Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/03967/2018
HU/09877/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2019	**On 8 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant
and

ZAHID GHAURI
ISRA ZAHID GHAURI
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondents: Mr H Sarwar, of Counsel instructed by JJ Law Chambers

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Munonyedi) allowing the applicants' appeal against the respondent's decision of 23 Janaury 2018 refusing them indefinite leave to remain as the first applicant fell within the provisions of para 322 (5) of HC

395 as amended. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicants as the appellants and the Secretary of State as the respondent.

2. The appellants are citizens of Pakistan, born on 18 September 1978 and 7 November 1982 respectively. They are husband and wife and are present in the UK with two daughters both born in the UK. The first appellant entered the UK as a student on 1 July 2006 with entry clearance valid until 31 March 2008. He was granted further extensions of leave to remain as a student, a Tier 1 (Post-Study Work) Migrant and then as a Tier 1 (General) Migrant until 5 July 2016. On 20 June 2016 he applied for indefinite leave to remain based on 10 years continuous lawful residence. The second appellant is dependent on the first appellant's application.

3. This application was refused under the provisions of para 322(5) as it was the respondent's view that it was undesirable to permit the first appellant to remain in the UK in the light of his conduct, character or associations. In consequence, he could not meet the requirements of para 276B(ii) and (iii) for a grant of leave to remain on the grounds of long residence.

4. The respondent reached this decision as he was satisfied that the first appellant had used deception when making his application for further leave to remain on 29 March 2011 and 18 June 2013 by giving figures for his earnings which contradicted those given in his tax returns to HMRC for the same periods.

The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the appellants gave evidence.

6. The first appellant accepted that there were discrepancies between the figures declared in the applications and those declared to HMRC. It was the first appellant's evidence that he made a genuine error in filing his returns which were calculated on a cash basis whereas the accounts submitted to the respondent were prepared on an accrual basis. He also explained that for the tax year 2012/2013 the accounts traversed two different accounting periods. He said that he had notified HMRC of the mistake and paid the additional tax due. It was the second appellant's evidence that her husband was an honourable man who had made a genuine mistake.

7. The judge summarised her findings as follows:

> "13. I found Mr Ghauri to be a credible witness. His account had the ring of truth about it. He struck me as an intelligent and hardworking man. His account that he only became aware of his mistake when he began working as a bookkeeper and receiving training and supervision from qualified accountants is not only reasonable but plausible and credible. Having received assistance from an accountant he relied upon their advice and immediately notified HMRC about his mistake.
>
> ...

> 15. It is my finding that HMRC's decision not to impose a penalty demonstrates that they accepted that Mr Ghauri had made a genuine mistake and had not acted dishonestly.
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> 16. I also found Mrs Ghauri to be a credible witness.
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> 17. It is the cumulative effect of all the factors in this case which forces me to conclude that on the balance of probability Mr Ghauri did not act dishonestly. It is my finding that the difference in the amount of income was due to the different accounting periods used, the different accounting system used and the genuine mistakes that Mr Ghauri made in recording his income."

The Grounds of Appeal and Submissions

8. In the respondent's grounds of appeal, it is argued that the judge erred in law by failing to take into consideration the first appellant's delay in rectifying the discrepancies and the timing of the same; around the time he was due to submit an application for settlement. The grounds further complain that the decision of HMRC not to apply a penalty should have been regarded as irrelevant and that the judge failed to apply the guidance in *R (o.a.o. Shahbaz Khan) v Secretary of State [2018] UKUT 384.*

9. Mr Kandola submitted the judge failed to have regard to the fact that the first appellant rectified the accounts and applied for ILR in 2016. Further, the judge misdirected herself in law; the judge's characterisation of HMRC's decision not to impose a penalty as proof he did not act dishonestly; see *Balajigari [2019] EWCA Civ 673* at paras. 66 to 72. He submitted that this infected the overall credibility finding and so the decision was unsafe.

10. Mr Sarwar in amplifying his rule 24 response submitted that whilst the respondent argued that the judge failed to provide adequate reasons the challenge was essentially a perversity challenge. He submitted the judge was tasked to decide if there was dishonesty or a genuine mistake. Mr Sarwar pointed out that the judge dealt with the timing issue at [13] and [17], and that the respondent was simply in disagreement with her findings.

11. During the course of discussion during the hearing, Mr Sarwar accepted there was an error at [15] but submitted that it was not material as the credibility findings were independent. He referred to the judge's findings of fact at [8] to [12]. The judge's findings at [13] were based on that evidence which also addressed the issue of timings.

Assessment of the Issues

12. I will deal with the respondent's grounds in turn. The first is pleaded as a reasons challenge. Issue is taken with the judge's failure to have regard to relevant factors such as the timing of the rectification of the return(s) to the ILR application, and to the accepted fact that the first appellant paid

insufficient income tax for a period of a decade. Mr Sarwar submitted that this challenge is tantamount to a perversity challenge dressed-up as a reasons challenge. I agree. Perversity is not expressly raised in the grounds of appeal and Mr Kandola, rightly, did not seek to pursue such a challenge. I shall thus deal with the first ground as a "reasons" challenge as pleaded.

13. The judge had the benefit of hearing evidence from the appellants on the issue of deception. The judge summarised the evidence at [8] to [12]. This included a detailed summary of the first appellant's background, the extent of the discrepancies and the immediate action he took by instructing an accountant and notifying HMRC of the error. The first ground has to be considered in this context.

14. It is asserted that the judge at [13] had "little regard" to the accepted fact that the first appellant paid insufficient income tax for a period of a decade. It is then asserted that the judge had no regard to the timing of the first appellant's decision to rectify his accounts and only did so around the time he was preparing his application for long residence. It is clear from what the judge stated at [8] to [12] & [13] that she was fully aware that the first appellant only became aware of the errors when he began working as a bookkeeper in January 2016. There is no reason to suppose therefore that the judge was not aware of the timings or disregarded it. The judge's findings are based on the evidence and were open to her. While the judge's reasons could have been fuller, I am satisfied that her reasoning is adequate and that she took all relevant factors into account. I find this ground does not raise an issue of law. It seeks to reargue an issue of fact. There is no merit in this ground.

15. The real issue in this appeal is a rather discreet one, namely, whether the judge misdirected herself in law. The grounds rightly recognise that the judge was not obliged to cite the authority of *Shahbaz Khan* but complain that the judge failed to have regard to its guidance, in that, no consideration was given to the first appellant's knowledge that he was consistently under paying income tax. This assertion is not borne out by the evidence given that the first appellant only became aware of the error in 2016. The judge was clearly aware of the history and chronology and there is no reason to suppose that she did not fully take these matters into account.

16. Notwithstanding, I accept the judge fell into error in finding at [15] that HMRC's decision not to impose a penalty demonstrates they accepted the first appellant had made a genuine mistake and had not acted dishonestly. In *Balajigari*, the Court of Appeal rejected the claim that if HMRC had believed that a penalty was not payable and thus that it had believed that the error was innocent, it should follow an applicant had not acted dishonestly. The Court of Appeal noted that the statutory language used in the Finance Act simply means that a liability to pay a penalty arises if the statutory criteria are satisfied. It does mean there is a duty on HMRC to

impose a penalty in every case where it might in principle be imposed, see paras 73 & 74.

17. While the judge did not have the benefit of this guidance, following a discussion at the hearing, I did not understand Mr Sarwar to dissent from the position that the judge nevertheless erred at [15]. I find she clearly did so. The question that I must consider however is whether the error is material. I am satisfied that it is not. There appears to have been no dispute before the judge that the respondent had established a prima facie case for dishonesty. That being so, the judge was ceased of a fact-finding task to determine whether the first appellant had made a genuine mistake. The judge accepted the first appellant's account that he had made an honest mistake and his claim to be a man of integrity was supported by the second appellant whose evidence the judge also accepted at [13] and [16]. These findings of fact are adequately reasoned, sustainable and are not infected by error.

18. I agree with Mr Sarwar that the judge reached her credibility findings at [13] independent of her finding at [15]. I acknowledge that at [17] the judge stated that she reached her conclusion on "the cumulative effect of all the factors in this case". However, it is clear from [17] that the factors of emphasis leading to her conclusion was the "different accounting periods used, the different accounting system used and the genuine mistakes that Mr Ghauri made in recording his income." I am not persuaded that the judge in this case gave the decision of HMRC not to impose a penalty undue weight as a consideration in ultimately concluding that the first appellant did not act dishonestly.

19. In summary, I am not satisfied that the judge materially erred in law by finding that the respondent had not shown on a balance of probabilities that the first appellant had acted dishonestly. There were grounds on which the respondent could properly suspect that the first appellant had been dishonest, but he provided an explanation which the judge was entitled to accept and to find, in consequence, that the respondent had failed to discharge the onus of proving dishonesty. This was a question of fact for the judge to assess in light of the evidence as a whole. Whilst another judge may have reached a different decision, this judge reached a decision properly open to her for the reasons she gave.

Decision

20. The First-tier Tribunal did not err in law and the decision to allow the appeal stands.

Signed: Dated: 19 June 2019

Deputy Upper Tribunal Judge Bagral