



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/05576/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On April 17, 2019

Decision & Reasons Promulgated  
On May 1, 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR REHAN ANWAR  
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr J Gajjar, Direct Access Counsel

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Pakistan and he arrived in the United Kingdom on a student visa on October 17, 2006. The appellant extended his leave in the Tier 1 (Post Study) Migrant category until March 21, 2016. On March 17, 2016 he applied for indefinite leave to remain as a Tier 1 (General) Migrant but later varied this to an application for indefinite leave to remain under paragraph 276B HC 395.
2. The respondent refused this application on February 12, 2018 under paragraph 322(5) HC 395 on the basis the appellant had failed to disclose his true earnings to HMRC

for his Tier 1 application lodged on December 23, 2010.

3. The appellant appealed the refusal decision on February 23, 2018 and blamed his former accountants for negligently preparing his tax returns.
4. His appeal was heard by Judge of the First-tier Tribunal Beach on December 11, 2018 who in a decision promulgated on January 9, 2019 applied the decision of R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC) and dismissed the appellant's appeal by rejecting the appellant's claim that he had not been provided with either draft or final accounts to check by the former accountants.
5. The appellant appealed this decision on January 22, 2019 and, although Judge of the First-tier Tribunal Saffer refused permission to appeal, Upper Tribunal Judge Storey granted permission on the ground that it was arguable the Judge had failed to keep in his mind, when analysing the evidence, that the respondent bore the burden of proof in establishing dishonesty.
6. Mr Bates opposed the application on the basis the appellant had been given an opportunity to offer an innocent explanation and this had been rejected by the respondent and also the Tribunal.
7. No anonymity direction is made.

#### **SUBMISSIONS ON ERROR IN LAW**

8. Mr Gajjar submitted the Judge's decision contained irrational findings and proceeded to outline those areas of the Judge's decision that were irrational.
9. At paragraph 23 the Judge found in the appellant's favour for tax year 2009/2010 but when considering his explanation for the tax year 2010/2011 the Judge did not accept the explanation advanced even though he had previously accepted the argument for the previous tax year.
10. The appellant's case was his accountant was so incompetent that he had under-declared both the appellant's employed and self-employed income. In paragraph 25 of his decision, the Judge found the appellant had not provided all his P60s for the 2010/2011 tax year, but this finding was irrational and could not be sustained.
11. If the Judge was correct in finding that the appellant may have hidden one or more P60s then it must follow the P60s provided by him would total £7,093, but no combination of his P60s reached that figure with one P60 being for £477.73, one for £5,398.70 and the other for £5,919.88. The Judge's finding was not supported by the evidence.
12. The Judge took issue with the fact the appellant only amended his return on advice but overlooked the fact the appellant only became aware of the discrepancy when he checked with HMRC. Given paragraph 25 is unsustainable and given this is core to

the appellant's account then he submitted the decision may not have been the same if paragraph 25 had been revisited.

13. The second ground concerned the application of an incorrect standard of proof. Upper Tribunal Judge Storey granted permission on the basis the Judge may have misapplied it.
14. At paragraph 24 of the decision, the Judge accepted the accountancy firm had not complied with Companies House Rules for themselves and Mr Gajjar submitted that the Judge had applied the wrong test by saying it was "quite a leap to accept" whereas he should have considered whether his explanation was implausible against the acknowledgment the accountants had possibly erred in their preparation of the relevant income for the previous year.
15. Mr Gajjar submitted it was not so implausible the accountants would not have made another mistake and he submitted the Judge's expectation was flawed and he referred to paragraphs 20.2. and 20.3 of the grounds of appeal. The third ground followed on from ground two in that the Judge failed to attach weight to the fact the appellant did pay £3,805 tax.
16. The final issue arose from the recent Court of Appeal decision in the case of Balajigari and Others [2019] EWCA Civ 673. Whilst there had been a fact-finding approach in this case, Mr Gajjar submitted the Judge had erred by failing to consider "desirability" issue and this in itself there was an error in law. He referred the Tribunal to paragraph [33] of in the case of Balajigari.
17. Mr Bates submitted there was no error in law and whilst the Judge did not have the benefit of the recent Court of Appeal guidance, he had followed approach set out in the decision of Khan. The Court in Khan said it was not sufficient to simply place the blame on the accountant and the appellant had to back up such assertions with evidence.
18. The finding at paragraph 25 was prefaced by the Judge noting she had not been given the evidence that was said to have been passed to the former accountant. She concluded, following Khan, there should be evidence of what contact he had with those former accountants. The Judge speculated that only one or two P60s were provided but she was not satisfied all the evidence had been provided.
19. At paragraph 23 the Judge had given the appellant the benefit of doubt and found either the appellant or accountant may have overlooked the evidence because it was his first year of self-employment and the discrepancy was significantly less compared to the figure in 2010/2011. The fact the accountants were tardy providing their own returns did not mean they were negligent in providing the appellant's returns. No explanation had been obtained from the former firm of accountants which is something the Tribunal in Khan said should be done. The Judge had noted there was a larger discrepancy in 2010/2011 and the correction only occurred four years later in 2016 when he was preparing his Tier 1 application and the year, he would be eligible for indefinite leave to remain application.

20. The Judge rejected the appellant's claim it was the accountant's fault as there was a lack of evidence and the Judge's finding on his failure to explain the discrepancy was sustainable.
21. As to issue of desirability Mr Bates referred to paragraph 37(2) of Balajigari and argued that if there had been dishonesty then this pointed to the undesirability of granting him status. At paragraph [28] of her decision, the Judge found appropriate to refuse him leave and Mr Bates submitted paragraphs [28] and [29] were sustainable because the Judge had carried out a balancing act on proportionality and rejected the claim.
22. Mr Gajjar responded to these submissions by arguing Mr Bates's arguments about paragraphs [24] and [25] were flawed and that Mr Bates was simply inviting the Tribunal to ignore those aspects of the decision he did not like. The appellant had put forward an explanation and had highlighted the problems facing the former accountants and had submitted the tardy actions of the accountants demonstrated they were at fault. It should also not be overlooked that the firm had also been dissolved.

### FINDINGS

23. The appellant's application for indefinite leave to remain had been rejected because the Judge accepted the respondent had been entitled to refuse the application under paragraph 322(5) HC 395 through a failure to declare all his income to HMRC.
24. The Judge's decision was extremely detailed and set out in considerable detail the facts of this appeal. The Judge acknowledged that the appellant had not deliberately sought to mislead either the respondent or HMRC for the tax year 2009/2010 and she gave her reasons for this in paragraph [23] of her decision. Mr Gajjar's argument is that having made that finding and on the basis the accountancy firm did not have its own affairs in order the Judge should have reached a similar finding for the 2010/2011 tax year.
25. The appellant blamed the accountants and claimed the accountant submitted the tax return without checking the same with him. Both he and Mr Gajjar pointed to the fact that since his former accountant company was formed in November 2008 there had been steps taken to strike the company off Companies Register in 2010-2014 culminating in the Company being struck off in January 2015.
26. The Judge acknowledged these problems in paragraph [24] of her decision but stated, "it was quite a leap to move from this to a finding that the accountant firm was either so negligent in preparing the appellant's tax return that it missed a large amount of the appellant's income or that it was knowingly misrepresenting the appellant's income to HMRC and that it was further negligent in failing to ask for the client's approval of the tax returns before submitting it". The Judge continued in paragraph [25] of her decision to find, "... I do not find it credible that an accountant (even one as disorganised as could be evidenced by the failure to comply with Company House regulations) would not provide a draft tax return to a client and ask for approval

before submitting it to HMRC". The Judge went on to criticise the appellant for failing to check the return himself or follow up the lack of information with the accountant. The Judge then went on to find there was no evidence of what had been provided to the accountant.

27. Mr Gajjar has argued that the Judge's approach in paragraphs [24] and [25] were flawed when taken together whereas Mr Bates submitted the Judge had followed the guidance in Khan and had not placed the burden of proof on the appellant.
28. Whilst I acknowledge the Judge spent considerable time reviewing the evidence and making findings, I am satisfied there is an error in law.
29. The Judge did not address the fact the P60's did not total the amounts submitted in the tax return which brought into question what figures the accountants submitted. The Judge criticised the appellant for producing no evidence from the former accountant overlooking the fact the firm had been dissolved in January 2015. The Judge accepted the accountants may have messed up the previous years accounts and whilst the discrepancy was larger the appellant's explanation was the same for this second year as it was for the first. The issues raised by Mr Gajjar do go to the core of the assessment and I find there has been an error in law for this reason.
30. Evidence will be required in this appeal and I am also conscious of the recent approach taken by the Court of Appeal in Balajigari. The respondent should satisfy himself that the decision letter issued in this appeal does not fall within the type of case dealt with by the Court of Appeal. I remit this matter back to the First-tier Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

### DECISION

31. There was an error in law and material error in law and I set aside the decision and I remit this matter back to the First-tier Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

Signed

Date 29/04/2019



Deputy Upper Tribunal Judge Alis