



IAC-FH-CK-V1

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

Appeal Number: HU/06161/2018 (V)

THE IMMIGRATION ACTS

**Heard at Field House
On 11 December 2020**

**Decision & Reasons Promulgated
On 18 January 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR TARIQ ISMAIL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, Counsel instructed by ITN Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. In my decision promulgated on 12 November 2019 (a copy of which is attached) I set aside the decision of the First-tier Tribunal. I now remake that decision.

2. The appellant is a citizen of Pakistan, born on 4 June 1985, who has lived in the UK since 2006. He applied for indefinite leave to remain in the UK on the basis of long residence under Paragraph 276B of the Immigration Rules.
3. His application was refused for a single reason, which is that there was a significant discrepancy between the income he declared on an application for further leave dated 20 May 2013 and the income he declared to HMRC in the 2012/2013 tax year.
4. Initially, he declared a loss of £505 for self-employment in that year. However, on 30 September 2014 he amended the application to show a profit of £4,622 and he further amended the return on 21 March 2016 to show a profit from self-employment of £11,944.
5. The appellant claims that the discrepancy was a result of a mistake by his accountant, Mr Shahzad of Tax Perks Accountancy, and not because he was dishonest (or even careless).
6. In support of the appellant's case, Mr Shahzad wrote three letters, dated 25 September 2018, 21 March 2019 and 26 October 2020. In addition he gave oral evidence at the hearing.
7. Mr Shahzad was cross-examined at the hearing by Mr Kotas. His evidence, in summary, was that he is a qualified accountant with seven years' experience who charges the appellant between £250 and £300 for each tax return prepared on his behalf. He candidly acknowledged that he made a mistake in respect of capital expenditure and capital allowance in the appellant's 2012/2013 tax return. He stated that there was a small penalty imposed by HMRC which his firm paid, given it was their (and not the appellant's) fault and that he offered the appellant, by way of compensation, a refund for that year as well as to not charge him for the following year. He stated that he notified HMRC of the mistake.
8. Mr Kotas asked Mr Shahzad if he had assisted other individuals in a position similar to that of the appellant. He stated that he has been an accountant for over 300 people who have immigration issues, but that there has only been one other case where he has made a mistake that needed to be addressed. He stated that, since the mistake in respect of the appellant's tax return, he has undertaken training in respect of capital expenditure and allowances, and that no such mistake has been made since at least 2017.
9. In his submissions, Mr Kotas acknowledged that Mr Shahzad had given a detailed explanation for the discrepancy in the 2012/2013 tax return and had taken responsibility for it. He stated that if I found Mr Shahzad's evidence to be credible then I was bound to allow the appeal.
10. I found the evidence of Mr Shahzad to be candid and clear; and I have no reason to find him anything other than honest.

11. I find, therefore, that the discrepancy is a result of a mistake by Mr Shahzad, and not the result of dishonesty – or even carelessness – on the part of the appellant.
12. The only reason the appellant was found to not meet the conditions of Paragraph 276B was that he had been dishonest and therefore fell for refusal under Paragraph 276D of the Immigration Rules on the basis that he did not meet the conditions of Paragraphs 276B(ii) and 276B(iii) with reference to Paragraph 322(5).
13. I am satisfied, in the light of the evidence of Mr Shahzad, that the appellant was not dishonest. He therefore meets the conditions under the Immigration Rules that would entitle him to a grant of indefinite leave to remain on the basis of long residence.
14. This is not an appeal, however, against the refusal to grant the appellant indefinite leave to remain. It is a human rights appeal, made under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, on the ground that the decision to refuse the appellant's application for indefinite leave to remain on the basis of long residence was unlawful under section 6 of the Human Rights Act 1998 as it was contrary to Article 8 ECHR.
15. The appellant succeeds in his human rights appeal because (a) given the length of time he has resided in the UK, he plainly has a private life in the UK that engages article 8(1) ECHR; and (b) his removal from the UK would be disproportionate under article 8(2) because, as he satisfies the conditions to be entitled to a grant of indefinite leave to remain under the Immigration Rules, there is no public interest in his removal. See *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [34] (“...where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed”).

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 6 January 2021

IAC-AH-KRL-V1

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

Appeal Number: HU/06161/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 23 October 2019
Extempore Decision**

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR TARIQ ISMAIL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel (direct access)
For the Respondent: Ms R Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is appealing against the decision of Judge of the First-tier Tribunal Feeney promulgated on 27 June 2019.
2. The appellant entered the UK in 2006 on a student visa. His leave was extended as a Tier 1 General Migrant and on 14 June 2016 he applied for indefinite leave to remain on the basis of ten years' continuous lawful residence.

3. The respondent refused the application on the basis that the appellant had provided false information to HMRC about his income. The respondent observed that the appellant had made two amendments to his tax return for the year 2012/2013 in which he had initially declared a £505 loss for self-employment and a total income of £26,643.03 income from all employment in that tax year. The two amendments are as follows:
 - (a) on 30 September 2014 the appellant amended the 2012/2013 tax return to show that he had made a profit from self-employment of £4,622 (hereafter “the first amendment”);
 - (b) on 21 March 2016 he amended the 2012/2013 tax return again, this time to show a profit for self-employment of £11,944 (hereafter “the second amendment”).
4. In his application dated 20 May 2013 for leave to remain as a Tier 1 General Migrant the appellant claimed to have earnings of £11,944 from self-employment. Therefore, the amount declared to the respondent matched the tax return for 2012/2013 as amended on 21 March 2016 but not the tax return as it had been up until the second amendment.
5. The respondent took the view that the two amendments indicated dishonesty on the part of the appellant and his application was refused under paragraph 322(5) of the Immigration Rules.
6. The appellant appealed against the decision of the respondent and his appeal came before Judge of the First-tier Tribunal Loke. In a decision promulgated on 1 November 2018 Judge Loke allowed the appeal. The decision of Judge Loke includes an analysis of both of the above described amendments to the 2012/2013 tax return. The judge found that there was not dishonesty in respect of the first amendment. With respect to the second amendment, the judge found that there was not an adequate explanation for the delay and concluded that the respondent had discharged the legal burden of showing dishonesty. Judge Loke nonetheless allowed the appeal under Article 8.
7. The decision of Judge Loke was set aside by Upper Tribunal Judge Norton-Taylor in a decision promulgated on 14 February 2019. Upper Tribunal Judge Norton-Taylor preserved the findings of Judge Loke in respect of the second amendment. No other findings from the decision of Judge Loke were preserved.
8. The appeal was remitted to the First-tier Tribunal where it came before Judge of the First-tier Tribunal Feeney. In a decision promulgated on 27 June 2019 Judge Feeney dismissed the appeal.
9. As have the other judges who have considered this case, Judge Feeney considered each of the two amendments to the 2012/2013 tax return. The judge found that the appellant had not been dishonest in respect of the first amendment. One of the reasons given for reaching this conclusion was a letter from the appellant’s tax advisors, Tax Perks Accountancy dated 21 March 2019, in which A Shahzad, a

Director of Tax Perks Accountancy, gave an explanation for the error which he attributed to human error on the part of his firm. The judge concluded at paragraph 31 that the appellant had not been dishonest in relation to the first amendment.

10. Although the letter of 21 March 2019 from Tax Perks Accountancy also addressed the second amendment, Judge Feeney did not give any consideration to that part of the letter. At paragraph 32 of the decision Judge Feeney simply stated that the finding in respect of the second amendment had been preserved.
11. The grounds of appeal argue that the judge fell into error by failing to consider whether he ought to depart from the preserved findings in respect of the second amendment in light of the letter from Tax Perks Accountancy dated 21 March 2019.
12. Ms Bassi, on behalf of the respondent, argued that Judge Feeney was entitled to proceed on the basis that he was bound by the decision of Judge Loke in respect of the second amendment given the decision of the Upper Tribunal to preserve this finding of Judge Loke. She also argued that any error would be immaterial as the letter of 21 March 2019 merely repeated what the appellant had previously stated and was not a plausible explanation. She referred to paragraph 5 of the headnote to *R on the application of Khan v SSHD Dishonesty tax return paragraph 322(5)* [2018] UKUT 384 (IAC) where it is stated
 - (v) *When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):*
 - 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.*
13. Ms Bassi argued that the letter of 21 March 2019 from Tax Perks Accountancy fell substantially short of what was necessary as set out in the above section of the headnote to *Khan*.
14. I am satisfied that the decision of First-Tier Tribunal Judge Feeney contains a material error of law and that the error is material.
15. A decision by the Upper Tribunal to preserve a finding of fact from the First-tier Tribunal does not mean that a subsequent Tribunal considering the same issue is bound by the earlier decision if there is new evidence relating to that factual finding.

16. The principles relevant to this are set out in the starred decision of *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1, where guidance was given on the approach that should be taken where there exists a previous decision addressing the same issues. As explained in *Devaseelan* the previous decision stands as an authoritative assessment at the time it was made and is a starting point for any subsequent consideration. However the judge looking at the matter afresh is not bound by the previous decision if new evidence has been adduced.
17. In this case Judge Feeney was required to treat the preserved findings of fact in the decision of Judge Loke as authoritative at that time but he also needed to consider them in light of the letter dated 21 March 2019 from Tax Perks Accountancy which had not been before Judge Loke.
18. I have some sympathy for the argument advanced by Ms Bassi that the error is not material because the letter from Tax Perks Accountancy does little more than repeat what the appellant had said previously. However, I must take into consideration the fact that Judge Feeney found the letter from Tax Perks Accountancy persuasive in respect of the first amendment. I therefore cannot exclude the possibility that had Judge Feeney had regard to the letter in respect of the second amendment he may have reached a different conclusion as to whether the appellant had been dishonest, even taking the decision of Judge Loke as a starting point. I therefore am satisfied that the decision contains a material error of law and consequently must be set aside.
19. Mr Gajjar argued that the decision of Judge Feeney in respect of the first amendment should be preserved as it had not been challenged by the respondent and it is set out in clear and unambiguous terms.
20. Ms Bassi argued that no findings should be preserved and drew attention to the complexities that had arisen as a consequence of findings being preserved previously.
21. I have considered whether this is a case in which findings can reasonably be preserved and I have reached the conclusion that they cannot. The allegations of dishonesty concern two amendments to the same tax return by the same accountancy firm. The two amendments are therefore interlinked and it is difficult for them to be distinguished in a way that enables consideration to be given to one but not the other on the remaking of the decision. I therefore have reached the view that the decision of the First-tier Tribunal should be set aside in its entirety and considered afresh.
22. I have considered whether the appeal should be remitted to the First-tier Tribunal or should remain in the Upper Tribunal. Given that there have already been two hearings in the First-tier Tribunal and that the issues are relatively narrow, I consider this to be a matter that can, and should, remain in the Upper Tribunal.

Notice of Decision

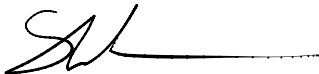
23. The decision of First-tier Tribunal Judge Feeney contains a material error of law and is set aside with no findings of fact preserved.

24. The decision will be remade in the Upper Tribunal at a resumed hearing.

Directions

- A. The parties shall serve on each other and file with the Upper Tribunal any evidence upon which they intend to rely that was not before First-tier Tribunal Feeney at least fourteen days prior to the resumed hearing.
- B. Skeleton arguments shall be filed and served at least seven days before the resumed hearing.
- C. The parties shall notify the Upper Tribunal at least seven days before the resumed hearing of the names of the witness or witnesses that will give oral evidence at the resumed hearing.

Signed



Upper Tribunal Judge Sheridan

Dated: 7 November 2019