Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/05919/2018

THE IMMIGRATION ACT

Heard at Civil Justice Centre Manchester
On 13th May 2019

Decision & Reasons Promulgated
ON 31ST May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr Muhammad Zeeshan Butt

(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Bates Senior Home Office Presenting Officer

For the Respondent : Mr Ahmed instructed by KM Solicitors Ltd

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Davey promulgated on the 28th of December 2018 whereby the judge allowed Mr Butt's appeal against the decision of the respondent to refuse the appellant's claims based on Private Life

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under Article 8 of the ECHR, with reference to paragraph 276B and paragraph 322(5) of the Immigration Rules.

2. I have considered whether or not it is appropriate to make an anonymity direction. Having considered all the circumstances I do not consider it necessary to do so.

3. Leave to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Chalkley on 20 March 2019. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

Factual background

4. Mr Butt had entered the United Kingdom on 2 April 2006. He had had leave throughout and therefore by December 2016 had accrued 10 years "lawful long residence" in the United Kingdom.

5. During the period that Mr Butt had been in the United Kingdom one of the applications, which he had made, was on 5th August 2010 for leave as a Tier 1 General Migrant. In support of that application the appellant had submitted evidence that his income at that stage was £43,525.88 p from all sources for the period 23 July 2009 to 11 July 2010. The alleged income was made up of £23,093.88 p from Pay As You Earn employment and £23,223 self-employment.

6. [The appears to be some discrepancy in the figures quoted by the respondent. The figures set out add up to £46,316.88 p].

7. By reason of the income the appellant was awarded 25 points for previous earnings. To be entitled to the points the appellant had to have earnings of between £40,000 - £49,999 for the relevant year. The appellant required 25 points in order to achieve the 80 points necessary to satisfy the rule as a Tier 1 General Migrant. As a result of the declared income Mr Butt achieved the required points and was granted leave as a Tier 1 General Migrant.

8. In response to the present application on 24 May 2017 the SSHD wrote to Mr Butt requiring him to complete a tax questionnaire, part of which required him to either include a tax summary or SA 302s for the years that he had been self-employed. As part of that questionnaire Mr Butt was required to disclose whether or not he had ever needed to correct or resubmit a tax return.

9. Mr Butt accepted that he had had to resubmit a tax return for the period 2009 to 2010 referred to above. He had resubmitted the tax forms in May 2016. The tax returns originally submitted declared a total income for the period in question of £20,156 including £16,768 from PAYE employment and £3388 from self-employment. There was therefore a discrepancy between the income declared to UKVI and to HMRC of over £23,000.

10. If the figure of £20,156 earnings for 2009-10 had been declared to UKVI at the time of making the application referred to above the appellant would have received no points for previous earnings and would not have met the requirements of the rules. Alternatively if the correct figures had been declared to HMRC there would have been an additional tax liability at that time of over £5423.64 p.

11. It appears that on 12 May 2016 the appellant submitted a revised tax calculation for the period 2009-10 showing income received of £40,191 including £16,768 from PAYE employment and £23,423 from self-employment thus reflecting an additional £20,035 from self-employment.

12. There is not only a discrepancy on the self-employment earnings but a discrepancy on the PAYE earnings.

13. In considering the appellant's application for indefinite leave to remain the respondent relied upon paragraph 322(5) of the Immigration Rules in that the appellant had either submitted a false tax return to HMRC or had submitted false information to UKVI.

14. The approach to be taken with regard to issues arising under paragraph 322(5) have been set out in the cases of R (on the application of Khan) v SSHD (dishonesty, tax return, paragraph 322 (5)) UKUT 00384 (IAC) and Balajigari v SSHD [2019] EWCA Civ 673.

15. The case of Khan from paragraph 32 onwards sets out the approach to be taken to assessing whether paragraph 322(5) of the Immigration Rules is engaged. Material in that regard is paragraph 33 of the judgement which provides: –

> *"33. It is further the case, in my judgement, that for an applicant simply to blame his or her account for an "error" in relation to the historical tax return will not be the end of the matter. Thus, the Secretary of State is entitled to take into account that even where an account has made an error, the account will or should have asked the taxpayer to confirm the return was accurate and to sign the tax return and furthermore the applicant will have known of his or her earnings have expected to pay tax thereon. Thus, in this case the applicant not pay tax of almost £15,000 when he would have expected to do so in the Secretary of State is therefore entitled to ask why, put on notice in this way that something was wrong, the "mistake" had not been remedied earlier."*

16. The case goes on to indicate that whilst an error by an accountant may be a reason for an applicant to show that he was not dishonest but was careless. However in paragraph 34 judgement clearly highlights consideration has to be given whether or not there was a genuine error on the part the account whether this is simply an attempt to pull the wool over their eyes

17. With respect that seems to be the core of the present case. In assessing the present case the judge does not have any explanation from the previous

accountant or acceptance that an error had been made and how that error arose. As indicated in the case law the Secretary of State was entitled where there was such a discrepancy to consider that it required an explanation. It was for the appellant to explain how the error arose. Merely blaming the accountant was in the circumstances insufficient. There needed to be evidence as to how the error arose and evidence from the accountant they accepted that the error was theirs.

18. The judge takes into account the approach by HMRC but that of itself does not deal with how the error arose in the alleged firm of accountants nor an acceptance by the firm of accountants that it was their error. Nor does it seek to analyse the circumstances. It seems merely to rely on the fact that HMRC have not imposed any penalty.

19. As identified in the case law there may be many reasons why HMRC do not impose a penalty, none of which impinge upon or reflect a view on their part of the appellant's behaviour. The judge in the present case appears to be much influenced by his view of why no penalty was imposed by HMRC.

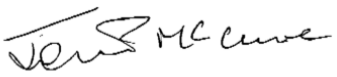
20. It was necessary for the judge to look at how the error arose and whether there was an explanation for the error from the accountants, including correspondence between the accountants and the client to show why the error arose. A mere assertion on the part of the appellant that it was the fault of his accountants was insufficient. That is made plain by the guidance in the cases where it is clear that an individual has to sign and check their tax returns. The caselaw makes clear that some explanation is necessary as to why expecting to may substantially greater tax payments an individual signed tax return which they knew or should know was clearly incorrect.

21. In the circumstances the judge has failed properly to assess the issues in the case specifically those identified the case law. I find that that is a material error of law.

22. The only course is for the matter to be returned to the First-tier Tribunal for a proper assessment to be made of the issues in the case.

Notice of Decision

23. I dismiss the appeal on all grounds.



Signed

Deputy Upper Tribunal Judge McClure Date 28th May 2018