



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10906/2018
HU/14162/2018

THE IMMIGRATION ACTS

Heard at Field House
On 13 March 2019

Decision and reasons Promulgated
On 28 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RASHID [M]

BIBI [M]

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Ms S Jones, Senior Presenting Officer

For the respondent: Ms Jones of Counsel

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondents are citizens of Pakistan born on 5 May 1977 and 14 March 1985 respectively. However, for convenience, I refer below to the respondents as the appellants and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal. I should also consider the

first appellant's appeal because the second appellant's appeal rests or falls with that of the first appellant.

2. The Secretary of State appeals with permission to the Upper Tribunal against the decision of First-tier Tribunal Judge Adio promulgated on 14 December 2018, allowing the appellants appeals against the decisions of the Secretary of State dated 1 June 2018 20 June 2018 respectively to refuse them leave to remain in the United Kingdom.
3. Permission was granted First-tier Tribunal Judge Davies who in a decision dated 11 February 2019 said that it is arguable that the Judge did not apply the recommended considerations to the evidence as indicated in the case of, **R (on the application of Khan) v the Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5) [2018] UKUT 00384 (IAC)**. Indeed the Judge has made no reference to the case, which in itself, it is arguable, amounts to an error of law.
4. First-tier Tribunal Judge allowed the appellant's appeal and found that the respondent has discharged the initial burden of proof by raising discrepancies in the tax figures. The amount is a considerable sum of money which was accepted by Mr Gajjar. The difference what was paid and what is due is about £17,000.
5. The appellant's explanation for the discrepancy in figures was accepted by the Judge who found that Nafia Financial Services, who was hired to file appellant's accounts with HMRC had made a big mistake. The Judge found it credible that the appellant looking at his payslip, was more concerned about his pay rather than how much tax had been deducted. He also bore in mind that the second appellant had tuberculosis which is a serious disease and that they just had a baby which could have taken his eye off the ball with regards to the 2012/2013 figures.
6. The appellant's explained that his tax return of 2010/2011 that the turnover and business expenses figure in this tax return was not correctly assessed and reported. They noticed that some business expenditures were deducted twice in trading accounts by one of their staff members, by using the incorrect formulas in Excel worksheet. For the 2012/2013 tax return the appellant provided business records in different parts and the fact remains that the accountants themselves did not enter it into Excel for calculations of the profit figures for the tax. They apologised for sending incorrect or incomplete information to HMRC. The Judge found the appellant's explanation innocent. the appellant was entitled to trust the work of his accountants and at best it can only show that he was a bit careless for not verifying the figures for the cost to him which she clearly admitted were done instead of just signing the tax form. carelessness does not amount to dishonesty

7. The HMRC has accepted the amendments made by the appellant and have imposed no penalty upon him and the appellant who is now amended his tax return.
8. The Judge allowed both appellants appeals and said that they have satisfied the requirements of paragraph 276 B of the immigration rules and the respondent has not successfully shown that paragraph 322 (5) applies to the appellant's case. He allowed their appeals under "Article 8".

Grounds of appeal

9. The respondent's grounds of appeal which I summarise are the following. The appellant's applications for indefinite leave under paragraph 276B of the immigration rules was refused under paragraph 322 (5) of the immigration rules. This was due to the discrepancies in the appellant's declared income to HMRC for tax purposes and the UKVI in his further leave applications.
10. The first-tier Tribunal Judge failed to apply the reasoning of the upper Tribunal in the case of **R (on the application of Khan) of the Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5) [2018] UKUT 00384 (IAC)** when assessing whether the appellant cited dishonesty relations to his dealings UKVI or HMRC.
11. The First-tier Tribunal Judge did not follow the recommended steps in **Khan** when assessing the appellant's actions and absolved the first appellant of any responsibility to ensure his tax returns are correct. The Judge has not provided reasons for why it is accepted that the appellant would not have been aware of the errors sooner given that his tax liability would have been significantly lower than expected by £17,000. There is also no finding relating to why the significant discrepancy was not rectified by the appellant sooner, given that he would have personally received this tax bill self-employed person. The Judge therefore has materially erred in the assessment of the appellant's actions.
12. The Judge also materially erred in his approach at paragraph 23 of the decision by finding that the actions of HMRC as being determinative of the appellant's actions, given that they have not imposed any penalty or take any action. This approach is not correct.
13. Reliance is placed on the findings of the Upper Tribunal judge the judicial review case of **R (on the application of Samat) v Secretary of State for the Home Department [2017] UKAIT JR** and **Abbasi JR/13807/2016** where there were findings relating to the relevance of the actions that HMRC makes against the appellant.
14. Both cases state that whether HMRC takes punitive action or not, is neither here or there. It states that there are several reasons why HMRC would not take action against a particular person. Therefore, the treatment of reviews by HMRC is not relevant to 322 (5) assessments, and in any event, does not

address the possibility that the original tax records were correct, but the appellant falsified higher earnings for his application under Tier 1.

The hearing

15. At the hearing both parties make submissions whether there is an error of law.

Findings as to whether there is an error of law

16. There was no dispute that there was a discrepancy between the appellant's income which was declared to HMRC in his tax returns and the income that he declared to UKVI for his further leave to remain applications.
17. The Judge did not take into account the recent case of **Khan** as to how to assess cases where there are discrepancies between the income declared to HMRC and the income declared to the respondent for his applications. The Judge clearly found that the respondent had discharged his burden of proof. Therefore, it was for the Judge to analyse the evidence and find whether there was an innocent explanation for the discrepancy of £17,000.
18. The Judge within the guidance given in Khan had to analyse whether the explanation for the error by the accountant was plausible, whether any documents which can be assumed to exist such as correspondence between the applicant his accountant at the time of the tax return has been disclosed. He also has to assess whether there is a plausible explanation for why such documentation is missing. The Judge also has to assess why the appellant did not realise the error sooner because his liability to pay tax was less than he should have expected and whether at any stage have been taken steps to remedy the situation and, if so, when the steps were taken and the explanation for any significant delay.
19. The Judge materially erred in not analysing the appellant's evidence with respect to how to approach the appellant's case within the guidance given in the case of **Khan**. Had the judge done so, he may have come to a different conclusion on the evidence in this appeal.
20. The Judge also erred in finding that because the HMRC has not taken any punitive steps against the appellant, this somehow goes in favour of the appellant. The case law set out by the respondent in his grounds of appeal, make it quite clear that the fact that the HMRC has not issued a penalty notice is neither here or there, because there could be many reasons why HMRC had not do so. Therefore, the Judge fell into error by considering failure by the HMRC to issue a penalty notice as something favourable for the appellant.
21. I find that the judge has not given cogent reasons for why he believed the appellant's explanation for the difference of £17,000 which is a substantial amount of money to be inconsistent about.

22. I therefore direct the appeal be remitted to the First-tier Tribunal's findings of fact to be made against the criteria and guidance set out in the case of **Khan**. The appeal be placed before any First-tier Tribunal Judge other than Judge Adio for a hearing de novo.

Decision

23. The appeal by the Secretary of State is allowed and the decision of First-tier Tribunal Judge is set aside. I remit the appeal to the First-tier Tribunal.

Signed by

Dated this 26th day of March 2019

A Deputy Judge of the Upper Tribunal Judge
Ms S Chana