



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03545/2018

THE IMMIGRATION ACTS

Heard at Field House
On 11 February 2019

Decision and Reasons Promulgated
On 15 February 2019

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKSHAY PRASAD VENKATESH
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms A Harvey, of Counsel, instructed by Quinn Noble Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of India born on 4th March 1985. He arrived in the UK on 2006 as a Tier 1 general migrant. He extended his visa on several occasions and on 19th May 2016, prior to the expiry of his leave to remain, he applied for indefinite leave to remain based on his having completed five years residence as a Tier 1 general migrant. That application was refused on 28th June 2017. On 13th July 2017 he submitted a second application for indefinite leave to remain, this time based on ten years lawful residence. His application was refused in a decision of the

Secretary of State dated 13th January 2018. His appeal against the decision was allowed on Article 8 ECHR grounds by First-tier Tribunal Judge Mailer in a determination promulgated on the 1st October 2018.

2. Permission to appeal was granted by Upper Tribunal Judge Kebede on 5th January 2019 on the basis that it was arguable that the First-tier judge had erred in law in failing to have regard to material matters when deciding that the respondent had not discharge the burden of proving dishonesty.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The Secretary of State sets out in the grounds of appeal and in oral submissions of Mr Whitwell that the claimant accepts that he failed to make a valid tax return for the year 2009/2010. The claimant says that this was an accountants' error but, it is contended, this explanation fails to take into account the fact that the claimant is responsible for his own tax affairs, see IR/13807/2016 Abbasi. Further, it is argued that the First-tier Tribunal failed to follow the process for assessing the validity of such an excuse set out at (v) of the guidance in R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 IAC, particularly as there is a failure to report the accountant to the relevant regulatory body and the theft of the claimant's funds paid on account to that accountant to the police. Thus, the failure to lodge these accounts should rationally have sufficed to show deception as required for paragraph 322(5) of the Immigration Rules.
5. Further, it is contended, that the First-tier Tribunal failed to consider the following when finding the claimant credible at paragraph 56 of the decision. Firstly, the fact that the claimant had added to his account at the First-tier Tribunal hearing when he said that he had paid his accountant £5000 towards his tax liability, and that the claimant had not complained to the relevant regulatory body about his accountant or reported the theft of this money by the accountant to the police. Secondly it was not reasonable to accept, at paragraph 57 of the decision, that the claimant could not contact his accountant when his evidence was that his solicitor and accountant shared the same office. Thirdly, the claimant accepted before the First-tier Tribunal that he had signed his tax return but also said that he had not received confirmation from HMRC about the payment of that tax.
6. Mr Whitwell also argued that the self-direction at paragraph 55 of the decision was arguably incomplete as in Khan the evidential burden is a shifting one with the Secretary of State having to provide a prima facie case regarding deception, and then the burden shifts to the claimant to provide a plausible explanation and then in the light of all information the Tribunal must assess whether the respondent has proved his case of showing deceit and/ or dishonesty to the civil standard of proof.

7. In the Rule 24 notice and in oral submissions Ms Harvey argued for the claimant that there was no change in his account with respect to his dealings with accountant: he simply had not been asked about some matters prior to the hearing before the First-tier Tribunal, for instance about the £5000 payment in advance to his accountant, and so they were not dealt with in his interview or witness statement. The claimant had not complained about the loss of £5000 as when he found out it had not been paid to HMRC he felt he had been stupid and had shortly other things to deal with, namely the applications for leave and thereafter the refusal of his indefinite leave to remain Home Office application. There was evidence before the First-tier Tribunal that he had tried to get in touch with his former solicitors who were in the same building as his former accountant, see paragraphs 25, 33 and 37 of the decision. The claimant says that he is not entirely certain whether he signed his accounts, but believes that he did, see paragraph 34 of the decision. There is no reason to find any of these issues ones which reduce the credibility of the claimant's account, and thus the conclusions of the First-tier Tribunal were rationally open to it. Further, it is argued, the Secretary of State's interviewer had also found the claimant to be credible, as is recorded at paragraph 42 of the decision.
8. This was not a case involving a misleading submission to HMRC as the accounts for 2009/2010 were not served at all until after the fact they were missing came to light in 2015. This issue was not the central focus of the interview with the Secretary of State. Thus, this case differs on its facts from the many others where the amount declared to HMRC differed from that declared to the Home Office on applications for further leave to remain. As it was the first year of accounts that were missing the HMRC would not have sent a reminder to ask for them either as the claimant would not have been on their radar at all at that time.
9. It was therefore open to the First-tier Tribunal to find the claimant credible in the explanation he provided for the issue with his accounts and not to find that he had been deceptive. It was a long and careful hearing before the First-tier Tribunal, and there were good reasons given by the First-tier Tribunal for their decision. A number of matters stated at paragraph 2 of the renewal grounds from the Secretary of State were not true: it was not true that the First-tier Tribunal had found the claimant a deceptive person; it was not true that the claimant had signed off incorrect paperwork; and it was not true that he had left this matter to be resolved until it suited him.
10. Ms Harvey argued that there was no misdirection on the burden of proof. It was clear that the First-tier Tribunal had looked at the prima facie case presented by the Secretary of State, and the explanation provided by the claimant and then decided if the Secretary of State had shown that the claimant was not of good character through proving to the civil standard of proof on the totality of the evidence that the claimant had been dishonest in his dealings with HMRC and the Home Office.

Conclusions – Error of Law

11. The First-tier Tribunal Judge guides himself appropriately when determining the appeal by reference to the Secretary of State's own guidance on the General grounds of Refusal dated 10th April 2017 and the Long Residence Guidance dated 3rd April 2017, see paragraphs 57 to 60. The direction at paragraph 55 on the burden of proof in relation to the general grounds of refusal is legally correct. There is no doubt that the approach adopted by the First-tier Tribunal was to consider the contention made by the Secretary of State that the claimant was deceptive by way of failing to declare his self employed income for the tax year ending April 2010 to HMRC, whilst declaring it to the Home Office, see paragraph 56 of the decision, and then going on to consider the explanation for this offered by the claimant before concluding that the burden of showing deception was not met by the Secretary of State.
12. When considering the credibility of the claimant I find that it was appropriate to consider the claimant's lack of criminal convictions and letters attesting his good character as is done at paragraph 62 of the decision. It is clear that the fact of correct returns being made in other years was found to be particularly significant by the First-tier Tribunal Judge when assessing whether there was a misrepresentation relating to the tax year 2009/2010, see paragraphs 62, 64 and 66. I find that this was also a lawfully relevant consideration. Consideration is given to the fact that the former accountant could not be reached despite efforts on the claimant's part, see paragraph 57 of the decision, and that the accountant could have made the error at paragraph 67 of the decision. I find that it was open to that First-tier Tribunal not to consider that additional information about the payment of £5000 on account to the accountant, which came to light in the lengthy hearing, was not a matter which affected the finding of the claimant being credible. The provision of additional information at a hearing is not necessarily a negative matter.
13. In the context of all of the evidence the First-tier Tribunal finds that the explanation that it was an error by the accountant was plausible. I find it was open to the First-tier Tribunal to reach this conclusion given that there is an explanation for a lack of documentation as the accountant was no longer at the address where he had been based at that time; there is an explanation as to why the claimant did not realise until 2015 that the error of failing to make a submission had happened and as Ms Harvey has argued it is plausible that this failing would not have come to the claimant's notice given it should have been his first tax return and this is what the First-tier Tribunal accepts at paragraph 56 of the decision; and it is clear from the findings at paragraph 56 that the tax and interest was paid in 2015 when the claimant became aware of the failing, and as set out at paragraph 19 there is correspondence from his current accountant about the correction of the errors. Whilst it is the case that the claimant had not lodged a complaint with the regulatory body or police about his accountant by the time of the hearing the First-tier Tribunal was satisfied that he had tried to address the problem by unsuccessful attempts to contact the accountant by phone and visiting the place that had been his office. The claimant's history is that he instructed an

accountant and to the best of his memory signed off his accounts and provided him with the funds to make the 2009/2010 return, and so this is not a case, like a number of others which have come to light recently, where a claimant has demonstrably been shown to have failed to take his responsibility and signed off a differing amount to HMRC. I find that the guidance at (v) in Khan has been substantially followed by the First-tier Tribunal when considering whether the explanation of accountant error was plausible, and that the conclusion that the claimant had not been deceptive was a decision that was rationally open to the First-tier Tribunal on the facts and sufficiently reasoned.

14. I find that the First-tier Tribunal has therefore properly and lawfully addressed the key substantial issue in the appeal, which was whether the appellant is of good character given the allegation of HMRC/ Home Office dishonesty relating to this tax return, and that it was lawfully open to that Tribunal to allow the appeal on human rights grounds having found that the claimant had shown he could meet the requirements of paragraph 276B of the Immigration Rules and so there was no public interest in his removal given he had been lawfully in the UK for ten years; speaks English; and is financially independent.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. The decision of the First-tier Tribunal allowing the appeal on human rights grounds is upheld.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 11th February 2019