Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00007/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 10th June 2019	**On 25th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FAISAL RASHEED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss H Aboni (Senior HOPO)
For the Respondent: Mr G Hodgetts (Counsel)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Cassel, promulgated on 25th March 2019, following a hearing at Taylor House on 7th March 2019. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Pakistan, and was born on 29th November 1981. He appealed against the decision of the Respondent dated 6th December 2018, refusing his application for indefinite leave to remain in the United Kingdom on the basis of ten years' continuous long residence. The basis of the refusal was that under paragraph 322(5) there was evidence of deceit committed by the Appellant with HM Revenue & Customs, in relation to the Appellant's tax affairs, and that it was not conducive to the public good to allow him to remain in the United Kingdom.

The Judge's Findings

3. The judge's findings are based upon two essential matters. First, the judge considered that as far as the Appellant's tax affairs were concerned, it came to the Appellant's attention prior to making his application for indefinite leave to remain, that there had been an error made by his accountant in the submission of his tax returns for 2010 to 2011. The Appellant explained that this had been rectified with the HMRC. Significantly in this case, there was a letter (at page 20 of the Appellant's bundle) from his accountant, Ashton Coopers & Co, in which his accountant acknowledged that the error had been made by a member of their staff who had been dealing with the accounts of a different client who had a similar name to the Appellant. In these circumstances, it had been contended before the judge that the Appellant could not be treated as one whose presence in the UK was not conducive to the public good.

4. Second, the judge noted how the Appellant had applied for leave on 5th July 2016 and that the Respondent had treated the application as being out of time so that it was in breach of the Appellant's valid leave by one day, but there was evidence before the judge of posting of the application on 4th July 2016 (see paragraphs 4 to 5).

5. The judge did not find either of the two matters above to have been against the Appellant. His conclusion was that both the Appellant sought advice from his legal representatives obtaining supporting documentation in or around March 2016. The purpose of the legal advice was the assistance of an application to the Respondent for further leave to remain:-

> "At that stage it came to light that an error had been made in the accounts submitted to HM Revenue and Customs and the error was rectified on the initiative of the Appellant. There is no evidence whatsoever that points to any culpability on the part of the Appellant and he has been entirely credible and consistent throughout" (paragraph 11).

6. That dealt with the question of whether the Appellant had in fact been guilty of dishonesty in violation of paragraph 322(5) of the Immigration Rules.

7. Third, the additional matter was as to whether the Appellant had fallen foul of his married leave to remain by one day, and in this regard, the judge noted that "the application to the Respondent was sent in time under the provisions of Rule 34G(i)

and there was no break in continuity in valid leave. I find that the Appellant meets the requirements of paragraph 276B" (see paragraph 11).

8. The appeal was allowed.

Grounds of Application

9. The grounds of application state that the judge has simply accepted at face value what the Appellant had to say in relation to incorrect tax returns during 2010 to 2011, which were not discovered by him until many years later in 2016 when he made his application for indefinite leave to remain. This could not have been credible and did not excuse the Appellant's liability for checking the tax returns before he signed them off. In particular, the judge had failed to have regard to the decision in **Khan v. SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384**, which required a consideration of the Appellant's motive and failure to act, as matters that the Tribunal had to consider.

10. On 17th April 2019 permission to appeal was granted.

Submissions

11. At the hearing before me on 10th June 2019, Miss Aboni, appearing on behalf of the Secretary of State, relied upon the grounds of application. In particular, she emphasised the importance of **Khan [2018] UKUT 384**, which the judge had not followed in this case. It was not explained by the judge why the Appellant had not realised this error earlier. It was not explained why he had been able to sign off a tax return which was so plainly incorrect. The difference in the figures was quite stark. It was the difference between some £45,000 as declared compared to £20,068. There would have been an impact in terms of the amount of tax that the Appellant would have had to pay on this. The matter ought to have been properly considered by the judge. It was not. The judge simply took at face value what the Appellant stated. It was also a matter of complete irrelevance that the HMRC did not take further action against the Appellant. Yet, the judge placed some value on that.

12. For his part, Mr Hodgetts, relied upon his well-compiled Rule 24 response and skeleton argument. He submitted that the case of **Khan** was not relied upon by the Presenting Officer. It did not modify binding Court of Appeal authority on the duty to give reasons. If there was reasons to challenge then the party making the challenge had to establish that each of the points now relied upon were raised before the judge. This was not the case when one looks at how the Presenting Officer put his case (see the refusal letter at paragraph 9). It was not correct to say that the judge failed to make any finding as to whether the accountant's explanation was credible or not. The accountant himself provided evidence of his error. The judge had in mind the accountant's letter and explanation (see paragraph 4). The judge took into account the documentary evidence and the Appellant's oral evidence and statement (see paragraphs 8 and 11). The judge had accepted the Appellant's oral evidence as credible and consistent (see paragraph 11). The Secretary of State today had made no challenge to the credibility findings of the judge in relation to the Appellant. It was

these circumstances that the judge had correctly concluded that "there is no evidence" of dishonesty or "culpability" on the part of the Appellant. That was a finding that the judge was entitled to come to on the evidence before him. Moreover, inaction on the part of the HMRC was not irrelevant, as contended by the Respondent today.

13. The Court of Appeal in **Balajigari** have now recently made it clear that, whilst it was not determinative and may have little weight, it is not irrelevant or even a neutral factor, that the HMRC has not taken action. It observed:-

> "If the Secretary of State adopts the 'minded to refuse' procedure which we consider is necessary in this context, that will afford an applicant the opportunity to draw attention to anything relevant, for example what action HMRC decided to take or not to take in respect of an inaccurate tax return" (paragraph 75).

14. That was the position here, submitted Mr Hodgetts.

15. In fact, in **Balajigari [2019] EWCA Civ 673**, the Court of Appeal had now confirmed (at paragraph 42) that discrepant amounts between a Tier 1 application and HMRC returns do not in themselves justify a finding of dishonesty. They are only sufficient to establish a "suspicion" of the same. In this case, that suspicion had been dispelled by the fact that Ashton Coopers, the accountants, had themselves in a letter (at page 20) apologised to the Appellant and given him a full reimbursement of fees paid for that year, and in mitigating their error, also did not charge him for the accounts for 2015 to 2016 tax year, and made a detailed explanation of the error. It was an error committed in one year only. Indeed, Ashton Cooper were referred to in the refusal letter itself as "reputable chartered accountants" (see paragraph 6), and so if they had owned up to the fact that the error was by them, it could hardly be said that this in itself did not mean that the Secretary of State did not have to prove dishonesty on the part of the Appellant. The Secretary of State had failed to do so.

No Error of Law

16. 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 the decision and remake the decision. My reasons are as follows. This is a case where, the Appellant was cross-examined by the Presenting Officer at the hearing, and he had explained that his tax returns had been amended, following a mistake of his accountant, and an additional tax payment had been made of some £7,567.20, which was paid on 10th June 2016 (see paragraph 8 of the determination). This is a case where the judge had regard to the fact that an innocent explanation for an apparent dishonesty had been advanced (paragraph 9).

17. Most importantly, this is a case where the judge was clear in his findings that "There is no evidence whatsoever that points to any culpability on the part of the Appellant and he has been entirely credible and consistent throughout" (paragraph 11). These conclusions, come in the wake of a full and frank admission of culpability on the part of the Appellant's own accountants, described as "reputable chartered accountants",

by the name of Ashton Coopers, to such an extent that they have reimbursed the Appellant of his fees, and undertaken to do his accounts for the years 2015 to 2016 as well.

18. It is significant that they were the Appellant's accountants right from the outset, and the explanation that they have given is that they mixed up his name with somebody else of the same name. That is not something which is beyond the bounds of all possibility. It is something that was accepted by the judge as having in this case taken place.

19. Ultimately, the threshold under paragraph 322(5) is a high one, and the Respondent Secretary of State failed to demonstrate that the Appellant had actually been guilty of deceit and dishonesty, especially when an innocent explanation had been provided by the Appellant, that was backed up by documentary evidence from his accountants. The decision was one that was open to the judge to make.

Notice of Decision

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

21. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 12th July 2019