



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/09055/2018

THE IMMIGRATION ACTS

Heard at Field House

On 08 February 2019

**Decision & Reasons
Promulgated
On 04 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**MR NANDLAL ALIAS NIRMAL SHYAM CHHABRIA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Muquit of Counsel

For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He was born on 29 October 1981. He appealed against the respondent's decision to refuse him leave to remain dated 7 April 2018.
2. Judge G D Davison (the judge) allowed the appeal in a decision dated 19 November 2018. The judge found there was a difference between the late filing of a return and dishonest filing. The Presenting Officer for the respondent accepted at the hearing that the information given to UKVI and HMRC was the same. There was no issue that the appellant had earned the money in question. Applying **Khan** (**Dishonesty, tax return,**

paragraph 322(5)) [2018] UKUT 00384 (IAC) the judge found that he had not acted dishonestly rather, he was simply overwhelmed and in time, he notified HMRC and paid the tax owed without penalty such that paragraph 322(5) was applied by the respondent incorrectly. That was because at worst, the appellant was only guilty of filing his accounts late.

3. The grounds claimed that the judge made a mistake as to a material fact and made a material misdirection in law.

4. The Presenting Officer's note at the hearing said:

"I submitted that by his own evidence the appellant had left the UK on 31/12/2009 at a time when his leave to remain had expired and was subsequently refused entry clearance at the BHC Mumbai on 05/02/2010."

5. The appellant left the UK on 31 December 2009 on his own evidence and did not make an entry clearance application within 28 days of his previous leave expiring. In actual fact, the appellant's leave to remain had expired on 23 November 2009 so even if the appellant's date of leaving the UK was taken as 5 January 2010, that was still after the appellant's leave to remain had expired. As a result, the judge erred in making a mistake as to the time period after the appellant's leave expired which had materially affected the outcome of the appeal as the 28 day period, permitted under the Immigration Rules, had been incorrectly calculated.

6. Further, the judge erred because he failed to follow **Khan** when assessing if the appellant's behaviour in failing to provide his tax return could be viewed as dishonesty. Headnote (iv) of **Khan** says:

"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 taxpayer 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."

7. At [23](ii) of the decision the judge said:

"The appellant should have been on top of his financial situation, but the documents in the bundle, particularly those referenced 'G' show the financial pressures and struggles he was under at this time. It is to his credit that he sought to resolve the mess created in his business by the global financial crisis. But the Tribunal did not find him to be acting dishonestly, he was simply overwhelmed, in time he did notify HMRC and has paid the tax owed without penalty (save interest charges)."

8. The Secretary of State argued following the rationale in **Khan** that the appellant was fully aware of his earnings and the fact that he would have

to pay tax on those earnings. The appellant did not resolve that issue within a reasonable timescale, waiting until 2016 to ensure he met his tax liabilities such that he deliberately and knowingly avoided meeting his tax liabilities at the time, regardless of the fact that his business was in trouble. That could only be seen as a dishonest act when applying the guidance in **Khan**, as the appellant would have benefited financially from not paying taxes owed at the time. As a result, the judge materially erred in law by finding that the appellant's deliberate failure to declare earnings to HMRC was not a dishonest act but something done due to the pressure of his failing business.

9. Judge Grimmett granted permission to appeal on 28 December 2018. He said inter alia:

“2. There appears to be an issue as to the date on which the appellant left the UK, whether it was 31 December 2009 as the respondent says or January 2010 but in either event it is arguable that after the appellant left the 28 day period in which he could re-apply was not met.”

10. There was no Rule 24 response.

Submissions on Error of Law

11. Mr Clarke said there was confusion regarding the date the appellant left the United Kingdom but that it was beyond doubt that he could not have left before 5 January 2009 because he was only handed back his passport on that day. Mr Clarke acknowledged ground 1 was in error. The guidance was inconsistent with the Rules. Mr Clarke sought to amend the grounds which Mr Muquit challenged. I offered Mr Clarke the opportunity to apply for an adjournment so the grounds could be amended and served upon the appellant, which he declined on issues of costs.
12. As to the challenge that the judge had made a material misdirection in law, Mr Clarke relied upon the grounds. Mr Muquit submitted that this was not a case where the accountant had been blamed as in **Khan**. The judge was entitled to reach the decision he did such that he did not err.

Conclusion on Error of Law

13. The judge might well have been generous in the findings he made at [19]-[24] but the facts in this case can clearly be distinguished from those in **Khan**. In the circumstances, the judge was entitled to conclude that the appellant had not carried out a dishonest act and that the omission was one of error, having been overwhelmed by events and without dishonest intention. That was a conclusion the judge was entitled to come to on the evidence before him.

Notice of Decision

The judge's decision reveals no error of law and shall stand.

No anonymity direction is made.

Signed

Date 28 February 2019

Deputy Upper Tribunal Judge Peart