Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/04046/2018
HU/09064/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2019	**On 4 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UPILITHA ERANKA ILLANGAKOON (FIRST RESPONDENT)
ANISHA SURANTHI BANDUWANSA (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondents: Mr J Dhanji, Counsel

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Onoufriou allowing the appeals of the appellants against the decision to refuse to grant them indefinite leave to remain by reference to paragraph 322(5).

2. The respondents are citizens of Sri Lanka. They are husband and wife born on 8 April 1982 and 14 September 1986 respectively. The first applicant entered the UK as a Student Migrant on 6 October 2007 with

entry clearance valid until 31 October 2009. He was subsequently granted further leave to remain as a Tier 1 (General) Migrant until 13 May 2016, following further applications and latterly following an appeal which was allowed by a judge on 10 October 2013.

3. On 15 December 2016 the first respondent applied for leave to remain as a Tier 5 Migrant under the Government Authorised Exchange Scheme which was granted with leave to remain until 13 November 2017. On 11 September 2017 he made a human rights application for indefinite leave to remain in the UK on the basis of completing 10 years' residence and on the basis of his private life established during that time. The respondent refused the application in the light of the first applicant's character and conduct it would be undesirable to allow him to remain in the UK, having declared different income to HMRC and UK Visa Immigration.

4. The second respondent's application was based on being the dependant of the first applicant. Her application consequently failed with that of the first applicant.

5. The respondents claimed that to remove them would give rise to a breach of their human rights under Article 8 of the ECHR.

6. At the hearing before the judge it was stated by the Secretary of State that the sole issue in this case related to whether the first applicant had been dishonest in completing his tax return for the year ended 5 April 2011, thus engaging paragraphs 322(5) and 276B(ii)(c) and (iii). The respondents' Counsel added that even if the judge found that the first respondent was dishonest in the submission of his tax return, this needed to be assessed proportionately with regard to his achievements as a pharmaceutical scientist.

7. The judge's findings of fact and credibility are set out at paragraphs 18 to 25. At paragraph 23 the judge sets out what appears to be the respondent's explanation, maintaining that he was aware his income from Taprobane Chem Limited in the form of dividends was fully disclosed to the HMRC. He believed that all the tax that was due from him had been paid as he had entered into a payment plan with HMRC in respect of unpaid tax for the financial years ending 5 April 2010, 2011 and 2012 as stated in HMRC's letter of 24 September 2018. Counsel Mr Dhanji referred to the HMRC guidance on the taxation of company dividends which indicated that the Rules in respect of dividends prior to 6 April 2016 were different from the current Rules.

8. The judge held as follows at paragraph 24:

> "It is also significant that, having been advised by the respondent that he may not have fully paid the tax that was due from him, he completed a further tax return and paid his outstanding tax. The HMRC fact sheet sets out the circumstances in which a penalty for an inaccuracy may be charged or not. It sets out eight stages in working out the amount of any penalty which includes determining whether the

> individual had exercised reasonable care in completing their tax return or whether they were aware that their return was inaccurate when they sent it. The fact that HMRC appeared to have charged no penalty indicates that, according to their fact sheet, the first appellant had exercised 'reasonable care' over his tax affairs. Therefore, taking these factors into account, balancing both sides of the argument, and also taking into account the findings regarding his credibility and integrity in Judge Baldwin's determination and his honesty and general good character in the various letters of support, I accept that he was not deliberately dishonest in the completion of his tax returns for the years in question, in which case the first appellant satisfies the Immigration Rules".

9. I accept the argument in the Secretary of State's grounds that the judge erred in law by placing significant, if not sole, emphasis on the actions of HMRC as being determinative of whether the first respondent acted dishonestly in his dealings with HMRC and UKVI.

10. First-tier Tribunal Judge J M Holmes granted permission and said it was arguable that the judge failed to engage with or apply the relevant current jurisprudence; **Khan [2018] UKUT 384**, stating that although the judge made no reference to this jurisprudence in her decision, it may be that it was never drawn to her attention. He stated that the failure of HMRC to issue a penalty or to prosecute the applicant was not determinative of the appeal.

11. Mr Dhanji submitted in his Rule 24 reply that the judge cannot be criticised for failing to refer to the judgment in **Khan** as that judgment was not reported until after the hearing of the respondent's appeal. He argued that in any event the judge adopted a **Khan** compliant approach determining the issue of whether, in his judgment, the Secretary of State had proved that the first respondent was dishonest with his dealings with either HMRC or the UKVI, critically evaluating the explanation provided in response to the evidence adduced by the first respondent.

12. I was not persuaded by Mr Dhanji's submission as paragraph 24 does not indicate a critical evaluation of the explanation provided by the first respondent.

13. I accept that the decision in **Khan** was not available to the judge as it was not reported until after the respondent's appeal. Nevertheless, I find that **Khan** provides an approach that is helpful to judges in deciding cases like this.

14. At paragraph 25 the judge found that as the first respondent satisfies the Immigration Rules, he considered that his removal would be disproportionate. In reaching this decision the judge failed to consider whether the respondent and his wife have established a private life in the UK. I agree with Judge Holmes in his grant of permission that the reference to the public interest in the respondent's pursuing their career is arguably inconsistent with the guidance to be found in Thakrar (Cart IR;

Article 8; value to the community) [2018] UKUT 336, and indicative of a misguided approach to a private life appeal.

15. I find for the above reasons that the judge erred in law. The judge's decision cannot stand. It is set aside in order to be re-made.

16. The respondents' appeal is remitted to Hatton Cross for rehearing by a First-tier Tribunal Judge other than Judge Onoufriou.

No anonymity direction is made.

Signed Date: 28 February 2019

Deputy Upper Tribunal Judge Eshun