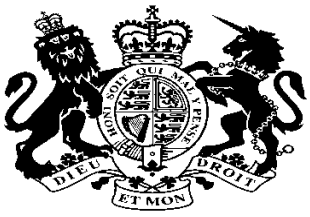

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11184/2018**
HU/21885/2018

THE IMMIGRATION ACTS

Heard at Field House
On 22 March 2019

Decision & Reasons Promulgated
On 02 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

N A
B N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar (counsel) instructed by ATM Law, solicitors

DECISION AND REASONS

1. To preserve the anonymity direction made by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Freer, promulgated on 09 January 2019 which allowed the Appellants' appeal on article 8 ECHR grounds.

Background

3. The Appellants are husband and wife. The first appellant was born on 01/06/1982. The second appellant was born on 13/08/1988. Both appellants are Pakistani nationals. The second appellant's application is dependent on the first appellant's application. In April 2017 the first appellant applied for indefinite leave to remain on the basis of 10 years lawful residence in the UK. The first appellant arrived in the UK on 17 May 2007. The appellants have two young children

4. On 2 May 2018 the Secretary of State refused the Appellants' applications for leave to remain in the UK after considering paragraph 276B of the Immigration Rules.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Freer ("the Judge") allowed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 25 February 2019 Upper Tribunal Judge Jackson granted permission to appeal stating

> "The respondent seeks permission to appeal in time against the decision of First-tier Tribunal Judge Freer promulgated on 9 January 2019 allowing the appellants' appeals against the respondent's refusals of their applications for leave to remain pursuant to paragraph 322(5) of the immigration rules.
>
> The grounds of appeal are that the First-tier Tribunal has attached too much, if not sole weight, to the lack of any penalty imposed by HMRC for under declaration of earnings in a previous tax year when allowing the appeal, contrary to the findings on the cases of R (on the application of Samant) v Secretary of State for the home Department [2017] UKAIT JR/6546/2016 and R (on the application of Abbasi) v Secretary of State for the home Department (JR/13807/2016).
>
> All grounds of appeal are arguable. The decision of the First-tier Tribunal arguably treats the lack of penalty from HMRC not only as indicative that they had investigated and found no dishonesty by the application (of which there is no evidence) but determinative of the issues under paragraph 322(5) of the immigration rules -see paragraph 55 of the decision in particular. Although not binding on the First-tier Tribunal, there is no good reason for not following the findings in Abbasi and in any event those are consistent with the reported decision in Khan. The First-tier Tribunal finds that the appellant's position can survive an analysis based on Khan, but it is arguable on the facts available that the decision of the First-tier Tribunal is inconsistent with the findings and guidance in Khan in a number of significant respects.

> The First-tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

The Hearing

6. For the respondent, Ms Everett that moved the grounds of appeal. She told me that the Judge found at [59] of the decision that the HMRC decision not to impose a penalty was determinative of this case. She told me that HMRC did not deal with the question of whether or not deception was employed in an application for leave to remain in the UK. She told me that the HMRC decision cannot be determinative of the appeal, yet the Judge treated it as so. She referred me specifically to [59(v) & (vi)] of the decision and told me that the error of law lies there, because it is there that the Judge relies entirely on the HMRC's treatment of the appellant's tax affairs. She urged me to allow the appeal and set the decision aside.

7. For the appellants, Mr Gajjar relied on the detailed rules 24 response. He told me that at [71] and [81] of the decision the Judge clearly acknowledged the discretion created by paragraph 322(5) of the Immigration Rules. He told me that there is no attack on the Judges findings at [71] and [81], and argued that the respondent's appeal cannot therefore succeed. He told me that the Judge applied the correct test in law. He took me to [45], [49] and [51] to [64] of the decision. He told me that the decision is properly reasoned and does not contain an error of law, and that the Judge correctly took guidance from Khan. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) held that (1) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy; (2) Where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty; (3) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the "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; (4) For an Applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore, the Applicant will have known of his or her earnings and will have

expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty; (5) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):

(i) Whether the explanation for the error by the accountant is plausible;

(ii) Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;

(iii) Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;

(iv) Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.

9. The Judge combines his credibility findings with his findings of fact between [45] and [70] of the decision. In reaching his findings, the Judge carefully weighed the evidence for and against the appellant. At [52] the Judge finds that the appellant confesses to carelessness and blames his accountant. At [53] the Judge finds that it is the taxpayer who is responsible for an accountant's mistake and reminds himself at between [53] and [58] of the guidance given in Khan

10. At [56] the Judge summarises the appellant's reasons for blaming his accountant. At [57] and [58] the Judge analyses the appellant's version of events, and at [59] the Judge sets out the factors which weighed against the respondent's position. The respondent's submissions before me focus on [59(v)] and [59(vi)], but [59] of the decision must be read in its entirety.

11. At [61] the Judge finds that the first appellant has not been dishonest. At [63] the Judge finds that the respondent does not discharge the burden of proving dishonesty and at [64] the Judge finds the evidence produced answers the questions set out in the guidance in Khan.

12. At [60] the Judge finds that the appellant had a high-income in 2011 and did not overstate his income to the respondent. That finding strikes at the heart of this appeal. Having made that finding, the Judge follows the guidance given in Khan.

13. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has

been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

14. A careful reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing wrong with the Judge's fact-finding exercise. The respondent might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

15. The decision does not contain a material error of law. The Judge's decision stands.

DECISION

16. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 9 January 2019, stands.

Signed Date 28 March 2019

Deputy Upper Tribunal Judge Doyle