



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07666/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 26 July 2021

Decision & Reasons Promulgated  
On 04 August 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

TAHIR IQBAL  
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Zane Malik of Counsel, instructed by Awan Legal Associates

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 16 March 2018 to refuse him indefinite leave to remain pursuant to paragraph 276B of the Immigration Rules HC 395 (as amended) on the basis of 10 years' lawful residence in the United Kingdom, alternatively on human rights grounds. The appellant is a citizen of Pakistan.

2. This is an 'earnings discrepancy' case. The history of this appeal is set out in the decision of Upper Tribunal Judge Plimmer on 4 September 2020, setting aside the decision of the First-tier Tribunal.
3. In brief, the appellant meets all of the requirements of paragraph 276B, save that the respondent applied paragraph 322(5) of the Rules (the deception provision) by reason of his having under-declared his income in his 2010/2011 and 2012/2013 tax returns, such that he under paid tax for those years. He under-declared his self-employed income by almost £55000.
4. At the beginning of the hearing today, Mr Malik and Mr Tufan agreed that the decision in this appeal would turn on a finding of fact as to whether the appellant was dishonest in his submission of those tax returns. It was also common ground that the burden of proving that fact lies on the Secretary of State, not the appellant.
5. By a transfer order dated 1 December 2020, Acting Principal Resident Judge Kopieczek declared himself satisfied that it was not practicable for Upper Tribunal Judge Plimmer to remake the decision without further delay and the appeal was transferred for rehearing afresh before a differently constituted Tribunal.

### **Respondent's position statement**

6. In his position statement on behalf of the respondent, Mr Christopher Bates, a senior Home Office Presenting Officer, relied on *Ashfaq (Balajigari: appeals)* [2020] UKUT 00226 (IAC), *Abbasi (rule 43: paragraph 322(5): accountants' evidence)* [2020] UKUT 00027 (IAC), and *Yaseen v Secretary of State for the Home Department* [2020] EWCA Civ 157.
7. The conclusions to be drawn from those decisions are that the explanation by any accountant said to have made or contributed to an error is essential, because the allegation of error goes to the accountant's professional standing (*Ashfaq*), that if the accountant does not attend and give evidence, the Tribunal is unlikely to place any material weight on an accountant's letter admitting fault (*Abbasi*), and that where dishonesty is proven in an earnings discrepancy case, very strong positive factors will be necessary before the balance will tilt back in favour of indefinite leave to remain for the appellant (*Yaseen*).
8. The respondent maintained her position.

### **Appellant's case**

9. In his skeleton argument for the appellant, Mr Malik identified two issues: first, whether the appellant was dishonest in his earlier dealings with the Secretary of State and/or HMRC and falls for refusal under paragraph 322(5), and second, whether in any event, his removal would breach the United Kingdom's Article 8 ECHR duty by disproportionately interfering with his private and family life in the United Kingdom.

10. The appellant had lived in the United Kingdom lawfully for more than 10 years and in principle, subject to the dishonesty issue, qualified for indefinite leave to remain on the grounds of long residence (paragraph 276B of the Rules). Mr Malik relied on *Secretary of State for the Home Department v Shehzad* [2016] EWCA Civ 615, in which Lord Justice Beatson, with whom Lady Justice Black and Lady Justice King agreed, observed that in cases involving allegations of dishonesty, the primary evidential burden was on the Secretary of State to furnish proof of deception. If the Secretary of State provided prima facie evidence of deception, the burden shifted to the appellant to provide a plausible innocent explanation.
11. There was no legal burden on the appellant to disprove dishonesty (*Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, at [42] in the judgment of Lord Justice Underhill, who gave the judgment of the court). The Secretary of State must prove that the appellant was dishonest, which required reliable evidence of sufficiently reprehensible conduct and an assessment of whether his or her presence in the United Kingdom was undesirable. That should be followed by a balancing exercise as to whether there were other factors outweighing the presumption that leave should be refused.
12. Mr Malik also relied on *Yaseen*. The appellant's case was that the respondent was unable to prove that he was personally dishonest; and even if he were, the nature of the alleged conduct was not such as to engage paragraph 276B(ii)(c) and 322(5) of the Rules.
13. The discretionary refusal of indefinite leave to remain would be neither justified nor proportionate, it being accepted that the appellant met all the other requirements of paragraph 276B: see also *Ashfaq* and *OA and others (human rights: new matter: section 120) Nigeria* [2019] UKUT 65 (IAC). Mr Malik also made brief reference to section 117B and to the decision of the Supreme Court in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58: an appellant's appeal could sometimes succeed even where his immigration status was always precarious.
14. On the facts of this appeal, the public interest in removal was reduced to the extent that his removal from the United Kingdom would amount to a disproportionate interference with his Article 8 ECHR rights.
15. That is the basis on which this appeal came before the Upper Tribunal today.

### **Upper Tribunal hearing**

16. I heard oral evidence from four witnesses: the appellant himself; his former accountant Mr Muhammad Afzal Khan of Universal Accounts Ltd; his present accountant, Mr Talaat Mahmoud Sheikh of Graham Nobel Denholm & Co; and his former landlord and friend, Mr Mohammed Taj.
17. On the crucial issue, the appellant's evidence was that this was his first year of self-employment; that he did not know much about tax and was distracted by his mother's steeply declining health; and that he relied on Mr Khan entirely. He said

that at the end of the year, Mr Khan sent him a document of about 15-20 pages and that he had pre-authorised Mr Khan's firm to submit his tax return. He approved the tax return by telephone:

"He asked me, do I want to submit these taxes, and I said, yes, you carry on. He said he would complete everything and I approved it on the phone. I had already given him my consent: [I told him] you can make my accounts, everything."

That is certainly an incautious and careless approach to an important matter like accounting for taxes to the Inland Revenue, which was the appellant's personal responsibility, not that of his accountant.

18. The appellant's account is that he did not discover the error until he was consulting a mortgage advisor some three years later: Mr Jayesh Patel, a mortgage advisor with GB Mortgages Limited has confirmed in writing that he did advise the appellant on his mortgage in September 2015, and that the appellant came along with his then landlord, Mr Taj.
19. The appellant's account, not confirmed in the letter from Mr Patel, is that Mr Patel expressed his opinion that with the declared income, the appellant could not afford a mortgage. The appellant then replied that he was sure he had earned more than the sum declared.
20. With the help of Mr Sheikh's firm, the appellant caused his previous tax returns to be investigated and discovered the discrepancy. He made a payment plan with HMRC for £14816.16 including interest, but no penalties, to be paid in instalments of £200 over 73 months.
21. When challenged about the error, Mr Khan took responsibility and paid the interest due to the appellant in cash. He says he did so because the firm's card reader for electronic payment was not working that day. Mr Khan paid the appellant £1852.67 for damages and interest, and the appellant banked £1720 the same day, having spent the balance. Universal Accounts Ltd's invoice dated 4 May 2016, and a bank statement for the period 27 February - 27 May 2016 are produced, and support that account.
22. The appellant was satisfied by the reparation made by Universal Accounts Ltd and made no complaint to any external professional body.
23. There was no re-examination.
24. Mr Muhammad Afzal Khan confirmed his name and address and adopted his statement. He was tendered for cross-examination. He accepted that he should have checked the trainee accountant's work, but they were very busy at that time.
25. When pressed, Mr Khan said the trainee's name was Zayrab Tasdiq: that name does not appear in his witness statement. No witness statement from Mr Tasdiq is before me and he did not give oral evidence. Mr Tasdiq no longer worked for Universal

Accounts Ltd and Mr Khan could not say whether he had subsequently qualified as an accountant. Mr Khan said that was up to the Tribunal whether to count Mr Tasdiq as a trained accountant now.

26. Mr Khan explained that the firm had at that time two clients called Tahir Iqbal, and that Mr Tasdiq had used the wrong file to prepare the appellant's accounts. Mr Khan had apologised to both clients and paid compensation to the appellant (£1852.67 in cash) for the interest which he had to pay to HMRC when the correct position was declared. Mr Khan could not explain how he happened to have that much cash available to pay the appellant on that day.
27. Mr Khan took the opportunity to clarify paragraph 8(d) of his witness statement, which as adopted reads as follows:

"8. ... (d) Filing tax returns was implicitly part of our service (our expertise) that we provided. We hereby confirm that we did not send Mr Tahir Iqbal tax returns for his perusal before submission, as we prepare all our tax returns through commercial software."

Mr Khan said that he had meant to say that they had not sent the appellant the tax calculation document: he had sent the draft tax return, of course.

28. Both documents were about 16-18 pages long. The commercial software which they used to prepare tax returns was called TaxFiler. After sending the appellant the draft tax return, he had telephoned him for approval, then submitted the tax return to HMRC. Mr Khan emphasised that 'Never ever we can file tax return without showing it to the client'.
29. There was no re-examination.
30. Mr Talaat Mahmoud Sheikh, the appellant's current accountant, confirmed his name and address and adopted his statement. So far as relevant to these proceedings, Mr Sheikh's evidence was as follows:

"Mr Iqbal came to see us in early October 2015 requesting details of his taxable income required for a mortgage assessment. This income is normally based on the SA302 certification issued by HMRC.

We therefore carried out a review of our client's 2012/2013 (06/04/2012 to 05/04/2013) income and 2013/14 (06/04/2013 to 05/04/2014) income for mortgage purposes. Because Mr Iqbal was employed as well as self-employed during these two tax years, we carried out an exercise to establish our clients' taxable income for these two tax years from the two sources of income. As a result of this review, it came to light that our client's 2012/2013 income showed a substantial shortfall [of £32647]...

Mr Tahir Iqbal had been under the impression that all his tax affairs were up to date and correct to reflect his true income. He was therefore very surprised to learn of the 2012/2013 shortfall in income.

Mr Iqbal then instructed us to carry out a review of the previous two tax years (2010/11 and 2011/12) in case there were more errors... Upon carrying out a review of the two tax years, it came to light that Mr Iqbal's 2010/11 income showed a shortfall [of £27769]. ...

We advised Mr Tahir Iqbal that due to the gravity of the errors he should contact his ex-accountant immediately and to get the 2010/11 and 2012/13 tax files reviewed by him. Once this review had been carried out by the ex-accountant and the findings made known, we immediately prepared amended 2010/11 and 2012/13 self-assessment tax returns as instructed by Mr T Iqbal and which were duly forwarded to HMRC under cover of our letter on the 26/11/2015.

Our client has exercised his rights to amend his 2010/11 and 2012/13 tax returns under the provisions of the Taxes Management Act 1970 and which were accepted in their entirety by HMRC. ... ”

31. There was no cross-examination of Mr Sheikh by Mr Tufan.
32. In answer to questions from me, Mr Sheikh said that the practice of his firm was that they would normally email the draft tax return and tax calculation to a client, including the potential tax liability, queries and outstanding issues, and receive approval by email. Sometimes, although not recently because of the pandemic, he would see a client to go through the tax return for approval. No tax return would be filed without client approval.
33. If the client telephoned rather than emailed, Mr Sheikh would make a timed and dated note to document the approval, but 'more and more, it comes by email'. He had never been in the position of having to pay compensation, but if he did so, it would not be in cash: he would want the transaction to be documented.
34. In answer to a supplementary question from Mr Malik, Mr Sheikh said this:

“It is technically possible for an incompetent accountant to submit a tax return without showing the client the tax calculation. I think it's quite possible.”
35. Mr Sheikh's evidence therefore stands unchallenged and falls to be treated as entirely credible.

### **Analysis**

36. It was common ground that the only issue in this appeal is whether, as a matter of fact, the respondent could show that the appellant had used deception in making the under declarations which had triggered the respondent's reliance on paragraph 322(5) of the Immigration Rules HC 395 (as amended).
37. I have to decide which witnesses before me gave reliable evidence. Mr Sheikh's evidence was not questioned and must be taken to be credible. Mr Khan was an unimpressive witness, but his account of the lax proceedings in his firm was confirmed by Mr Sheikh. The accepted evidence of Mr Sheikh was that it was 'quite

possible' that an incompetent accountant, such as Mr Khan admitted his firm to be, might submit a tax return without showing the client the tax calculation.

38. The unshaken evidence of the appellant and of Mr Khan was that he had pre-authorised the firm of Universal Accounts Ltd to do just that and that he had approved the submission of his tax return over the telephone, having not checked the accounts, because he was naïve and his mother was very ill.
39. The evidence before me does establish laxity and carelessness by the appellant in failing to check his tax return at a time of personal stress. It is right to say that he behaved irresponsibly in failing to check his tax returns, which was not compliant with his duty to HMRC. However, the underpayment has been declared and HMRC have imposed no penalties on the appellant.
40. The evidence before the Tribunal establishes incompetence and negligence by Universal Accounts Ltd and by Mr Khan in failing to supervise a junior member of his staff. The appellant, having been compensated for the interest accumulated, chose not to take the professional negligence issue further. That was a matter for him, although his forbearance seems generous.
41. On the evidence before me, and applying the ordinary civil standard of balance of probabilities, the respondent has not discharged the evidential burden upon her of proving dishonesty by the appellant. It was not necessary to go on to consider Article 8 ECHR and I make no findings thereon. Absent a finding of dishonesty, as agreed by all parties at the beginning of the hearing, this appeal must succeed.

## DECISION

42. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law and has been set aside.

I remake the decision by allowing the appeal.

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

Date: 26 July 2021