



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: HU/05983/2018

THE IMMIGRATION ACTS

**Heard at Manchester Civil Justice Centre
On 20 March 2019**

**Decision & Reasons Promulgated
On 25 March 2019**

**Before
DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between
MUJEEB UR REHMAN
(ANONYMITY DIRECTION NOT MADE)**

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shah from First Law Solicitors

For the Respondent: Mr Bates Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Tully promulgated on 27 September 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 3 April 1973 and is a national of Pakistan.
4. On 10 November 2016 the Appellant applied for ILR on the basis of 10 years long residence.
5. On 14 February 2018 the Secretary of State refused the Appellant's application. The refusal letter was on the basis of paragraph 322(5) of the Rules because it was asserted there was a significant discrepancy between the income declared for the purpose of Tier 1 applications made in 2011 and 2013 and the income declared to HMRC.
6. Grounds of appeal were lodged against the Judge's decision arguing that paragraph 322(5) should not have been relied on as the Appellants conduct was not such as to engage the provision relying on failure to follow the Respondents own Guidance; the Judge failed to give adequate reasons for rejecting the Appellants innocent explanation; failed to take into account the best interests of the Appellants child
7. On 31 December 2018 Resident Judge of the First-tier Tribunal Judge Zucker gave permission to appeal in respect only of the ground that relying on paragraph 322(5) was inappropriate so that the proportionality assessment was flawed.
8. At the hearing I heard submissions from Mr Shah on behalf of the Appellant that:
 - (a) He relied on his skeleton argument.

- (b) The Judge failed to strike a fair balance between the Appellants behaviour and the requirements of Article 8.
- (c) The Judge did not accept the Appellants explanation for the underreporting of his income but her concerns were based on speculation.
- (d) There was no incentive for the Appellant to lie about his income he was just digging a hole for himself.
- (e) HMRC did not prosecute.
- (f) The Article 8 was ‘superficial and cursory’ and inappropriate weight was given to the finding that the Appellant failed under paragraph 322(5).
- (g) He made a mistake and he rectified it.

9. On behalf of the Respondent Mr Bates submitted that :

- (a) Although the Judge’s decision pre dated Khan she in fact anticipated in how she assessed the evidence taking into account each and every relevant factor set out in Kahn.
- (b) However while the Judge did not accept that the Appellant had provided an innocent explanation for the discrepancies in issue she nevertheless went on to consider the third stage of the process and found that the Respondent had met the evidential burden that was on them.
- (c) All of the findings were open to the Judge and well reasoned.
- (d) This was simply a disagreement with findings reasonably open to the Judge.
- (e) In relation to proportionality in the light of KO [2018] UKSC 53 having failed to meet the Suitability Requirements of the Rules the starting point was the family returned to Pakistan.
- (f) The Judge then considered all the other factors and gave them appropriate weight.
- (g) This was a private life appeal only and the children were not qualifying children as they were not British and had not been in the UK for over 7 years. There were no compelling features and they could return together.

10. In reply Mr Shah on behalf of the Appellant submitted there was too much emphasis on his being educated and trying to suggest that an educated man would not make such mistakes.

The Law

11. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible.
13. As to the duty to give reasons I take into account what was said by the Court of Appeal in MD (Turkey) [2017] EWCA Civ 1958 at paragraph 26:

"The duty to give reasons requires that reasons must be proper, intelligible and adequate: see the classic authority of this court in Re Poyser and Mills' Arbitration [1964] 2 QB 467. The only dispute in the present case relates to the last of those elements, that is the adequacy of the reasons given by the FtT for its decision allowing the appellant's appeal. It is important to appreciate that adequacy in this context is precisely that, no more and no less. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their

merits. The purpose of the duty to give reasons is, in part, to enable the losing party to know why she has lost. It is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case some error of approach has been committed.”

Finding on Material Error

14. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law. This was an extremely detailed and carefully reasoned decision that anticipates the guidance given by the UT in Khan and examined in detail the Appellants account of how this discrepancy arose. I find that the grounds are no more than a disagreement with a decision that was open to the Judge on the findings she made.
15. I accept that Mr Shah did not draft the grounds of appeal but he endorsed them in his skeleton argument. As I pointed out to Mr Shah in suggesting that the decision maker failed to take into account their own Guidance and therefore the decision to invoke paragraph 322 (5) was flawed counsel Mr Ahmed relied on the wrong guidance. He referred to the Guidance on the General Grounds for Refusal rather than the specific guidance that related to Tier 1 applications where there is an allegation of a discrepancy between income claimed for Tier 1 purposes and that claimed with HMRC PS OPI 83 of 2015. This Guidance addresses the use of paragraph 322(5) but the matter was put beyond doubt in R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) which in headnote 1 provides:

“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.”

16. Thus while I find that permission was granted on a flawed basis misled by what was asserted in the Grounds I have nevertheless considered whether the findings made by the Judge in respect of paragraph 322(5) were open to her.
17. The starting point as set out in Khan 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 (as here), she 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.
18. The Judge set out in detail the history of the case against which she made her findings (paragraph 20). She recognised quite correctly that as this was an allegation of fraud her approach was as set out in SM and Qadir. It was clearly open to her to find that as there was a discrepancy in the amount of income declared for the Tier 1 applications and that which was declared to HMRC and in one of the tax years the difference was of £47,000. Having found this it was open to her to find that the Respondent had satisfied the initial legal burden on them.
19. The Judge then at paragraph 23 onwards examined the explanation given by the Appellant for these discrepancies in essence that this was the fault of his accountant based on unreliable evidence from a former accountant and that he had rectified the position as soon as he became aware of it(paragraph 23)The Judge acknowledges that no prosecution followed but properly finds that this was not a requirement under paragraph 322(5)
20. The examination of his explanation is very detailed (paragraphs 26 -47) While Mr Shah sought to argue that too much emphasis was placed on the Appellant being well educated it was clearly open to her to take into account that this was income derived from self employment by someone who had gained a Masters Degree in Finance and Business in the UK and while she noted that he claimed he did not study a tax module it was open to her to find that he would have understood the notion of taxable profits.

21. Mr Shah suggests that the Appellant had nothing to gain from what he did: this is utterly disingenuous. He paid less tax and as the Judge noted at paragraph 29 had he based his visa application on what he declared to HMRC he would not have received the necessary points to be granted leave under the Points based scheme.
22. It was open to the Judge to find at paragraphs 30-31 that the evidence provided by his accountants and what was claimed by the Appellant was inconsistent. Mr Shah criticises as speculation the Judges finding at paragraph 32 that she would have expected the Appellant to have been asked to approve the figures sent to HMRC: in Khan at paragraph 33 Mr Justice Spencer makes exactly the same point

“Thus, the Secretary of State is entitled to take into account that even where an accountant has made an error, the accountant will or should have asked the taxpayer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon.”

23. It was open to the Judge to find that there was no evidence of any kind including previous correspondence (either between the Appellant and his previous accountants or between his new accountants and the previous ones) to show that the previous accountants who were being blamed for giving inaccurate information to his new accountants existed (paragraph 33) There has never been a complaint made by him to any professional body.
24. It was open to her to find that the size of the discrepancy was such as to militate against this being a simple error and that he must have had some idea of what tax he was likely to be asked to pay and again this is a factor that is set out in headnote (iv) of Khan as a matter the fact finder is entitled to take into account.
25. It was open to the Judge to find in the absence of any evidence that HMRC requires such reviews as his accountants claimed they did when discovering this ‘error’ that she did not find it credible that his accountants simply decide to carry out unpaid work they were not required to do and also to find that this was

not the explanation given by the Appellant in his tax questionnaire (paragraphs 40-41) It was open to the Judge to find the timing of his resolution of the underpaid tax as being significant coming as it did before his application to the Respondent.

26. The Judge then summarises at paragraphs 45-47 why she rejected the Appellants explanation and I am satisfied given that she examined all of the evidence in a way that was entirely consistent with Khan the weight she gave to the various factors was a matter for her. It was open to the Respondent to exercise the discretion against the Appellant and he did not meet the Rules.
27. That was the backdrop against which the Judge considered Article 8 and I told Mr Shah that his suggestion that her analysis was cursory and superficial had no merit whatsoever. He was unable to identify any factor, and piece of evidence that she overlooked in her detailed analysis which ran to 13 paragraphs looking at the circumstances of both him and his wife and children who are all Pakistani nationals where the children have been in the UK for less than 7 years. Again she draws all the strands together at paragraph 62-63 and reached a conclusion that was open to her on the evidence that removal was proportionate against the background that he had not met the requirements of the Rules.

CONCLUSION

28. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

29. **The appeal is dismissed.**

Signed

Date 20.3.2019

Deputy Upper Tribunal Judge Birrell