Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17274/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 December 2018	**On 9 January 2019**
Decision given orally at hearing	

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE KEBEDE

Between

MD AYAZ KARIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Turner, Counsel instructed by Hubers Law
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought with permission, following the setting aside by the High Court of the Upper Tribunal's original refusal of permission to appeal against the decision of the First-tier Tribunal which, after a hearing on 23 February 2018 at Hatton Cross, dismissed the appellant's human rights appeal.

2. This case involves another of the large number of decisions made by the respondent pursuant to paragraph 322(5) of the Immigration Rules to refuse leave to remain to a person on the basis that it is considered that that person behaved dishonestly; either in under-declaring tax to Her Majesty's Revenue and Customs, or in inflating his or her income for the purposes of obtaining previous leave to remain from the Secretary of State for the Home Department.

3. The decision of First-tier Tribunal Judge Smith notes that the appellant applied for leave to remain in 2011 based on his claimed income of £35,765, which meant he met the relevant income requirements under the points-based system rules for leave to remain. However, through his accountant, the appellant had declared to HMRC that he earned only a third of that amount - some £11,266 - over the same period.

4. The respondent's case was that the appellant had acted dishonestly in over-declaring his income in his points-based application. Alternatively, that he had under-declared his income to HMRC.

5. The appellant said that his under-declaration to HMRC was an innocent mistake at the hands of his then accountant. He had been honest in respect of his 2011 application.

6. Having set out the relevant law the judge at paragraph 22 of the decision turned to the burden and standard of proof. The judge noted correctly that it was for the respondent to establish deception on the balance of probabilities standard and that if the respondent provided evidence to demonstrate deception, then an evidential burden shifted to the appellant to provide a plausible innocent explanation, which if done shifted the evidential burden back to the respondent.

7. The judge noted the evidence which was both in written and in oral form. The oral evidence came from the appellant. The written evidence consisted of various documents. In particular, there was a letter from his then accountants, called MSCO. The first of the letters from MSCO dated 21 March 2011 is described by the judge as follows:-

> "It does not feature a salutation and it is not clear to whom it was addressed. It appears to be in response to a query seeking some form of financial reference for the Appellant. … The operative part of the letter states when the Appellant's tax liabilities for the 2010/11 tax year will be payable ("January 2013"). It states that the Appellant became self-employed on 7 April 2010. It concludes with a warning, identical to the closing paragraph of the second letter [to which the judge would make reference shortly], refusing to take responsibility for the contents of the letter."

8. The second letter to which the judge referred was dated 27 April 2016. This was not addressed to anyone and was in the style of "to whom it may concern". The judge considered it necessary to quote from that letter and we do the same:

> "During the tax year 2010-2011, Mr Karim's income from all sources, which include employment and self-employment, was for the amount of £35,794. However, due to

> clerical error on our behalf [sic], we failed to declare his income from self-employment. As a result, his total income for the year 2010-2011 on the HMRC record showed only £13,824.
>
> Our client approached us in the beginning of 2015 as to inquire his actual tax return for the year 2010-2011 [sic], when we realised that an error was made by us and thereafter we advised him to amend his tax return through his current accountants.
>
> Whilst the information provided above is believed to be true, it is provided without acceptance by MSCO of any responsibility whatsoever and any use you wish to make of the information is therefore, entirely at your own risk."

9. The judge noted at paragraph 29 of his decision that there was no indication as to who the authors of the letters were. He also noted that nobody from the accountants had attended to give evidence. We will come back to that matter in due course.

10. The judge noted at paragraph 30 that the appellant produced a record of interview with the respondent and it was noted that there was a recording of "credible" in that printout.

11. At paragraph 31, the judge dealt with the oral evidence of the appellant. In cross-examination, the appellant said he did not complain to a professional regulatory body about the errors committed by MSCO. He spoke to them about what had happened but did not feel he needed to take the matter further and he had accepted their mistake. He neither sought nor received any compensation from them. He was content to have the letter acknowledged and was said to be "really happy" with the way MSCO had dealt with the situation in 2016. He did not want to upset a professional.

12. Nevertheless, as the judge noted at paragraph 32, the appellant changed to a firm called ABC Accountants in 2013, on the recommendation of friends; and this firm also produced a letter to the judge.

13. The appellant told the judge about the family life he enjoyed with his wife in the United Kingdom.

14. The judge's findings begin at paragraph 34. The judge noted the significant discrepancy identified by the respondent. The judge considered it to be of importance. Either way, the judge said the discrepancies stood to benefit the appellant. They either resulted in a more favourable treatment of his immigration application than he deserved, or, alternatively, they resulted in a significant reduction of his tax liabilities. The magnitude of the sums involved attracted, according to the judge, a corresponding expectation that a person in the appellant's position would have paid extra special attention to the information he gave to the respondent and HMRC respectively.

15. The judge noted at paragraph 36 that it was not necessary for the respondent to establish which of the two possible deceptive activities occurred. It was sufficient that one or other must have occurred. In all the circumstances, the judge considered that the evidential burden had shifted to the appellant and it was therefore necessary to consider the appellant's explanation.

16. At paragraph 39, the judge considered the letter of 27 April 2016 from MSCO. Applying the starred determination in Tanveer Ahmed the judge found that he could place no weight on that letter. It was in the judge's view not reliable. It was not clear who had authored it. The sender did not attend the Tribunal to give evidence, which would be expected, in the judge's view, in a matter of this gravity. There was no written confirmation from the author as to why he or she was unable to attend.

17. At paragraph 40, the judge noted additional documentation said to support the letter but that the judge found that this documentation was marred by grammatical errors which called into question its reliability. The judge also considered it significant that, again, this letter stated that the writer, whoever that might be, was unable to accept responsibility for its contents. In the circumstances, the judge did not consider that it was possible to place significant reliance on this letter either.

18. The judge noted at paragraph 42 that the appellant had taken undergraduate and postgraduate degrees, the postgraduate degree being an MBA. The judge found the appellant to be educated and intelligent. "In light of his clear skills and abilities, including in the field of business, I am not persuaded that the Appellant's then lack of experience with the tax system in this jurisdiction would have resulted in this error going undetected by him".

19. At paragraph 43, the judge noted the appellant's oral evidence and considered whether it was capable of alleviating the concerns he had expressed. The judge was not persuaded that it did. The judge took into account the ease with which the appellant could have taken steps to support his account and verify the reliability of the document.

20. The judge noted at paragraph 44 that HMRC had not charged the appellant a penalty fee for the late payment of tax. The judge explained why in his view that was not a matter that had any material effect on the appeal.

21. The judge noted at paragraph 46 the fact that, as previously noted, a caseworker for the respondent, having interviewed the appellant, had recorded him in the printout as "credible". The judge said: "The fact that a Home Office interviewer annotated his account as 'credible' simply means that an individual civil servant had no credibility concerns arising from the interview itself". The judge went onto expand upon that reasoning.

22. The judge also noted an argument on behalf of the appellant at paragraph 47. This was that the appellant had drawn attention to the fact that his earnings in the years that followed 2011 were at the rate of the 2010 declaration. If he artificially inflated

his income when declaring it to the Home Office in 2010 how, the appellant asked rhetorically, could he have earned the same amounts in the following years?

23. The judge considered there were two reasons why that argument did not shift the evidential burden back to the respondent. First, having secured leave through inflating his earnings in 2010, it was plausible that the appellant would have used the foundation that the over-declaration provided as a basis upon which to establish himself in employment and self-employment such that his income was able later to reach that level. Secondly, his earnings may well have been at that level, but led the appellant to under-declare to HMRC. Overall, the judge did not consider that the appellant had discharged the evidential burden that had shifted to him. In any event even if it had, the judge would overall, as paragraph 49 makes plain, have been satisfied that the respondent had discharged the "return burden", as the judge described it.

24. Having found those matters in favour of the respondent, the judge then turned as was required in the human rights appeal to other aspects of the appellant's claim. However, for the reasons given in the paragraphs that followed, the judge did not conclude that the appellant had shown that the human rights decision in this case was wrong and that the refusal of his human rights claim was not permitted by reference to the legislation and the ECHR.

25. An application for permission to appeal was filed and that was refused in the First-tier Tribunal. An application was then renewed in the Upper Tribunal. Upper Tribunal Judge Freeman on 8 June 2018 refused permission to appeal, the challenge being that the judge should have granted an adjournment when it became clear in his mind that he had concerns over the letter to enable the writer of the letter, the firm of accountants to attend.

26. There was then a challenge to Upper Tribunal Judge Freeman's refusal of permission brought by way of judicial review in the High Court that resulted in the High Court granting permission. We have seen today the grounds of application, which included the challenge that the judge should have granted an adjournment. They also included the challenge pursued by Mr Turner today, that the findings of the judge were irrational.

27. Mr Turner submitted that the judge's analysis of the accountant's letters was overly forensic. He pointed to case law which he said was supportive of his case. This case law is R (on the application of Khan v SSHD) [2018] UKUT 384, a decision of Martin Spencer J sitting in the Upper Tribunal, and Williams v SSHD JR/10532/2017, a decision of Upper Tribunal Judge Canavan.

28. There is the following point to make about both of those decisions. They arose in immigration judicial review proceedings. In such proceedings, the task of the appellant is to show, according to public law principles, that the decision of the respondent (which by definition is not subject to appeal) is wrong in law.

29. In the present case and in stark contrast, we have an appeal brought against a refusal to accept a human rights claim. That appeal turned to a significant extent upon whether the appellant was rightly or wrongly denied leave by reason of the Immigration Rules. That in turn involved a forensic examination by a judge, making primary findings of fact, as to whether the appellant had in effect acted dishonestly. The judge's findings of fact therefore stand as the decision which the Upper Tribunal must analyse. Mr Turner faces a high hurdle in showing that the judge was not rationally entitled to reach the findings that he did.

30. So far as the MSCO letters are concerned, although Mr Turner did not major on them in oral submissions to us, he did succeed in obtaining a judicial review on behalf of the appellant, on the basis that the judge should have adjourned the proceedings for the reasons that Mr Turner gave.

31. We have no hesitation in dismissing that aspect of the challenge to the judge's decision. It should have been manifest to the appellant and his advisers that to rely upon the letter of 27 April 2016 from the accountants, read with the letter of 21 March 2011, was likely to be regarded by any judicial factfinder as problematic. The problematic nature of those letters is brought out by the judge. The matter therefore was a classic Tanveer Ahmed issue. A person came before a fact- finding body with a document which that fact-finding body concluded was not reliable. There was no obligation on the fact-finding body in the circumstances of this case to indicate that the document was in its view not reliable and give the appellant an opportunity to call oral evidence to support it. On the contrary, that was something which should have been in the mind of the appellant and his advisers to do if they saw fit. They did not. Accordingly, there is no valid criticism of the judge's decision on this issue.

32. Nothing of materiality can be derived from the findings of Upper Tribunal Judge Canavan in the case of Williams. This is not just because that case involved a judicial review, as opposed to an appeal. It is also because, if one reads the judgment, it is manifest that there were other unusual features of the case which do not feature in the present one.

33. In the present case, the judge made his own findings of credibility. He came to the conclusions that we have mentioned earlier. The judge explained why, in circumstances of this case, the recording on the printout at the interview that had resulted in the finding of "credible" was in no sense determinative of the matter. The judge's findings are adequately reasoned and should stand.

34. So far as the case of Khan is concerned, it is instructive to look at paragraph 37 of that judgment. Mr Whitwell urged us to do so and suggested that it is illuminating to compare the guidance set out by Martin Spencer J in that case with what the judge did in this one. Taking first the issue whether there was a significant difference between the income claimed in a previous application for leave to remain and income declared to HMRC, Mr Whitwell pointed out, as we have already recorded, that the difference in this case was indeed significant. Was the Secretary of State presented with a case that indicated that there had not been dishonesty but only

carelessness? If so, then Khan indicates it is the Secretary of State's task to make relevant findings.

35. In the present case, for reasons we have seen, the Secretary of State came to a conclusion in this case that there had been dishonesty. This being an appeal, the judge undertook his own fact-finding task. For the reasons we have given, his analysis is not to be criticised. So far as the third aspect of the Khan guidance is concerned, which turns on the standard of proof, again, for the reasons we have given, the judge committed no error there either.

36. Fourthly, Martin Spencer J in Khan stated that simply to blame the accountant for the error in respect of the tax return would not be the end of the matter: "far from it". That essentially was what the appellant had sought to do in the present case. The judge considered the appellant's case but found that he not discharged the evidential burden. Again, there is no reason to find error in that part of the judge's decision.

37. As for the requirement in Khan for there to be a consideration of evidence pointing in both directions, that is precisely what happened here. The judge did consider the appellant's case both orally and in writing and for the reasons given the case was rejected. Again, there is no error there.

38. The remaining parts of the Khan guidance seem to us to take matters no further insofar as this particular case is concerned.

39. Accordingly, drawing these threads together, the challenge made against the judge's decision fails. It fails by reference to the submissions advanced by Mr Turner today, with his customary care, and it also fails by reference to the written grounds of judicial review challenge (assuming they are relevant), and by reference to the previous challenges to the decision brought by way of applications for permission to appeal.

40. There is, accordingly, no error of law in the judge's decision such as to require that decision to be set aside. This appeal is accordingly dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date: 20 December 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber