



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04333/2018

THE IMMIGRATION ACTS

Heard at Field House
On 5 December 2018

Decision & Reasons Promulgated
On 4 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A H M HASANUZZAMAN CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T. Wilding, Home Office Presenting Officer
For the Respondent: Mr J. Gajjar, Counsel instructed by Thamina Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of First-tier Tribunal Judge Shore whose decision was promulgated on 27 September 2018. I shall refer however to Mr Chowdhury as 'the appellant' as he was in the First-tier Tribunal. For reasons which I shall explain later, it is apparent that he appeared in person at the hearing which took place on 18 September 2018.

2. The issue before me is whether or not the judge materially erred in reaching the conclusion that he did.
3. The broad facts are that the respondent had claimed to be earning £26,000 of self-employment income at the material time; however, his tax return produced for the benefit of HMRC showed he had self-employed earnings of only about £11,000 odd. There was therefore a discrepancy between his actual earnings and the tax return of something in the region of £15,000. That, on its face, was evidence that the appellant had made a misstatement to the Inland Revenue in order to achieve the benefit of paying less tax.
4. The Secretary of State in the refusal letter considered the point and in the Reasons for Refusal Letter said:-

“It is not credible that a professional, registered accountant would make such a mistake on your tax return. Your tax affairs are not complex as they are based on turnover minus cost equalling profit and are considered routine calculations. As such you have taken reasonable care when preparing your accounts and it was your responsibility to ensure that your tax return was submitted on time with the correct information”.

That was a perfectly sustainable point for the Secretary of State to make and it was a claim that required the appellant to answer. However, it must not be forgotten that this was an allegation of dishonesty and it therefore fell upon the shoulders of the Secretary of State to establish that there was dishonesty and that it was not a mistake. The material to which I have earlier referred went so far in establishing that the miscalculation was unlikely to have been a pure error, but it did not establish on its own the act of dishonesty. Instead, it was for the appellant to give some sort of explanation which may or may not have been accepted by the judge.

5. The difficulty arises as to what happened at the hearing itself. The appellant’s advocate, Mr Sharma, had booked himself into two courts at Taylor House and was simply absent, notwithstanding the fact that he had accepted instruction from Mr Sharma and the judge was waiting for Mr Sharma to make himself available. However, in the course of waiting, the Presenting Officer spoke to the appellant. As a result of what was said by the Presenting Officer, and understandably so, the appellant indicated that he wished to proceed immediately without representation.
6. I took the unusual step in the course of the hearing before me to hear what the appellant himself said as to what took place at the hearing in Taylor House. I did so because, on instructions, the appellant’s advocate, Mr Gajjar, told me that there had been a conversation between the appellant and the Presenting Officer which was material to my decision. Subsequently his barrister told him that the Presenting Officer had not had the benefit of the documentation. More importantly however, the Presenting Officer said that he had gone through the documentation that he had. There was an error with the tax return but that the appellant had paid all that was owing. The Presenting Officer said to Mr Chowdhury,

I do not see any wrongdoing. The hearing could be over in about two minutes and I do not see any dishonesty in your case. There was an error and you corrected it.

That conversation is a conversation which was not the subject of any cross-examination by Mr Wilding, but then he had no instructions on that matter.

7. The conversation is supported by what is said in the decision itself where the judge says (in paragraph 8) that Mr Sharma was not available during the course of the hearing but the judge had been advised by his clerk that the appellant had been speaking to the Presenting Officer and that he wished to proceed immediately without representation. That is entirely consistent with the conversation which Mr Chowdhury spoke of, namely that it was not going to make any difference because the hearing would be done in two minutes and he, the Presenting Officer, did not see that there was any wrongdoing.
8. The judge however continues with what occurred at the hearing by saying in paragraph 9,

I went down to discuss the case with the Appellant and the Presenting Officer.

I am not entirely clear as to what the judge meant when he said that he went down to discuss the case, but it appears it was done within the context of the formal hearing room. The judge said:-

The Appellant was insistent that he wished to proceed without representation. The Presenting Officer said he had read the papers provided by the Appellant, including the papers produced on the day of the hearing, and thought that the Respondent may be in some difficulties. He indicated that if the Appellant adopted his witness statement, he would not be asking any cross-examination questions. He had no authority to make concessions or withdraw, but would limit his closing submissions to the refusal letter.

9. The witness statement supported the appellant's claim that he did not act with any dishonesty, but more importantly, it also supports the evidence about what happened at the hearing, namely, that the Presenting Officer had effectively agreed not to put forward any opposition to the appellant's case. It is doubtful whether that amounted to a concession because the Presenting Officer apparently said he had no authority to make any concessions or withdraw. But he did the only thing which was available to him and that was not to conduct any cross-examination or put to the appellant the issues which could properly have been put by him, namely the fact that the appellant made no effort to confront his accountant or to require the accountant to provide an explanation, rendering the evidence from the appellant largely unsupported. Nevertheless, that is what the Presenting Officer said and did.
10. Paragraph 10 of the decision goes further and says that the Presenting Officer said that the papers showed the appellant had received payments into his bank account that matched the income he had claimed to be earning when he made his 2011 application. I am not satisfied that this is material. The material consideration was

whether or not the appellant had dishonestly submitted a tax return which had dishonestly misstated his earnings.

11. In these circumstances the judge reached a conclusion which he was invited to make by the parties. It seems to me inconceivable that if Mr Chowdhury, the appellant, was about to be found to have been dishonest that he would not have called for his barrister to be present at the hearing. The fact that he agreed to continue without the assistance of his Counsel strongly suggests that a conversation took place that rendered it unnecessary for his Counsel to attend. The fact that there was a conversation between the appellant and the Presenting Officer is also evidenced by the concession, (if I can call it that) or the statement made; the statement falling short of a concession perhaps, that he was in '*some difficulties*', that is a term of art which is often used by an advocate to say '*I realise that I have a problem in establishing my case.*'
12. The Presenting Officer may well have entirely misconstrued what the issues were in this case. In particular I have had my attention drawn to the case of *R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5))* [2018] UKUT 00384 (IAC). There is a suggestion that this case was before the judge and so he was made aware of what are the relevant principles; in particular, the way that these cases are proved. It cannot be said that he misapplied the law in that he was aware of the judgment of Martin Spencer J in *Khan*. In these circumstances, I do not consider that there was a material error conducted by the judge.
13. There is another matter which I can properly say in relation to this appeal. The grounds of appeal do not properly address the matters to which I have referred. Instead they talk of the fact that the Presenting Officer relied upon the refusal letter, thereby indicating that this case was fully contested. I do not think that properly deals with the situation as recorded by the judge in paragraphs 8 to 10 of the decision. There is also a reference to two reported cases. I am not going to refer to those cases in detail, but they are directed to an entirely discrete point, namely reliance by an appellant upon the fact that HMRC has not seen fit to issue a penalty notice. It does not seem to me that that principle was germane to this case. This case was properly directed to whether or not the Presenting Officer felt he could establish wrongdoing.
14. For these reasons I am satisfied that the judge made no material error. It is true that his decision is short, but I console myself by the fact that if I were to be remaking the decision I would require the evidence of Mr Chowdhury as to what took place. I am told by Mr Wilding that there is no note on the file in relation to what the Presenting Officer said at the hearing; indeed, it may no longer be possible to contact him. In those circumstances it is likely that the conversation which took place between the appellant and the Presenting Officer would be uncontroversial, and given the conversation that took place it is apparent to me that the Presenting Officer was not putting forward any viable opposition to what the appellant was saying and he, the Presenting Officer, probably mistakenly thought that that would be enough for the

appellant to succeed in his appeal. In those circumstances I do not consider that the remaking of this decision would lead to any substantially different result.

NOTICE OF DECISION

The decision of the First-tier Tribunal Judge reveals no error of law and his determination of the appeal shall stand.

No anonymity direction is made.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL

Dated 02 April 2019