



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07499/2018

THE IMMIGRATION ACTS

Heard at Field House, London  
On 18<sup>th</sup> February 2019

Decision & Reasons Promulgated  
On 13<sup>th</sup> March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHAHRIAR FERDOUS ALI  
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer  
For the Respondent: Mr S Karim, Counsel

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Khawar promulgated on 4<sup>th</sup> December 2018 in which he allowed Mr Ali's appeal against the decision of the Secretary of State on 18<sup>th</sup> March 2018 to refuse Mr Ali's application for leave to remain on the grounds of ten years' lawful residence. As this is the Secretary of State's appeal for the purposes of clarity throughout this decision I will refer to Mr Ali as being the Claimant and to the Secretary of State as being the Secretary of State, given that Mr Ali was the Appellant within the First-tier Tribunal whereas the Secretary of State is the Appellant in the Upper Tribunal.

2. In this appeal the Secretary of State is represented by Ms Isherwood the Senior Home Office Presenting Officer and the Claimant is represented by Mr Karim of Counsel. I am grateful to both of them for their helpful submissions this morning. In considering this appeal I have considered all of the documents in the file including the original decision of the First-tier Tribunal Judge, the Grounds of Appeal and the Rule 24 reply that has been submitted on behalf of the Claimant, together with the grant of permission by First-tier Tribunal Judge Grimmett on 4<sup>th</sup> January 2019 and all of the documents have been relied upon before the First-tier including, particularly in this case, the original refusal letter by the Secretary of State dated 18<sup>th</sup> March 2017. I have considered all the financial documentation before the First-tier Tribunal.
3. The Claimant is a citizen of Bangladesh who was born on 21<sup>st</sup> July 1986. Judge Khawar noted that in the Secretary of State's refusal letter the Secretary of State had concluded that the Appellant's application fell for refusal under paragraph 276B(iii) general grounds for refusal because his character and/or conduct was such that it would be undesirable to allow him to remain in the United Kingdom. Having considered his conduct under paragraph 322(5) of the Immigration Rules under the general grounds for refusal, Judge Khawar noted at paragraph 4 of his decision that the Secretary of State had noted that in his Tier 1 application made on 24<sup>th</sup> March 2011, the Claimant claimed to have generated a net profit of £27,900 through self-employment, which was said to be evidenced by accounts and an accountant's letter. The Claimant had said he received such earnings for the tax period between 19<sup>th</sup> August 2010 until February 2011 falling into the 2010/2011 tax year. Judge Khawar stated that,

*"However, evidence from HMRC provided on 8<sup>th</sup> February 2018 reveals that in the 2010/2011 tax year the Appellant declared a turnover of £29,757 with a net profit of £14,403 – these were figures submitted in his return of 15<sup>th</sup> January 2012. Evidence from HMRC on 8<sup>th</sup> February 2018 reveals that the Appellant made an amendment to his company tax return on 27<sup>th</sup> October 2016 and in his amended return he claimed a turnover of £29,757 with a net profit of £26,757."*

Judge Khawar went on to state that,

*"The Respondent records 'this is a difference of £12,354 and had the amount of £14,403 been declared to the Home Office the application would have been refused as you would not have been awarded the required 80 points under Appendix A of the Immigration Rules'."*

4. Judge Khawar stated that the Secretary of State's case was that the Claimant had proffered an incorrect income figure in support of his application for a Tier 1 (General) Migrant visa on 24<sup>th</sup> March 2011 and that therefore the Secretary of State concluded the Claimant's character/conduct was such that it would be undesirable to allow him to remain in the United Kingdom and his application was refused under the general grounds of paragraph 332(5) of the Immigration Rules and his ILR application was therefore refused under paragraph 276B(iii). The Judge noted that the Claimant was said to have family life with his wife, Mrs Chowdhury, who was not a British citizen but was also a Bangladeshi national and that the Claimant was also the parent of a minor child.

5. In making his findings Judge Khawar at paragraph 24 found that,

*“Having carefully considered all the evidence and the law and the reasons set out below I find in favour of the Appellant. In my judgment at best the conduct complained of by the Respondent is that the Appellant is guilty of an accounting error which resulted in a misdeclaration of the profits of SFA Limited, the company of which he was sole director.”*

6. Judge Khawar noted that the Secretary of State did not seek to assert deception or dishonesty on the part of Mr Ali at paragraph 26 of his judgment the Judge set out the material paragraph in the refusal letter in which it was stated that the Claimant’s actions in declaring different amounts of income to HMRC and UKVI had led to a conclusion that in light of his character and conduct it would be undesirable to allow him to remain in the United Kingdom.

7. However Judge Khawar went on at paragraphs 30 and 31 of the decision to state,

*“30. As can be seen above, no explanation is proffered as to why an accounting error on the part of the Apellant/applicant leads to the inference that the Appellant’s character/conduct is so badly tarnished that it would be appropriate to refuse his application under paragraph 322(5) of the Rules.*

*31. The HOPO was unable to explain how making such aforesaid accounting error reflects so badly on an individual’s character/behaviour to warrant refusal of leave.”*

At paragraph 34 Judge Khawar went on to find,

*“At the risk of repeating myself, if SFA Limited profits were inadvertently under-declared (which appears to have been the case because the Appellant’s expenditure was inadvertently taken as being expenses of the company), this would have resulted in the Appellant’s dividend entitlement being lower. Therefore, if the accounting error had not occurred the Appellant’s aggregate income would have been higher than that which was actually declared in his application dated 24<sup>th</sup> March 2011.”*

8. Judge Khawar found that the Secretary of State’s conclusion that the Claimant’s application would have been refused as he would not been awarded the 80 points under Appendix A of the Immigration Rules was wholly misconceived. The Secretary of State had not sought to distinguish between the income/profit figure of the limited company and those relating to the Claimant’s personal financial affairs and found that there was confusion in the Secretary of State’s analysis within the refusal letter. Judge Khawar was not satisfied that the decision to refuse under paragraph 322(5) of the Immigration Rules was made out and went on to allow the appeal under Article 8 of the ECHR.

### The Grounds of Appeal

9. The Secretary of State now seeks to appeal that decision. Within the Grounds of Appeal, which Ms Isherwood simply seeks to rely upon today, it is argued that the First-tier Tribunal Judge made a material misdirection in law. It was said that the

Secretary of State had originally refused the application due to discrepancies in the amount of self-declared income to UKVI and to HMRC for tax purposes and that the Judge materially erred by absolving the Claimant of any blame for his failure to correctly declare his self-employed income to HMRC and that therefore the assessment of the Claimant's actions and whether they amounted just to dishonesty was flawed. The Secretary of State relies upon the recent Upper Tribunal case of **R (on the application of Khan) v Secretary of State for the Home Department (dishonest, tax return, paragraph 322(5)) [2018] UKUT 00384** and the finding there that a Claimant is personally responsible for their own tax affairs and the headnotes paragraphs(i) and (v) of **Khan** that,

*“(i) That 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 Appellant 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 discrepancy.”*

*“(v) 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 whether there is a plausible explanation as to why it is missing;*
- iii. Why the applicant did not realise 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.”*

10. It is argued by the Secretary of State that the Judge has not followed the recommended steps in **Khan** when assessing the Claimant's actions and that there was no documentation to demonstrate why the error of the accountant had occurred and no explanation was argued as to why the Claimant did not realise the error sooner. It is argued that the Judge erred in finding that paragraph 322(5) did not apply in this case.

#### My findings on error of law and materiality

11. The difficulty with the Secretary of State's appeal is that when one reads the decision of First-tier Tribunal Judge Khawar in its entirety, he makes it clear at paragraph 26 of the decision that the Secretary of State did not seek to assert deception/dishonesty

on the part of Claimant and at paragraphs 28 through to 31 inclusive when setting out the material part of the refusal letter and the fact that the Claimant had been refused on the basis that his character and conduct made it undesirable for him to be allowed to remain in the United Kingdom under paragraph 322(5), Judge Khawar specifically found that no explanation had been proffered as to why an accounting error on the part of the Claimant led to the inference that his character/conduct was so badly tarnished that it would be appropriate to refuse his application under paragraph 322(5) of the Rules. Judge Khawar specifically noted that he had asked the Home Office Presenting Officer why it was that accounting errors reflected so badly on Mr Ali's character/behaviour as to warrant refusal, but the Judge found at paragraph 31 of the decision that the Home Office Presenting Officer was able to explain why such accounting errors would mean that this Claimant's character or behaviour warranted refusal under 322(5).

12. The point under consideration in the case of **Khan** was whether or not in a judicial review case, the Secretary of State was actually entitled to draw an inference that a Claimant had been deceitful/dishonest and should be refused ILR within paragraph 322(5) on the basis of differences between income claimed in a previous application for leave to remain and income declared to the HMRC. The whole point of that case was that the Secretary of State was entitled to draw that distinction and take those differences and discrepancies into account in considering whether or not a Claimant had been deceitful or dishonest. The Court gave guidance as to how the Secretary of State should carry out the consideration as to whether or not a Claimant was dishonest, or merely careless.
13. However, in this case the Secretary of State was not seeking to argue that Mr Ali had been dishonest or exercised deception. That was made clear by Judge Khawar at paragraph 26. He also clearly asked why it was that the accounting error reflected so badly on Mr Ali's character or behaviour as to warrant refusal. The Home Office Presenting Officer at the First-tier Tribunal did not seek to argue that the errors should be treated as evidence of deception or dishonesty on the part of Mr Ali that should be held against him for the purposes of paragraph 322(5).
14. Although within the refusal letter it was stated that had the amount of £14,403 been declared to the Home Office, the application would have been refused, as he would not have been awarded the required 80 points under Appendix A of the Immigration Rules, Judge Khawar dealt with that as I have stated in finding that the limited company's profits were inadvertently under-declared and that if the accounting error had not occurred the Appellant's aggregate income would have been higher than was actually declared in the application dated 24<sup>th</sup> March 2011.
15. Clearly, in this case, had the Secretary of State sought to argue that the accounting errors were evidence of dishonesty or deception, then in that case Judge Khawar would have been duty bound to have considered the case of **Khan**. But in this case the Secretary of State was specifically saying he did not seek to assert deception and dishonesty and Judge Khawar specifically asked the basis upon which it was said that paragraph 322(5) applied and the Home Office Presenting Officer could not give an explanation for that at the First-tier Tribunal. The case of **Khan** is a case which

considers whether or not conduct amounts to deception or dishonesty as opposed to simple carelessness. In this case dishonesty and deception were not being argued, as was told to Judge Khawar and no explanation could be given as to why it was being said that 322(5) applied other than the fact that there had been a discrepancy in the sums declared. The First-tier Tribunal Judge in those circumstances was not wrong in failing to consider the case of **Khan**. The Judge was not being asked to consider if the Claimant was dishonest or merely careless. In this case dishonesty was not being put forward at the appeal hearing as the reason as to why 322(5) applied. It was simply being put forward that the discrepancy in the sums declared in itself was sufficient. That in itself would not justify refusal under 322(5).

16. Where the Home Office Presenting Officer could not say why such accounting errors should mean refusal under 322(5), then Judge Khawar quite properly found that 322(5) did not apply in the circumstances of this case, based on the way the case was presented to him by the Secretary of State and on the basis of what he was asked to consider. He did not fail to consider **Khan**. Although he did not consider the case, it was not a failure or legal error in this case as **Khan** did not apply, as the Secretary of State was not seeking to rely upon deception or dishonesty and was simply seeking to rely upon a discrepancy in the accounts. One cannot simply read into the refusal letter that there is an allegation of deception or dishonesty. That is a serious matter and should actually be stated within the refusal letter if that is being relied upon. It was not in this case and the Home Office Presenting Officer at first instance was not seeking to say that the Claimant had utilised deception or dishonesty.
17. For those reasons, the decision of First-tier Tribunal Judge Khawar does not reveal any material error of law and is maintained. The appeal of the Secretary of State is dismissed.

### **Notice of Decision**

The decision of First-tier Tribunal Judge Khawar does not contain any material error of law and the decision is maintained. The Secretary of State's appeal is dismissed.

I do not make any order for anonymity in this case, no such order was made by the First-tier Tribunal and no such order has been sought before me today.

Signed

Date 7<sup>th</sup> March 2019

*R McGinty*

Deputy Upper Tribunal Judge McGinty