Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16415/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 May 2019	**On 04 June 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAJID MEHMOOD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Respondent: Mr Saini, instructed by Adam Bernard Solicitors

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Eban. For reasons given in his decision promulgated 7 March 2019, the judge allowed the respondent's appeal on human rights grounds. I shall refer to him in these proceedings as the claimant.

2. The claimant had appealed against the Secretary of State's decision dated 31 July 2018 refusing his human rights application for indefinite leave to remain on the basis of ten years' residency which had been made on 22 September 2016. The Secretary of

State contended the application fell for refusal under paragraph 322(5). This was on the basis that as part of an earlier application made as a Tier 1 Migrant on 12 October 2010 the claimant had claimed to have an income of £58,251 from all sources between 1 September 2009 and 31 August 2010 from his self-employment. In a more recent application dated 26 March 2013 the claimant had claimed to have an income of £58,273 for the period 1 March 2012 and 28 February 2013. The Secretary of State had written to the claimant on 23 May 2017 asking him to complete a tax questionnaire and to provide either a tax summary or SA302s for the years for which he had been self-employed. By way of response the claimant had provided a number of documents from HMRC that identified discrepancies. Based on the revised tax calculations for the periods in question the Secretary of State contended that the points scored by the claimant would have fallen short of the number required under a general Tier 1 application. This led the Secretary of State to conclude it would not be desirable for the claimant to remain in the United Kingdom in the light of his character and conduct based on misrepresentation of his earnings. Whilst acknowledging that paragraph 322(5) is not mandatory it would have been a clear benefit to the claimant by either failing to declare his full earnings to HMRC or falsely representing those earnings to UK Visas and Immigration to meet the points required.

3. With reference to paragraph 276B of the rules, it was contended the claimant did not meet the requirements of paragraph 276D with reference to 276B(i) and (iii) with reference to the general grounds for refusal at paragraph 322(5).

4. The application was also considered on the basis of the claimant's family and private life including his relationship with Usra Sajid, with the Secretary of State considering the claim under the ten year partner route and not the parent route. It was not accepted that the claimant met the suitability requirements by reference to the claimant's conduct. With his partner having no valid leave to remain in the United Kingdom the claimant could not meet the requirements of E-LTRP.1.2. of Appendix FM and EX.1 did not apply to his case. In short, the Secretary of State contended that were no insurmountable obstacles to the family life continuing outside the United Kingdom and furthermore I did not consider that the claimant's private life justified a grant of leave under the Rules of by reference to any exceptional circumstances.

5. The judge assessed the evidence and made findings on the explanation advanced for the differences in the figure work. Having regard to the claimant's explanation he concluded that the account of events had met the minimum level of plausibility and gave detailed reasons for that conclusion. At [24] the judge explained:

> "24. Looking at all the evidence in the round I find that the respondent has not shown that it is more likely than not that the appellant demonstrated bad *character* either when he completed his applications of 12 October 2010 and 26 March 2013 and/or when he submitted his tax returns for the tax years ending April 2010, 2011 and 2013 or that it is *undesirable* for him to be permitted to remain. I accept the appellant's explanation of what occurred and that he made a genuine mistake in his tax returns for the tax years ending April 2010, 2011 and 2013."

6. Thereafter the judge explained his conclusion that the claimant met the requirements of paragraph 276B of the Rules and by reference to Article 8 allowed it on human rights grounds.

7. The grounds of challenge by the Secretary of State are twofold. The first is that the judge made a material misdirection of law on a material matter. In this instance it is argued that the absence of any sanction by HMRC as a result of a claimant making a correction of an income tax return was legally irrelevant and should not be the basis for finding that paragraph 322(5) does not apply in this case.

8. The second ground in summary is that the judge had made perverse or irrational findings on matters that were material to the outcome. It is argued that given the size of the discrepancies involved which amount to tens of thousands of pounds it was irrational for the judge to conclude the claimant would not have been aware of the fact that his tax returns contained errors and should have sought to rectify those errors sooner.

9. In granting permission to appeal, Judge Boyes considered ground 1 was not arguable on the basis that the judge had not utilised the penalty payment issue as the sole reason or the decisive reason as permission was expressly refused on this ground.

10. In relation to ground 2, Judge Boyes considered this arguable on the basis that the judge had seemingly accepted that instructing a professional accountant absolved the claimant of any responsibility. That was arguably wrong as a matter of common sense. He continued:

> "If it is correct then the Home Office can never win in these cases. The figures are strikingly different such that one might have expected the appellant to notice. The reasoning given by the Judge as to why he prefers the appellant's account is arguably deficient in terms of content and depth of that examined. One may have expected the appellant to have been asked about checking the statement etc."

11. Ms Holmes queried the position in relation to ground 1 however on reflection she accepted it was unarguable having regard to the unambiguous grant of permission which left the only ground of challenge being one of irrationality or perversity in ground 2. In her submissions, she argued that the judge had erred in finding positively in favour of the claimant in relation to his lack of awareness of the mistakes by his accountant. Her contention was that given the size of the amounts involved, the claimant who holds a post-graduate qualification should have been aware. She referred to the decision in *R (on the application of Khan) v SSHD (Dishonesty, tax return paragraph 322(5))* [2018] UKUT 384 (IAC) by Martin Spencer J sitting as a judge in the Upper Tribunal. In particular the observations at paragraph 37(iv) as follows:

> "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."

12. Ms Holmes however accepted that the judge had referred to the decision at [17]. She candidly acknowledged the difficulties in pursuing the ground in the light of the high threshold.

13. For his part Mr Saini argued the judge had not left any of the evidence into account, had directed himself correctly and reached conclusions rationally open to him on the evidence.

14. I encouraged both parties to have regard to the decision in *R (Iran) & Ors v SSHD* {2005] EWCA Civ 982 in particular the observations of Brooke LJ as to the standard.

15. By way of response, Ms Holmes argued that the judge had not taken into account the timing of the corrective exercise undertaken by the claimant although here too acknowledged candidly that the judge had identified the chronology.

16. Given the seriousness of the challenge, it is appropriate to set out the relevant passages from the judge's decision between [17] and [26].

> "17. I have carefully considered all the evidence before me and the guidance in R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC). The respondent has relied on discrepancies between the income the appellant declared to UKVI with his applications of 12 October 2010 and 26 March 2013 and the income he declared to HMRC in the tax years ending April 2010, 2011 and 2013.
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> 18. With respect to the returns for 2010 and 2011, a Mr Jitesh Patel FCCA trading as Lloyds Associates accepts that clerical errors were made by members of staff. The appellant has said that he relied on Lloyds. When he submitted his visa extension application on 12 October 2010 he relied on self-employed income of £58,251 for the 12 month period from 1 September 2009 to 31 August 2010. This period straddled two consecutive tax years namely 2009/2010 and 2010/2011. While they overlap to some extent they are not the same time period. The respondent does not appear to have considered the earnings declared in the appellant's 2011/2012 income tax return. The appellant declared to HMRC income from self-employment of £6,793 during the period 6 April 2009 – 5 April 2010 which contrasts with his revised earnings from self-employment of £33,987 [AB/H11]. The appellant declared to HMRC income from self-employment of £8,034 during the period 6 April 2010 – 5 April 2011 which contrasts with his

revised earnings from self-employment of £24,264 [AB/H12]. These are substantial differences.

19. I have asked myself whether the appellant's explanation *satisfies the minimum level of plausibility*. Notwithstanding the substantial differences, I bear in mind that the tax years ending April 2010 and 2011 were the first years the appellant worked and submitted tax returns. An FCCA registered account has claimed responsibility for the error [see paragraph 13 above]. FCCA registered accountants are subject to a code of ethics and a requirement to act with integrity. I accept that it was the appellant's responsibility to check that the information provided to HMRC was correct, but I do not find it unreasonable that having employed and paid for a qualified professional to assist him, he would then rely on that professional. HMRC imposed no penalty on the appellant. Looking at the evidence in the round I consider that the appellant's account of events meets the minimum level of plausibility.

20. The respondent has not put forward any reason why I should not take the letter from the registered FCCA accountant at face value. I find that the respondent has not shown that the appellant either intentionally deflated the income he declared to HMRC in his 2010 and 2011 tax returns in order to evade tax or that he intentionally inflated his income for the purposes of his 12 October 2010 visa application in order to secure leave to remain.

21. As to the error in the 2012-2013 tax returns, this amounts to expenses being input as £14,586 instead of £4,576. The effect of this is that the appellant has an additional £4,900 odd to pay in tax {AB/F15], which he is paying by instalments. Again those who submitted the appellant's tax return, Zenith, have taken responsibility. Although Zenith on their letterhead describes themselves as *Accountants and Tax Advisers* there is no indication of the professional body to which they belong, if any.

22. I have asked myself whether the appellant's explanation *satisfies the minimum level of plausibility*. I bear in mind that for the tax year ending April 2013 the appellant paid tax in excess of £8,500 on the basis of his original return. This is a substantial amount and there is no reason to suppose that the appellant would have anticipated that there should have been more to pay. The appellant was taking advice from someone who held themselves out as *Accountants and Tax Advisers* and they have claimed responsibility for the error [see paragraph 14 above]. I accept that it was the appellant's responsibility to check that the information provided to HMRC was correct, but I do not find it unreasonable that having employed and paid for *Accountants and Tax Advisers* to assist him, he would then rely on that professional. HMRC imposed no penalty on the appellant. Looking at the evidence in the round I consider that the appellant's account of events meets the minimum level of plausibility.

23. The respondent has not put forward any reason why I should not take the letter from Zenith at face value. I find that the respondent has now shown that the appellant either intentionally deflated the income he declared to HMRC in his 2013 tax return in order to evade tax or that he intentionally inflated his income for the purposes of his 26 March 2013 visa application in order to secure leave to remain.

24. Looking at all the evidence in the round I find that the respondent has not shown that it is more likely than not that the appellant demonstrated *bad character* either when he completed his applications of 12 October 2010 and 26 March 2013 and/or when he submitted his tax returns for the tax years ending April 2010, 2011 and 2013 or that it is *undesirable* for him to be permitted to remain. I accept the appellant's explanation of what occurred and that he made genuine mistakes in his tax returns for the tax years ending April 2010, 2011 and 2013.

Paragraph 322(5)

25. The respondent has complained about under-declaration of genuine earnings for tax to HMRC in the appellant's April 2010, 2011 and 2013 tax returns, or inflated representation of income to earn more points and obtain leave to remain in his 12 October 2010 and 26 March 2013 applications. The respondent considers this conduct sufficient to engage paragraph 322(5).

26. I have found that the respondent cannot show on balance that the appellant did not make an inadvertent mistake. In the circumstances it follows that paragraph 322(5) does not apply in this case."

In *R (Iran) & Ors,* Brooke LJ addressed a number of questions that had arisen since the jurisdiction of the former Immigration Appeal Tribunal was restricted to appeals on point or points of law. At [11] and [12] under the heading "Part 4 Perversity, the failure to give reasons and proportionality" he observed: "11. It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter.

12. We mention this because far too often practitioners use the word "irrational" or "perverse" when these epithets are completely inappropriate. If there is no chance that an appellate tribunal will categorise the matter of which they make complaint as irrational or perverse, they are simply wasting time – and, all too often, the taxpayer's resources – by suggesting that it was."

17. Examination of the judge's reasoning indicates as submitted by Mr Saini that all relevant evidence was taken into account by the judge who was clearly alive to the important points as to the extent of the difference in the figures between the original and the corrective returns and the timing of the corrective exercise. There is no doubt that the judge directed himself correctly as to the issues and in my judgment adequate reasons are given why the judge concluded as he did in [24] and in [26]. As will be seen from the extracts above from the decision, the judge explained at [17] that he had regard to the guidance in *Khan* and was clearly alive to the range of the discrepant figure work: "[18] … These are substantial differences". What follows in

[19] *ff* is detailed sustainable reasoning why the judge was nevertheless persuaded as to the appellant's integrity.

18. Given the nature of the challenge, the question is whether a reasonable judge, correctly directed, could have come to such a conclusion on the evidence. It needs to be remembered that the judge heard and assessed the evidence of the appellant and whilst another judge may have come to a different legally correct conclusion on the facts it does not follow that this judge reached an irrational or unreasonable decision. The decision was within the range of rational findings on the evidence which included an acceptance of responsibility by Zenith. It was a decision that might be surprising to some but, in the light of the reasons given by the judge, I am satisfied that it was not one that strayed into irrationality. I am not persuaded that having correctly directed himself the judge reached an irrational conclusion. Accordingly, on the restricted ground on which permission has been granted, I am not persuaded that the judge erred in law. This appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

Signed

Date 20 May 2019

UTJ Dawson
Upper Tribunal Judge Dawson