was not clear whether the case cited in the grounds was the same one cited by the judge but it showed that HMRC's position could go one way or another but as argued above at page 36 of the bundle HMRC had considered culpability. The appellant had been found to be credible and the judge was entitled to come to that finding.
23. With regard to the accountant's evidence, Abbasi did not set out a rule of law that written evidence from an accountant was irrelevant and it was not an error of law to take it into account as corroborative of accepted oral evidence. There was no explicit challenge in the grounds to the positive credibility finding at paragraph 18 of the judge's decision. It could not be said that inappropriate weight was placed on the accountant's evidence. It seemed there was no evidence that the same accountants had supported the Tier 1 application. It was clear from paragraph 42 of Balajigari the dishonesty issue had to be decided and the judge had done so.
24. By way of reply Mr Clarke was not sure that the Saman or Samant cases were the same but it was not material in any event. Otherwise as regards the evidence of what the accountants did at the time it may be there was no evidence that they were the same accountants but if not it would heighten suspicion. If the two sets of figures had been sent to the Home Office and HMRC by different accountants it begged more questions.
25. I reserved my decision.
26. The judge came to clear credibility findings in this case as a consequence of her assessment of the evidence. She found the appellant's oral evidence to be credible and accepted the explanations he gave in his witness statements which were consistent with his evidence and cross-examination as well as the admission of responsibility for the error by Nafiya Accountants that the error was made by their mistake. As regards the first ground, the judge found that the HMRC letter confirming that no penalties had been imposed was relevant and did carry weight in showing they had not found deception. In my view that it is not inconsistent with any of the guidance in the case law. The judge was entitled to take it into account and it was done by her in the context of having previously found the appellant's evidence to be credible and the fact that the previous accountants had taken responsibility for the error. I agree with Mr Hodgetts that Abbasi does not establish a rule of law that an accountant has to be present to give evidence in support of their admission of fault in a case such as this. The accountant's letter was in any event not perfunctory but carried a sufficient explanation for the error for the judge to be entitled to attach the weight to it that she did. It is not a decision that every judge would have come to: as Mr Clarke argued, the discrepancies are very significant ones, but the judge had the evidence of the appellant before her and was entitled to come to positive credibility findings as a consequence of her assessment of the appellant's evidence, supported by the accountant's letter and bearing in mind the position taken by HMRC. Accordingly I consider that it has not been shown that she

erred in law and therefore her decision stands, subject to the caveat that I mentioned at the outset of the hearing. This was that the judge allowed the appeal under the Immigration Rules. She was not entitled to do that as the appeal was on human rights grounds only. Therefore for her decision allowing the appeal under the Immigration Rules is substituted a decision allowing the appeal under Article 8 of the European Convention on Human Rights.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed
Upper Tribunal Judge Allen

Date 14 April 2021