



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04125/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2019

Decision and Reasons Promulgated
On 18th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD SALMAN
(Anonymity Direction Not Made)

Respondent

Representation:

For the Appellant Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr A A Khan (counsel) instructed by Thompson & Co,
solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal.

This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge J Robertson, promulgated on 19/11/2018 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 11/09/1983 and is a national of Pakistan. On 23/01/2018 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge J Robertson ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15/12/2018 Judge O'Callaghan granted permission to appeal stating inter alia

2. The grounds assert that the Judge erred by making a material misdirection in absolving the appellant of any blame in discrepancies arising as to his tax return. Reliance is placed upon the recent Upper Tribunal decision of R(on the application of Khan) v SSHD [2018] UKUT 00384(IAC), which though promulgated on 3 May 2018 was only reported on 16 November 2018.

3. The decision in Khan was reported after the oral hearing in this matter but prior to the promulgation of the Judge's decision and reasons.

4. Though I have sympathy for the Judge in the circumstances of this appeal, it is arguable that the Judge has not followed the steps now identified as applicable by the Upper Tribunal in Khan. Whether such arguable failings are material on the particular facts of this appeal will be a matter upon which the Upper Tribunal will no doubt expect to be addressed by the respondent.

The Hearing

5. For the respondent, Mr Duffy moved the grounds of appeal. He told me that the Judge placed too much weight on the fact that HMRC did not penalise the appellant for incorrect tax returns. He argued that HMRC will not impose penalties on people who report themselves for an understated income tax return and then offer payment. He told me that the question that the Judge should have determined is whether or not the appellant deliberately underreported earnings to HMRC for financial benefit. He told me that the Judge's findings are unsafe and relied on Khan [2018] UKUT 384 (IAC). He asked me to set the decision aside and remit this case to the First-tier Tribunal.

6. (a) For the appellant, Mr Khan took me through the decision in Khan [2018] UKUT 384 (IAC) and told me that the Judge's decision follows the guidance given there. He told me that between [10] and [12] of the Judge's decision the Judge follows the guidance in Khan [2018] UKUT 384 (IAC). He told me that even though the Judge

does not refer to Khan, the guidance given there is clearly followed. He told me that the Secretary of State is simply trying to relitigate this case. He asked me to dismiss the appeal and allow the decision to stand.

Analysis

7. The Judge's decision was promulgated on 19 November 2018. The decision in Khan [2018] UKUT 384 (IAC) was promulgated on 3 May 2018, but was only reported on 16 November 2018.

8. R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) held that (1) 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. Such an inference could be expected where there is no plausible explanation for the discrepancy; (2) 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 must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty; (3) 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; (4) 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, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore, the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty; (5) 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.

9. At [9] the Judge finds that the appellant changed accountants. The appellant's new accountants completed a five-year review in 2015, which disclosed errors in his income tax returns between 2011 and 2013. At [11] the Judge finds that is not enough to blame the accountant, but says that she accepts the appellant's evidence. The Judge emphasises that HMRC have not imposed civil penalties.

10. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

11. The degree of enquiry required by the guidance given in headnote four in the rubric to Khan has not been followed. The Judge's findings cannot be reconciled with the guidance that blaming an accountant is not the end of the matter. Enquiry into the appellant's state of knowledge, particularly why the appellant believes that having earned a significant income their liability to income tax is negligible, is missing from the decision.

12. There are differences between declared income and actual taxable income which one might expect to be obvious to the appellant. The Judge's fact-finding exercise is incomplete because there is no enquiry into the appellant's state of knowledge about the ability to repeatedly earn significant sums of money which do not attract liability to income tax. There is an absence of fact-finding about the timing of the realisation that accounting errors had been made. There is an absence of fact-finding about the figures provided to the accountants. There is an absence of fact-finding about who signed the tax returns.

13. Because the fact-finding exercise is incomplete, and because the guidance given in Khan has not been followed, the decision is tainted by material error of law. I set it aside. I consider whether I can substitute my own decision. The material error of law in the decision relates to an inadequacy of fact finding. I cannot substitute my own decision. Further fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

14. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

15. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

16. I remit the matter to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge J Robertson.

Decision

17. The decision of the First-tier Tribunal is tainted by material errors of law.

18. I set aside the Judge's decision promulgated on 19 November 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.



Signed

Date 13 February 2019

Deputy Upper Tribunal Judge Doyle