



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01182/2019
HU/02193/2019
HU/02196/2019
HU/02198/2019

THE IMMIGRATION ACTS

Heard at Birmingham
On 1st October 2019

Decision & Reasons Promulgated
On 7th January 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED [Y] (plus 3 dependants)
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms H. Aboni, A Senior Home Office Presenting Officer
For the Respondent: Mr A. Jaffar of Counsel

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Lal in respect of Mr [Y]'s and his dependants' human rights claims. To ease following this decision I shall refer to Mr [Y] as the Claimant/Appellant although this is the Secretary of State's appeal.

2. When granting permission to appeal, First-tier Tribunal Judge Landes noted that the Secretary of State's original refusal letter was based on the Claimant's alleged dishonesty in relation to his tax affairs/disclosure of his earnings. In summary Judge Landes noted further that:
 - (i) It was arguable that the Judge did not give adequate reasons for his conclusion that the calculations may have an element of complexity to it and did not consider the matters set out in the decision in **Khan** at paragraphs 4 and 5;
 - (ii) The Judge did not explain why he found the Appellant to be credible save to say that the amendment was "accepted" by HMRC;
 - (iii) As was pointed out in the grounds of appeal, the fact that HMRC took no further action was not determinative;
 - (iv) The Judge did not explain or make findings about why the Appellant did not realise an error had been made when he signed the tax return;
 - (v) Neither did the Judge explain why he found the calculation may have had an element of complexity about it so far as the accountants were concerned. It was difficult to see why the calculation in the tax return would be complex given the documents in the Appellant's supplementary bundle;
 - (vi) This dividend income could simply have been copied over into the tax return submitted in January 2012;
 - (vii) Similarly the correct net profit for the year 2012/2013 appeared in the Appellant's profit and loss account signed by the first Appellant and could just have been carried over into the tax return submitted in January 2014.

3. At the hearing before me today, Ms Aboni said that she relied on the grounds of appeal. The Judge had failed to give adequate reasons as to why the Appellant's circumstances were complex. The accounts were prepared by qualified accountants. The Judge had failed to follow the guidance in **Khan**. It was not sufficient to blame the accountants. There was no evidence from the accountant as to why there was an error and what the error was. The Judge had erred in his assessment. The Judge appeared to give credit when there was no penalty imposed. The issues of no penalties being imposed was a different issue. Just because they have accepted the amended accounts does not mean that there was no deception used. Ms Aboni said the grounds of appeal referred to **Khan**. Ms Aboni said I should also refer to the case of **Balajigari v SSHD** [2019] EWCA Civ 673. That was an earnings deception case. At paragraph 67 it was made clear that the fact that no penalty imposed does not mean that there is a duty on HMRC to impose a penalty in every case. At paragraph 73 it was clear that there were many reasons why HMRC may not impose a penalty or investigate a tax return. Ms Aboni said that if I found that there was an error of law then it was open to me to re-make the decision.

4. Mr Jafar in his submissions said that there was a failure by the Secretary of State to fully appreciate the case before him. At D3 of the SSHD's bundle it was to be noted that the Appellant had married. He had been to and from back home. There was a child. There was a health reason too. The SSHD when reviewing the evidence at page 4 of the refusal letter referred to various questions but did not engage with question 7. Namely that at the time the Claimant was submitting his returns to HMRC he was distracted by all of these life events. The witness statements in the bundle had confirmed this. In **Khan** at paragraph 4 of the headnote the matters included deception, lack of knowledge or carelessness. There were 3 stages. The Claimant's attention was diverted at the time. It was not in question whether or not the Claimant had signed the document. The point was whether the Claimant had given an explanation. His attention was diverted just at that time.
5. At [14] there was explicit acceptance by the Judge of the explanation provided. At [15] the Judge then accepted the evidence. The SSHD's grounds were drafted without context the case.
6. In respect of complexity at paragraph 19 the Judge was making a routine generalisation that there can be an element of complexity to it. It was a perfectly rationale and logical point to make. The point was that the Judge did not regard that as determinative. Looking at the determination as a whole, the Judge's decision was entirely logical and rationale. The grounds reflected no more than a disagreement and there was no error of law.
7. As for blaming the accountants, one should look at the circumstances. Paragraph 34 of **Khan** does say that a defence can be mounted where an individual's attention is distracted at the time. That was despite **Khan** being a Judicial Review case which has a higher test of perversity. The finding was not starred or a Country Guidance case, so it is was not legally binding, but there was nothing in **Khan** outside the Judge's decision.
8. The Judge's decision was fully reasoned and with an analysis at [16]. The whole context was at [17]. It may not have been appropriate to make a complaint. There was a letter from the legal representatives to the Accountants with proof of posting seeking an explanation from the accountants. The accountants letter at p10 onwards was evidence of his bank account.
9. There had been two amendments relied upon by the SSHD. Page 4 of the refusal letter refers, but it was an immaterial discrepancy in any event.
10. In reply Ms Aboni said that she maintained that there were no adequate reasons in the Judge's decision. If there was a genuine error then what was the explanation and why did the Judge accept it? One cannot merely blame an accountant. There was no explanation from the accountants. The Judge has failed to give adequate reasons and has failed to go through the headnote of **Khan**.

11. In considering my decision I have to look carefully at the Judge's decision, but it is also necessary to carefully consider the caselaw. The SSHD's grounds of appeal refer to the case of **R (Khan)** [2018] UKUT 384 (IAC) which was a decision of Martin Spencer J. The SSHD's grounds of appeal do not refer to the Court of Appeal's decision in **R (Balajigari) and others v SSHD** [2019] EWCA Civ 673, [2019] 1 WLR 4647, but the importance of **R (Khan)** was not undermined.

12. In **Balajigari** Underhill LJ had delivered the judgment of the Court of Appeal to which all members had contributed. The problem was identified from the outset in the judgment at paragraph 5,

*"5. It has been Home Office practice to refuse applications for ILR in all, or in any event the great majority of, cases where there are substantial discrepancies between the earnings originally declared to HMRC by a *4655 T1GM applicant (even if subsequently amended) and the earnings declared in the application for ILR or a previous application for leave to remain ("earnings discrepancy cases"), relying on the "General Grounds for Refusal" in Part 9 of the Immigration Rules."*

13. There was also reference by the Court of Appeal to the wider concerns about the use of paragraph 322 (5) of the Immigration Rules at paragraph 32 of its judgment.

"32. The Guidance does not purport to, nor could it, restrict the meaning of paragraph 322(5). We did not understand it to be contended otherwise on behalf of the claimants. Although the examples given include cases involving criminality, a threat to national security, war crimes or travel bans, it is clear both from the Guidance itself and from the terms of the rule that it is not restricted to such types of case. We are aware that there has been concern expressed both in Parliament and elsewhere that paragraph 322(5) may be being used for a purpose for which it was not intended. In particular, there have been suggestions that it may have been intended to apply only to cases where there is a threat to national security. In our view, it is clear from its terms that that is not so."

14. As I have indicated already, the decision of Martin Spencer J in **R(Khan)** was specifically considered by the Court of Appeal. The Court largely agreed with that decision, but not on every aspect. For example, importantly, it was said in respect of the 'starting point' that,

"42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in

that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."

15. Therefore because the SSHD's grounds only refer to the case of **R (Khan)** it is important to note that the Court made this distinction with how that judgment ought to be looked at in relation to the 'starting point'.
16. The Court of Appeal did agree with another important part of the judgment in **R (Khan)** relating to fairness at paragraph 43,

"... This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences. Accordingly, we agree with Martin Spencer J that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty."
17. Counsel for one of the Appellants had made what the Court of Appeal had referred to as being a 'bold' submission in respect of the Finance Act 2007 relating to penalties imposed by HM Revenue and Customs. There was also reference to the **Tameside** duties. The Court had no hesitation in rejecting those submissions at paragraphs 70 onwards in its judgment. As Ms Aboni has said the Court also made clear that the fact that there was no penalty imposed by HMRC does not mean that there was no dishonesty.
18. I also note that a large aspect of the appeal dealt with judicial review matters. This matter before me is a statutory appeal and many of those issues are not relevant.
19. I then turn to the Judge's decision in this case. I list some of the findings of the Judge:
 - (1) The Judge noted that there were character and conduct issues raised against the Claimant;
 - (2) The Judge said he had considered the written and oral evidence with care and had concluded that the Claimant had provided him with a credible explanation;
 - (3) The Judge noted the dates of the amendments correctly;
 - (4) The Judge noted that there was communication with HMRC and that HMRC had said that there would no further action taken;
 - (5) The Claimant was acting on professional advice and there was no deceit on his part. When the error was discovered, it was corrected;

- (6) The Claimant had changed accountants in any event and as no further action was taken by HMRC it may not have been appropriate to make a complaint about the former accountants;
 - (7) The Judge said he was balancing the fact that there were no other negative factors against the Claimant. Be that in respect of his character or other immigration breaches or criminal matters;
 - (8) The Judge was of the view that as there was employment, self-employment and dividend income then any such calculation may have an element of complexity to it;
 - (9) The fact that the Claimant may have misled HMRC was not supported because the Claimant was paying back more tax than before and which was acceptable to all parties.
20. Against that background, I also note that the Claimant had sent in a letter of complaint with proof of posting to his former accountants. That letter was before the Judge. There does not appear to have been a response, but in my judgment the Judge was entitled to conclude that as there was no issue with HMRC then to proceed with a complaint would have been to do too much.
 21. It is tempting to conclude that short decisions from First-tier Tribunal Judges mean that there has not been sufficient for the losing party to know why it has lost. I remind myself that just because a decision is long or short does not mean it contains a material error of law. The issue is whether within **R (Iran)** principles a material error of law has been shown.
 22. I have to remind myself that even if another Judge might have come to a different decision does not mean that there is a material error of law. I also remind myself that this Judge saw and heard the Claimant. Indeed the Claimant was cross examined at the hearing.
 23. In my judgment, there is no material error of law in the Judge's decision. The Judge looked carefully to the explanations provided to him and cross referred to the written evidence. He had before him a case in which the burden of proof of to prove dishonesty was on the SSHD. The Judge made clear that he had been given an explanation for the errors by the Claimant. The Judge had read through and referred to the witness statement of the Claimant. The Claimant had explained the family and health issues that his wife was going through and the birth of their children in the UK with no assistance from any family members to look after their child. He also referred to his own health issues at that time. The Claimant had therefore provided the explanation for what went wrong which led to the mistake and how he had not been able to concentrate on work and tax affairs to the best of his ability. This led to the Claimant's distraction at that time. That context was vital.

24. I note what is said by the Court of Appeal at paragraph 42 of its judgment that a discrepancy in the tax affairs is not the starting point. I also note that the Claimant has provided a consistent and plausible explanation for what went wrong in those years of his business when he had work as an employee, self-employment and dividend income. The point being that the Judge accepted the Claimant's evidence that the family life, new child, new marriage, health problems of his wife and of himself all featured in the reasons why there was an error in the tax returns.
25. As I have said, it may be that another Judge might have come to a different conclusion, but that does not mean that there is an error of law. Perhaps some Judges would have prepared longer decisions. But that does not show a material error of law either. In the end this Judge accepted the Appellant's evidence and explanation. He did so with sufficient reasoning so that the losing party knew why it lost and when that losing had attended the hearing and cross examined the Claimant. It was for the losing party in this case to prove dishonesty. The Judge did not accept it had done so. The Judge did not go beyond the case law. He did not conclude that just because there was no penalty imposed by HMRC that it meant that was a sufficient reason to allow by itself to allow the appeal. The Judge's decision was much more nuanced than that. The Judge noted, in reality, that in the real world there was no need for the Claimant to follow up the complaint about his former accountants because HMRC had not taken any action in any event and the Claimant had new accountants now.
26. Therefore, despite the helpful submissions of Ms Aboni, I conclude that there is no material error of law in the Judge's decision.

NOTICE OF DECISION

There is no error of law in the decision of First-tier Tribunal Judge Lal.

The appeal of the Claimant and the three dependants therefore remain allowed.

Signed: A Mahmood

Date: 01.10.2019