Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07730/2017
HU/16362/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2019	**On 15 February 2019**

Before

UPPER TRIBUNAL JUDGE PITT
H H STOREY, JUDGE OF THE UPPER TRIBUNAL

Between

MR ALI HAIDER KHAN
MRS SHAHLA KHAN

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr F Farhat of Gulbenkian Andonian Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision issued on 27 June 2018 of First-tier Tribunal Judge Talbot which refused the human rights appeal of Mr and Mrs Khan.

2. At the beginning of the hearing Mr Farhat renewed an application for the appeal to be adjourned pending the outcome of a challenge in the Court of Appeal to the respondent's approach to paragraph 322(5) of the Immigration Rules. Mr Farhat

maintained that the case had recently been heard over a number of days in the Court of Appeal and that a decision was expected within approximately two to three months. We concluded that the correct approach was to apply the law as it stands, avoiding delay. We were also not provided with any details of the matter in the Court of Appeal in order to be able to asses if it was relevant to this case. We concluded that it was in the interests of justice to proceed and refused the adjournment request.

3. Mr Khan is a national of Pakistan, born on 25 July 1982. The second appellant is his wife, also a national of Pakistan, born on 30 December 1980. In all material regards in this matter, Mrs Khan's claim is dependent on that of her husband. For the purposes of this decision, therefore, we refer only to Mr Khan as the appellant and to the facts of his claim.

4. The background is that Mr Khan came to the UK on 22 February 2007 with entry clearance as a student which was valid until 24 June 2008. He obtained further grant of leave as a student until 30 June 2009. He then applied for leave as a Tier 1 (Post-Study Work) Migrant and obtained leave until 22 April 2011. On 26 March 2011 he applied for further leave to remain as a Tier 1 (General) Migrant and was granted leave until 11 May 2013. On 30 April 2013 he applied for further leave to remain as a Tier 1 (General) Migrant and was granted leave until 12 June 2016.

5. On 6 June 2016 Mr Khan applied for indefinite leave to remain (IILR) as a Tier 1 (General) Migrant, varying that application to one for ILR on the basis of long residence on 7 February 2017.

6. The respondent refused the application for ILR in a decision dated 26 June 2017. The respondent applied paragraph 322(5) of the Immigration Rules which states that an application may be refused on the basis of:

> "(5) The undesirability of permitting the person concerned to remain in the United Kingdom in light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;"

7. The respondent's specific reasons for applying paragraph 322(5) were as follows:

> "On a previous application you submitted on 26 March 2011 for leave to remain as a Tier 1 migrant you claimed self-employed net profit of £33,102 between 30 July 2010 and 10 March 2011, however information provided by Her Majesty's Revenue and Customs (HMRC) confirms you declared net profit of £9,320 for the 2010/11 tax year.
>
> From the information provided by HMRC above and Home Office records we have confirmed that there was a discrepancy of £23,782 between what you declared in net profit to the Home Office and what you declared to HMRC for the 2010/11 tax year. When questioned about the discrepancy you claimed that your previous accountants, Agha Associates, made an error on your tax return and you were not aware that there was an issue until your new accountant, Kingsway Accountants reviewed all your tax affairs before you submitted an application for indefinite leave to remain in 2016.

> You stated that you provided your accountant with invoices and bank statements from them to prepare your tax return. It is not considered credible that a registered accountant would submit a self-assessment tax return for the period 2010/11 tax year declaring net profits through self-employment when they had all the relevant information which are significantly lower than those claimed on your Tier 1 application of 10 March 2011. It was your responsibility to ensure that your tax return was submitted on time with the correct information and by failing to do so it is considered that you have been deceitful or dishonest in your dealings with HMRC.
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> You claim that you retrospectively filed an amended tax return for the 2010/11 tax year in 2016 and have now fully paid any outstanding tax. However you did not provide any evidence of this and the information disclosed by HMRC to us on 28 April 2017 shows no record of any amended tax returns. It is noted that HMRC records can take some time to update and it is accepted that you may have submitted an amended tax return for 2010/11. However, whether you submitted an amended tax return or not would have no impact on the outcome of this application. It is the Secretary of State's view that you only sought to rectify your tax returns for 2010/11 in the knowledge that you will be called to account for your previous returns when applying for your indefinite leave to remain application.
>
> It is acknowledged that paragraph 322(5) of the Immigration Rules is not a mandatory refusal, however the evidence submitted does not satisfactorily demonstrate that the failure to declare to HMRC at the time any of the self-employed earnings declared on your previous application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant was a genuine error. It is noted that there would have been a clear benefit to yourself either by failing to declare your full earning to HMRC with respect to reducing your tax liability or by falsely representing your earnings to UK Visas and Immigration to enable you to meet the points required to obtain leave in the United Kingdom as a Tier 1 (General) Migrant."

8. The appellant appealed against the respondent's decision to the First-tier Tribunal. In the grounds of appeal, he maintained his submission that he was unaware of an error made by previous accountants, Agha Associates. He maintained that he had retrospectively paid his full tax liability to HMRC prior to the respondent's decision. The appellant had chosen to flag up the discrepancy in his application and the questionnaire provided to him on 7 February 2017 as part of his application for indefinite leave to remain. He also maintained that the respondent had not met the initial burden of proof for the allegation of undesirable character or conduct.

9. The appeal came before First-tier Tribunal Judge Talbot on 8 June 2018. In his decision dated 27 June 2018 the judge summarised the respondent's decision in some detail in paragraph 5. The appellant's oral evidence was recorded in paragraphs 7 to 13. In paragraph 11 the judge records the appellant's oral evidence as follows:

> "In 2016 the appellant went to a firm of consultants called Kingsway to deal with his affairs in connection with his ILR application. They asked him for details of his business accounts for the previous six years. The Appellant provided Kingsway with evidence such as old invoices, showing that he had earned in the region of £41,000 for the tax year 2010-11 (£33,000 from self-employment and £8,000 from employment) and they queried with him why he had only had a tax liability of £2,636 for that year (on

the basis of self-employed income of only £9,000). In order to remedy this matter Kingsway then contacted HMRC and paid the 'back tax' for that year on the basis of the income actually earned. The HMRC accepted this and did not impose a penalty payment on him."

10. In paragraph 14 the judge recorded the Home Office Presenting Officer's submissions. The submissions included a reference to the appellant providing Kingsway Accountants with evidence showing his earnings from 2010 to 2011. The Presenting Officer pointed out that the appellant had not produced that evidence to the Tribunal. The Home Office Presenting Officer also submitted that there was no evidence from Kingsway Accountants about their role in assessing the appellant's tax liability and repaying the sum due from the 2010/2011 tax return. about the matter.

11. In paragraph 15 the judge summarised the oral submissions made for the appellant. The decision records that Mr Farhat, who also represented before the First-tier Tribunal, referred to an unreported Upper Tribunal decision, **Parveen & Saleem v SSHD JR/9440/2016**. Mr Farhat maintained that the respondent had not met the burden of proof, that the appellant had trusted his previous accountants and that weight should attract to the appellant having remedied the discrepant tax payment from 2010/11, no penalty being imposed by HMRC. Mr Farhat also referred to a Home Office questionnaire dated 7 February 2017 completed with the appellant when he applied for ILR which recorded in the penultimate box that the appellant did not appear to have been coached in order to provide answers and did not appear to lack credibility.

12. In paragraph 18 the judge set out the correct legal test, identifying that where there was an allegation of dishonesty the initial burden of proof initially fell on the respondent and that it was then for the appellant to provide an innocent explanation.

13. The judge concluded in paragraphs 20 to 22 that the appellant's evidence on the discrepancies in the financial declarations to HMRC and the respondent was not credible. The reasoning was as follows:

> "20. The Appellant's evidence as to how he conducted his business affairs in 2010-11 would suggest that he had been extremely naïve. I do not find this credible. He had a Business degree and a MBA in Business from Punjab University; he had been working in the family business in Pakistan; and he had also been studying a postgraduate diploma in Business Management in the UK. He admitted that his studies had included modules in business accounts. Further by 2010-11 he had already spent over three years to adjust to life in the UK. Yet he has said in evidence that he allowed Agha Associates to prepare his accounts without ever seeing them himself or even asking them to send him a copy. He also said that he was never sent a copy of the completed tax return for that year and that he never received the invoices back from Agha Associates that he had sent them for the purpose for preparing his accounts the Appellant must have been aware at least approximately of his net earnings from self-employment for that year (stated as £33,102 in the Tier 1 application) as well as his employed earnings for that year of £8,897. I do not find it credible that he would not have queried a total tax liability of £2,636.

21. There is a great dearth of evidence to corroborate his business activities for the year 2010-11. He said in evidence that at the time of remedying his tax default, he had been able to re-calculate his self-employed income for that year through invoices from Crestplus and by getting details of his old accounts from Crestplus. Yet none of this evidence was provided for the appeal. There was also no documentary evidence (for example in the form of business correspondence) about the Appellant's dealings with Agha Associates apart from very brief emails regarding his login details and bank statements showing him having paid the firm for their work for him. Whilst I accept that it can be difficult to access evidence from past years, I would expect the Appellant to have been able to provide the Tribunal with at least some evidence from the companies for whom he worked for that year in support of the claimed level of work that he did for them. Mr Farhat asked me in submissions to consider the evidence of the Appellant's work record since 2010-11. I note in passing that according to HMRC records (provided by Respondent), his total taxable income for the following year (2011-12) was only £20,941 (all of it being from self-employment) which is far less than the total of over £40,000 taxable income that he claims to have earned for 2010-11.

22. Having carefully considered the evidence before me, I do not believe that the Appellant is a credible witness he would have been aware that in order to gain the requisite number of points for a Tier 1 (general) applicant, he needed to show a sufficient level of earnings. I do not believe that his earnings were in fact at the level claimed or that the Appellant genuinely believed them to be at that level when the application was submitted and I do not believe that he has given a true account of his dealings with Agha Associates. Having considered the evidence in the round, I am satisfied that the Respondent has met the burden of proof that was upon her that the Appellant knowingly provided false information about his earnings in his Tier 1 application in order to obtain leave to remain. The true level of his earnings is likely to have been that reflected in the tax calculations set out in his self-assessment for 2010-11. I am satisfied that the Appellant would have been well aware at the time of the discrepancy between the figure given in his Home Office application and the figure subsequently given in his tax return. I find that the Respondent was fully entitled to exercise her discretion in refusing the Appellant's long residence application on the basis of paragraph 322(5) of the Immigration Rules in the light of the Appellant's conduct which made it undesirable for him to be granted leave and thus profit from his previous deception."

14. The appellant appealed against the decision of the First-tier Tribunal and was granted permission to appeal to the Upper Tribunal on 26 September 2018.

15. Paragraph 3 of the grounds refers to the challenge being on the basis of "a sole error of law". The grounds go on to set out that there were two possible ways in which the appellant could be found to be dishonest. The first was in under-declaring income in a tax return to HMRC. The second was over-declaring income to the respondent in an application for leave to remain. It is worth noting that both of those possibilities were encompassed within the respondent's refusal letter, set out above.

16. The grounds go on to assert that at the outset of the hearing the First-tier Tribunal agreed to admit two unreported Upper Tribunal cases. The first was the case of **Sandeep Kadian v SSHD (HU/11723/2016)**. In that decision a Deputy Upper Tribunal judge had found that dishonesty in a tax return, in the manner alleged here, was "regrettable" but could not come within the ambit of paragraph 322(5) as set out in the respondent's policy guidance. The second case that the grounds maintain the judge was asked to admit was that of **Parveen & Saleem v SSHD JR/9440/2016**.

17. The grounds go on to argue that, having admitted these cases, in particular **Kadian**, the First-Tier Tribunal was precluded from finding that paragraph 322(5) could be applied to the appellant regarding any incorrect declarations to HMRC. According to the grounds, that only left open a finding that the appellant was dishonest in his declarations to the respondent. It was argued that the material before the First-Tier Tribunal was not capable of showing that the respondent had met the evidential burden of showing dishonesty in the declarations of income in the 2011 application for leave as no documents from that application were provided.

18. We did not find that the grounds had merit for the following reasons. Certainly, the two unreported cases referred to in the grounds were in the materials before the First-Tier Tribunal. The case of **Parveen & Saleem** is referred to in paragraph 15 of the decision in the summary of Mr Farhat's submissions. The case of **Kadian** is referred to in the appellant's "briefing note" provided to the First-Tier Tribunal.

19. However, nothing in the decision shows that a formal application was made for unreported cases to be admitted or that either of the cases of **Kadian** and **Parveen & Saleem** were formally admitted. There is no reference in any of the materials before us to the First-Tier Tribunal or in the decision to the detailed procedure for admitting unreported decisions, set out in paragraph 11 of the Practice Direction of the Senior President of Tribunals, amended on 13 November 2014. Mr Farhat did not seek to suggest that a formal application of that nature was made to the First-Tier Tribunal. We were not referred to the record of proceedings of the First-Tier Tribunal or provided with the record of proceedings or notes of the representatives who appeared before Judge Talbot. We were not provided with a witness statement from Mr Farhat setting out what was said on this matter in the First-Tier Tribunal hearing. The reference to the case of **Parveen & Saleem** at paragraph 15 of the decision is not an indication that such an application had been made or that the judge had admitted unreported cases or that he had agreed to follow the ratio of those cases.

20. Put simply, it is not our conclusion that the judge "agreed" to either admit or place weight on the ratios of these unreported cases. He was not restricted to considering only the possibility of dishonesty in the appellant's dealings with the respondent and not HMRC.

21. In any event, the judge did not find against the appellant regarding tax declarations to HMRC. He found the appellant had over-declared income to the respondent. We found no error in that part of the decision. At hearing before us, Mr Farhat was asked whether the appellant disputed the figures contained in the respondent's refusal

letter as to his tax declaration from 2010/2011 and his declaration of income in his application for leave made on 26 March 2011. Mr Farhat stated that the appellant did not dispute the accuracy of those figures. His concession was clear. Mr Whitwell relied on it at the outset of his submissions.

22. The undisputed facts before the First-tier Tribunal were, therefore, that the figures for the declarations of income to the respondent and HMRC in 2011 as set out in the refusal letter were accurate. Those figures are manifestly discrepant. As indicated in the headnote of the reported case of **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC):**

    (i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.

23. The initial evidential burden on the respondent was clearly met here by the discrepant figures provided to the respondent and HMRC in 2011. The submission to the contrary in the grounds has no force.

24. It is undisputed that the burden then passed to the appellant to provide an innocent explanation. The grounds do not challenge the reasoning of the First-Tier Tribunal on the appellant's evidence for the discrepant declarations and conclusion that he had been dishonest. The reasoning appeared to us to be sound and in line with the guidance contained in **Khan** on how to approach this part of the assessment. It was open to the judge to place adverse weight on the absence of documents the appellant maintained he had provided to accountants relatively recently and there being nothing from Kingsway Accountants explaining how they had noticed and rectified the incorrect tax return from 2010/11.

25. For these reasons, therefore, we did not find that the decision of the First-tier Tribunal disclosed an error on a point of law.

Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed:  Date: 12 February 2019

Upper Tribunal Judge Pitt