



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

Appeal Number: HU/05040/2018
HU/12387/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18 March 2019**

**Decision & Reasons Promulgated
On 03 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR PAVEL HASAN KHAN
MS SABRINA SOHANY
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer

For the Respondents: Mr R Sharma, Counsel instructed by Wilson Barca LLP

DECISION AND REASONS

1. The respondents are a married couple from Bangladesh.
2. On 11 August 2017 the first respondent (hereinafter “the claimant”) applied for indefinite leave to remain in the UK pursuant to paragraph 276B of the Immigration Rules. His application was refused under paragraph 276B(iii) by reference to paragraph 322(5) on the basis that the income he had declared to HMRC in the tax years 2010/11 and 2012/13

was significantly less than the amount he declared in immigration applications made in March 2011 and May 2013.

3. The Secretary of State did not accept the claimant's claim that the discrepancy was because of a mistake by his accountant and concluded that it would be undesirable for him to remain in the UK in light of his dishonesty.
4. The claimant appealed to the First-tier Tribunal. His appeal was heard by First-tier Tribunal Judge Nixon, who, in a decision promulgated on 19 December 2018, allowed the appeal. The judge found that the Secretary of State had not established that the claimant had acted dishonestly. His reasons for reaching this conclusion were that:
 - (a) the discrepancy was noticed by the claimant before he applied for indefinite leave to remain and he approached his accountant about it;
 - (b) the claimant's accountant accepted in writing full responsibility for the error and stated that the claimant correctly reported the figures to them;
 - (c) the claimant made a formal complaint against the accountant;
 - (d) the claimant is not trained in accounts and placed his trust in the professional he employed;
 - (e) the claimant rectified the position and paid the tax;
 - (f) HMRC chose not to execute a penalty. At paragraph 19 the judge stated:

"Significantly HMRC chose not to exact any penalty against [the claimant] which they would have been entitled to do if they were of the view that he had acted without reasonable care or had deliberately sent incorrect information. Their lack of penalty for [the claimant] suggests that they determined he had not acted with dishonesty."
 - (g) the mistakes in reporting income identified in the refusal letter are the only ones that have emerged;
 - (h) no immigration application has been made in reliance on any tax return containing errors;
 - (i) the claimant brought the errors to the attention of the Secretary of State.
5. The grounds of appeal contend that the judge erred by finding the absence of punitive action by HMRC as "being in some way determinative" of whether the claimant acted dishonestly.
6. At the error of law hearing, Ms Isherwood argued that the absence of a penalty from HMRC is not a basis to dislodge a decision to refuse leave. She also, relying on *Khan* [2018] UKUT 00384, submitted that the claimant cannot avoid responsibility by simply blaming his accountant.

7. Mr Sharma argued that the only issue in the grounds is whether the First-tier Tribunal treated the absence of a penalty from HMRC as determinative; and as the judge did not treat it as determinative (it was just one of several factors) the appeal must fail. He also argued that the judge was entitled to treat the absence of a penalty as a relevant (but not determinative) factor in assessing whether the claimant had been dishonest.
8. The grounds of appeal refer to the judge treating the absence of punitive action by HMRC as “in some way determinative”. Ms Isherwood confirmed that the Secretary of State’s case is that the judge erred because he treated the absence of a penalty as determinative. She clarified that it was not being argued that it was an error of law to treat the absence of punitive action as a material matter.
9. The difficulty with the Secretary of State’s case - and the reason the Secretary of State cannot succeed - is that, as submitted by Mr Sharma, the judge did not treat the lack of punitive action by HMRC as “in some way determinative”.
10. The judge identified multiple factors (as summarised in paragraph 4 above) which, taken together, lead him to the conclusion that the Secretary of State had not discharged the burden of establishing dishonesty. These included that the claimant’s accountant took responsibility for the mistake, that the claimant brought the error to the Secretary of State’s attention, that no immigration application had been made on reliance on the tax returns containing the error and that the tax had been paid. The lack of punitive action was only one of numerous reasons given by the judge and was by no means treated as determinative.
11. It may well be that, as argued by Ms Isherwood, the approach taken to the blame being placed on the claimant’s accountant was misconceived and inconsistent with *Khan*. However, this (and criticism of other factors identified by the judge as indicating the claimant was not dishonest) cannot be relied on to challenge the decision as they were not raised in the grounds of appeal.
12. The grounds of appeal make a single argument, which is that the judge erred by treating the lack of punitive action by HMRC as “in some way determinative”. However, it is clear from the decision that although the judge treated the lack of punitive action by HMRC as relevant he did not treat it as determinative. As the grounds of appeal do not identify an error of law the appeal is dismissed.

Notice of Decision

The appeal is dismissed and the decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan Dated: 1 April 2019