



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/09569/2018
HU/01639/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 26 July 2019**

**Decision & Reasons Promulgated
On 09 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**SAMIA HASSAN (FIRST APPELLANT)
MUHAMMAD HASSAN (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Dhanji of Counsel

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan. The first appellant was born on 15 April 1984. The second appellant, the husband of the first appellant, was born on 7 April 1978.
2. The appellants appealed against the respondent's refusal to grant them leave to remain in two decisions dated 20 December 2017 and 16 April 2018.

3. In a decision promulgated on 6 March 2019, Judge Seifert (the judge) allowed both appeals. As regards the appeal of the second appellant, the judge found the grounds in 322(5) of the Immigration Rules were not made out. The respondent had also refused the application under paragraph 276B(iii) and paragraph 276B(ii)(c) which the judge did not consider were made out. He said it was likely the second appellant would meet the requirements of the Rules. The first appellant's appeal was considered in the light of the refusal of her husband's application. As regards the appeal outside the Rules, the judge repeated that the general ground for refusal under paragraph 322(5) was not made out and that there were exceptional circumstances.
4. The grounds claim the judge made a material error. The grounds are set out in detail which I do not propose to repeat here. Briefly, they allege that the judge made a material misdirection in law and failed to apply the reasoning of the Upper Tribunal in **Khan (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** in assessing whether the second appellant had acted dishonestly in relation to his dealings with UKVI or HMRC. Two judicial review cases were also relied upon, **Samant [2017] UKAIT JR/6546/2016** and **Abbasi JR/13807/2016**.
5. Judge Hollingworth refused permission to appeal in a decision dated 24 April 2019.
6. He said:

*"No error of law vitiates the decision which would lead to a different outcome. The judge has implicitly considered the salient criteria set out in **Khan**. At paragraph 22 the judge has referred to Mr Hassan having had strokes three times. The judge referred to the effect of the strokes. Medical evidence had been provided. The judge has referred to the letter from the accountants accepting prejudice to their client due to errors which had been made. The judge has referred to the footings of tax liability. The judge was entitled to conclude on the basis of the sustainable analysis set out that Mr Hassan was a credible witness. The explanations put forward were accepted. The judge has depicted the backcloth to the acceptance of those explanations by referring to the extent of the available evidence. The judge has set out the chronology in relation to the discrepancies. The judge was entitled to refer to no penalty having been imposed. This reference was made on the footing of the confirmation. The position adopted by HMRC did not play a material role in the reaching of the judge's conclusions. The judge has dealt with the issue of the allocation of losses".*
7. The grounds were repeated to the Upper Tribunal. An additional observation was made that Judge Hollingworth noted that the Tribunal referred to a letter from the appellant's former accountants as forming part of the credibility assessment. That finding was based on the

understanding that the accountants' letter was unchallenged but that was not the case. Following **Khan** the Tribunal should have applied a critical scrutiny to this evidence and noted that the accountant had not been tendered for cross-examination. On that basis, it was submitted that there was little weight that should have been applied to that evidence. It followed that the Tribunal's finding that there was a reasonable explanation for the appellant's conduct was necessarily weakened.

8. Upper Tribunal Judge Pickup granted permission on 24 June 2019. He said, inter alia:

- “1. It is arguable that the judge took an unduly generous view of the second appellant's explanations for the significant discrepancy between his HMRC declaration of income and that provided to the respondent on his previous application for leave to remain. Following **Khan**, when assessing whether the second appellant acted dishonestly it is arguable that the judge should have adopted a more critical scrutiny, noting that the accountant was not called as a witness so that little weight should attach to the letter. In effect, the judge absolved the appellant of liability for his tax submission showing a significantly lower income.*
- 2. It is arguable that these matters fatally undermine the findings that there was a reasonable explanation for discrepancies. The fact that no penalty was imposed by HMRC was not probative of the issue either way and the decision is arguably in error for that additional reason”.*

Rule 24 Response

9. Mr Dhanji handed up his Rule 24 response which was dated 16 July 2019. Although the judge did not refer to **Khan (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** it was clear that from his reasoning he applied the guidance in **Khan** as amended by the Court of Appeal in **Balajigari [2019] EWCA Civ 673**. The judge acknowledged that the discrepancy between earnings declared to HMRC and the Home Office gave rise to a suspicion of dishonesty that required the appellant to provide a plausible explanation and the judge went on to assess whether that explanation was satisfactory.
10. At [17] of his decision, the judge noted that Mr Hassan was credible. He was persuaded by the medical evidence adduced relating to the three strokes he suffered in 2011, 2014 and 2017 and by his evidence about the effect the strokes had on the way in which he conducted himself in his tax affairs. He had relied on his accountant to assist him. The judge assessed whether the explanation for the error by the accountant was plausible which approach reflected that suggested in **Khan**.

11. The judge found that Mr Hassan had discharged the evidential burden and that discrepancies had “been satisfactorily explained”. That was a conclusion open to the judge on an assessment of the evidence.
12. The challenge on the part of the Secretary of State rested on nothing more than a disagreement with the judge’s conclusions.

Submissions on Error of Law

13. Mr Dhanji relied upon his Rule 24 response I have set out above.
14. Mr Tarlow relied upon the grounds.

Conclusion on Error of Law

15. **Balajigari** considered 322(5) and found that ongoing use of the same could lead to unfairness because decision makers were proceeding directly from finding that the earnings discrepancies were the result of dishonesty without giving applicants an opportunity to proffer an innocent explanation. The court approved **Khan** and held that an earnings discrepancy only constituted sufficiently reprehensible conduct if it was as a result of the applicant’s dishonesty. Carelessness or ignorance or poor advice were not conduct making it undesirable for the applicant to remain here. However regrettable, such “genuine” or “innocent” errors did not meet the necessary threshold. The judge considered the circumstances of the errors in considerable detail at [15]-[24]. The judge carried out a comprehensive and careful analysis taking into account considerable documentary evidence including the appellant’s significant health issues between 2011 and 2017. The judge found at [24] that taking into account the evidence and explanations including reliance by the appellant upon his professional advisers’ advice, it had not been shown that a ground for refusal under 322(5) had been established. The discrepancies were not the result of any dishonesty or intention to deceive or mislead. There was no penalty imposed by HMRC for the error corrected by the amendment. It was irrelevant that the accountant failed to attend to give evidence. The judge carried out an appropriate analysis under **Khan** and **Balajigari**. He gave clear and cogent reasons for his decision which he was entitled to come to on the evidence before him.
16. The grounds disclose no error of law. The judge’s decision shall stand.

No anonymity direction is made.

Signed

Date

29 July 2019

Deputy Upper Tribunal Judge Peart