Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00829/2019

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 19 August 2019	**On 6 March 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MUHAMMAD NADEEM ANWER
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs, Counsel instructed by LRP Solicitors
For the Respondent: Ms E Groves, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of the appellant, a national of Pakistan, against the decision of the respondent refusing him indefinite leave to remain in the United Kingdom. The appeal was brought on human rights grounds.

2. For the purposes of introduction the appellant had been identified as a person to whom paragraph 322(5) of HC 395 applies and against that finding refusing him leave to remain was proportionate on human rights grounds. Paragraph 322(5) is described in the Rules as one of the "grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused" and is in the following terms:

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> "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."

3. The short point is that the appellant is one of many people who was thought to have been dishonest because of a discrepancy between income declared to HMRC for the purposes of assessing tax liability and income declared to the respondent for the purpose of satisfying the Immigration Rules.

4. I begin by considering very carefully the First-tier Tribunal's approach to this appeal.

5. The judge began by summarising the respondent's reasons for refusing the application. As the judge explained when the appellant applied for leave to remain on 1 April 2011 he said in his application that he earned £38,867.25 made up of salaried employment with the Ministry of Justice paying £12,021.25 and earnings from self-employment under the trade name "MNA Logistics and Consultants" in the sum of £26,846.00.

6. On 27 September 2017 the respondent wrote to the appellant's representatives asking for details about his tax. Details were provided on 20 October 2017 and this showed that the taxable income originally declared to HMRC for the year ending in April 2011 was £13,551.00 which is clearly very different from the £38,867.25 declared to the respondent. However it is also right to say that the records show that the appellant had amended the tax return for 2011 on 7 July 2015 to show an income that agreed with the sum declared to the respondent. He attributed the error to poor advice from a friend who was not a qualified advisor and the correction was made sometime before the application leading to the decision complained of which was made on 14 March 2017. It was not obviously to the appellant's advantage to change his tax returns in 2015. The change had not been made shortly before an application for indefinite leave to remain

7. Nevertheless, as the judge noted, the respondent did not accept that this was a genuine error.

8. The respondent found that the appellant had either failed to declare his full income to HMRC to reduce his tax liability or inflated his income to bolster his immigration application and the respondent decided that the appellant was not a suitable person.

9. The judge then summarised the appellant's case. The appellant said that he satisfied the requirements of the Rules and therefore his appeal on human rights grounds should succeed.

10. He further argued that even if he did not satisfy the Rules removing him would be disproportionate. It was the appellant's case that it was for the respondent to prove that the appellant had behaved dishonestly either with HMRC or with the respondent and, given that dishonesty, his presence was undesirable when other factors were considered.

11. The judge directed himself at paragraph 12 in the following terms:

> "I am reminded that it is for the respondent to advance sufficient evidence to discharge the evidential burden. If I find that there is, then I must go on to consider whether paragraph 322(5) applies, having regard to all the relevant evidence."

12. The judge then summarised seven points made on the appellant's behalf. I set them out below:

(i) The appellant has given a detailed, consistent and plausible account as to how the discrepancy arose;

(ii) the amended 2010/2011 tax return was prepared by reputable accountants who support for the appellant's case, and who have confirmed that no penalty was imposed because the error was the result of a genuine mistake, and that it was voluntarily amended;

(iii) the appellant provided the requisite evidence in support of his claimed income when he made the application in 2011, and the respondent has not provided evidence that the documents were false;

(iv) the 2010/2011 application was corrected, and the tax paid, long before the current application was made, that was done for reasons unconnected with his immigration status in the context of a mortgage application, and this was inconsistent with the allegation made against him that he had evaded tax and/or lied to the respondent as to his income;

(v) the appellant voluntarily disclosed the information when he made his application for indefinite leave to remain;

(vi) HMRC accepted the amendment, and accepted that there was no dishonesty involved; and

(vii) there was evidence of good character, including numerous character witnesses.

13. The judge then reviewed the evidence at the hearing and the submissions and analysed the evidence that he had heard. In his analysis the judge summarised the key points particularly noting that the appellant amended the tax return on 7 July 2015. It was his case that the error came to his attention when he had to make a mortgage application and that he notified HMRC promptly and then paid the relevant tax.

14. The judge then addressed his mind to the guidance given by Martin Spencer J in **R (On the application of Khan) v SSHD** **(Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC)** and he has set out the eight guiding propositions identified by Martin Spencer J in that case.

15. The judge said at paragraph 32 that:

> "The starting point in applying that guidance to the facts of this case is to acknowledge that the difference between the income claimed in the appellant's 2011 application and the income declared to HMRC for the same year is £25,316.25. The level of discrepancy is such that, absent a plausible explanation for it, the Secretary of State is entitled to draw an inference that the appellant has been deceitful or dishonest, and so that he should be refused indefinite leave to remain on the basis that paragraph 322(5) of the Rules applied."

16. The judge then looked at the explanation offered noting, correctly, that it was the appellant's case that it was an innocent mistake and that he was guilty of nothing worse than carelessness. The judge directed himself at paragraph 33: "I must, therefore, undertake the fact-finding task needed to decide whether the explanation and evidence is sufficient to displace the prima facie inference of deceit/dishonesty."

17. The judge then worked his way through the seven points identified by Mr Biggs in his skeleton argument. The judge accepted that the explanation of innocent mistake compounded by the intervention of a friend was "superficially reasonable". He acknowledged that the alleged friend claimed to have some knowledge of accountancy and that the appellant then appeared unfamiliar with the tax system. The judge noted the appellant's evidence that he did not check or sign his tax return but the judge could make

no sense of this claim because he would have expected some acknowledgement to be required. The judge noted that a mistake is always possible and therefore some method of checking was necessary even if not strictly required as a matter of law. It is what a responsible person would do. He acknowledged the appellant's apparent inexperience at the material time but he also considered the sums involved. The judge said at paragraph 39:

> "The tax liability on an income of £13,551 is very different from that on an income of £38,867.25. I would not expect the appellant to have known the precise amount of tax that he was liable to pay. I would expect him to have known that he would have to pay a larger amount of tax on an income of £38,867.25 than on an income of £13,551. The difference between the two is not trivial, but a substantial sum of over £25,000. The one figure is almost three times bigger than the other. It follows, that, had there been a genuine mistake, I would have expected him to notice that something was amiss when he received his tax bill for that financial year, and found it to be very much lower than his income might have led him to expect."

18. The judge noted it was the appellant's second point that the amended return was prepared by reputable accountants who were said to "support the appellant's case". The judge considered that submission very carefully and looked at the supporting letter from the tax accountants. The judge said:

> "It merely reports factually that the tax return was not correctly filed, and that there were errors. It does not say how those errors came about. Indeed, it could not. The accountants who wrote the letter were not in a position to know whether the errors were the result of an innocent mistake, or otherwise. They were not involved in the preparation of the tax return in question. It was not their role to carry out an enquiry as to the cause of the error, but only to identify that it was there, and to give appropriate advice as to how it should be resolved."

19. The judge also noted the accountants act on instructions. There was no reason for them to query the instructions that the appellant had acted on an innocent mistake but neither does their conduct in correcting the error somehow add weight to the claim that it was innocent.

20. The judge found it significant that there was no direct evidence from the friend who is said to have caused the error.

21. The third point raised by the appellant is that the respondent has not provided evidence that the "documents were false". The judge described this argument as "flawed". It had never been the respondent's case that the appellant had relied on false documents. The respondent was concerned either that the appellant had overstated his income to bolster an application for leave or understated it to avoid tax. There was no reason to assume the respondent had kept documents provided by the appellant when he made his 2011 application.

22. The fourth point was that the erroneous declaration was identified, corrected and tax liability discharged well before the application leading to the decision complained of and that it was done for reasons unconnected with his immigration status. The judge regarded this as a point that had "some initial appeal" and on reflection decided it was entitled to some weight in the appellant's favour. However the judge also recognised that if the appellant was telling the truth and it was an innocent mistake that came to his attention and he is an honest person he would have done exactly as he appears to have done, that is

to have acted promptly to declare the error and made good the payment due promptly on it coming to his attention. However the judge did not regard this as a telling point. He said:

> "Equally, however, if there had been past dishonesty, it would have been a sensible response on the part of the appellant to pass it off as an innocent mistake when it was raised with him in 2015, and to take the same steps to rectify it. At that time, he would have had every incentive to deal with past misconduct in such a way: his job, his immigration status, and his mortgage application were all at stake. His actions were, in my view, equally consistent with his having learnt of an innocent mistake, or with his past misconduct having come to light. This is a neutral point."

23. The fifth point was described as the appellant voluntarily disclosing the information when he made his application for indefinite leave to remain. The judge regarded this as a neutral point. The Revenue would have been told. There was every chance of it coming to light and no need to suppress the information.

24. The sixth point is that HMRC accepted the amendment and accepted there was no dishonesty involved. It is quite clear that no penalty charge was made and indeed the appellant has gone on to find work with HMRC. However, as the judge rightly noted, there was no evidence of the policy approach of HMRC when faced with a taxpayer who voluntarily declares unpaid tax. It may well be that penalising people who bring to the attention of HMRC an underpayment which may very well have gone undetected otherwise is not a priority. There was no evidence on the point.

25. Finally the appellant relied on evidence of good character and referred to there being "numerous character witnesses". However the judge also found that evidence of good character is not normally "directly probative of the matter, one way or the other". He said that the good character evidence was something to which he should have regard and did have regard but he did not regard this as a case that was finely balanced so one where evidence of good character might be thought to tip the matter in the appellant's favour. The judge made it plain that he had had regard to all of the evidence in the round and said at paragraph 50:

> "I find that there is a strong prima facie case which the arguments advanced by the appellant have not dispelled. I find the character evidence insufficient to outweigh the other evidence."

26. He also reminded himself of the seriousness of the allegation but correctly applied the standard of proof of the balance of probabilities. He went on to say that he found the "allegation of dishonesty is made out to the requisite standard".

27. He had no difficulty concluding that the appellant's dishonesty was bad conduct within the scope of paragraph 322(5). The judge did not rush to condemn. He reminded himself expressly that the appellant had not been convicted of an offence and was not subject, yet, to removal. Nevertheless the judge found that the appellant's dishonesty was of a kind that was commonplace describing the behaviour as "widespread" and "serious" because it "undermines the integrity of the system put in place for the management of immigration and taxation, and it also undermines public confidence in those systems".

28. These are the main reasons found by the judge for justifying the conclusion that the conduct was disreputable and was proper reason for interfering with the private and

family life the appellant had clearly established during his stay in the United Kingdom. The judge did not accept that there would be very significant obstacles to the appellant re-establishing himself in his country of nationality. He then dismissed the appeal.

29. Permission to appeal was granted by the First-tier Tribunal. The main reasons for granting permission was at point 2 where the First-tier Tribunal Judge granting permission stated:

> "The lengthy grounds assert that the Judge erred in the approach [by] to an Immigration Rule 322(5) tax case by adopting the starting point set out in **R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC)** as opposed to the approach in the Court of Appeal decision of **Balajigari and Ors v SSHD [2019] EWCA Civ 673**."

30. Mr Biggs had prepared the grounds of appeal to the Upper Tribunal and headed the grounds of appeal as "Grounds of Appeal and Written Submissions". There is no obligation to prepare the case in that way but it is sensible and appreciated. Mr Biggs adopted and supplemented the arguments in his submissions to me.

31. The keystone of his submissions is the emphasis in **Balajigari and Ors** on Martin Spencer J describing the discrepancy as the "starting point". At paragraph 42 of the Court of Appeal's judgment, Underhill LJ said that "there is on our view a danger that his "starting point" misstates the position". The distinction drawn out by the Court of Appeal was between an unexplained discrepancy creating the suspicion of dishonesty, which it can, and being positive evidence of dishonesty, which it is not. The First-tier Tribunal should not have started from the assumption that the appellant had been dishonest but the assumption that his conduct was suspicious.

32. I was satisfied at the hearing that the First-tier Tribunal had erred as Mr Biggs contended and I announced that I would set aside the decision and hear evidence to redetermine the appeal.

33. The "prima facie case" is clearly established.

34. Before the First-tier Tribunal the Presenting Officer indicated that there was no need to cross-examine certain witnesses. That concession was not withdrawn in notice before the hearing and I found it was too late at the hearing before me to allow the Secretary of State to change her position on that.

35. The appellant gave evidence before me. He had made a statement and supplementary statement dealing with his personal circumstances. I have read them. I note particularly the appellant's education. He had an MBA from the University of Wales and graduated in 2010. I accept that he had secured employment with the Ministry of Justice as an administrative officer and that he now works for HMRC.

36. The important part of the evidence concerns the tax return. He emphasises in his statement that it was his first tax return and that he claims to have acted promptly to correct an error when it was found.

37. He told me in his oral evidence that he did not check the tax return. He was sorry he had not done that. He accepted it was his responsibility but he insisted he did not know that the return was in a wrong form when it was made.

38. He was cross-examined. It did not occur to him that his tax liability was very low.

39. I returned to this point at the end of questioning and he insisted that he did not think it was too low at that time. He relied on his friend to do his job. He hinted that he thought the tax years might have had something to do with it and that he would be faced with a later tax bill on the next year but he was vague about that.

40. I have reflected very hard on this. The high spot of the Home Office case is the discrepancy in the sums. It is a great deal of money and it is very difficult to believe the appellant did not think that something was wrong.

41. Against that there is a lot of evidence that he is a man well thought of by his peers and there is evidence that he works for HMRC and I have seen some evidence to confirm to confirm his extremely plausible claim that HMRC would have checked his records and known that he had amended a return before offering him a job.

42. Unlike the First-tier Tribunal Judge I do not regard this as a neutral point. There is something profoundly unattractive in finding a person to have been dishonest in his tax affairs on evidence that did not stop HMRC giving him a job.

43. I also asked myself what that appellant would have done if, as claims, he made an honest mistake that was brought to his attention? The answer to that is that he would have declared the correct position as soon as he could and paid his bills and that is exactly what he did. This does not make him innocent but it is as consistent with an honest man as it is with a guilty man who wanted to correct a false return.

44. This is not the kind of case that we all see from time to time in this Tribunal of a person amending tax records shortly before making an application for Indefinite Leave to Remain and realising that tax records will be scrutinised. That is a sometimes telling and always suspicious element that is not present in this case.

45. I reflected hard and too long on this case. Certainly I am satisfied that there is something to explain. The prima facie case is made out. I have to decide if the evidence is capable of being believed and it clearly is and I have to satisfy if the Home Office has satisfied me that it should not be believed.

46. By the narrowest of margins I have come to the conclusion that I am not persuaded that the appellant has told lies.

47. I give some weight to the support of his colleagues and the many character references that are before me. Character references are easy to give and it is an obvious fact that a person with a very high reputation for honesty and good behaviour can behave in a contrary way. As is often said in the criminal courts if good character were a defence nobody would ever get convicted of anything.

48. I do give some weight to his being employed by HMRC. I have seen a letter from Mr Peter Wrangling the line manager at HMRC confirming that checks are made before a person is employed.

49. I have also considered the evidence of Mr Ibrahim Mahmood confirming that he had helped with the troublesome tax return but could not really remember what had happened. This is rather thin evidence. Oral evidence and cross-examination would have been better but it assists the appellant rather than frustrates his case.

50. For all the heat and paperwork that has been generated it is a simple point. I find that the First-tier Tribunal has erred by giving too much weight to the prima facie case and not recognising the difficulties that the Court of Appeal identified in **Balajigari**. I do not wish to make the same mistake. By the narrowest of margins I am persuaded that this man was not dishonest.

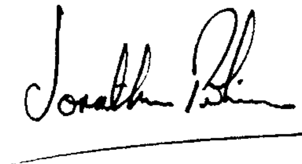
51. That of course is not the end of the matter but a careless error in tax returns that is corrected without problem to the Revenue should not ordinarily be a reason to disqualify a person making them not suitable for living in the United Kingdom and it does not do so here. There is no sensible reason to find that the corrected tax record was false and invented to support an "immigration" application.

52. I find that the appellant satisfies the rules. Clearly he has established private and family life during his stay in the United Kingdom and clearly the decision interferes with that disproportionately.

53. With that finding the case is made out under the Rules and the Article 8 claim makes itself.

Notice of Decision

54. The First-tier Tribunal erred in law and I set aside its decision substituting the decision allowing the appeal.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 6 March 2020