



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09750/2018

THE IMMIGRATION ACTS

Heard at Field House
on 14 March 2019

Decision & Reasons Promulgated
On 16 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FARRUKH AKBAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow of the Specialist Appeals Team
For the Respondent: Mr R Sharma of Counsel instructed by Lincolns Solicitors

ERROR OF LAW DECISION AND REASONS

The Respondent

1. The Respondent (the Applicant) is a Pakistani born on 16 December 1983. On 27 January 2008 he entered with leave as a student. In 2011 his wife entered with leave as his dependant. They have two children born in 2013 and 2016.
2. He obtained a series of further leaves to remain within the Points-Based Scheme, the last of which expired on 06 June 2016. On 31 May 2016 he applied for indefinite leave to remain as a Tier 1 (General) Migrant which application on 22 September 2017 he varied to an application for indefinite leave on the basis of 10 years' lawful residence.

The SSHD's decision

3. On 12 April 2018, the Appellant (the SSHD) refused the Applicant's application by reference to paragraphs 322(5) and 276B of the Immigration Rules because the Respondent considered the Appellant had been deceitful or dishonest in his dealings with HM Revenue & Customs (HMRC) or UK Visas and Immigration (UKVI) or both.
4. The Respondent came to this conclusion because for the year ending 5 April 2011 the Applicant had submitted a tax return showing a total income of £18,443.50 which was significantly lower than the earnings of £37,877.71 claimed in his application of 5 April 2011 for further leave under the Points-Based System. Similarly, in relation to the year ending 5 April 2013, he had declared to HMRC a total income of £21,271.44 and for a similar period to UKVI an income of £36,994.79.

Proceedings in the First-tier Tribunal

5. The Applicant appealed and by a decision promulgated on 15 November 2018 Judge of the First-tier Tribunal Stedman accepted the reasons given by the Applicant for the need to have amended his 2011 and 2013 tax returns because his employer had supplied him with payslips evidencing deductions for income tax but had failed to pass the details to HMRC. The Applicant had not been aware of this until he had been preparing the application to the SSHD leading to this appeal. He concluded the Applicant had not been deceitful or dishonest and allowed the appeal.
6. The SSHD sought permission to appeal on the basis the Judge had erred in law. On 27 December 2018 a First-tier Tribunal Judge refused permission noting the permission application had failed to make clear on what footing the Applicant's actions or omissions had caused him not to meet the relevant Immigration Rules. Further, the Judge had been entitled to reach his conclusions

The Upper Tribunal Proceedings

7. The SSHD renewed its permission application to the Upper Tribunal. On 6 February 2019 Deputy Judge of the Upper Tribunal Maller granted permission because it was arguable that the Judge had erred in finding the Appellant had met his obligations to HMRC when he had not paid any income tax from the relevant employment and in concluding paragraph 322(5) of the Immigration Rules was not applicable. He referred to the judgment in *R (Khan) v SSHD [2018] UKUT 00384 (IAC)*.
8. The Applicant attended with his instructing solicitor. I explained the purpose and procedure to be adopted at an Error of Law hearing and the Applicant took no active part in the hearing. No Response under Procedure Rules 24 had been filed for the Applicant and Mr Sharma confirmed there was no application for submission of any further evidence.

Submissions for the SSHD

9. Mr Tarlow relied on the grounds for appeal. The Applicant had claimed the errors in his tax returns were not his fault. He referred to the accountant's letter identified at item 9 of the Applicant's solicitors' letter of 22 September 2017 varying his application for further leave. Both parties confirmed there was no copy of the letter in their files and there was none in the Tribunal file.
10. Mr Tarlow continued that the Judge had erred at paragraphs 16 and 17 of his decision and in finding that the provisions of paragraph 322(5) were not applicable. There had been a significant error in the income figures which the Applicant had reported to HMRC. The Applicant was responsible for accurately reporting his income and had failed so to do. The Judge had erred in concluding that paragraph 322(5) had no application in this case.

Submissions for the Applicant

11. Mr Sharma submitted the accountant's letter previously referred to was not material because the Judge had found the Applicant had been dishonest with neither HMRC nor the SSHD.
12. The Judge had dealt with the applicability of paragraph 322(5) at paragraphs 18ff of his decision although the SSHD had failed to make a case for considering the Applicant to have been dishonest. Dishonesty was a necessary condition to engage paragraph 322(5). The Applicant accepted his returns to HMRC had been inaccurate. The income tax due on the Applicant's earnings from employment subject to the Pay As You Earn scheme was deductible by the employer who was under a duty to account for it to HMRC. The Applicant's payslips and bank statements tallied. With good reason the Applicant had believed and had always believed that he had met his tax liabilities as evidenced in the documentation supplied to him by his employer. There was no reason for him to make enquiries whether his employer had passed on to HMRC the tax deducted from his earnings.
13. The Judge had considered that the unreported decision in *Sandeep Kadian (HU/11723/2016)* had no application to the facts of the Applicant's case and separately had concluded that paragraph 322(5) also had no application.
14. Mr Tarlow had no further submissions to make beyond referring to the misrepresentation of the Applicant's income identified on page 3 of the reasons for refusal of 12 April 2018.

Consideration

15. The Applicant accepted the discrepancies identified by the SSHD between his returns to HMRC and his applications to the SSHD. His case in brief is that the discrepancies relate to his earned income subject to PAYE. His employer had supplied him with payslips evidencing deduction of tax. His bank statements showed receipt of the net earnings disclosed by the payslips. His employer

had failed to account to HMRC for the deductions for tax the employer had made from the Applicant's earnings.

16. The Judge erred in stating that the Applicant had met his full tax liabilities rather than simply stating the Applicant had every reason to believe he had met his liabilities because his employer had deducted under the PAYE scheme sufficient from his earnings to discharge his liabilities. He also erred in failing to take account of the learning in *R (Khan)*. For these reasons I find the decision contained a material error of law. There was no challenge before me to the core facts found by the First-tier Tribunal save as mentioned in the first sentence of this paragraph which refers more to construction than to fact-finding. In the circumstances, I find it appropriate to deal with the substantive appeal.
17. The Applicant's mis-representations to HMRC amounted to a failing to declare earned income for which he believed all tax had been deducted by his employer and accounted to HMRC. The Judge had referred to the accountant's letter at paragraph 15 of his decision and at paragraph 14 noted the Applicant stated he had made enquiries of his employer but without success. The Judge accepted the explanation from the accountant: it is unfortunate that the letter no longer appears to be in the Tribunal file. There was no claim by the SSHD that it had not been included with the Applicant's original application as listed as item 9 of his covering letter of 22 September 2017.
18. The statement of Mr Lewis of HMRC at item C of the Respondent's bundle records the Applicant's PAYE earnings and the amount of tax deducted. The SSHD had this information from HMRC and had sight of the Applicant's payslips. There is no indication in the Tribunal file that the SSHD had made further enquiries about the tax records of the employers who had operated the PAYE schemes from which deductions had been made for tax from the Applicant's earnings. The combination of the payslips and bank statements submitted by the Applicant is in my view sufficient to explain the discrepancies identified by the SSHD. The SSHD has powers under s.40 UK Borders Act 2007 to obtain further information from HMRC about the operation of the PAYE scheme by the Applicant's employers to which information the Applicant may not be entitled. Whether the SSHD suggests or requests HMRC to investigate the manner in which the Applicant's employers have operated the PAYE scheme in relation to the Applicant is not for me to say. The SSHD made no suggestion and submitted no evidence to indicate the Applicant might have been complicit or connived with his employer.
19. The Judge erred in stating that the Applicant had met his full tax liabilities rather than simply stating the Applicant had every reason to believe he had met his liabilities because his employer had deducted under the PAYE scheme sufficient from his earnings to discharge his liabilities. He also erred in failing to take account of the learning in *R (Khan)*. For these reasons I find the decision contained a material error of law. There was no challenge before me to the basic facts found by the First-tier Tribunal save as mentioned in the first

sentence of this paragraph which refers more to construction than to fact-finding. In the circumstances, I find it appropriate to deal with the substantive appeal.

20. I refer to the guidance given at paragraph 37 of *R (Khan)*:

(i) 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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.

(ii) However, where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.

(iii) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the "balance of probability", a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences.

(iv) However, 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: far from it. 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 tax payer 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. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.

(v) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.

(vi) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

- 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.

(vii) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the Applicant has been deceitful/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.

(viii) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached.

21. The Judge gave sustainable reasons for finding the Applicant's explanation of the discrepancies in income declared to HMRC and to UKVI. The SSHD has obtained the statement of Mr Lewis of HMRC but this statement on its own does not give any factual information which supports or disproves the Applicant's plausible explanation. The Applicant's explanation is plausible and credible in the light of the production of bank statements showing receipt of the net earnings disclosed in the Applicant's payslips.
22. The Applicant has accepted he failed to disclose in his tax returns income received from employment where he had every reason to believe that tax had been deducted for onward transmission to HMRC by his employer. I am satisfied the Applicant's omission of a reference in the tax returns to PAYE employment falls into the category of carelessness and not dishonesty. The Applicant had every reason to believe that tax on those earnings, having been deducted from his earnings, had been declared and paid to HMRC by his employer.
23. For these reasons, I do not find the SSHD has shown there are grounds to engage paragraph 322(5) and in the alternative, if there are grounds, then

applying the jurisprudence in *R (Khan)* the Applicant has displaced the inference of deceitful or dishonest behaviour and it is disproportionate to refuse his claim for indefinite leave based on long residence because of the omissions from two of his tax returns of mention of his income from PAYE employment in respect of which he had every reason to believe his employer had declared and paid to HMRC all tax due on his income from that employment. On the figures disclosed to the Tribunal there would have been no liability to pay any further income tax at basic or higher rate levels. The appeal is allowed.

Anonymity

24. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law and to the limited extent referred to is set aside.

The appeal of the Applicant is allowed.

Anonymity direction not made.

Signed/Official Crest

Date 15. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal