Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16413/2018
HU/21165/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 29th July 2019	**On the 09th August 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ZEESHAN SHAHZAIB
ZAINAB ZEESHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Isherwood, Senior Presenting Officer
For the Respondent: Mr Dhanji, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

1. The Secretary of State with permission, appeals against the decision of the First-tier Tribunal (Judge Solly) (hereinafter referred to as the "FtTJ") who, in a determination promulgated on the 24th March 2019 allowed their appeals against the decision of the Respondent dated 27 July 2018 to refuse their human rights claim.

2. Whilst the Secretary of State is the appellant, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

3. The appellants are national of Pakistan and are husband and wife. The second appellant is a dependent of her husband. Their immigration history is set out at paragraphs 11-14 of the FtT determination and in the comprehensive decision letter issued by the Secretary of State on the 27th July 2018. The first appellant entered the UK on 26 August 2006 with entry clearance as a Tier 4 (General) student valid from the 7 August 2006 to 31 January 2008. There followed a number of in time applications for leave to remain as a student in 2008, and he was granted leave until 31 January 2009. In November 2008 he applied, in time, for leave to remain as a Tier 1 general migrant and leave was granted in this capacity from 8 December 2010 until 8 December 2012. He made an in-time application for further leave as a Tier 1 general migrant granted from February 2013 until 1 February 2016.

4. On 13 January 2016 he applied for indefinite leave to remain as a Tier 1 general migrant and on 28 June 2016 the appellant made an application to vary the outstanding application for indefinite leave to remain by submitting an application for indefinite leave to remain on the grounds of his ten years lawful residence in the UK under paragraph 276B of the Immigration Rules.

5. That application was refused on 27 July 2018 (following judicial review and a further decision). The decision letter set out the immigration history recited above. His application was refused after consideration of documentation obtained under the tax questionnaire of 16 May 2017 under the general grounds for refusal. The decision letter set out the discrepancies between the income declared in his Tier 1 application for leave to remain made on 14 October 2010 and as part of the Tier 1 application made on 12 November 2012 which were inconsistent with the documentation from the HMRC. The decision set out the particular figures at pages 4 – 6 and took into account that the later amendments made to the figures and the revised declarations to HMRC which increased the level of self-employment earnings, cast serious doubt that the amendments that were subsequently made in 2016 were purely to make the declaration to HMRC to be more in line with those claim to UK V I as part of the Tier 1 application. The decision letter made reference to the explanations provided in the tax questionnaire but concluded that the explanations relating to the accountant's mistakes were unlikely and not credible.

6. Because of these discrepancies the Secretary of State decided to refuse the claimant's application for ILR on the basis of his character as set out in paragraph 322(5) of the Immigration Rules, the relevant part of which provides as follows:

> "**Refusal of leave to remain, variation of leave to enter or remain or curtailment of leave**
>
> 322. In addition to the grounds for refusal of extension of stay ... the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave ...
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused ...**
>
> (5) 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 ..."

7. In this case the Secretary of State in his refusal letter of 27 July 2018 refused the application specifically on the basis of character under paragraph 322(5) of the Rules and did so in the context of the application made under paragraph 276B, as the application fell for refusal under the general grounds under paragraph 322(5) in respect of his character and conduct, he did not meet the long residence provision requirements under Pargraphs 276B(ii) and 276B(iii).

8. The appellant issued grounds to appeal the decision and the appeal came before the FtTJ on the 11th March 2019. The FtTJ heard the oral evidence of the parties and the evidence of a witness. In a decision promulgated on 26 March 2019, the FtTJ allowed the appeal. The judge reached the conclusion from the evidence in its totality that the appellant had made genuine errors in the tax documentation and that when he had realised that there had been discrepancies in the documents and the accounts submitted to HMRC he took steps to promptly amend them, to change adviser and to pay the additional income tax due. The judge found that it was in his favour that he had done so before making his application for leave to remain. Consequently the judge concluded that paragraph 322(5) did not apply and as this had been the only reason for refusal of his application, as a result the appellant satisfied paragraph 276B, on the basis that he had demonstrated 10 years continuous lawful residence.

9. The Secretary of State sought permission to appeal that decision and FtTJ Neville refused permission on 26 April 2019. On renewal to the Upper Tribunal, UTJ pickup granted permission on 24 June 2019 stating:

> "it is arguable that the credibility findings are fatally undermined by errors in the decision and in consequence unsustainable. All grounds may be argued."

9. The appeal came before the Upper Tribunal. Ms Isherwood on behalf of the respondent relied upon the grounds of appeal. She submitted that the FtTJ misdirected herself in law. Her first point relied upon paragraph 2 of the grounds where it was asserted between paragraphs 34 and 39 of the decision, the FTT J set out detailed figure work. She submitted that this was irrelevant and the point at issue was whether the appellant had made different declarations of income and the reasons for the discrepancies.

10. She directed the Tribunal to the decision of R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 and the headnote relying on subparagraph (iv). She submitted that the FtTJ had erred in its assessment of the appellant's intentions, firstly by disregarding the appellant's own responsibility when making a tax return. She submitted that the appellant was unable to blame his accountant which is what he did.

11. Ms Isherwood submitted that given the points raised in the decision letter and the discrepancies were for a number of years, the judge did not grapple with the issues at paragraph 46 of his decision. She accepted that it was recorded in the decision at

paragraph 47 that the appellant was not cross-examined on the details of the changes made in his returns and the reasons for them, but she submitted that the reasoning did not answer the challenges made.

12. In the written grounds at paragraph 5, the respondent made reference to the appellant's evidence concerning the accuracy of the relevant accounts for May 2015 and that he had corrected them by November 2015. As regards paragraph 46 of the decision, the FtTJ found that the appellant had sought to rectify these errors well before making his ILR application but that was not the case as the application was only made in January 2016 two months after the tax discrepancies had been resolved. This was a clear error of approach.

13. It is therefore submitted that the cumulative effect of the points raised in the grounds undermined the Tribunal's conclusions and therefore the findings made were unsustainable.

14. As to article 8, it was submitted that the reasons given that it would be disproportionate to return the family to their home country were weak and unsustainable and did not outweigh the public interest in immigration control.

15. Mr Dhanji, counsel on behalf of the appellant relied upon in rule 24 response submitted by him. In that document it was stated that the decision of the FtTJ contained no material errors of law and that it was clear from the decision that the judge had properly had regard to the guidance given in the case of Khan (as cited above). In particular, at paragraph 51 of the decision the FtTJ applied it when reaching her decision. The FtTJ acknowledged that an explanation from the appellant was required and paragraphs 40 – 50 of the decision, the FtTJ gave careful consideration to whether the explanation was credible. He submitted that it was open to the judge to reach the conclusion that the explanation provided was a credible one (see paragraphs 45 – 49) of the decision.

16. He therefore submitted that the challenges advanced on behalf of the respondent were nothing more than a disagreement with the conclusions reached by the judge which were open to her and where an attempt to re-argue the merits of the respondent's case that he had practised deception but failed to identify how the judge had misdirected herself in law.

Decision on the error of law:

17. I remind myself that I should not interfere with the decision of a FtTJ unless it has been demonstrated that the judge erred in law and as set out in Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal reminded the court that it is necessary to guard against the temptation to characterise errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.

18. I have therefore given careful consideration to the grounds advanced on behalf of the respondent as set out in the written grounds and the oral submissions from Ms

Isherwood. Having done so, I am not satisfied that the grounds demonstrate any material error of law in the decision of the FtTJ and I shall set out my reasons for reaching that decision.

19. There is no merit in paragraph 2 of the grounds which seeks to criticise the detailed figure work set out at paragraph 34 – 39 of the decision. It is plain from those paragraphs that the judge was simply setting out the figures relied upon by the respondent to demonstrate the discrepancies in the respective tax years and the documentation. It is a recitation of facts to provide some background evidence for the findings of fact that the FtTJ went on to make.

20. Ms Isherwood has relied upon the guidance given at paragraph 37 of R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 which is as follows:

> "(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.
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> (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 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. 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. 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."

21. It is submitted that the judge failed to have regard to that guidance in reaching his conclusions and therefore had erred in law in the assessment made of the appellant's intentions. In particular, the judge disregarded the appellant's own responsibility when making the tax returns. It was also submitted that the appellant's evidence on this point was not credible.

22. It is plain from reading the decision that the judge properly had regard to the guidance given in the decision of Khan (as cited above) and as confirmed in Balajigari v SSHD [2019] EWCA Civ 673. Paragraph 37(2) of Balajigari 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 earning figures, whether to HMRC or to the Home Office, would not do so."

23. However, a case where there are discrepant earnings figures only engages paragraph 322 (5) where there has been dishonesty. Paragraph 42 of the decision in Balajigari states as follows:

> "A discrepancy between the earnings declared to HMRC and the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty, but it does not bite self-justifying conclusion to that effect. What it does is to call for an explanation. If a next nation 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 discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."

24. The FtTJ's approach to the appeal was consistent with guidance and properly directed herself that where there is no plausible explanation for a significant discrepancy between the income claimed in a previous application for leave to remain and in the income declared to the HMRC, the respondent is entitled to draw the inference that he has been dishonest and that indefinite leave to remain should be refused within paragraph 322 (5) of the Rules.

25. The judge acknowledged that a plausible explanation was required from the principal appellant and set out that explanation at paragraphs 40 – 50 of her decision. During the appeal, the judge had the benefit of hearing the oral evidence of the appellant and his witness and for that to be the subject of cross-examination. At [45] the FtTJ set out her assessment of that evidence. She considered the appellant's oral evidence to have been consistent with the written evidence and described him as a "straightforward witness" and that his evidence had been given "clearly with no hesitation". Furthermore, it was not simply the way in which he gave his evidence because the judge made reference to the written evidence confirming his credibility. The FtTJ stated that the correspondence produced had shown that he had chased HMRC regularly concerning outstanding tax issues from at least 7 November 2015 despite this resulting in him paying more income tax, so essentially to his tax disadvantage.

26. In reaching a conclusion as to whether the appellant had given a plausible explanation, the FtTJ properly addressed the issues identified in the decision of Khan. As set out above, it was open to the judge to have regard to the way in which the appellant gave his evidence and she expressly found that there were no inconsistencies in that evidence (see paragraph 45). I can find no error in the judge's assessment of the circumstances in which the appellant discovered the error in his tax affairs. The appellant's explanation was that he had used a particular accountant and followed him when he changed his businesses. Difficulties started in March 2015 when he learned that his accounts had not been submitted and after making several enquiries without success, he approached his witness for advice and was referred to a different accountant. That accountant advised the appellant to ask for a form SA302 from HMRC which could be used during a mortgage assessment. When this arrived in May 2015 the appellant realised there were inconsistencies in the amounts

declared and therefore undertook a review with his new accountant. He advised expenses had been shown against self-employed income which should not have been (paragraph 28 of the witness statement) and dividends for the year 2012 – 13 had not been recorded correctly and were understated. As a result the appellant submitted amended returns. It had not been disputed that he had paid the additional income tax due. The letter at page 57 demonstrated that the appellant exercised his right to amend his tax returns for the relevant years, having found discrepancies in his tax returns. The FtTJ found that the appellant had made approaches to amend his two tax returns for the two years in issue (2010 – 11 and 2012 – 13) well before making his application on 13 January 2016 for leave to remain. The grounds relied upon by the respondent submit that the judge was wrong to accept that evidence. It is asserted that the application for ILR was made in January 2016 only two months after the tax discrepancies had been resolved. However, as the judge set out at paragraph 46 and is recorded in the appellant's evidence given at paragraph 44, that he discovered the incorrect figures when he wanted to apply for a mortgage in May 2015. The documents in the bundle at page 59 made reference to the correspondence between HMRC and the appellant that had begun in May 2015 and the letter dated 17 November 2015 from HMRC confirming the amendments had been made (Exhibit 16). It was the respondent's case that the amendments were made on the 2 February 2016, which was after he had made his application for ILR. It was entirely open to the judge to find on the evidence that he had made approaches to amend the two tax returns well before making the application in January 2016 by taking into account that evidence. It was therefore open to the judge to place weight upon the timing of his approaches to the HMRC to amend his tax returns and his conduct in making those amendments (see paragraphs 45 and 46).

27. The judge observed at paragraph 47 that the appellant was not cross-examined on the detail of the changes made in his returns and the reasons for them. The judge accepted his explanation as both credible and plausible that the changes made were due to the treatment of expenses and dividends.

28. Ms Isherwood submits that the judge misdirected herself in law when considering the issue of the accountant's evidence relying on subparagraph (iv). She submits that the appellant was blaming the accountant. However, it was open to the judge to accept the evidence that the person who had been involved in the production of the accounts initially was not in fact an accountant and had no qualifications in this area and not a member of any regulatory body therefore the appellant was not in a position to make any complaint about him. It was also open to the judge to accept as a fact that the appellant himself had no qualifications in tax affairs. The appellant was not seeking to blame the accountant but setting out the background of the events that had taken place and as the decision in Khan sets out at (iv), if the applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty. On the evidence in this appeal, the appellant had submitted amended returns and had paid the additional income tax due (see paragraphs 41 – 42). The judge properly had regard to the factors additionally set out in Khan at (v).

29. When looking at the decision as a whole, the FtTJ properly assessed the evidence in accordance with the issue raised in the decision letter as to whether the appellant had been dishonest in his declarations of income to the HMRC and the Home Office or merely careless. The judge properly had regard to the relevant legal principles and applied them, taking into account the role of the man who was said to be his previous adviser and that he had remedied the incorrect declaration by submitting amended returns and paying the additional income tax due.

30. In my judgment, the grounds are simply a disagreement with the findings of fact made by the judge. The FtTJ did not misdirect herself in law and was plainly aware of the need to examine the appellant's claim that his previous advisers had been responsible for the incorrect declaration made in the forms submitted. The FtTJ had the benefit of hearing the oral evidence of the appellant whom she found to be entirely credible and straightforward and who had given consistent evidence. The FtTJ property took into account the evidence and was entitled to reach the conclusion that there had been no dishonesty and therefore there was no relevant conduct within paragraph 322 (5). The judge found that the errors were genuine errors (see paragraph 51). The FtTJ conducted a careful examination of the evidence of the appellant, and his supporting evidence both his witness statement evidence and his oral evidence together with the surrounding documentation and that of his witness. The judge was satisfied the appellant had provided an innocent explanation. It is therefore not the position that the judge made any legal error in reaching his decision.

31. Whilst the grounds submitted also challenge the article 8 assessment, that would only be arguable if an error of law had been found on the principal grounds advanced in relation to paragraph 322 (5). As the judge had made a finding that the appellant had met the immigration rules under paragraph 276B (10 years continuous residence), that was a weighty factor in the proportionality assessment and on the facts of this case were properly determinative as it had not been demonstrated that there was any public interest in his or his family members removal.

Notice of Decision:

The appeal of the Secretary of State is dismissed; there is no error of law demonstrated for the reasons set out above. The decision of the FtT shall stand.

Signed: *Upper Tribunal Judge Reeds* Date: 30/7/2019
Upper Tribunal Judge Reeds