



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05052/2018  
HU/08539/2018

**THE IMMIGRATION ACTS**

Heard at Fox Court  
On 12<sup>th</sup> February 2019

Decision & Reasons Promulgated  
On 15<sup>th</sup> March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR MUHAMMAD AQIB  
(2) MRS ATTIYA BASHIR  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr S Saeed (Solicitor), Aman Solicitors Advocates (London) Ltd  
For the Respondent: Ms J Isherwood, Senior HOPO

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Moan, promulgated on 5<sup>th</sup> November 2018, following a hearing at Birmingham on 23<sup>rd</sup> October 2018. In the determination, the judge dismissed the appeal of the

Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellants**

2. The Appellants are husband and wife. Both are citizens of Pakistan. The first Appellant, the husband, was born on 18<sup>th</sup> July 1983. The second Appellant, his wife, was born on 2<sup>nd</sup> November 1992. In 2016 the first Appellant applied for leave to remain outside the Immigration Rules, as a Tier 1 Migrant and subsequently on the basis of long residence, having completed ten years in the UK. On 2<sup>nd</sup> February 2018, the Respondent refused that application. This appeal before Judge Moan, was against that decision.

### **The Issue**

3. The issue before Judge Moan, was the fact that in the principal Appellant's previous applications for leave to remain, he had submitted evidence of his earnings which were not accurate. He had provided information as to his earnings for the tax year 2010 to 2011 and for 2012 to 2013. His stated earnings for those years did not accord with the tax returns to HMRC. The first Appellant sent in revised self-assessments as late as January 2016 and incurred further tax liabilities as a result. The first Appellant's explanation was that his previous accountant had been responsible for the original erroneous self-assessment tax returns. The first Appellant sent a letter from CBS Accountants dated 28<sup>th</sup> June 2017 (who are currently acting for him) which indicated that they conducted a review of the Appellant's income and found a discrepancy on his tax returns for the years 2010 to 2011 and 2012 to 2013. It was then that the Appellant informed the HMRC and provided revised tax returns for those years. The Appellant's previous financial advisors had been MSCO Accountants. There was a letter from them dated 12<sup>th</sup> January 2011. They confirmed that they acted for the first Appellant as his accountants.
4. The first Appellant's explanation for the discrepancies was set out in his witness statement of 25<sup>th</sup> June 2018. He explained that the income details sent to the Home Office were indeed correct. He accepted that the tax returns for 2010 to 2012 and 2012 to 2013 were incorrect. He said that the mistakes in his tax returns were made by a Mr Ansari. This man had led the Appellant to believe that he was working for MSCO Accountants. Mr Ansari, however, was an immigration consultant. The first Appellant believed that he passed the financial documents to someone else at MSCO to draft their accounts. Mr Ansari was instructed to complete the tax returns after April 2011 and this was also done for 2011 to 2012 and then for 2012 to 2013 tax years. The Appellant said that he could not contact Mr Ansari in 2015 as Mr Ansari had now moved to Dubai. The first Appellant approached CBS Accountants who noticed the errors on his tax returns and this was how the discrepancies were allegedly corrected.

## The Judge's Findings

5. The judge had regard to the Home Office guidance on the general Grounds for Refusal in relation to the application of paragraph 322(5). This refers to "grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused", and it goes on to refer to "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct, character or associations or the fact that he represents a threat to national security".
6. The judge, in looking at the Home Office guidance, underlined the guidance which stated that,

"A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the United Kingdom" (paragraph 14).
7. The judge also had regard to the fact that the Appellant's representative, on the day of the hearing, attempted to rely upon the unreported decision of Deputy Upper Tribunal Judge Taylor in the case of **Kadin**, which was dated 1<sup>st</sup> May 2018. This made it clear that, not declaring all relevant income, whilst highly regrettable, cannot properly be described as conduct which impacts upon character and a person being undesirable. The judge stated that reliance upon this decision would not be helpful to her in coming to the decision.
8. Having heard the Appellant's evidence, the judge concluded that the first Appellant's evidence was simply not credible and that the Respondent was correct in applying paragraph 322(5) and refusing leave to remain.
9. The appeal was dismissed.

## Grounds of Application

10. The grounds of application state that the judge erred in law because as a first step, the burden of proof was on the Respondent to show that the Appellant's character or conduct fell within the scope of paragraph 322(5) of the Immigration Rules. This had been well-established since the cases of **IS (marriages of convenience) Serbia [2008] UKAIT 0031**, and the case of **AA (Nigeria) [2010] EWCA Civ 773**. The failure of the judge to consider this as a preliminary issue meant that the judge had assumed that the Respondent had discharged the burden of proof upon her simply by asserting that the Appellant's character and conduct fell within paragraph 322(5). This conclusion was unsustainable (see paragraph 20 of the determination). That being so, on this basis alone the decision should be set aside on the basis of an error of law.

11. Second, it was asserted that the judge had wrongly disallowed the reliance that the Appellant sought to be placed upon the unreported decision of Deputy Upper Tribunal Judge Taylor, given that no other decision was precisely on the point that was before the Tribunal, and assistance was plainly to be gained from that decision. The judge had said that such a decision could only be relied upon by giving notice but there was nothing in the practice statement to this effect.
12. Third, it was stated that the HMRC itself had not taken the view that the Appellant should be fined or be subject to any criminal sanctions. Their view appears to have been that the Appellant was simply careless or negligent, having failed to take reasonable care in filling his tax return, and this being so, it was once again not permissible for the Tribunal to say that the conduct fell under paragraph 322(5), without further ado.

### Submissions

13. At the hearing before me on 12<sup>th</sup> February 2019, Mr Moan, proceeded to rely upon the grounds of application. He explained that the well-established decision in **AA (Nigeria) [2010] EWCA Civ 773**, required there to be a finding of “dishonesty” before a person could be charged with fraudulent conduct. This had not been done. The approach of the judge was accordingly flawed.
14. Secondly, that to say that the unreported determination could not be relied upon because no notice had been given to the other side, was misconceived. The Practice Direction required no such notice to be given. In any event, given that reference to the unreported decision was made and the skeleton argument which was served on the Respondent at the beginning of the day, and the hearing did not commence until 12.35pm later in the afternoon, it was arguable that notice had indeed been given to the other side.
15. Third, the Appellant’s conduct had been categorised, by all accounts, as far as the HMRC was concerned, on the basis that he did not take reasonable care when filing his tax return, or that he was careless when doing so. The HMRC did not categorise the first Appellant as someone who deliberately made an incorrect tax return. The Appellant was not fined. If one looks at the supplementary bundle (see pages 73 to 78), the HMRC Rules are set out there. There are four different categories. The first one is where the Appellant has not taken reasonable care. The second one is where the Appellant has been careless. The remaining two categories are those where there has been deliberate deception, whereby the HMRC may cause such a person to be fined. In the instant case, nothing of the sort had been done. The failure of the judge to have regard to this meant that she had fallen into error.
16. Finally, the judge had stated (at paragraph 29) that there was no explanation why the first Appellant thought that his self-assessment tax returns were wrong in 2016 but not so before. The Appellant had given a full explanation why he did not realise the mistake until CBS Accountants told him about this in 2016 (see paragraphs 9 to 19). In fact, CBS Accountants even provided a letter to confirm that they had told the

Appellant about the discrepancies in his tax returns in December 2015/January 2016 (see page E1 of the Respondent's bundle).

17. For her part, Ms Isherwood submitted that nothing better explains the reason why this case properly fell to be considered under paragraph 322(5) than the refusal letter of 2<sup>nd</sup> February 2018, itself. This sets out, under the heading "Refusal of Your Application for Leave to Remain" (at J4), how it was that the Appellant had, over a number of years from 2010 to 2011 and then from 2012 to 2013, whilst making further applications for leave to remain, declared his income in such a way as to have been awarded 20 points, which he would otherwise not have been awarded.
18. As the refusal letter makes clear (at J4) if those 20 points had not been granted, he would have failed to obtain leave under Tier 1. It was not sufficient to say, submitted Ms Isherwood, that the Appellant had brought to light the true state of affairs, long before he made his application for indefinite leave to remain on the basis of ten years' residence in the UK, given that during previous periods, when he was making applications for Tier 1 leave to remain, he had misrepresented the correct position.
19. Second, if one has regard to the reported decision of the Upper Tribunal in **Khan (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384**, this makes it clear that it is not sufficient "for an applicant simply to blame his or her accountant for an 'error' in relation to the historical tax return" as this "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" (see the headnote at (iv)). This, submitted Ms Isherwood, was precisely the position here.
20. The judge had not erred in law.
21. In reply, Mr Saeed submitted that one had to take proper cognisance of the decision in **Khan**. This was a JR case. It was not binding upon this Tribunal. But in any event, the case of **Khan**, did make allowance for the fact that a mistake can be remedied in time. It must not be overlooked that in this case, the Appellant had applied for indefinite leave to remain on 23<sup>rd</sup> September 2016, which was nine months after he had alerted the authorities about the mistake in his tax affairs. In the case of **Khan** (see paragraph 8 of the decision), the Appellant had only alerted of the authorities five days before his application. Mr Saeed submitted that I should allow the appeal.

### **No Error of Law**

22. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, in what is a clear, comprehensive, and careful determination, the judge had regard to the Home Office guidance (at paragraph 14) to the effect that a person does not need to have been convicted of a criminal offence and that the key thing is to consider whether there is reliable evidence to support a decision that the person's

behaviour calls into question their character. In this respect the judge had properly directed herself.

23. Second, in relation to the unreported decision of "**Kadin**" it is important not to misconstrue what actually happened at the Tribunal. The judge was again very careful in her treatment of this piece of evidence. Although it is the case that the judge stated that an application should have been made on notice, this was purely for the purposes of enabling the other party "to respond to the application for admission and to ascertain if there are any contrary decisions" (paragraph 16). This was an entirely reasonable statement to make given that the judge also pointed out that "there are contrary unreported decisions such as the decision of Deputy Upper Tribunal Judge Birrell in the case of **Tahir** who found that "the failure to file tax returns as sufficient to engage paragraphs 276B(ii) and paragraph 322(5) as conduct making it undesirable to allow leave to remain" (paragraph 17).
24. However, most importantly, the judge pointed out that, given that there were contrary authorities on this issue, that she would not be materially assisted by the determination of Deputy Upper Tribunal Judge Taylor because the issue was "still a contentious one and one which requires an authoritative reported determination for guidance" (paragraph 18). That was the conclusion that was entirely open to the judge to make.
25. Finally, and no less importantly, is the fact that the judge was simply not impressed by the explanation given by the Appellant. The failings of the Appellant lay not only with regard to the substantial under-disclosure of his earnings. As the judge pointed out, in 2010 to 2011 the first Appellant claimed to have an income of £44,063. He had initially declared his income to HMRC to be just £20,732 for that period. The revision that he then made was in 2016 when he said that his income was £44,177 (paragraph 21). However, the Appellant had not only "significantly increased the figure for his self-employment to support his Tier 1 application", but his figure for employment was also incorrect, and the judge was clear that "this should have been easily ascertainable from his payslip or his employer" (paragraph 22).
26. Second, however, the judge was clearly far from impressed by the Appellant's explanation in relation to his engagement of a Mr Ansari. As the judge explained, the Appellant did not explain how he came to engage Mr Ansari if he had never attended the offices of MCSO. Indeed MCSO accepts that the first Appellant did ask them to complete accountancy services during two periods. It was implausible that Mr Ansari would be seen as an employee or agent of MCSO if the first Appellant had never gone to their offices" (paragraph 26). Mr Ansari would be seen as an employee or agent of MCSO if the first Appellant had never gone to their offices" (paragraph 26). Therefore, in stating, as the judge did, that "I was unable to accept his explanation that someone else was responsible for the errors in the HMRC submissions or that he was not aware of those errors" (paragraph 28), the judge was acting entirely in accordance with the strictures given by **Khan [2018] UKUT 384**. Accordingly, there is no error of law.

**Notice of Decision**

27. The decision of the First-tier Tribunal did not involve a material error of law. The decision shall stand.
28. No anonymity direction is made.
29. This appeal is dismissed

Signed

Date

Deputy Upper Tribunal Judge Juss

13<sup>th</sup> March 2019