Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10226/2018

THE IMMIGRATION ACTS

Heard at Field House
On 19th February 2019

Decision & Reasons Promulgated
On 15th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MISBA HU SUHAIL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Saini (Counsel)
For the Respondent: Mr L Tarlow (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Nixon, promulgated on 25th October 2018, following a hearing at Birmingham on 9th October 2018. In the decision, the judge allowed the appeal of the Appellant, whereupon the Respondent

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Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 27th January 1984. He appeals against the decision of the Respondent, dated 18th April 2018, refusing his application for leave to remain on the basis of long residence. The basis of the refusal is that the Appellant has been dishonest in relation to his tax affairs.

The Appellant's Claim

3. The Appellant states that he has not been dishonest. He states that there has been no discrepancy in his tax affairs. He has been self-employed. All he had done was to correct a tax return for 2010 to 2011, by way of an amendment, which the refusal letter states (at page 7) as one where:-

> "It does not find it credible that if you were in the presence of your accountant you were not requested to review of your accounts and sign that they were an accurate reflection of your business income. It is also questionable as to why you were not aware of any errors with your 2010-2011 tax return …".

4. The Appellant maintains that he has never stated that his 2010 to 2011 tax amendments were as a result of a mistake. His amendment was only so as to enable him to avoid any complications in his application for leave to remain in this country. All this was an irregularity that he was correcting. It was the only irregularity in all his tax affairs over an eleven year period that he had been in this country. He was a married man, married to a doctor working at Luton, and had his own home. He has two children. He has been engaged in community projects. The amendment that he had made was an honest amendment to one particular tax year in relation to his expenses. That is all it was. As soon as it had been discovered by his accountant, the Appellant had the option of putting it right, which he did. There was a plausible mistake by a previous accountant. Mistakes of this kind are not unknown, particularly over a period of ten years. No penalty had been exacted upon him by the HMRC. This was the only aberration in his tax affairs (see paragraphs 10 to 13 of the decision).

The Judge's Findings

5. The judge observed that the effect of the Appellant's amendment was that he made an extra payment of tax. The judge observed that the discrepancy was in fact identified by the Appellant's accountant before the application and rectified by his payment of an additional tax of £3,371.00 (paragraph 18). No penalty was exacted by the HMRC. The Appellant:-

> "seemingly had no obligation to pay any additional tax but could have simply set the error off against a future return. I find that the fact that he chose to deal with the error in this way indicates that he was not deliberately trying to

mislead. I think it is very much in the Appellant's favour that he has lived in the UK for over a decade and submitted numerous tax returns and this is the only error that has emerged, once again pointing towards an innocent mistake" (paragraph 19).

6. The appeal was allowed.

<u>Grounds of Application</u>

7. The grounds of application state that the judge had failed to have regard to cases in relation to a tax misconduct such as those of **<u>ex parte Khan</u> [2018] UKUT 00384**, because what that case emphasised was that when considering whether or not the Appellant is dishonest or merely careless, it is not enough to say that the Appellant relied upon his accountant, because it is to the accountant that the Appellant gives his information, and he has the option of then checking it as well. The judge had not followed the steps recommended in **<u>Khan</u>** when assessing whether the Appellant acted dishonestly in his dealings with the HMRC. The points had not been addressed in **<u>Khan</u>**.

8. Permission to appeal was initially refused by the First-tier Tribunal, but then allowed by Judge Storey on 17th January 2019.

<u>Submissions</u>

9. At the hearing before me on 19th February 2019, Mr Tarlow, appearing on behalf of the Respondent Secretary of State relied upon the grounds of application. He submitted that there had been a delay in the Appellant correcting his tax affairs. This was the basis upon which the Upper Tribunal had granted permission. The incorrect tax return was for 2010 to 2011, and on the Appellant's own account, he did nothing to correct it until 2015. This was not a matter that had been addressed by Judge Nixon.

10. For his part, Mr Saini submitted that the grounds were simply generic as they often appear in such cases. Moreover, the reference to **<u>Khan</u>** and other cases was a reference to judicial review cases where a different standard of proof applies. Moreover, the other cases are unreported. The fact remained that not a single paragraph in the judge's decision had been expressly challenged by the Respondent Secretary of State. On the other hand, Mr Saini drew my attention to an unreported Upper Tribunal decision in which he had appeared of **<u>Quadri</u>** (HU/04004/2018) which had been promulgated on 15th January 2018. In this decision, DUTJ Davidge had referred to the cases of **<u>Samant</u> [2017] UKAIT** JR/6546/2018 and to the case of **<u>Abbasi</u>** JR/13807/2016. First, the evidence of the accountant in that case had not been contested at the hearing before the judge. It was evidence that was capable of providing a plausible explanation for the error on the tax return. There may have been unattractive aspects to the evidence. However, it was the case that the burden rested on the Respondent. It was not for the judge to make up the Respondent's case (see paragraph 4).

11. Second, cases such as **Abbasi** are not on all fours with a case such as the present, because in this case the HMRC had investigated and reached a decision that the Appellant was not culpably careless and had not engaged in deliberate deception. Third, these cases are in any event judicial review cases. In this case the issue of delay was not significant as a factor because there was no discrepancy in the Appellant's accounts. He was simply correcting a matter that he need not have corrected because as the judge made it clear he could have simply set the error off against a future return (see paragraph 19). At no place was the tax return wrong. It was not the case at all that he had ever avoided any tax. This was entirely different from what was said at **Khan** (at head note (v)). The Appellant was entitled to avoid complications in his application by correcting matters at any time before his application.

No Error of Law

12. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside. On the contrary, the decision is detailed, and sensitive in its treatment of facts on each side.

13. First, it is important to understand what the alleged "irregularity" was that the Appellant was seeking to correct for the tax year 2010 to 2011. The judge refers to this as an attempt "to avoid any complications" (paragraph 10). That is indeed right.

14. The Appellant explains in great detail (at pages 3 to 5 of his witness statement of 24th September 2018) that the reason why his self-employment income declared to UKVI was different to HMRC was:-

> "because of the fact that my Self-employment income period was from 1st April 2010 to 31st December 2010 and did not coincide with my tax period of April 2010 to April 2011, and as such I had some more expenses that I had included in my returns for the year 2010-2011 to HMRC" (paragraph 18).

15. This clearly demonstrates how a desire to "avoid any complications" would have arisen. The plain fact was that the tax year from April 2010 to April 2011 did not tally with the Appellant's self-employed income period which was declared from 1st April 2010 to 31st December 2010. The Appellant goes on to explain that Mr Samard Khan, enquired of him if he was able to gather the old invoices because the chance remained that the Home Office may want to question him about his income discrepancy "and that I should be able to justify it".

16. The Appellant explains that he was unable to find any old invoices or transactions "pertaining to 2010/2011" (see paragraph 19). The Appellant goes on to explain that:-

> "Mr Samard Khan presented to me the option of carrying out a tax correction for year 2010-11, which will result in me having to pay more taxes to HMRC but at the same time will result in my Home Office and HMRC income matching.

And at the time this seemed to me the only option out in case the issue was highlighted" (paragraph 20).

17. Second, against this background, it does rather seem that the Appellant was being penalised by the Home Office for actually setting straight his financial affairs, in a way that would leave absolutely no doubt about his probity in the way in which he had conducted himself. The judge herself was able to recognise the efforts that the Appellant made.

18. Indeed, the Home Office Presenting Officer on the day of the Tribunal hearing also "conceded that his tax irregularities were a one off and from some years ago but submitted that it was his responsibility to check his financial affairs" (paragraph 16).

19. Third, this was a case where the Appellant had actually been interviewed. Yet, the interview record was not available before the Tribunal. The judge expressed concern that "I am unable to read the questions and answers in context" and that from what she had seen she did not find it "questionable" that a man who is starting out in his own business is prepared to work full-time in a retail unit. In fact, the judge went on to say that, "Indeed I commend the Appellant for working in order to support his family notwithstanding his qualifications".

20. Moreover, the judge found that the information before the Tribunal was "sparse information provided to me in the refusal letter" and that it was not the case at all, as the Home Office had concluded, that the Appellant had "been vague and given little detail about his business". The judge's eventual conclusion is unambiguously clear, namely, that, "I am able to understand his business from his answers and struggle to see what more detail the Respondent would require" (paragraph 20). All-in-all, accordingly, there is no error of law and the decision of the judge shall stand.

Notice of Decision

21. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

22. This appeal by the Respondent Home Office is dismissed.

23. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019