



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09439/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2019

Decision & Reasons Promulgated
On 22 February 2019

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR SHAFQAT RASOOL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs (Gaffrey Brown Solicitors)

For the Respondent: Mr S Khotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, permission having been granted by Judge Hollingworth on 27th December 2018. It relates to a Decision of First-tier Tribunal Judge Wylie promulgated on 23rd November 2018 in which she dismissed the Appellant's appeal.
2. The appellant is a citizen of Pakistan born on 2nd February 1985. He had applied for indefinite leave to remain in the United Kingdom, which application was refused by the Secretary of State on 6th April 2018.

3. The appellant first entered the UK in September 2006 with a student visa valid until October 2008. He made an in-time application for further leave to remain as a highly skilled migrant which was granted until July 2011. He then made a further in time application as a Tier 1 general migrant which was granted until June 2013. That leave was successfully extended until June 2016. He made an in-time application for indefinite leave to remain on 9th June 2016 as a Tier 1 general migrant but then varied that application, in April 2017, to one for indefinite leave to remain on the basis of his long residence.
4. The application was refused under paragraph 322 (5) of the Immigration Rules because the Secretary of State had ascertained that he had declared two different figures to UKVI and HMRC in terms of his earnings. The Secretary of State concluded that the appellant had been deceitful or dishonest in his dealings with either HMRC or UKVI and that it would be undesirable for him to remain in the United Kingdom.
5. The appellant appealed and his appeal came before Judge Wylie sitting at Hatton Cross on 1st November 2018. Mr Biggs represented the appellant then as now. Judge Wylie did not have the benefit of a representative from the Home Office. She found that the provisions of paragraph 322(5) were met, that it was undesirable given the appellant's conduct, to grant him leave to remain in the United Kingdom and taking into account the requirements of section 117B of the Immigration and Asylum Act 2002, dismissed the appeal on human rights grounds.
6. The grounds upon which permission to appeal was granted were drafted by Mr Biggs. The first ground of appeal is an allegation of an inadequacy of reasoning. It asserted that the judge failed to provide adequate reasons for her conclusion that the Secretary of State had discharged the evidential burden, failed to acknowledge the need for cogent evidence of dishonesty before the respondent could discharge the legal burden, failed to make any separate and sustainable findings on the appellant's credibility having regard to all material matters and in failing to give significant weight to HMRC's decision not to take any adverse action against the appellant.
7. The second ground is essentially a restatement of the first. It is argued that, although the standard of proof for dishonesty is a balance of probabilities, there nevertheless needs to be cogent evidence.
8. Ground three asserts that the judge has given no clear findings on the appellant's credibility; there is no separate reasoned consideration of the appellant's credibility.
9. The fourth ground asserts that factual errors have been made by the Judge, in particular she found that the accountants had not admitted culpability whereas it was at least arguable that one of them had. It is asserted that the judge had not engaged with the appellant's evidence that the tax returns were submitted online and therefore did not require his signature and there was no sufficiently reasoned consideration of why the appellant's account was not accepted.
10. It is asserted the fact that the judge did not attach weight to the fact that HMRC had decided not to impose any penalty was also a material error of law and in that regard

Mr Biggs relied on a guidance published by the Secretary of State, since the Decision and Reasons was promulgated, indicating that HMRC will take action in such cases.

11. With regard to the allegation of inadequacy of reasons, reliance was placed on MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).
12. Mr Biggs also relied on a Court of Session case, Collins and Ishoma against the Secretary of State for the Home Department [2018] CSOH 127 and in particular paragraph 30 thereof where the Court of Session found the Secretary of State to be at fault for not affording the petitioner an opportunity to explain why there were two different figures submitted to UKVI and HMRC.
13. Dealing with the last point first, the Court of Session case was a case taken in relation to the Secretary of State's decision. It was not an appeal. The issue there was that the decision that the petitioners had been dishonest was made without them having the opportunity to respond. The Secretary of State made no such error in the present case because the Letter of Refusal sets out the appellant's explanation. It is written there that, in question 14 of the tax questionnaire, the appellant was asked whether he had ever needed to correct or resubmit tax returns during any period of his self-employment. He had said that he had needed to correct his tax returns for the years 2010/2011 and 2012/2013 as his accountant had submitted wrong figures. He had, it is written, stated that there was a lack of coordination between him and his accountant and that he was busy in his employment at the time. He also explained that the accountant had submitted his tax returns online on his behalf.
14. Turning to the adequacy of reasons generally and the judge's consideration of this appeal, the Decision and Reasons is lengthy and detailed. It sets out the issues in considerable detail. In particular it sets out that in an application for Tier 1 general migrant status in April 2011 the appellant claimed earnings of £34,514 from self-employment and £7,520 from employment. In the application in May 2013 the appellant claimed earnings of £29,930 from self-employment for the period May 2012 to May 2013 and £23,298.15 from employment. The income claimed was sufficient for him to score the necessary points to obtain leave.
15. The Secretary of State's checks carried out with HMRC showed that in his original tax return for the year 2010/2011 he declared a total income of only £6,475 and for the tax year 2012/2013 £24,528.
16. The appellant then, in February 2016, wrote to HMRC to amend the tax return for the year 2010 2011 to declare a total income of £41,201 and in January he had amended the tax return for 2012/2013 to declare an income of £40,368.
17. The judge set out the appellant's explanation as set out in his witness statement and oral evidence. His explanation was that he had instructed accountants to prepare his tax return and he had sent them his bank statements, invoices, P 60 and expenditure details. He was very busy in his employment during the busy period of Christmas and New Year. He had not visited his accountant and was not aware about the details of the tax return which had been submitted online.

18. It is then set out that he went to see his accountant in October 2015 asking him to check his past records and found there to be a discrepancy in the total amounts declared in the years 2010/2011 and 2012/2013. Amended returns were then submitted and a demand for additional tax made in respect of each of the years, which the appellant paid in February 2016.
19. The appellant explained that he had instructed AS Associates, chartered certified accountants to prepare accounts to show his earnings when his visa application was lodged in April 2011 and also to submit his tax return for that year. For his visa application in 2013 he instructed another firm, Riz & Co, who had been recommended by a friend, to prepare his accounts for the purpose of the visa application. He could not remember if he had instructed them to prepare and lodge his tax return. There was a mistake in the tax return. He did not like Riz & Co and returned to AS Associates.
20. The person that he had dealt with at AS Associates had left the firm before October 2015. He said that when he went to AS Associates and discovered there had been a mistake in the tax return, the manager agreed, as a goodwill gesture, to prepare and submit the amended return without charge. He made no formal complaint about the accountants.
21. The judge then set out Mr Biggs' submissions namely that the correct approach was first to establish whether there had been dishonesty. He submitted that refusal under paragraph 322(5) was a draconian provision and it must be shown that the appellant's presence in the United Kingdom is undesirable. He also reminded the judge that the burden of proof was on the respondent who must provide cogent evidence to discharge the evidential burden and only then is the appellant required to give an explanation.
22. He submitted that the appellant was a credible witness who had explained in candid and clear detail that he had not known the mistakes had been made. He had relied on his accountant and subsequently paid the tax properly due. The discrepancy, he argued, for the years 2012/2013 was around £4000 and for 2010/2011 less than £10,000.
23. Mr Biggs had referred the judge to a letter from the accountants which, he argued, confirmed that the errors had been found and been corrected. The accountants accepted their fault and had not charged the appellant for the work required to rectify the returns
24. Mr Biggs also relied on the fact that HMRC accepted the payment of tax due and had not imposed any penalty, which, he argued, was an important point. He submitted that as experts in tax affairs, if HMRC had considered there had been dishonesty, they would have imposed a penalty.
25. The judge commenced her findings at paragraph 31 by reminding herself of the burden and standard of proof and of the applicable law.
26. She noted that the appellant accepted that incorrect earnings had been presented to HMRC and found that the respondent had met the initial burden of proof which

meant there was an evidential burden on the appellant to show an innocent explanation for his actions. I do not find that to be inadequately reasoned, the judge having previously set out what lay behind the Secretary of State's conclusion. Mr Biggs said there needed to be cogent evidence but in this case the appellant accepted that incorrect figures had been sent to HMRC. The difference between what he claimed as earnings to UKVI and what he declared to HMRC for the period 2010/11 was £34,726 and for 2012/2013 £15,840; not insignificant amounts. Furthermore, 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) the first paragraph of the head note states:-

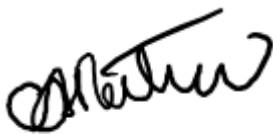
“Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the appellant has been deceitful or dishonest and therefore should be refused ILR within paragraph 322 (5) of the immigration rules. Such an inference could be expected where there is no plausible explanation for the discrepancy”.

27. The submission that there was no cogent evidence in this case is unattractive and I find no error of law in that regard.
28. The judge then went on to consider the appellant's explanation. He blamed his accountants. She noted that AS Associates had written a letter dated October 2017 which indicated that the firm had found errors in the tax returns and they rectified the error for both years. She also noted however that they had not accepted any liability for the mistake or identified how the error had occurred. She noted that there was no information at all how the errors had been made. The judge did not accept the appellant's oral evidence that the accountants had accepted the error and not charged him for rectification as a gesture of goodwill. Apart from his assertion, there was no other evidence to that effect. The judge found that it did not seem credible that two separate firms of professionally qualified accountants would make similar mistakes in completion of tax returns when those returns would have been prepared on the basis of information provided by the appellant. She did not accept the explanation given by the appellant that he had been busy in his work between Christmas and New Year. She noted that the appellant would have been fully aware as he completed his visa application what his self-employed and employed earnings were and therefore should also have been aware that he should have paid considerably more tax than he had. She noted that the appellant must have known that he had earned sufficient to meet the financial visa requirements and must have been aware that tax was required to be paid.
29. The judge noted that while the appellant provided a quantity of documentation to support his earnings for the year 2015/2016 he had not done so in relation to the years 2010/2011 or 2012/2013, the years in question.
30. On that basis the judge found that the Secretary of State had met the burden to show that there had been dishonesty on the part of the appellant.

31. The judge noted at paragraph 52 that HMRC had not imposed any penalty for late payment of tax due but noted that she had no information about what HMRC considered when making such a decision and gave little weight to that fact.
32. Overall the Judge's reasoning and conclusions were perfectly in line with the wisdom of Khan. The judge had to decide whether the appellant had been dishonest or only careless and came to the conclusion that he had been dishonest and not merely careless. That is unsurprising given the size of the discrepancy, the length of the time the appellant had been in the UK and therefore his knowledge of UK law and also the fact that he only rectified the situation with HMRC very shortly before he made his application for indefinite leave to remain, in the knowledge that the Secretary of State would check HMRC's figures. That was 4 years after the first incorrect figures were supplied to HMRC.
33. The judge was entitled to attach no weight to the fact that HMRC did not impose any penalty. As she rightly pointed out, she was provided with no evidence as to what factors HMRC take into account before making such decisions. Whilst Mr Biggs provided guidance from the Home Office suggesting that HMRC would indeed take such action, that did not exist at the date of the hearing before Judge Wylie. Cases such as this one have become common in this Tribunal and rarely have any of the appellant's concerned had penalties imposed by HMRC. We do not know the reason. It may simply be that the error having been pointed out by the taxpayer himself and the tax having been paid it would not be practical or economic to pursue matters any further. However, that is speculation. The truth is we do not know and for that reason alone the judge was entitled to attach no weight to it. It would no doubt assist judges in future if the Secretary of State made enquiries of HMRC as to what they consider when deciding whether to impose penalties
34. For all of the above reasons I find that the decision of Judge Wylie is a detailed and thorough assessment of all of the evidence applying the law and burden and standard of proof correctly. On the evidence in this case, indeed any other result would have been surprising. The appellant can be in no doubt why he lost his appeal.

Decision

35. The Decision and Reasons of the First-tier Tribunal does not contain any material errors of law and the appeal to the Upper Tribunal is dismissed.
36. The First-tier Tribunal did not make an anonymity direction and I see no justification for one.



Signed

Date 19th February 2019

Upper Tribunal Judge Martin