



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01956/2018
HU/05556/2018
HU/05565/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6th March 2019

Decision & Reasons Promulgated
On 28th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD [B]

OMRIYE [B]

[Z B]

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondents: Mr Z Jafferji, instructed by Mayfair Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in this appeal I refer to the parties as they were in the First-tier Tribunal.

2. The first Appellant is Mr [B], the second Appellant is his wife, and the third Appellant is their daughter. The first Appellant is a national of Pakistan and the second and third Appellants are nationals of Turkey. The Appellants appealed to the First-tier Tribunal against a decision made by the Secretary of State on 20th December 2017 refusing the first Appellant's application for indefinite leave to remain in the UK on the basis of ten years' residence and the decision of 12th February 2018 refusing the second and third Appellants' applications for leave to remain as dependants of the first Appellant. First-tier Tribunal Judge Zahed allowed the appeals in a decision promulgated on 9th January 2019. The Secretary of State now appeals against that decision with permission granted by First-tier Tribunal Judge Grimmett on 31st January 2019.
3. In the Grounds of Appeal the Secretary of State contends the First-tier Tribunal made a material misdirection in law by failing to apply the reasoning of the Upper Tribunal in the case of **R (on the application of) Khan v Secretary of State for the Home Department (dishonesty tax return paragraph 322(5)) [2018] UKUT 00384 (IAC)** when assessing whether the first Appellant acted dishonestly in relation to his dealings with UKVI or HMRC. It is contended in the grounds that the First-tier Tribunal Judge did not follow the recommended steps in **Khan** when assessing the first Appellant's actions and failed to provide reasons why he accepted that the Appellant would not have been aware of the errors in his tax returns sooner given that his tax liability would have been significantly lower than expected as his earnings were undeclared by several thousands of pounds. It is contended that there are no findings as to why the significant discrepancy was not rectified by the first Appellant sooner given that he would personally have received his tax bill as a self-employed person. It is argued that the First-tier Tribunal Judge materially erred in his assessment of the Appellants' actions. It is further contended that the First-tier Tribunal Judge materially erred in finding that the actions of HMRC in not issuing any penalties or initiating any proceedings against the Appellant as being in some way determinative of the first Appellant's action. Further in the grounds reliance was placed on the findings of the Upper Tribunal in the judicial review cases of **R (on the application of) Samant v Secretary of State for the Home Department [2017] UKAIT URJR/5646/2016** and **Abbasi JR/13807/2016** which make findings relating to the relevance of the actions that HMRC take against Appellants. This contended that there are several reasons why HMRC would not take action against the first Appellant and that the judge accordingly erred in finding that HMRC's actions are in some way determinative of whether the Appellant's actions could be viewed as dishonesty.
4. The background to this appeal is that the first Appellant entered the UK as a student on 28th July 2006 with a visa valid until 30th April 2008 and was granted extensions of his leave to remain on that basis until October 2010. He was subsequently granted leave to remain as a Tier 1 Highly Skilled person until 22nd April 2012 and as a Tier 1 (General) Migrant until 26th January 2013 and then until 24th January 2016. He made application for indefinite leave to remain as a Tier 1 (General) Migrant on 30th December 2015 but that application was refused and his subsequent application for indefinite leave to remain as a Tier 1 (General) Migrant was refused on 23rd February

2017. He requested an administrative review but that decision was maintained and on 18th April 2017 he applied for indefinite leave to remain.

5. The application for indefinite leave to remain was considered under paragraph 276B of the Immigration Rules. However the Respondent considered paragraph 322 of the Immigration Rules which contained the general Grounds for Refusal. The Secretary of State concluded that, whilst the Appellant had accrued ten years' continuous residence in the UK, he fell under the general Grounds for Refusal because, in his application of 9th December 2010 for leave to remain as a Tier 1 (General) Migrant, he claimed that he had previous earnings of £40,143.34 whereas his original tax return for 2010/2011 he declared the significantly lower income of £9730. On the basis of the amount declared to the Home Office he was awarded 35 points and obtained leave to remain as a Tier 1 (General) Migrant. Following this period of leave he submitted a further application as a Tier 1 (General) Migrant dated 10th January 2013 and in relation to this application he claimed that he had previous earnings of £42,370.15 from four sources of income including earnings from employment and self-employment. He provided evidence in relation to these earnings and was awarded 25 points and obtained leave to remain as a Tier 1 (General) Migrant. However his original tax returns for April 2012 and April 2013 declared a significantly lower total income of £17,285.
6. According to the reasons for refusal letter the Secretary of State wrote to the Appellant on 12th September 2017 in connection with his application for indefinite leave to remain requesting that he complete and return a tax questionnaire with reference to his previous application. The Secretary of State stated that the Appellant did not return this questionnaire as requested and considered that the Appellant failed to meet the requirements of paragraph 322(9) having failed to provide requested information. The First-tier Tribunal Judge considered that the Respondent had not made out this ground as on the basis of evidence that a tax questionnaire had been responded and considered that paragraph 322(9) did not apply. The judge's finding in this matter has not been challenged.
7. The Secretary of State also went on to set out how checks made with HMRC revealed that the Appellant declared tax returns for the year ending 2010/11 and 2011/12 and 2012/13 all showed amounts of declared income which were lower than those claimed in the Appellant's applications for leave to remain. It is stated that the initial declared income to HMRC would have led to the award of zero points in the previous earnings category. The Secretary of State did not accept that the failure to declare to HMRC at the time the self-employed earnings on his previous applications for leave to remain in the UK as a Tier 1 (General) Migrant were genuine errors. In the reasons for refusal letter the Secretary of State rejected the explanations put forward by the Appellant and refused the application under paragraph 276B(ii) and (iii) with reference to paragraphs 322(5) and (9) of the Immigration Rules.
8. The First-tier Tribunal Judge considered the issue of paragraph 322(5) at paragraph 17 to 24 of the decision. In essence the judge concluded that the Appellant was not dishonest in his dealings with HMRC or the Home Office with regard to his Tier 1

application in December 2010 and his tax return year ending April 2011 [19] and that he had not been dishonest in his dealings with HMRC and UKVI in his January 2013 application and the tax returns corresponding to that application [23].

9. At the hearing before me Mr Avery contended that the judge took an erroneous approach to dealing with the evidence. He referred to the guidance given in the decision of Khan and in particular to the guidance in the head note. He contended that here the judge had given a lack of detail for why the Appellant's explanation had been accepted. In his submission in this case the discrepancy between the amounts declared to HMRC in the 2010/11 tax year was over £30,000 less than the amount the Appellant claimed to have earned in the application to the Home Office. In his contention the judge failed to grapple with this issue and failed to give an explanation as to how the mistake occurred which in his view was not adequate given the magnitude of the error made by the accountants. In his submission the judge accepted a weak letter from the accountants and this reflects a lack of attention to the circumstances which would not have happened if the judge had approached the case in the manner set out in Khan.
10. In the case of Khan Mr Justice Martin Spencer set out the approach which should be followed as follows:

“(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."*

11. At paragraph 32 of the decision Mr Justice Spencer sets out the starting point is that where the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC she is entitled to draw an inference that the Appellant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. However it does not follow that in all such cases a decision to refuse ILR will be lawful. It is pointed out that where an applicant has presented evidence to show that, despite the prime facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented by the fact-finding task which must be carried out fairly and lawfully and in that regard Judge Spencer considered that the Secretary of State needs to remind him or herself;

"... that finding that person has been deceitful and dishonest in relation to his tax affairs with the consequence he is denied settlement in this country is a very serious finding with various consequences and therefore the evidence must be cogent and strong although, as the authorities show, the standard of proof remains on the balance of probabilities".

The decision highlights that it is not enough for an applicant simply to blame his or her accountant [33]. It sets out guidance as to the factors which should be considered in situations where there have been discrepancies between previous applications for leave to remain and tax returns which had been made covering the same period.

12. Mr Jafferji contended that, as the decision in **Khan** related to judicial review where the primary issue is the rationality of the Secretary of State's decision, the guidance there is primarily to the Secretary of State in the context of a judicial review challenge where the issues are whether the decision was irrational. However he accepted that the guidance in **Khan** is useful. In his submission the issue was whether it had been applied in substance. I accept that there is no error on the part of the judge to have failed to refer to **Khan** but that the guidance there is useful and that the issue is not whether he specifically referred to the case but whether he took the right approach to considering paragraph 322(5) of the Immigration Rules.

13. I accept Mr Jafferji's submission that there was a significant amount of evidence before the First-tier Tribunal in the Appellant's bundle which contains the Appellant's witness statement, his original and amended tax return from 2011 and his original and amended tax return from 2012/13, correspondence with his accountants and an explanation from his current accountant. The explanation from his accountant about the error is at page 36 of the Appellant's bundle. That letter explains that the accountant made an error on the tax return for the year 2010/2011. It states that the accountant made an error inadvertently having overlooked some documents provided to the firm due to the high volume of workload at that particular time. The judge referred to this letter at paragraph 17 of the decision. It is clear that the judge took this letter into account and accepted that it is more than a bare assertion or that the Appellant was blaming the accountant for an error.
14. At paragraph 18 the judge took into account the Appellant's evidence as to why he did not check the tax return. The judge noted that the Appellant accepted that it was his responsibility to check it but stated that he was under a lot of strain in his personal life. He gave evidence about an issue in relation to his marriage which went on for a number of years and the Appellant explained that it was in the context of this background that he did not check the tax return knowing that the accountants had been recommended to him and they had all the invoices and documents needed to complete the return.
15. The judge said at paragraph 19

"I have carefully looked at all the documents and had an opportunity to see and hear the Appellant give evidence. I find that having seen the documents and noting that the Appellant had amended his tax return before he made the ILR application and having seen and heard him give evidence which was corroborated by his wife, I find that the Appellant was not dishonest in his dealings with HMRC or the UKVA with regard to his Tier 1 application in December 2010 and his tax returns year ending April 2011".
16. I find that in the judge's approach to the tax return for 2010/11 he has taken the correct approach to the evidence in accordance with the guidance in **Khan** as set out above and reached findings open to him on that evidence at paragraph 19.
17. The judge looked at the tax return for the year ending 2013 at paragraphs 20 to 23. The judge accepted the explanation that the discrepancy in relation to this period related to the way capital gains is dealt with under the section dealing with capital gains from property and investments. The judge concluded that, if this amount is taken into account, the Appellant's in the amended return is in line with his claimed earnings on his January 2013 Tier 1 application. The judge also noted at paragraph 21 that the first amendment to the 2012/13 tax return was with regard to PAYE income on which he had already paid tax. The judge also accepted that the Appellant had used a different set of accountants who had gone out of business.
18. At paragraph 21 the judge also noted that HMRC had not issued any penalties or initiated any proceedings against the Appellant but simply accepted that it was a

mistake. It is contended in the grounds of appeal that the judge considered that this matter was determinative of the appeal. I do not agree, in my view it is clear that he took this factor into account along with all the other evidence. The judge was entitled to do so.

19. At paragraph 23, having looked at all of the evidence and on hearing and seeing the Appellant give his evidence and explain how the errors occurred and how he tried to rectify them and taking into account a number of references submitted by the Appellant with regard to his honesty and integrity from former employers, the judge found that the Appellant has not been dishonest in his dealings with the HMRC and the UKVI in relation to the January 2013 application and the corresponding tax return. In my view those conclusions were open to the judge on the basis of the evidence. The judge took the approach outlined in the decision of **Khan** looking at all of the evidence including the Appellant's actions before concluding that the act of dishonesty had not been established.
20. Looking at the substance of the decision in this case I am satisfied that the judge approached the evidence in the proper way. The judge did not simply accept that the accountants made a mistake. The judge accepted the explanation put forward about the accountants' mistake and all of the other evidence before him before concluding that dishonesty has not been established in this case. In my view the judge's decision was open to him on the evidence before him.

Notice of Decision

The grounds of appeal do not disclose any error of law in the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed

Date: 25th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal

Signed

Date: 25th March 2019

A Grimes

Deputy Upper Tribunal Judge Grimes