



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04899/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 21 February 2019

Decision & Reason Promulgated
On: 1 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASSAD REHMAN

Respondent

Representation:

For the Appellant: Ms S Jones, Home Office Presenting Officer

For the Respondent: Mr A Miah, Counsel, instructed by Sony Sadaf Haroon Solicitors

DECISION AND REASONS

1. This is an appeal brought on behalf of the Secretary of State, having been given permission by First-tier Tribunal Judge Hollingsworth on 21 December 2018.
2. In short, this appeal concerns a 35-year-old Pakistani man who applied for indefinite leave to remain under paragraph 276B of the Immigration Rules ('the Rules') having resided in the United Kingdom for 10 years.
3. The matter was listed before First-tier Tribunal Judge Oliver on 14 September 2018. The focus of the appeal concerned the then appellant's tax affairs. The Home Office had

identified a discrepancy in the amount disclosed in the tax year 2012/2013. The figures submitted by the appellant's accountants to HM Revenue and Customs ('HMRC') differed from the amount of income he had declared to the Home Office as part of his Tier 1 (General) application. The appellant at first-instance attributed the error to a health issue at the time. The central issue for the tribunal judge to decide was whether this error was a genuine or careless mistake or whether it was deceitful or dishonest. When alleging dishonesty, the burden, as correctly identified by Judge Oliver, initially stands with the Home Office on the balance of probabilities. (For the operation of the standard and burden of proof, see *Secretary of State for the Home Department v Shehzad and Chowdhury* [2016] EWCA Civ 615.)

4. Judge Oliver found that the appellant satisfied paragraph 276B of the Rules and that his application should therefore succeed. In so concluding, he found that the Secretary of State had not made out a case for deception.

5. It is against that background that this matter was listed before me.

6. The grounds of appeal can be summarised thus: firstly, that the judge failed to provide reasons and failed to make any adequate findings on material matters; and secondly, that the judge materially misdirected himself on the law.

7. In terms of a failure to provide reasons, the Secretary of State identifies paragraph 10 of the determination, where the judge at first-instance held:

"Many of the occasions on which the respondent has applied this section are cases involving employment and self-employment and the respondent has not always shown any understanding that the tax years in each may be different. Because the allegation is one of deception, the onus lies on the respondent to establish this. It might be thought surprising, therefore, that the respondent has not provided any expert evidence to show that this possible explanation does not apply in the case of the appellant. On the other hand, it is equally surprising that the appellant has not produced evidence from his own accountant, with whom he has stated he is still in contact. He has also stated that he handed all the papers to his accountant throughout."

8. I concur with the Secretary of State that the judge therein fails to provide an adequate reason for why he has concluded that the respondent has not made out a case of deception. The above paragraph begins with what can only be described as anecdotal evidence emanating from the judge himself. It is not specific to this appeal. I share the Secretary of State's concern that the suggestion that the respondent must in some way provide expert evidence to demonstrate that the judge's conjecture does not apply sets the bar too high.

9. The judge was required to address the evidence in this matter. While the judge has endeavoured to give a detailed narrative of the appellant's case in the introduction to his judgement, he then makes insufficient findings of fact in terms of what elements of that case he accepted, as opposed to what the Secretary of State said was the position. As Judge Hollingsworth observes in granting permission to appeal, the essence of the case was that in the period ending 28 February 2013 in respect of the appellant's Tier 1 (General) application, the appellant had claimed an income made up of £20,241.03 from PAYE

employment and £15,350 of dividends from his company. That brought his income to over £35,000 and accordingly he was awarded 20 points under the previous earnings category for Home Office purposes. However, in the appellants tax return for 2012/2013 the appellant had initially not declared any income from self-employment or dividends.

10. There was no dispute an error had been made. In terms of the discrepancy, the judge was required to address whether it was a genuine error or deceitful.

11. The issue is highlighted in *R (on the application of Shahbaz Khan) v Secretary of State for the Home Department* [2018] UKUT 00384 (IAC), where the court found that where there was 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 was entitled to draw an inference that the applicant had been deceitful or dishonest and therefore he should be refused indefinite leave to remain within paragraph 322(5) of the Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.

12. In my finding, the judge has failed to provide cogent reasons to support the conclusion he has reached or why the inference was not made out, other than the bare statement at paragraph 11 of his determination that the respondent's assertion of deception failed. It follows that the Secretary of State must succeed on the first ground of this appeal.

13. For completeness, I also address the second ground of appeal - a material misdirection on the law.

14. The judge appears to have considered the appellant's health issues, which were the appellant's explanation for the error, *before* considering whether the Home Secretary had satisfied the tribunal of the initial evidential hurdle, namely whether there had been deceit. The judge appears to dismiss the evidence relating to the appellant's health, finding that he could place little reliance on the medical reports and had formed a strong impression that during the hearing the appellant 'was exploiting this claim to further what he perceived as his own interests in the appeal', suggesting, on one view, that the evidential burden had shifted in the instant matter to the appellant. It was at least arguable, if it had shifted to the appellant, that the judge made no specific findings about hyperthyroidism, or how that or the other health issues associated with it might have affected the appellant at the relevant time.

15. Equally, the judge's statements on terrorism and serious criminality in paragraph 12 do not assist the reader in ascertaining how the First-tier Tribunal arrived at its conclusion and trespasses to a degree on speculation.

16. In my finding, the judge's alternative hypothesis, combined with what is said about the medical condition, provides an insufficient analysis in terms of the operation of the relevant Rules and amounts to a material misdirection in terms of the law. The second limb of this appeal also succeeds. I therefore propose to set this decision aside.

17. I add for completeness that it was not possible for me to rehear this matter on the day. My decision was reserved and I have come to the conclusion that this matter is better

remitted to the First-tier as the fact-finding tribunal. To assist the judge and the parties going forward, I append to this decision the guidance that was produced by Mr Justice Martin Spencer in the case of *Khan*.

NOTICE OF DECISION

18. The Secretary of State's appeal is allowed.
19. The decision of the First-tier Tribunal is in error of law and is set aside.
20. I remit the appeal to the First-tier Tribunal for a fresh hearing on all issues.
21. The matter will now be referred to a tribunal case officer at Hatton Cross for a pre-hearing review and for the listing of this matter as an oral hearing.

Signed



Deputy Upper Tribunal Judge Sutherland Williams

Date: 25 February 2019

Appendix – extract from:

R (on the application of Khan) v Secretary of State for the Home Department
(Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC)

Guidance

37. In order not to fall into the trap which I consider that the Secretary of State (or those acting on her behalf) fell into on this occasion, it may assist for me to give some guidance in relation to the decision-making process where there have been discrepancies between previous applications for Leave to Remain (with points claimed on the basis of earnings or profits) and tax returns which have been made covering the same period. This guidance stems from my observations at paragraphs 32-34 above:

- (i) 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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.
- (ii) However, 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 is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.
- (iii) 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.

- (iv) However, 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: far from it. Thus, the Secretary of State is entitled to take into account that, even where an accountant has made an error, the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.
- (v) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.
- (vi) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

- 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.
- (vii) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the Applicant has been deceitful/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.
- (viii) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached.