



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05561/2018
HU/06026/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2018

Decision & Reasons Promulgated
On 24 January 2019

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

RONAKKUMAR MAHENDRABHAI PATEL
GRISHMA RONAKKUMAR PATEL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellants: Mr C Howells, Home Office Presenting Officer

For the Respondent: Mr S Slatter (Counsel) instructed by Sadozai Solicitors

DECISION AND REASONS

1. On 13 February 2018 a decision was made by the appellant (hereinafter the Secretary of State or SSHD) to refuse leave to remain to the first respondent (hereafter the first claimant). The first claimant had applied for ILR on the basis of ten years long residence and on the basis of private life. He had entered the UK as a student on 1 September 2006 and he received grants of leave including as a Tier 1 (General)

Migrant until 30 March 2016. The claimant's appeal came before Judge Spicer of the First-tier Tribunal (FtT) which in a decision sent on 19 October 2018 dismissed the appeals of his and his dependent sponsor the second claimant. The couple have two children aged 5 and 3.

2. At paragraphs 36 and 37 the judge stated:

"36. I make the following findings of fact relating to the Appellant's tax and immigration history.

- (i) I accept that the Appellant runs an off-licence and convenience store situated in Brighton.
- (ii) I accept that the First Appellant relied on his accountants to prepare his accounts and to submit self-assessment tax returns on his behalf.
- (iii) I accept that, on 19 October 2015, the First Appellant requested his SA302 Self-Assessment tax calculations for the years 2011/2012, 2012/2013 and 2013/2014. I find that the First Appellant's tax calculation for the tax year 2013/2014 disclosed a profit of £23,570.00.
- (iv) I find that the First Appellant notified HMRC that he had additional tax to pay for the year 2013/2014, because he subsequently declared that his profit was £26,785.00 and this was confirmed by HMRC in a letter dated 6 May 2016. The extra tax was assessed as £932.35. HMRC did not penalise the Appellant for amending his tax return.
- (v) The First Appellant's application for indefinite leave to remain submitted on 30 March 2016, postdates the amendment of his tax return and the payment of the extra tax.
- (vi) The First Appellant has submitted his tax return for the tax year 2014/2015 showing total income received as £26,000.00.
- (vii) The First Appellant has submitted his tax return for the tax year 2015/2016 showing the total income received as £26,210.00.

37. The sole issue between the parties in relation to the First Appellant's application for indefinite leave to remain relates to paragraph 322(5). There is no issue taken with the Appellant's length of lawful residence."

3. Having set out paragraph 322(5) of the Rules at paragraph 39 and summarised the SSHD's, policy guidance in relation to the type of conduct likely to meet the threshold set out in the Rules, the judge concluded:

"41. I am satisfied that the First Appellant has not been involved in criminality. He voluntarily contacted HMRC to amend the tax return for 2013/2014, and incurred an additional tax liability. The First Appellant adequately explained the circumstances leading to the amendment of his tax return, namely that he changed accountants towards the end of 2015 and requested his tax calculations for the years 2011 to 2014 so that they could be checked by his new accountants. It was following the check by his new accountants that the First Appellant discovered that his profit for 2013/2014 had been wrongly calculated. It cannot properly be said that the under-declaration by his previous accountants calls into question his character conduct and associations. There is no suggestion that he has been or is a threat to

national security or subject to a travel ban or has been involved in a sham marriage.

42. No other reason has been relied upon by the respondent in relation to refusing the First Appellant indefinite leave to remain on the basis of ten years' lawful and continuous residence."

4. The judge went on to assess the two claimants' Article 8 circumstances outside the Rules. At paragraphs 51 – 53 the judge concluded:

"51. The First Appellant has established that he has been in the UK for ten years lawfully and continuously. I have found that the Respondent's decision to invoke paragraph 322(5) is inconsistent with the Respondent's own policy guidance. Taking all of the evidence into account, I find that the Respondent's decision is a disproportionate interference with the First Appellant's private life.

52. Given that the First Appellant satisfies the requirements of paragraph 276B of the Immigration Rules, and is entitled to settled status, I find that it would be disproportionate to refuse the Second Appellant indefinite leave to remain in the United Kingdom as the partner of the First Appellant.

53. I have also considered the best interests of the children of the First Appellant and the Second Appellant, and find that it is in their best interests to remain in the United Kingdom with both of their parents."

and accordingly allowed their appeals on human rights grounds.

5. The SSHD's written grounds contend that the judge failed to give adequate reasons for finding on material matters. In particular they maintain that the judge failed to take account of the key issue raised in the Reasons for Refusal Letter, namely that:

"A tax calculation for 2013/14 shows you initially declared a total income received of £23,570 from self-employment. On this basis for the period 01 April 2014 to 28 February 2014 had you declared profit of £23,570 to UKVI you would have been awarded a total of 70 points so would have been 5 points short of the required 75 and your application for Tier 1 (General) on 7 March 2014 would have been refused."

6. The grounds also submitted that the judge was wrong to give any consideration to the [first claimant's] efforts to blame previous accountants, as responsibility for the contents of the tax returns lay entirely with the first claimant.

7. Mr Howells' oral submissions amplified the written grounds emphasising that the judge had not addressed the connection between the tax discrepancy and the first claimant's immigration history. He had sought to amend his tax return only shortly before he applied for ILR. The SSHD was entitled to regard the first claimant's delay in seeking to rectify his tax returns with the HMRC as significant. In respect of the judge's observations about the mistake made by the claimant's accountants, Mr Howells sought to rely on the case of **R (on the application of Khan) v SSHD (Dishonesty, tax return, pre 322(5))** [2018] UKUT 384 (IAC), especially paragraph (iv) of (v) the headnote which states:

- “(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.”*

8. Mr Slatter submits that the SSHD’s grounds merely seek to re-argue the case based on speculation as to the first claimant’s motives. The judge clearly understood the SSHD’s position as set out in the Reasons for Refusal Letter. The first claimant’s case has always been that he made the correct application to the UKVI and that the incorrect declaration initially made to HMRC regarding his earnings was due to an error by his accountants. The error was not discovered until he had switched to a different set of accountants. The SSHD had not alleged fake representatives under paragraph 322(2). The judge had resolved the issues of fact in the claimant’s favour. Unlike the discrepant amounts at issue in **Khan**, which were over £30,000, the amount involved in this case was relatively small. The SSHD was also wrong to suggest that continuous residence of ten years was dependent on the perceived misconduct of the first claimant relating to 2015.

My Decision

9. I see no merit in Mr Slatters’ contention that somehow the paragraph 322(5) issue was irrelevant to the first claimant’s ten years lawful residence. It is correct that no action was taken to revoke it, but clearly, if the SSHD was right to refuse his incorrect tax return for 2013/14 as dishonest, then that amounted to misconduct within the meaning of paragraph 322(5).
10. However, I am not persuaded that the SSHD’s grounds are made out for three main reasons. First of all, the contention that the judge failed to take account of the

SSHD's view that the first claimant had deliberately submitted an incorrect tax return to HMRC for the tax year 2013/14 in order to achieve an immigration advantage is belied by the judge's clear identification of this issue at paragraph 7:

"The First Appellant's application was refused on 8 February 2018 under paragraph 322(5) of the General Grounds for Refusal. The Respondent was satisfied that the First Appellant had misrepresented his earning at various times and had changed what he had represented in respect of his earning to HM Revenue & Customs (HMRC) and/or to UK Visas and Immigration (UKVI) for the purpose of reducing his tax liability or for the purpose of obtaining leave or both. This was because of an amendment in the Appellant's claimed income for the tax year 2013/2014.

11. Second, the judge clearly considered the first claimant's explanation for the delay in spotting the mistake on his tax return and in taking action to rectify it. In essence, the judge accepted the first claimant's explanation that he had little understanding of the tax system and that he had only realised the error when he changed accountants in late 2015: see paragraph 41. These findings were ones which the judge was entitled to reach on the evidence and did not involve any failure to take account of any relevant matter.
12. Third, insofar as the SSHD's grounds seek to argue that the judge was wrong to accept the first claimant's blaming of the tax error on his accountants, the case of **Khan** is not authority for the proposition that accountant error is irrelevant in paragraph 322(5) cases. Paragraph (v) of the headnote clearly contemplates that explanation for the error by the account may be considered plausible in certain circumstances, especially when there has been adequate explanation for the delay in realising the error and acting to rectify it. On the judge's finding in this case the first claimant had only realised the error in September 2015 and had then moved relatively quickly to rectify it (in January 2016).
13. In short, I concur with Mr Slatter that the SSHD's grounds amount to a mere disagreement with the judge's findings of fact regarding the circumstances surrounding the first claimant's incorrect tax claim for 2013/14 tax year.
14. Mr Howells did not dispute that if the judge's findings on the paragraph 322(5) issue were upheld, she was entitled to allow the claimant's appeal on Article 8 grounds
15. For the above reasons, I conclude that the judge did not materially err in law.

No anonymity direction is made.

Signed

Date: 12 January 2019



Dr H H Storey
Judge of the Upper Tribunal