Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09460/2018
HU/10130/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 13 March 2019	**On 7 January 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RUPESH RATANKUMAR AGARWAL
MRS AMITA RUPESH AGARWAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Ms S Jones, Senior Presenting Officer
For the respondent: Mr S Karim of Counsel

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondents are citizens of India born respectively on 30 September 1981 and 11 November 1981 and her husband and wife. However, for convenience, I refer below to the respondents as the appellants and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal. I should also consider the first appellant's appeal because the second appellant's appeal rests or falls with that of the first appellant.

2. The Secretary of State appeals with permission to the Upper Tribunal against the decision of First-tier Tribunal Judge Dineen promulgated on 1 January 2019, allowing the appellants appeals against the decisions of the Secretary of State dated respectively to refuse them leave to remain in the United Kingdom pursuant to paragraph 276B and 322 (five) of the immigration rules bases, on the character of the appellant which the respondent found to be dishonest.

3. Permission was granted First-tier Tribunal Judge Andrew decision dated 8 February 2019 stating that it is arguable that the Judge did not follow the guidance in **R (on the application of Khan) v the Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5) [2018] UKUT 00384 (IAC)** when coming to his findings that the explanation given by the appellant is a plausible one.

4. First-tier Tribunal Judge allowed the appellant's appeal and found that the appellant stated in his application made on 16 June 2013 that from 1 June 2012 to 31 May 2013 was £42 ,554.24 and this included £20,780 from self-employment. However, in his tax return for 1 April 2012 through 31 March 2013 the appellant showed that his earnings from self-employment were 16,054. Therefore, the respondent found that the appellant's application did not meet the threshold required for the Tier 1 General Migrant criteria.

5. The judge noted that the difficulty is that the £16,054 referred to is in respect of the period up to 31 March 2013 as the period in question in the Tier 1 application was up to 30 May 2013. This gave rise to the question as to what was by self-employment months after 31 March 2013 which it is asserted by the appellant brought up a self-employed receipt for the period in question from £16,054 to £20,782.

6. Respondent's case is that nothing was earned by way of self-employment in the period up to 31 May 2013 from 31 March 2013 because the appellant's tax return for the year 1 April 2013 to 31 March 2014 shows no self-employment income. However the appellant's case as that in fact during that period the growth of £6000 plus a few hundred pounds by way of self-employment that in that particular year so far as the HMRC is concerned he completed his return, as his accountant who customarily dealt with his returns being absent from the United Kingdom, that he filled in his return in relation in relation to his earned income from at least two sources he forgot to deal with his unearned income.

7. The appellant provided a letter to the HMRC dated 30 November 2017 stated that he has noticed that he has made an under declaration by leaving out a self-employment income for the year 2013 to 2014. There was no reply from HMRC to that letter and that "the appellant can certainly be criticised for not pressing HMRC to provide a reply, it may be like so many people with tax affairs he does not wish to engage more than necessary with the authorities but the fact of the matter is it would have been most helpful to have a reply. Suffice it to say that he has said in that letter amounts to a voluntary declaration that the

HMRC has not rejected what he has said or attempted to impose upon him any penalties.

8. Thus the appellant says that the figure of £42,554 for the year in question at the time of the Tier 1 application is correct that he provided documentation to support that figure. The respondent's response is that this is not an account which can be accepted because there is no further confirmation from HMRC that the figures dated is accepted by them.

9. The initial burden of proof is on the respondent which has been satisfied by producing the appellant's tax return for 2013 to 2014. In the case of Khan it is stated that where there is a significant difference between the income claimed in the previous application for leave to remain in the income declared to HMRC, the Secretary of State is entitled to draw an inference of the applicant has been deceitful or dishonest. The Judge reminded himself that although the standard of proof of the respondent is the balance of probability, finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequences that he is denied settlement of the country is a very serious finding with serious consequences.

10. The Judge found that in all the circumstances the appellant's explanation that he left out self-employed earnings in the year 2013 to 2014 tax return is at least plausible. The judge found the appellant truthful he stated that he has realised his error has taken steps to remedy it. The letter written to HMRC is a step within a reasonable timeframe even if it took the steps after being prompted by the respondent in relation to his financial affairs of the application leading to this appeal. The appellant acted quickly upon being so prompted and in all the circumstances the judge was satisfied that the burden of proof in relation to this serious matter has been satisfied in a finding of this honesty of bad character. The Judge allowed the appeal on human rights grounds.

Grounds of appeal

11. The respondent's grounds of appeal which I summarise are the following. The appellant's applications for indefinite leave under paragraph 276B of the immigration rules was refused under paragraph 322 (5) of the immigration rules. This was due to the discrepancies in the appellant's declared income to HMRC for tax purposes and the UKVI in his further leave applications.

12. The first-tier Tribunal Judge failed to follow the reasoning of the upper Tribunal in the case of **R (on the application of Khan) of the Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5) [2018] UKUT 00384 (IAC)** when assessing whether the appellant cited dishonesty relations to his dealings UKVI or HMRC.

13. The First-tier Tribunal Judge did not follow the recommended steps in **Khan** when assessing the appellant's actions and absolved the first appellant of any responsibility to ensure his tax returns are correct. The Judge has not provided

reasons for why it is accepted that the appellant would not have been aware of the errors sooner given that his tax liability would have been significantly lower than it has been previously or subsequently. In addition the Judge has not factored in the delay in the appellant remedy the situation, given that he only sought to address this apply for indefinite leave to remain several years later. Even then it was only undertaken following prompting by the respondent.

14. The Judge notes at paragraph 7 in his decision that there is no documentary evidence that demonstrates that HMRC has resolved this issue with the first appellant. If the judge fully consider the factors in the head note of Khan the outcome of the appeal would have been different.

15. The Judge has failed to give reasons or any adequate reasons for finding on material matters. At paragraph 12 the Judge states that he accepts the explanation given by the appellant for why he left out self-employment only the year 2013 to 2014 tax return is at least plausible. The Judge has failed to provide adequate reasons for why the explanation given by the appellant for his failure to declare self-employment found to be plausible. In addition response has been received from HMRC and therefore without that evidence it is not sure that the appellant has actually remitted the discrepancy. The Judge has failed to provide adequate reasons for this finding of fact.

The hearing

16. At the hearing both parties make submissions whether there is an error of law.

Findings as to whether there is an error of law

17. There was no dispute that there was a discrepancy between the appellant's income which was declared to HMRC in his tax returns and the income that he declared to UKVI for his further leave to remain application. The appellant left out self-employed earnings in the year 2013 to 2014 tax return.

18. The Judge into account the case of **Khan** as to how to assess cases where they are discrepancies between the income declared to HMRC and the income declared to the respondent for his previous application. The Judge clearly found that the respondent had discharged his burden of proof. Therefore, it was for the Judge to analyse the evidence and find whether there was an innocent explanation for the discrepancy.

19. The Judge within the guidance given in Khan analysed whether the explanation for the error of not declaring himself earnings was plausible, whether any documents which can be assumed to exist such as correspondence between the applicant his accountant at the time of the tax return has been disclosed. He also has to assess whether there is a plausible explanation for why such documentation is missing. The Judge also has to assess why the appellant did not realise the error sooner because his liability to pay tax was

less than he should have expected and whether at any stage have been taken steps to remedy the situation and, if so, when the steps were taken and the explanation for any significant delay.

20. The Judge who is a very senior judge and in a very careful decision analysed the evidence and came to his reasoned conclusion on the evidence in the appeal. He found the appellant credible and his explanation credible and plausible. He referred to the case of **Khan** and therefore guided himself appropriately.

21. The Judge found that the appellant rectified his tax returns once the respondent referred to discrepancy in his reasons for refusal letter. A letter to HMRC dated 30 November 2017 was considered by the Judge to demonstrate that the appellant had under declared his self-employment earnings to rectify the error made. The Judge found that he does not take against the appellant that he only attempted to rectify once prompted by the respondent. The Judge found that that voluntary declaration which the HMRC has not rejected or attempted to impose upon him any penalties.

22. The fact that the HMRC does not impose penalties is neither here or there as set out in the decision of the Upper Tribunal the judicial review case of **R (on the application of Samat) v Secretary of State for the Home Department [2017] UKAIT JR** and **Abbasi JR/13807/2016** where there were findings relating to the relevance of the actions that HMRC makes against a person. It states that there are several reasons why HMRC would not take action against a particular person and that should not go in favour of the appellant.

23. Therefore, the treatment of applicants by HMRC is not relevant to 322 (5) assessments. The Judge however did not take the fact that the HMRC has not imposed penalties the appellant into account in favour of the appellant and therefore did not fall into material error that regard.

24. I find that the Judge has given reasons for why he believed the appellant's explanation after hearing the appeal and considering the evidence, documents and the arguments. The Judge was right to consider that 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. The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.

25. **R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468)** Richards LJ stated at paragraph 62 that "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more

serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

26. The consequences to the appellant and his wife were serious and that they have lived in this country for 10 years and their applications were only refused under the provisions of paragraph 322 (5) of the immigration rules in respect of character and conduct.

27. The grounds of appeal are no more than a quarrel with the findings of the first-tier Tribunal Judge by all accounts has considered all the evidence carefully and I cannot find a material error of law.

Decision

28. The appeal by the Secretary of State is dismissed and the decision of First-tier Tribunal Judge stands.

Signed by

Dated this 26th day of March 2019

A Deputy Judge of the Upper Tribunal Judge
Ms S Chana