



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04216/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2019

Decision & Reasons Promulgated
On 11 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MAMOON NASEER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr P Saini, Counsel

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Andonian in which he allowed the appeal of the respondent against the decision of the Secretary of State dated 25 January 2018 refusing him leave to remain in the UK on long residency and human rights Article 8 grounds.
2. For ease of reference Mr Mamoon Naseer will be referred to as the applicant.

3. The Secretary of State refused the applicant's application which he made on 28 January 2016 for indefinite leave to remain as a Tier 1 (General) Migrant because his self-employed earnings which he had declared to the HMRC for the tax year 2010/2011 and 2012/2013 were significantly different to the information he had declared to the Secretary of State for self-employment.
4. At an interview on 1 November 2016 with the Home Office the applicant said that he had sight of the tax returns which were submitted to the HMRC and signed them as he was advised to by his accountants. In respect of his self-employment for the year 2012/2013 he had made amendments prior to his current application – 2012 to 2013 it was £30,000 with amendments which he submitted before he made his current application for indefinite leave to remain.
5. It was argued before the judge by the HOPO that the applicant's actions in declaring different income to HMRC and the Home Office led to the conclusion that in the light of his character and conduct it would be undesirable to allow him to remain in the UK and therefore his application was refused under the general grounds of refusal and at paragraph 322(5) of the Immigration Rules.
6. Counsel for the applicant below argued that during the applicant's interview with the Home Office while his application was still pending, he had informed the Home Office about the amendments made in his tax returns for the years 2010 to 2011 and 2012 to 2013. The applicant said due to complete trust he had in his accountants he did not check the tax returns before the accountants submitted them.
7. The judge had before him a letter from the applicant's accountants, Rose Financial Solution, in which they stated that HM Revenue and Customs had agreed and accepted the amendment of the tax returns for 2010/2011 and 2012/2013 and tax liabilities. The accountants gave their view as to what had gone wrong and so far as the previous accountants had handled the applicant's tax affairs were concerned. Rose Financial Solutions said that this mistake had nothing to do with the applicant and he should not be penalised for it. The applicant had said that there was no dishonesty or any intention on his part to deceive either the Home Office or HMRC. The only mistake he made was to trust the chartered certified accountants and any lay person who does not have any knowledge of taxation or accounting would do the same, it was submitted.
8. The judge's conclusions are set out at paragraphs 40 to 47.
9. Mr Bramble relied on the grounds which challenged the judge's finding at paragraph 41. The judge held:

"41. From the evidence that I have heard and from the documents that I have read typically the letters from the two accountants, it seems to me that the appellant having admitted these errors, they were in fact innocent mistakes. Mistakes can occur. They occur everywhere in our lives, in the NHS, sometimes with fatal consequences, and in public life. The appellant was

not expressly challenged by the Secretary of State in relation to these mistakes, and all that was said was that it was his responsibility to make sure that the accounts were signed off properly for the respondent and the HMRC. If the appellant through his previous accountants made innocent mistakes then this does not constitute in my view evidence of bad character and conduct or association. The intention was not there to deceive in my view. There was no intention to act in that way. If there was intention that would be a different matter and would go against his character. But having regard to all the evidence I believe that the respondent has not properly considered his guidance notes in that regard. The guidance states inter-alia generally you must assess if there are cumulative grounds for refusing a person on character, conduct or association grounds if a person falls under more than one of the categories included in this section, or there are other reasons for considering refusal. However, the person must be informed of the reasons why their application is being refused or why a particular course of action for example deportation, is being considered or pursued. It is not enough to simply refuse a person on character, conduct and/or association grounds without explaining why."

10. Mr Bramble complained about how the judge considered the applicant's explanation and his conduct in this matter. He submitted that whilst their grounds did not directly refer to **R (on the application of Khan) v SSHD (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 0038 (IAC)**, the judge failed to fully consider the applicant's explanation for the inconsistencies in his self-employed income which the judge recorded at paragraphs 15 and 16 and 17 of the decision.
11. I accept Mr Saini's submission that **Khan** was a JR review case which has a different standard of proof and a different threshold – the question in JR cases is whether the decision of the Secretary of State is open to him rationally. Nevertheless, I find that **Khan** cannot be ignored because it gives guidance on the approach that the Secretary of State should adopt in cases such as this. The guidance in my opinion also assists judges. In any event, paragraph 322(5) is a discretionary provision and what a judge is required to do is to decide whether the Secretary of State was right to exercise her discretion under this provision adversely to the applicant.
12. I was not persuaded by Mr Bramble's submission that the judge failed to fully consider the applicant's explanation. At paragraph 41, the judge noted that the applicant was not expressly challenged by the Secretary of State in relation to the mistakes. All that was said was that it was his responsibility to make sure that the accounts were signed off properly for the respondent and the HMRC. I find that it was open to the judge to find that if the applicant, through his previous accountants made innocent mistakes, then this does not constitute evidence of bad character, conduct or association. The judge found that the applicant's intention was not to deceive in his view. The judge quite rightly said that the respondent had not properly considered his guidance in that regard and cited the guidance at the end of his paragraph 41 and paragraphs 42 and 43.

13. Mr Bramble relied on the Secretary of State's argument that it was wrong for the judge at paragraph 46 to focus on the fact that HMRC did not take the matter any further and cited Abbasi JR/13807/2016. At paragraph 46 the judge held:

"46. The law requires the respondent to be satisfied that the applicant's income is from a genuine source or no points will be awarded. The respondent has already awarded the appellant points in respect of his previous applications and the applicant reasonably believed having arranged an accountant to submit a tax claim that the earnings claimed were genuine. The applicant has submitted evidence of his current full-time employment. The applicant amended and updated the tax figures with HMRC and therefore the Secretary of State's enquiries should reveal that the applicant's tax records are up-to-date with him and with HMRC. I was also advised that the HMRC has a long established process for tax amendments because HMRC understands and acknowledges that for innocent reasons, adjustments may be made. Unless HMRC has levelled a dishonesty claim in an individual case and levied substantial fines there is no evidential basis for stating that the earnings claim is not genuine. The sole issue is whether at the time of the application the applicant reasonably thought that the earnings claimed were genuine. I believe he did."

14. Mr Saini submitted an extract of the HMRC Internal Manual - Compliance Handbook. This document states that each tax or duty has specific rules on penalties for late payment or filing. The penalty may also be due if the client does not tell HMRC about a liability to tax at the right time. Penalties can be charged if there are errors on returns or other documents which include understate the tax or misrepresenting the tax liability. The document further states that if a client sends in a document that contains a mistake, HMRC will charge a penalty if the error is because of a lack of "responsible care", deliberate - such as intentionally sending incorrect information and deliberately and concealing for example intentionally sending incorrect information and taking steps to hide the error. The level of the penalty is linked to the reason why the error occurred. Mr Saini said that the judge looked at the processes based on the HMRC Internal Manual. The judge found that the Secretary of State had not established that the applicant's earnings were not genuine.
15. Mr Saini submitted that at paragraph 47 the judge found that the Secretary of State has failed to discharge the burden of proof on him. The judge found that the applicant had submitted an innocent explanation. He said the judge's decision was fully reasoned.
16. I accept Mr Saini's submission and accept that the judge did not make any error of law in his findings at paragraph 46. Looking at the HMRC Manual, the HMRC could have levied a penalty against the applicant if they were inclined to do so. Not having levied a penalty against the applicant, I agree with the judge's decision that there was no evidential basis for stating that the applicant's claimed earnings were not genuine. The applicant believed they were genuine and so did the judge.

17. I find that the judge's decision discloses no error of law. The judge's decision allowing the applicant's appeal shall stand.

No anonymity direction is made.

Signed

Date: 6 March 2019

Deputy Upper Tribunal Judge Eshun