Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05931/2018
& HU/08298/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2019	**On 20th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NASIR ARSHAD
SERISH NASIR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Ms R Bagral, counsel.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the applicants' appeal against the decision of 14 February 2018 refusing them indefinite leave to remain as the first applicant fell within the provisions of para 322 (5) of HC 395 as amended. In this decision I will refer to the parties as they

were before the First-tier Tribunal, the applicants as the appellants and the Secretary of State as the respondent.

Background

2. The appellants are citizens of Pakistan, born on 31 December 1983 and 19 April 1989 respectively. They are husband and wife. The first appellant entered the UK as a student on 5 November 2006 with entry clearance valid until 31 December 2008. He was granted further extensions of leave to remain as a Tier 1 (Post-Study Work) migrant and then as a Tier 1 (General) migrant. On 5 November 2016 he applied for indefinite leave to remain based on 10 years continuous lawful residence. The second appellant is dependent on the first appellant's application.

3. This application was refused under the provisions of para 322(5) as it was the respondent's view that it was undesirable to permit the first appellant to remain in the UK in the light of his conduct, character or associations. In consequence, he could not meet the requirements of para 276B(ii) and (iii) for a grant of leave to remain on the grounds of long residence.

4. The respondent reached this decision as she was satisfied that the first appellant had used deception when making his applications for further leave to remain on 1 April 2010 and 2 December 2013 by giving figures for his earnings from his self-employment which contradicted those given in his tax returns to HMRC. In his application made in 2010 he gave the total figure for his earnings from self-employment in his Tier 1 application as £17,635, whereas in his tax return he gave a figure of £3,895. His accountants calculated his tax liability for the financial year ending 2010 as £23.80 whereas on the larger figure it should have been £3701.

5. In his evidence, the first appellant said that he queried the figure of £23.80 with his accountants but they said it was correct. When he made his application for indefinite leave to remain in 2016, he telephoned his accountants to get them to confirm that all the figures for his accounts were correct and it was then that the errors relating to his earnings from self-employment for the financial year ending 2010 and subsequent years were discovered [19]. Subsequently, amended tax returns were filed for the financial years ending 2012, 2013 and 2014, disclosing underpayments of tax for these three years of respectively £4158.19, £2974.87 and £3329.76. The underpaid tax has been paid in full by the first appellant together with interest [20].

The Hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, it was agreed between the parties that it was for the respondent to raise a prima facie case of dishonesty against the first appellant and that if the evidence provided did not establish such a case, then the refusal would be unsustainable. If a prima facie case of dishonesty was established, it would be for the first appellant put forward a reasonable answer to the respondent's allegations and, were he unable to do so, the respondent's objection would prevail, whereas if he did so, then the objection would fail [16]. It was further agreed that if the judge found that the first appellant had behaved in a dishonest

manner, then he could exercise the discretion contained within para 276B as a refusal under that paragraph was not mandatory [17].

7. It was the first appellant's evidence that his accountants had made mistakes involving large sums in his tax returns for years ending 2010, 2012, 2013 and 2014. The judge referred to a letter from the first appellant's accountants of 8 February 2016 in which it was said that they understood that their client acted had "acted honestly and rectified the error when it came to his attention" [21]–[26]. He said that that letter was ambiguous as it might be read as stating that the first appellant had provided the inaccurate information [24].

8. However, there was a later letter dated 22 June 2017 in which the accountants confirmed that the net profit for the period from September 2009 to March 2010 for self-employment was £17,635 but the accurate turnover figure provided by the first appellant for the preparation of the tax return for the year ended 5 April 2010 was understated due to a calculation error in a spreadsheet. The judge said that that wording corroborated the first appellant's statement that his accountants had told him that the mistake had arisen as a result of an error in their spreadsheet and that the fault was theirs [30].

9. The judge summarised his findings as follows:

> "34. However, whether the mistakes in the tax returns for years ending 2012 to 2014 resulted from faults by Mr Arshad or his accountants, I am not satisfied that the errors contained in them were caused by Mr Arshad's dishonesty. I am not prepared to conclude that Mr Ashad had provided inaccurate information to his accountants for those years, without having documentary evidence to see what precisely he did submit to them. Even if the material he submitted to them was inaccurate, I would have to decide in the light of that material, whether in submitting the material he did he was acting dishonestly.
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> 35. After considering all the evidence I had before me, oral and documentary, I have come to the conclusion that the respondent has not discharged the burden on her of demonstrating, on the balance of probabilities, that Mr Arshad behaved dishonestly in submitting the tax returns that were initially submitted for years ending 2010, 2012, 2013 and 2014. In addition, she has failed to demonstrate that he acted dishonestly in providing the financial information he did in support of the applications he made to her for leave to remain dated, respectively, 1 April 2010 and 2 December 2013."

The Grounds of Appeal and Submissions

10. In the respondent's grounds of appeal, it is argued that the judge erred in law by failing to take into consideration that the first appellant was responsible for signing off his accounts and the fact that the misunderstanding in the figures was to his advantage; the judge misunderstood the approach he should have taken as only the first appellant or his accountants could provide evidence of what documentation he had provided to his accountants and the first appellant benefited from his failure to provide documentation; there was no regard to the delay of four years in rectifying

the discrepancy and the decision of HMRC not to apply a penalty should have been regarded as irrelevant.

11. Ms Isherwood adopted her grounds. She referred to the judgment in R (o.a.o. Shahbaz Khan) v Secretary of State [2018] UKUT 384 and submitted that the judge had been entitled to infer dishonestly from the discrepancy in the figures submitted by the first appellant to the respondent and to HMRC. But when considering his explanation, the judge had failed to resolve the factual issue highlighted at [34], whether the inaccuracy in the information submitted was the fault of the first appellant or his accountants.

12. Ms Bagral submitted that the judge had properly directed himself in accordance with the principles set out in Shahbaz Khan. He was fully aware of the fact that amended tax returns had been submitted and that no penalty had been incurred. He was aware of the delay in bringing the matter to the attention of HMRC. The judge's comment that he had not been supplied with documentary evidence about precisely what the first appellant had submitted to his accountants did not undermine his finding of fact that on the evidence before him the respondent had failed to discharge the burden of demonstrating dishonesty.

Assessment of the Issues.

13. I will deal with the respondent's grounds in turn. It is asserted firstly that in paragraphs 28-34 the judge gave no consideration to the basic principle that the first appellant was responsible for approving and signing off his accounts but simply accepted his account that for the years in question he was an unfortunate and innocent victim of a misunderstanding. However, there is no reason to believe that the judge was not fully aware that the first appellant had to sign off his accounts. It was his case that he relied on his accountants, the judge noting the first appellant's evidence at [28] that he was not a "money man" and that he had always relied on the accuracy of the information given to him by his accountants and paid what he was told to pay.

14. It was a question of fact for the judge to decide what weight to give to this evidence. This ground does not raise an issue of law. It seeks to reargue an issue of fact. The grounds then argue that the judge had no regard to the fact that this misunderstanding was to the first appellant's financial advantage as it meant that he did not have to pay his tax on time. The fact that it was to the first appellant's advantage is self-evident as is the fact that the first appellant subsequently rectified matters. The judge would have been well aware of this. This ground again raises issues of fact, which were for the judge to assess in the light of the evidence as a whole.

15. It is then argued that the judge misunderstood the approach he should have taken. There is no substance in this ground. The judge's self-direction on the law at [16] is entirely consistent with the judgment of the High Court in Shahbaz Khan as summarised in the italicised headnote. It is argued that the judge erred at [34] of his

decision when he said that he would not find against the first appellant unless he could see what evidence he had provided to his accountants. It is argued that the only people who could provide this evidence were the first appellant and his accountants and it is difficult to see how the first appellant should benefit from his failure to provide this evidence and to allow it to be tested.

16. I am not satisfied that this ground indicates that the judge erred in law. He had to determine the appeal on the basis of the evidence before him. In his assessment of the evidence, the judge was entitled to comment on the absence of evidence he might have expected to see, but it is then for him to decide what inferences of fact to draw from the failure to produce that evidence. The judge was aware that there was or might be evidence, which was not before him but, nonetheless, he had to decide what findings to make on the evidence which was before him. I am satisfied that the judge in his comment in [34] was simply making the point that the evidence before him was not sufficient to satisfy him that the first appellant had been dishonest.

17. It was also argued that the judge had no regard to the timing of the first appellant's attempts to rectify the position but, again, he must have been aware of this as it was clear from the chronology and it was him to decide what weight to attach to the delay. It is argued that the conduct of HMRC in deciding what penalties to apply to the late payment were a matter for that organisation and that their decision has no impact on the decision whether or not leave should be granted. There is no substance in this ground. No penalties were imposed, and reasons were given in the letter from HMRC dated 12 May 2016 as follows: "In this instance we have reduced the maximum amount payable, 100% of the tax, to 0 due to abatements for telling of 30%, helping 40% and giving access 30%". The fact that HMRC chose not to impose a penalty, whilst by no means determinative, was nonetheless a factor the judge was entitled to take into account.

18. In summary, I am not satisfied that the judge erred in law by finding that the respondent had not shown on a balance of probabilities that the first appellant had acted dishonestly. There were grounds on which the respondent could properly infer that the first appellant had been dishonest, but he provided an explanation which the judge was entitled to accept and to find, in consequence, that the respondent had failed to discharge the onus of proving dishonestly. This was a question of fact for the judge to assess in the light of the evidence as a whole. Whilst another judge might have reached a different decision, this judge reached a decision properly open to him for the reasons he gave.

Decision.

19. The First-tier Tribunal did not in law and the decision to allow the appeal stands.

Signed: H J E Latter Dated: 14 March 2019

Deputy Upper Tribunal Judge Latter