Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05432/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30 April 2019

Decision & Reasons Promulgated
On 16 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHINDER PAL SINGH SANDHU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. N. Bramble, Home Office Presenting Officer
For the Respondent: Mr. P. Saini, Counsel instructed by Synthesis Chambers Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Eban, promulgated on 3 October 2018, in which she allowed Mr. Sandhu's appeal against the Secretary of State's decision to refuse leave to remain in the United Kingdom on human rights grounds.

© CROWN COPYRIGHT 2019

2. For the purposes of this decision I refer to the Secretary of State as the Respondent, and to Mr. Sandhu as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. Permission to appeal was granted as follows

> "The grounds seeking permission assert that the Judge erred in failing to apply the reasoning in **R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)**. Specifically, it was said that she had failed to consider the factors mentioned in that case when determining whether the Appellant had been dishonest or merely careless in his dealings with HMRC or UKVI.
>
> In her decision, the Judge attached weight to a letter from the Appellant's accountant which indicated that errors in one of his tax returns were attributable to a junior member of staff. In relation to another return, the Judge concluded that the Respondent had erred in a comparison of earnings which overlapped between two tax periods.
>
> No complaint is made in the grounds relating to the 2012/2013 tax return. Nevertheless, there is nothing to suggest that the Judge was directed to the decision above. I consider that, absent any explanation as to why the Appellant had not realised the error (which resulted in an underpayment of tax of over £4,000), it is arguable that the Judge erred in failing to make adequate findings in accordance with the decision in **Khan**. Accordingly, permission to appeal is granted."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

5. It was accepted that, at the time of promulgation of the decision, 3 October 2018, the decision of <u>Khan</u> had not been reported. <u>Khan</u> was not reported until November 2018. Both representatives relied on the case of <u>Balajigari</u> [2019] EWCA Civ 673.

<u>Error of Law</u>

6. The Judge states at [15], [16] and [17]:

> "In the light of the accountant's letter taking responsibility for the error, I accept that the appellant inadvertently under-declared his self-employed income for 2010/2011 and in May 2016 he corrected that under-declaration. The difference is £12,743 which is substantial in the context of the appellant' receipts and which gave rise to an additional tax liability of £4,283.72, almost double the previous assessment. Whilst I accept that the responsibility for accounting properly for income is always that of the taxpayer, I find that the appellant was entitled to rely on his accountant to prepare and submit the correct figures to HMRC. [15]

> HMRC has a discretion to decide how to proceed in cases of underpayment of tax, and in particular, whether to prosecute the offender or to recover the underpaid tax and penalties without commencing proceedings, pursuant to the provisions of the Taxes Management Act 1970. HMRC exercised its discretion in the applicant's favour. [16]
>
> In the circumstances, and in reliance on the accountant's letter I find that the appellant was not dishonest when he submitted his original 2010/2011 tax return and his application for leave to remain dated 24 March 2011." [17]

7. The Judge considers the alternative to her finding that the Appellant was not dishonest at [23] and [24]. At [24] she states:

> "I find that not declaring all relevant income, even deliberately whilst highly regrettable, cannot be equated to conduct such as that set out in the policy guidance. The appellant has not been involved in criminality. It cannot properly be said that his failure to disclose (if there was a failure) calls into question his *character, conduct and associations*. There is no suggestion that he has been or is a threat to national security or subject to a travel ban or has been involved in a sham marriage. In the circumstances I find that paragraph 322(5) would not apply in this case."

8. I find that [24] involves the making of an error of law as paragraph 322(5) can be used by the Respondent where there is a difference between the accounts submitted to HMRC and to the Secretary of State. This is confirmed by [35] and [37(2)] of Balajigari which refer to the use of paragraph 322(5) where there is a deliberate and dishonest submission of false earnings. [37(2)] states:

> "We would accept that as a matter of principle dishonest conduct will not always and in every case reach a sufficient level of seriousness, but in the context of an earnings discrepancy case it is very hard to see how the deliberate and dishonest submission of false earnings figures, whether to HMRC or to the Home Office, would not do so."

9. However, a case where there are discrepant earnings figures only engages paragraph 322(5) where there has been dishonesty. The Judge found that there had not been dishonesty in the Appellant's case, and for that reason she found that paragraph 322(5) did not apply. Therefore, although she has erred at [24], this is only material if she has erred in her finding that Appellant was not dishonest when he submitted his 2010/2011 tax return. These findings are set out at [12] to [17], and summarised at [22].

10. It was submitted by Mr. Bramble that the case of Khan was approved by Balajigari. I was referred to [40]. In response, Mr. Saini submitted that there was a difference, as made clear at [42] which states:

> "A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an

explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.

11. This makes clear that the fact of a discrepancy between the earnings declared may justifiably give rise to a suspicion that it is the result of dishonesty, but it does not by itself show that it is dishonesty. Applying this to the Appellant's situation, there is a discrepancy, so the Appellant must offer an explanation.

12. I find that the Appellant offered an explanation which was considered by Judge Eban. This explanation was in the form of his accountant's letter. The nature of the letter is set out at [13]. The Judge expressed some concerns with it at [14] but made clear that there was no challenge to this letter or its reliability, and accepted it at face value. In this letter the Appellant's accountant took responsibility for the error, as set out at [13] and [15]. It is highly relevant that that there was no challenge to this letter, or to the explanation it contained.

13. The Respondent asserts that the Judge did not follow the steps set out in Khan when considering this letter. However the Judge had found that there was no challenge to this letter, which addressed the suspicion of dishonesty which arose as a result of the discrepancy. It was not submitted that the explanation was implausible (headnote (v)(i) of Khan). In the absence of a challenge to the letter, the Judge was entitled to rely on it. She found at [15] that the Appellant was entitled to rely on his accountant and she therefore accepted the explanation. There is no error in her reliance on this letter.

14. She further considered the actions of HMRC when coming to her finding that the Appellant had not been dishonest [16]. There was a letter from HMRC dated 5 October 2016 in the Respondent's bundle. This stated that the Appellant had amended his tax return for the year ended 5 April 2011, but not until June 2016. The letter states:

> "You did not send us your amendment at the right time. We view this as a failure to take reasonable care with your tax affairs for the above period."

15. It was submitted by Mr. Saini that this letter was evidence that an assessment been carried out by HMRC following the late submission of an amendment by the Appellant. At [16] the Judge states that HMRC has a discretion to decide how to proceed, and that "HMRC exercised its discretion in the applicant's (sic) favour".

16. Mr. Saini referred me to [35] of Balajigari. This states:

> "As to the first two limbs, Mr Biggs' position was that an earnings discrepancy case could constitute sufficiently reprehensible conduct for the purpose of

> paragraph 322 (5) if but only if the discrepancy was the result of dishonesty on the part of the applicant. That was not disputed on behalf of the Secretary of State, and in our view it is correct. The provision of inaccurate earnings figures either to HMRC or to the Home Office in support of an application for leave under Part 6A as a result of mere carelessness or ignorance or poor advice cannot constitute conduct rendering it undesirable for the applicant to remain in the UK. Errors so caused are, however regrettable, "genuine" or "innocent" in the sense that they are honest, and do not meet the necessary threshold."

17. He submitted that it was clear that HMRC considered the Appellant's behaviour akin to carelessness rather than dishonesty. The fact that HMRC considered the Appellant's behaviour to be "a failure to take reasonable care" was evidence that in their view it was carelessness and nothing more. Carelessness could not equate to dishonesty.

18. I find that the Judge was entitled to find at [16] that HMRC had exercised discretion in the Appellant's favour, given this letter. I find that the Respondent was aware when the decision was made that HMRC had not taken any action. He was aware that HMRC had made an assessment of the Appellant's situation and had concluded that there had been "a failure to take reasonable care". It was submitted that HMRC do not necessarily carry out an assessment in every case, but in the Appellant's case they had done so.

19. <u>Balajigari</u> states at [74]:

> "We further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would be information which was within an applicant's own knowledge and they could draw this to the attention of the Secretary of State."

20. It was submitted at [1(e)] of the grounds that the lack of punitive action was "legally irrelevant when considering if the appellant acted dishonestly". However, as set out in <u>Balajigari</u>, it was right for the Appellant to have drawn this to the attention of the Respondent. It is clear that the HMRC had assessed the situation and considered that the Appellant had not acted dishonestly. The Judge was entitled to take this into account. I find that there is no error in the Judge's finding at [16].

21. Although the Judge did not go through each and every aspect set out in <u>Khan,</u> as made clear by <u>Balajigari,</u> the discrepancy itself can only give rise to a suspicion of dishonesty, not dishonesty itself. The Judge considered the explanation given for the discrepancy, and decided that the Respondent's concerns had been addressed. There was no challenge to the accountant's letter which provided an explanation for the discrepancy. The Judge further found, as was already known to the Respondent, that HMRC had assessed the Appellant's case and had decided not to take any action. I find that there is no material error of law in the Judge's finding that the Appellant had not practised dishonesty.

22. Therefore, any error that the Judge may have made at [24] is not material as there is no error in her finding that the Appellant did not use dishonesty. As the Appellant had not used dishonesty, the Judge was entitled to find that paragraph 322(5) did not apply.

Decision

23. The decision of the First-tier Tribunal does not involve the making of an error of law and I do not set it aside.

24. The decision of the First-tier Tribunal stands.

25. No anonymity direction is made.

Signed Date 15 May 2019

Deputy Upper Tribunal Judge Chamberlain