Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: HU/04199/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 9 May 2019

Decision and Reasons Promulgated
On: 20 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between
MR ILYAS MUHAMMAD KASHIF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Gajjar, counsel instructed by Connaughts
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 20 February 1985. He appeals with permission against the decision of First-tier Tribunal Judge Cohen, promulgated on 26 February 2019 dismissing his appeal against the decision of the respondent dated 24 January 2018 refusing his application for indefinite leave to remain pursuant to paragraph 276B with reference to paragraph 322(5) of the Immigration Rules, on the grounds of his character and conduct.

2. Judge Cohen found that the appellant was fully aware of the incorrect declarations made to HMRC and the Home Office. That was damaging to his credibility. He rejected his excuses that he was not in a good mental state at the time due to his mother's ill health as he continued to work in both employed and self employed capacities throughout that time [34].

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3. He stated that he failed to arrange for his previous accountant to be available at court in order to answer detailed questions on the methodology used in compiling the earlier figures relied upon and submitted to the Home Office and HMRC and how the mistakes could have occurred in two separate years. Furthermore, the appellant claimed that he had incurred £3,000 of legal costs in respect of his appeal but did not seek compensation from Tax Assist in respect of those costs [38].

4. Although the appellant discovered the issues in his tax and figures quoted to the Home Office in August 2016, he did not notify the Home Office of this until he completed the subsequent Home Office inquiry questionnaire in April 2017. If the appellant was acting in good faith he would have reported the matter to the Home Office at the earliest opportunity. He found that his failure to do so further damaging to his credibility [39].

5. In the circumstances, he concluded that the appellant "has committed undesirable conduct which is of serious gravity" and the respondent correctly refused his application with reference to paragraph 322(5) of the Rules [40].

6. Mr Gajjar, who did not represent the appellant before the First-tier Tribunal, relied on the grounds of appeal dated 11 March 2019, which he prepared in support of the application for permission to appeal.

7. He submitted that the Judge failed to have regard to material evidence: He did not consider the fact that the appellant had explained during the hearing that he had questioned whether his accountant should attend and that he had been advised by his barrister that this was not necessary. Mr Gajjar produced an email from counsel, Ms Jones, who represented the appellant at the hearing. The appellant had asked her whether Tax Assist Accountants should represent him at court. Counsel stated in reply that "Tax Assist have done such a good letter, don't ask them."

8. Mr Gajjar noted that the Judge had recorded at [22] that the appellant informed him that Tax Assist want to come but the barrister said it was not necessary and it was all covered in their correspondence. The same counsel who represented him at the hearing had stated that it was not necessary to have the accountants.

9. There was nothing to suggest that Ms Jones disputed his assertion or withdrew from the case on the grounds of professional embarrassment. Nevertheless, the Judge proceeded to make a finding which plainly held against the appellant that his accountant did not attend and stated at [38] that he failed to arrange for his previous accountant to be available at court in order to answer detailed questions. The Judge did not 'factor in' that the appellant was acting on the basis of professional legal advice, nor did he provide any reasons for rejecting the recorded evidence at [22].

10. Mr Gajjar pointed out that the accountant had in fact attended the previous hearing which had been adjourned due to a lack of court time, where the appellant was represented by different counsel.

11. Mr Gajjar further submitted that the finding at [39] that an honest person would have told the secretary of state of the amendment prior to being asked in the questionnaire was irrational. If the appellant believed himself to be an honest person and that the

amendment was nothing more than the result of a mistake, there would be no need to have brought this to the attention of the secretary of state.

12. The finding that if the appellant was acting in good faith, he would report the matter to the Home Office at the earliest opportunity and that his failure to do so further damaged his credibility, was also irrational. In the application form, the relevant question in respect of open disclosure at E12 was "have you, or any dependants who are applying with you, ever engaged in any other activities which might indicate that you may not be considered to be persons of good character."

13. That question is placed under a number of questions relating to war crimes and terrorism. In any event, if the appellant was not dishonest, then there was no reason for him to have ticked "yes" to that question. He could not have "pre-empted" the respondent's concerns.

14. Mr Gajjar also submitted that the Judge erred in failing to consider the letters provided by the appellant's accountant. Having found that the appellant had not called his accountant to give evidence, the Judge failed to 'grapple' with the letter produced by the accountants, who accepted that they were fully responsible for the error, and who provided a detailed account of the error being discovered and communicated, and the fact that she made a correction to the appellant's return by adding the wrong person's details. As such, his returns were correctly filed to begin with and then amended, a further factor that was not properly considered.

15. He relied on the decision in R (on the application of Sanat) v SSHD (JR/6546/2016) in which it was noted that a letter admitting fault from an accountant can be an exceedingly powerful factor in his favour. Yet, the Tribunal did not grapple with the letter or its contents.

16. He submitted in ground 4 that the Judge further erred in failing to consider the death of the appellant's father on 14 October 2013 and that he went to Pakistan for two months during this period. He remained in Pakistan for three months after his death and stated that he was distracted during this time.

17. He referred to the decision of Mr Justice Spencer in R (on the application of Dr Khan) v SSHD (Dishonesty; tax returns; paragraph 322(5)) [2018] UKUT 384. The Court emphasised the importance of decision makers articulating a decision which considers the factors pointing in both directions when setting out the reasons for accepting or rejecting matters put forward as part of an innocent explanation.

18. Mr Gajjar submitted that the First-tier Tribunal Judge Cohen rejected the appellant's "excuses" that he was not in a good mental state at the time due to his mother's ill health as he continued to work in both employed and self- employed capacities throughout this time [34]. However, the Judge's actual findings and reasons made no reference to his father's death. This evidence was before the First-tier Tribunal and was recorded as part of the appellant's evidence at [18].

19. Whilst his mother's illness at the time was a worry for the appellant, it was overshadowed by the more serious incident of his father's passing. His father passed away on 14 October 2013 when the appellant was in Pakistan for two months after his death, and was

distracted. This would have been around the time of the submissions of the impugned 2012/2013 return.

20. Nor was it correct, as found by the Judge, that the appellant was able to continue his self-employment during this time. He had confirmed in his witness statement that he in fact took off time which included his father's death (paragraphs 27-28, AB 18). He stated that his father passed away on 14 October 2013. He went to Pakistan the same evening for the funeral. His mother was in a state of shock and had a heart attack. He was scared for his mother's health. He stayed with her for nearly two months for her medical tests so that she would feel better and be supported. He returned to the UK but for a few months could not concentrate on himself, his life and work because of the depression and grief he had following his father's death. Those matters had a bad effect on his work, life and health.

21. In ground 6, Mr Gajjar submitted that the Judge found that the appellant may have inflated his earnings in order to be granted leave to remain under the Tier 1 scheme without properly considering the legal burden and the evidence. The Judge had the same specified documents that had been before the respondent and led to the grant of leave to remain. There was no mention of this evidence when the Judge concluded that he had inflated his income.

22. Moreover, Khan could not be treated as authority that a significant difference in declarations was sufficient to allow the respondent to show that the appellant had been dishonest in his declaration to the secretary of state. It is understandable from a legal perspective that a significant difference between the figure evidenced to the Home Office and the figure declared to HMRC could lead to a conclusion that HMRC had not been told the truth. However, HMRC requires no corroboration whereas the secretary of state does.

23. Mr Gajjar submitted in ground 7 that the Judge also made an irrational finding that the appellant had a degree with an element of finance in it. That is not the same as being an accountant and the evidence did not indicate that his education had any element of tax in it to enable him to grapple with a complex tax system.

24. Finally, he submitted - ground 8 – that there has been an incomplete assessment under Article 8 of the Human Rights Convention. The Judge failed to consider a material aspect of those rights, namely that the appellant has an operative and successful company in the UK which contributes to the economy and also employs British nationals.

25. In that respect, he referred to the decision of the Court of Appeal in Onwuje v SSHD [2018] EWCA Civ 331 in support of the contention that the business the appellant has developed in the UK has arguably engaged his protected rights under Article 8. Having a business in the UK is capable of constituting private life within the meaning of Article 8 - at [26] of Onwuje.

26. He submitted that the Judge's finding that the appellant's removal is necessary to maintain effective immigration control and to protect the economy, is difficult to reconcile with the successful business and the 'potential' of that being closed down if required to leave, with the adverse impact that it could have on the economy and British jobs.

27. In reply, Mr Tarlow submitted that the Judge had noted at [11] the documents and letters from Tax Assist Accountants. He noted that the appellant claimed in his questionnaire that his accountant mixed up two of their clients when submitting the tax returns for 2010/2011 and 2012/2013. He referred to the decision of the Court of Appeal in Balajigari and others v SSHD and another [2019] EWCA Civ 673.

28. At [37] the Court of Appeal did not accept that as a matter of principle, dishonest conduct would only be sufficiently reprehensible if it were criminal, although it was not easy to think of examples of dishonest conduct that reached the necessary threshold which would not also be criminal. The point however was academic as the dishonest submission of false earnings to HMRC or the Home Office would be an offence.

29. The Court of Appeal accepted as correct in principle that properly interpreted, paragraph 322(5) involves a two stage analysis. The first stage is to decide whether paragraph 322(5) applies at all - that is, that it is 'undesirable' to grant leave in the light of the specified matters. If it does, the second stage - since such undesirability is a presumptive matter rather than mandatory ground of refusal - is to decide as matter of discretion whether leave should be refused on the basis of it.

30. Mr Tarlow submitted that the Judge was entitled to make the findings that he made at [34]. He referred to the appellant's qualifications, namely that he had worked as a book keeper and had undertaken a diploma and a degree including in finance. He also noted that despite claiming that he was incensed, the appellant did not make a complaint to the appropriate regulatory body or, as he claimed he wanted to at the time, to the police. The Judge found that the appellant's accountant had nothing to gain by such actions. The appellant, on the other hand, had a significant amount to gain. He gained in not paying the tax owed to HMRC. Without declaring incorrect and enhanced figures to the Home Office, he would not have obtained leave under the Tier 1 migrant scheme.

31. His finding that the appellant was fully aware of the declaration to HMRC and the Home Office is sustainable. In the light of [37] of the decision in the Court of Appeal, that is sufficient to dispose of the challenge.

32. The other grounds are not material in the light of this. In particular, it is for the appellant to decide what evidence he wishes to produce to the Tribunal. That was a matter between him and counsel. There had been no application for an adjournment. The Judge was accordingly entitled to reject the explanation by Tax Assist and to maintain the position that the appellant was responsible for filing tax returns.

33. In reply, Mr Gajjar submitted that whilst it is a matter for the appellant to decide what evidence to produce, it was held against him that he failed to arrange for his previous accountant to be available at court in order to answer detailed questions [38]. Being a bookkeeper and accountant does not amount to the same thing.

34. The decision amounts to a serious finding against the appellant which he will have to live with. There has been an incomplete determination. There has been an incorrect reading of the facts through no fault of the appellant's.

Assessment

35. It has not been disputed that an earlier hearing of the appellant's appeal, set down on 10 September 2018 was adjourned to 22 January 2019. In their letter to the Tribunal dated 17 September 2018 his solicitors noted that the appellant and counsel had attended. It is not disputed that his accountants, Tax Assist, attended to give evidence. They had wanted to come this time as well. The appellant had wanted them to attend. However, counsel who represented the appellant at the resumed hearing stated in an email to the appellant prior to the hearing, that this would not be necessary on the basis that their evidence was covered in their correspondence.

36. There was no challenge to the appellant's assertion in this respect which he confirmed during his evidence, namely, that it was counsel who subsequently represented him at the hearing who informed him that their presence would not be necessary. At the earlier hearing, the appellant had different counsel representing him.

37. Notwithstanding this background, the Judge found at [38] that the appellant failed to arrange for his accountant to be available to answer detailed questions. In the circumstances I find that it was not correct to hold against the appellant that he failed to arrange for his accountant to be available.

38. The Judge also stated that the appellant had not complained to the police about his accountant. However, he had not alleged fraud on the part of his accountants, albeit that he sought to blame them for the discrepancies referable to their mistake.

39. Further, the finding that if the appellant was acting in good faith, he would report the matter to the Home Office at the earliest opportunity did not have regard to the Home Office questionnaire in the respondent's bundle, in which he was asked whether he has ever engaged in any other activities which might indicate that he may not be considered to be a person of good character. If the appellant was not knowingly dishonest at that time, there was no reason for him to accept that he had been dishonest.

40. There was also no reason for him to anticipate an adverse decision when completing the Home Office inquiry questionnaire in April 2017.

41. The Judge did not consider the appellant's correspondence as well as call logs with HMRC. Even though the accountants were not called to give evidence, the Judge should nevertheless have dealt with the letters from the accountants produced at AB22, in which they took full responsibility for the error and provided an account of the error being discovered and communicated as well as a correction to his returns which had been made by adding the wrong person's details. His returns had accordingly been correctly filled in to begin with and were then amended. That was not properly taken into account.

42. As stated by the court in Samant, a letter admitting fault from an accountant can be a powerful factor in the appellant's favour.

43. Where there is no plausible explanation for a significant discrepancy between the income claimed in a previous application for leave to remain and the income declared to HMRC, the respondent is entitled to draw the inference that he has been deceitful or dishonest and that indefinite leave to remain should be refused within paragraph 322(5) of the Rules.

44. However, the appellant had produced evidence showing that despite that prima facie inference, he had not in fact been dishonest but only careless. The Tribunal was therefore required to consider the matters referred to in R (on the application of Khan), supra. In deciding whether the appellant had been dishonest or merely careless, those matters referred to in headnote [v] needed to be considered. This was a judicial review application and the court was required to consider the extent to which they are evidenced as opposed to merely asserted.

45. In the appellant's case this was not a matter of mere assertion. There was evidence from the accountant explaining the error.

46. In Balajigari the Court of Appeal referred to the decision of Mr Justice Spencer in Khan at [43] where he held that in approaching the fact finding task in the light of the explanation as to whether the respondent is satisfied that the applicant has been dishonest, the secretary of state should remind herself that, although the standard of proof is "balance of probability", a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences.

47. The Court of Appeal agreed that the concept of standard of proof is not appropriate in the present context. That 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, the secretary of state must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities, but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty.

48. For the above reasons, I find that the Judge unfairly held against the appellant that his accountants failed to attend the hearing to give evidence. He did not properly consider the detailed account put forward by the accountants regarding their error. Nor did he properly consider the cumulative effect that his father's death and his mother's subsequent illness for about two months, had on him. His state of mind which included depression and grief affected his work as well as his health.

49. I find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I accordingly set it aside. The parties agreed that if an error is found, the case should be remitted to the First-tier Tribunal for a fresh decision to be made. I agree that this is an appropriate case to remit.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal, Taylor House, for a fresh decision to be made by another Judge.

No anonymity direction made.

Signed Date 17 May 2019

Deputy Upper Tribunal Judge Mailer