



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16389/2018
HU/19857/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8th May 2019

Decision & Reasons Promulgated
On 5th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MUHAMMAD NADEEM (FIRST RESPONDENT)
MRS NARGIS NADEEM (SECOND RESPONDENT)
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Ms N Willocks-Briscoe

For the Respondents: Mr Eaton of Counsel

DECISION AND REASONS

Introduction

1. The Appellants born on 10th March 1978 and 1st April 1978 respectively are both citizens of Pakistan and are husband and wife. The Appellants had made application on 24th July 2018 for indefinite leave to remain on the basis of long residence in the UK and the second Appellant leave to remain under Appendix FM and paragraph

276B of the Immigration Rules. The Respondent had refused their applications with reference to paragraph 322(5) of the Immigration Rules. The Appellants had appealed that decision and their appeal was heard by Judge of the First-tier Tribunal Phull sitting at Taylor House on 6th December 2018. The judge had allowed the appeals on human rights grounds. The Respondent sought permission to appeal and permission was granted by the First-tier Tribunal on 4th April 2019. It was said that it was arguable that the judge had failed to give reasons or adequate reasons for accepting the first Appellant's account as credible and secondly had failed to properly apply the decision and reasons in the case of **R v Khan [2018] UKUT 00384**. Directions were issued for the Upper Tribunal to firstly decide whether an error of law had been made by the First-tier Tribunal and the matter came before me in accordance with those directions.

Submissions on Behalf of the Respondent

2. I was referred to the recent decision in **Balajigari [2019] EWCA Civ 673**, in particular paragraphs 40 to 43. It was further submitted the judge did not appear to appreciate that there were two separate periods of concern with respect to the Appellant's tax affairs and the Appellant's evidence that he was depressed because a series of deaths in his family could not have affected those periods that predated the deaths. There was simply an inadequacy of explanation as to why the deaths would have impacted on his ability to deal with matters when looking at the proper return of chronology of the tax return and applications.

Submissions on Behalf of the Appellants

3. It was submitted that it was a high threshold to find an inadequacy of reasons and the judge had given reasons principally based on the Appellant's evidence that his mind was taken with the deaths in his family. It was further said the judge had provided other factors that he had considered in the Appellants' favour. In respect of the case of **Khan** it was submitted that was a judicial review case only and that the matters referred to in **Khan** as being reasons for the arousal of suspicion were only four possible reasons, rather than a checklist.
4. At the conclusion I reserved my decision to consider the documents and submissions made. I now provide that decision with my reasons.

Decision and Reasons

5. The judge set out by way of self-direction the burden and standard of proof at paragraph 4. He said "in immigration appeals the burden of proof is upon the Appellant and the standard of proof is the balance of probabilities". Whilst that is correct in general terms, in this type of case where an assertion of dishonesty is being made by the Respondent it is a misdirection. The case of **Balajigari [2019] EWCA Civ 673** sets out the appropriate position in cases of this nature. At paragraph 43 when reviewing the case of **R v Khan [2018]** the Court of Appeal said

"We consider (as Martin Spencer J did) that the concept of standard of proof is not inappropriate in the present context. This is because what is being asserted

by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation carrying with it serious consequences. Accordingly we agree that the Secretary of State must be satisfied that dishonesty has occurred the standard of proof being the balance of probability but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty”.

6. However whilst the judge did not necessarily direct himself accordingly the issue is whether that led to any material error, particularly given he found in the Appellants’ favour.
7. The judge properly looked at the explanation provided by the Appellant to see whether the Appellant had been involved in any criminality. He gave reasons why he found on balance that not to be the case. In summary at paragraphs 16 to 19 he found the Appellant had not been dishonest for the following reasons:
 - (1) He had paid the tax he was told that he owed and had not seen the final tax return.
 - (2) Following the 2013 return there had been a number of deaths in his family and he had been grieving.
 - (3) He only became aware of the tax issues when he instructed his lawyers in 2015 to apply for leave to remain. He then submitted revised tax returns and paid tax due.
 - (4) He complained to his accountant.
 - (5) Unprompted by the Respondent or HMRC he realised the error in 2016 and rectified it promptly.
8. The judge further found at paragraph 21 that the decision to invoke paragraph 322(5) was inconsistent with the Secretary of State’s own policy guidance dated 11th January 2018 (quoted by the judge at paragraph 15). It is difficult to see how the judge could find that decision to invoke paragraph 322(5) by the Respondent to be inconsistent with her own policy. The policy stated inter alia “a person does not need to have been convicted of a criminal offence for this provision to apply”. The judge further had referred at paragraph 16 to the case of Khan [2018]. R v Khan at paragraph 41 had stated

“The starting point seems to me that when the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC she is entitled to draw an inference that the Appellant has been deceitful or dishonest and should be refused ILR within paragraph 322(5)”.
9. In this decision the Appellant had in his May 2011 application declared a total income of £58,612, including £42,700 from self-employment. In his tax return to HMRC 2010/2011 he claimed to have earned only £12,272 from self-employment.
10. In his application dated May 2013 he claimed total income of £55,922, including £22,300 from dividends. In his tax return for 2012/2013 he had declared a total

income of £31,000 all from PAYE and no self-employed income or dividends. Accordingly there were significant discrepancies in two tax years, both being years where the Appellant made visa applications and as noted by the judge being the only years the Appellant claimed to have been involved in self-employment.

11. The case of **Balajigari** (paragraph 106) further notes

“Each case will depend on its own facts but where an earnings discrepancy is relied upon (and without changing the burden of proof which remains on the Secretary of State so far as an allegation that an applicant was dishonest is concerned) it is unlikely that a Tribunal will be prepared to accept a mere assertion from an applicant or their accountant that the discrepancy was simply a ‘mistake’ without a full and particularised explanation of what the mistake was and how it arose”.

12. Leaving aside the judge’s misdirection on the burden and standard of proof it is clear that he had in mind **R v Khan** and looked at the explanation provided by the Appellant. The discrepancies in this case were significant and also covered two separate tax periods and were coincidental with two separate visa applications in those years. Those years also appear to have been the only two years the Appellant claimed to be self-employed. The higher figures given in the visa applications gave the Appellant points that allowed him to successfully obtain visas he might not otherwise have obtained. In all those circumstances and bearing in mind the commentary in **Khan** and in **Balajigari** there was an inadequacy of reasoning provided by the judge. It was not clear why he found deaths in the family which all postdated the tax returns and relevant visa applications would have caused those significant differences. There is some inconsistency in his finding of when the error was discovered. At paragraph 17 he appears to accept it was in 2015 when his lawyers were putting together evidence for his leave to remain application that would require him to disclose previous earnings when self-employed; whilst at paragraph 19 he refers to “unprompted by the Respondent or HMRC he realised an error in 2016”. He appears to accept the explanation that the Appellant relied upon his accountant to prepare and file tax returns while silent upon the accountant’s letter indicating the Appellant had signed returns before they were sent to HMRC and they the accountants have followed normal procedures. He further found that the Respondent had not followed its own guidance but provided no explanation as to why he found that to be the case particularly bearing in mind that which was said in **Khan** and referred to by the judge within his decision.

13. In summary the judge whilst clearly aware of that case and facts in the case that he was deciding did not regrettably provide an adequate or consistent explanation for his findings in a case where it was incumbent upon the judge to consider whether there had been a full and particularised explanation provided by the Appellant and then an adequacy of reasoning as to why the judge found in favour of the Appellant. That was not adequately done in this case.

Decision

A material error of law was made by the judge in this case such that the decision of the First-tier Tribunal should be set aside and made afresh.

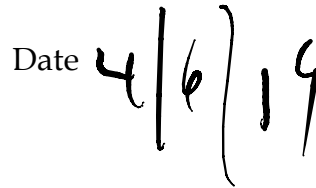
No anonymity direction is made.

Signed

A handwritten signature in black ink, appearing to be 'J. Lever', written in a cursive style.

Deputy Upper Tribunal Judge Lever

Date

A handwritten date '4/6/19' in black ink, written in a simple, slightly slanted style.