Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05402/2018
HU/09830/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 February 2019	**On 06 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD ASIM BASHIR (FIRST RESPONDENT)
MRS ATIQA ASIM (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellants: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr Jay Gajjar of Counsel

DECISION AND REASONS

Background

1. The appellant in this case is the Secretary of State and the respondents are Mr Bashir and Mrs Asim. However, for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where Mr Bashir and Mrs Asim were the appellants.

2. The first appellant is a national of Pakistan who appealed to the First-tier Tribunal against the decision of the respondent dated 13 February 2018 to refuse his application for indefinite leave to remain in the United Kingdom based upon long residence. The second appellant is dependent upon her husband the first appellant. The case turns on the fact that the respondent found that the application of the first appellant fell for refusal under paragraph 322(5) of the Immigration Rules.

3. Paragraph 322(5) provides, one of the Grounds on which leave to remain and variation of leave to remain in the United Kingdom should normally be refused, as follows:

> "... the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security."

4. This was because as part of the appellants' Tier 1 (General) leave to remain application of 25 March 2011 the appellant claimed to have an income of £52,080.50 from all sources between 23 April 2010 and 28 February 2011, including £14,501.49 from Pay As You Earn (PAYE) employment and £37,554.75 from self-employment. However, the appellant completed a tax questionnaire in 2017 and a revised tax calculation for 2010/2011 dated 20 June 2016 shows the appellant initially declared a total income received of £14,757 including £10,407 from PAYE and £4,380 from self-employment.

5. On the basis of the original earnings declared to HMRC of £14,767 the respondent confirmed that the appellant would have received no points for previous earnings and the respondent also noted that the appellant amended the figures declared to HMRC on 16 February 2016 to a total income received of £50,316, including £17,898 from PAYE and £32,418 from self-employment. The accompanying HMRC tax assessment letter of 20 June 2016 stated that the appellant only made contact with HMRC on 16 February 2016 and that the appellant was asked to pay an additional £11,148.37 in tax as a result. The delay of several years in correcting the declaration to HMRC indicated, in the respondent's view, that the appellant had little intention of correcting the errors and the respondent did not accept the appellant's explanation that the fact that the appellant's wife was undergoing fertility treatment was a good excuse.

6. In a decision promulgated on 8 October 2018 Judge of the First-tier Tribunal Swinnerton allowed the appellants' appeals.

7. The Secretary of State appealed with permission on the following grounds that:

   (1) the First-tier Tribunal made a material misdirection of law in its approach to whether the appellant had acted dishonestly by placing significant emphasis on the fact that HMRC had not imposed any penalty or taken any action against the appellant and the respondent relied on the judicial review cases of **R (on the application of Samant) v Secretary of State for the Home Department [2017] UKAITUR JR/6546/2016** and **Abbasi JR/13807/2016**; and

(2) failure to take into account and resolve conflict of fact or opinion on material matters; in relation to whether the appellant may have inflated his income for visa purposes.

8. Although Mr Lindsay attempted to introduce additional grounds of appeal it was not established before me that the new points made by Mr Lindsay were **Robinson** obvious. In considering whether a ground not advanced in the application for permission should be considered I am not satisfied that the grounds were ones which have a strong prospect of success or that the grounds relate to a decision which if undisturbed would breach the United Kingdom's international Treaty obligations or that the new grounds relate to an issue of general importance (see including AZ(error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC)).

9. Mr Lindsay relied on the guidance in the judicial review of **R (on the application of Khan v Secretary of State for the Home Department (Dishonesty, tax return paragraph 322(5) [2018] UKUT 00384**. In particular Mr Lindsay took me to paragraph 37 of that case which set out the guidance in these cases and which differed from the headnote. It was Mr Lindsay's case that given that the case provided at (v):

> "Where an issue arises as to whether an error in relation to a tax return has been honest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, to 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."

10. It was Mr Lindsay's submission that the First-tier Tribunal ought to have dismissed the appeal on the basis that the Secretary of State had properly considered the decision in the case including all the factors pointing in each direction in the refusal letter.

11. Even if that ground were properly before me, which I am not satisfied it was, it is not made out. The headnote makes no such reference and I am satisfied that the guidance at paragraph 37 is specifically directed to the circumstances where it is being considered, for judicial review purposes, whether or not the Secretary of State has made a rational decision.

12. It is incumbent on the First-tier Tribunal or other fact-finding Tribunal to consider all the evidence and reach findings on that evidence. Such an exercise cannot be fettered in the manner suggested by Mr Lindsay, whereby the First-tier Tribunal is, in effect, required to accept the decision of the respondent as to dishonesty in relation to a tax return. The purported new ground is misconceived.

13. Similarly, although Mr Lindsay submitted that the judge had failed to consider, as set out at page 4 of the reasons for refusal letter, that there had been a delay of several years in the appellant rectifying his tax matters and the judge had failed to make findings on this was not in the respondent's grounds of appeal. In any event, even if it were, I am not satisfied it was made out as the judge clearly had in mind all the

relevant factors including the delay as set out in the judge's recitation of the reasons for refusal at paragraphs [3] to [7] of the decision and reasons. The judge also specifically indicated at [19] that he had considered all the documentary evidence, even if not specifically referred to and specifically considered the issue of the amended tax return.

14. Any failure to specifically reference the delay cannot be a material error in the circumstances where the judge found the appellant's general explanation to be credible. For the avoidance of doubt, I also reject Mr Lindsay's primary submission that this was an appeal not properly capable of succeeding given his interpretation of the guidance cited at paragraph 37(v) of the case in **Khan**.

15. In relation to the grounds that were before me, I am satisfied that the First-tier Tribunal did not place excessive weight on HMRC's actions in this case. The judge conducted an examination of all of the evidence including the fact that the first appellant was not subject to a penalty by HMRC, but that was not the end of the matter. The judge took into consideration that the HMRC had characterised the appellant's failure to provide an amended tax return in good time as "a failure to take reasonable care". The judge agreed with that assessment.

16. I take into consideration that the judge properly directed himself as to the guidance in **Khan** and the factors set out by Mr Justice Martin Spencer which are recorded as follows in the headnote (v):

> "When considering whether or not the appellant 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 appellant 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 appellant 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 appellant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay."

17. The First-tier Tribunal followed that guidance and at [21] found that the Respondent was entitled to draw an inference that the first appellant had been deceitful and dishonest and the judge took into consideration that this was the appellant's first year of trading from 2010 to 2011, that he had some bookkeeping knowledge but was not well-versed in tax matters and had relied on the experience of his accountant, although he acknowledged that he had checked the tax return and that he had been distracted and preoccupied by his wife's fertility treatment and the circumstances around it.

18. The judge took into consideration that the first appellant had clearly underdeclared a significant amount of income and was now required to pay the tax back. It was the judge's findings that whilst the appellant had failed to take reasonable care in his behaviour towards his tax matters it was reasonable to accept that he would have been distracted by the fertility treatment. It was open to the judge to take into consideration as he did, as a factor, that the first appellant had not had to amend any other tax returns other than from 2010/2011 and that he was not subject to any penalty.

19. The judge also had clearly in mind that the appellant had taken steps to remedy the delay and had given an explanation to remedy the mistake and had given an explanation for it, which the judge accepted.

20. It was open to the judge to find as he did at [22] that the appellant had not been dishonest having considered "all the circumstances of this case". It cannot properly be said that in making that fact sensitive assessment the judge ought to have completely ignored the HMRC assessment. Although not determinative, the absence of a penalty imposed by HMRC is not necessarily irrelevant in relation to consideration as the issue of deception. I take into consideration the authorities relied on by the Secretary of State of **Samant** and **Abbasi** (see above) which were assessing whether the respondent's decisions had been rational in finding that the individuals have been dishonest. Whilst neither of the judges in those cases (which were considered by Mr Justice Spencer in **Khan**) concluded that the Secretary of State had been irrational, that cannot bind another decision maker in placing some weight on the HMRC's actions in a particular case.

21. This case is also distinguishable from **Samant** where there was no information from the HMRC in that case as to its thinking by contrast to the current case where the HMRC did assess the appellant's conduct and found it to be a failure to have taken reasonable care.

22. Whilst another judge may have reached a different decision, the judge gave adequate reasons for placing the weight on the matters he did, including considering in the round the approach of the HMRC. That cannot be said to be irrational and is sustainable. The first ground of appeal is not made out.

23. In relation to the second ground of appeal in the respondent's grounds, it is evident from the decision that the First-tier Tribunal was aware of the Secretary of State's basis for refusal, including the allegation that the respondent had alternatively inflated his income in order to secure leave to remain. It is relevant that the judge clearly accepted the appellant as credible for the reasons he gave and there was no specific challenge in the Secretary of State's grounds of appeal to the judge's findings that the appellant would have been distracted at the time of the tax return because of the family issues; nor is the overall positive credibility finding specifically challenged.

24. Although Mr Gajjar produced a new document (which was the respondent's reply to a Subject Access Request for a copy of the case record of the consideration of the first appellant's 2011 application) I have not attached any weight to this document. Although Mr Lindsay on the one hand did not make any specific objection to the appellants' representative submitting this to the Tribunal he subsequently indicated that he was prejudiced by not having considered it. I have therefore disregarded it.

25. However, I have considered the submissions of Mr Gajjar that the appellant was granted leave in 2011 which would only have occurred as a result of the Secretary of State's scrutiny of all the evidence before her including the evidence of income. Mr Gajjar relied on the grant of leave as a Tier 1 (General) Migrant dated 20th April 2011 which was before the First-tier Tribunal.

26. I accept Mr Gajjar's submission that the initial burden of proof, insofar as dishonesty is concerned, is with the Secretary of State. Whilst, as confirmed by **Khan**, a significant discrepancy may be sufficient for a prima facie inference of dishonesty in respect of the HMRC, I take into account that the appellants' previous immigration application and the evidence of earnings were accepted following careful scrutiny and that the HMRC's view was that the appellant had been careless in his tax matters rather than dishonest.

27. I also note in passing that although the Presenting Officer in the First-tier Tribunal relied on the reasons for refusal there were no specific submissions made (and it was not suggested that the recording by the First-tier Tribunal was anything other than accurate) in relation to the claim that the appellant had falsely inflated his income in order to obtain leave in 2011.

28. The second ground of appeal is not made out. The judge was entitled to find, for the evidence-based reasons he gave, that the respondent had failed to establish that the appellant's conduct fell within paragraph 322(5).

Notice of Decision

29. The decision of the First-tier Tribunal does not contain an error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the decision of the First-tier Tribunal to make no fee award in this case.

Signed Date: 1 March 2019

Deputy Upper Tribunal Judge Hutchinson