Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02154/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2018 and 21 March 2019	**On 26 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SATSORUBAN SUNDARALINGAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation on both days:
For the Appellant: Ms J Isherwood of the Specialist Appeals Team
For the Respondent: Mr N Paramjorthy of Counsel instructed by A&P Solicitors

DECISION AND REASONS

The Respondent

1. The Respondent, Satsoruban Sundaralingam (the Applicant) is a citizen of Sri Lanka born on 23 May 1984. On 27 July 2006 he was given leave to enter as a student. His leave was extended in different capacities several times, eventually expiring on 29 May 2016. On 25 May 2016 he applied for indefinite leave to remain as a Tier 4

(General) migrant which application 17 January 2017 he varied to an application for indefinite leave to remain on the basis of 10 years' continuous law for residence.

The SSHD's Original Decision

2. On 20 December 2017 the Appellant (the SSHD) refused the application because the Appellant did not meet the relevant suitability requirements of paragraphs 276B and 322(5) of the Immigration because having regard to the public interest it was undesirable to grant him indefinite leave in the light of his conduct. The reasons letter of 20 December 2017 deals with this in the last few paragraphs on page 4 which are so brief on the point as to be almost confusing. It appears that the SSHD takes two separate points against the Applicant.

3. The first point is that the Applicant had failed accurately in time to file a complete tax return and had under-declared his income. He had failed to declare in his tax return for the year ending 5 April 2011 all his income from Pay As You Earn employments of £10,783. He had declared only £7,183 of such income. The error had been corrected on 26 April 2016. The income in question arose from his employment with ASER Consultancy. The difference is shown in the tax calculations issued by HM Revenue & Customs on 26 April 2016 E5 of the SSHD's bundle: it was a difference of £3600 on which it would appear income tax at 20% (£720) had not been paid.

4. The second point is that the Applicant's declared total income was £37,627 (on the revised assessment) which was significantly less than the income of £46,223.59 declared on the Applicant's application of 1 April 2011 for further leave under the Points-Based System. The impact of the difference of some £8596.59 would have been that on the lower figure the Applicant would have been awarded 20 points for earnings instead of the 25 points he was actually awarded.

Proceedings in the First-tier Tribunal

5. By a decision promulgated on 26 September 2018 Judge of the First-tier Tribunal Chamberlain found that the Applicant's omission to declare the earnings from Aser Consultancy of £3600 was an innocent mistake. On that basis she allowed the appeal against the decision under paragraph 322(5) of the Immigration Rules. She then dealt with the Applicant's claim outside the Immigration Rules based his private and family life in the United Kingdom and allowed the appeal on human rights grounds.

6. On 19 October 2018 Judge of the First-tier Tribunal Saffer granted the SSHD permission to appeal because the Judge had not given adequate reasons for accepting the Applicant's explanation for the under-reported income, namely that it was an accountant's error in the light of the jurisprudence in two judicial review decisions cited in the grounds for appeal but which were not before the Judge or indeed before the Upper Tribunal. Further, the Judge had arguably erred in law by failing to address the second point under paragraph 322(5) of the Immigration Rules outlined in paragraph 4 of this decision.

Proceedings in the Upper Tribunal

Submissions for the SSHD

7. Ms Isherwood referred to the difference between the Applicant's income declared for tax and the income declared to the SSHD in his application for further leave under the Points-Based System. She described the difference as "almost £10,000". Mr Paramjoorthy intervened to say that the issue was the under-declared PAYE income.

8. Ms Isherwood continued that the Applicant had a first-class degree in accounting and finance and to a tribute the under-declaration of income to an omission on the part of his accountant was not the end of the matter. The explanation given by the Applicant at paragraphs 1 and six of his statement was inadequate. She referred me extensively to the judgment of Martin Spencer J in *R (Shahbaz Khan) v SSHD (dishonesty, tax return, para.322 (5)) [2018] UKUT 00384 (IAC)*. At paragraph 34 of his judgment Spencer J had acknowledged that a mistake in the completion of tax returns may be "a genuine error on the part of the accountants" or an attempt to pull the wool over the eyes of the SSHD. The Judge had not given adequate consideration to the range of possible explanations before reaching her conclusion. She relied on the agreed submissions at paragraph 26 of *R (Khan).* The Judge had erred and her decision should be set aside.

Submissions for the Applicant

9. Mr Paramjoorthy noted that the judicial review decisions referred to in the SSHD's grounds for appeal and in *R (Khan)* were not before the Judge. It was accepted that the SSHD was entitled to be suspicious because of the late admission of a previous under-declaration, particularly if it was sought to place the blame on an accountant. The question whether the Applicant had practised deceit had been put to him directly at the hearing before the Judge as she recorded at paragraph 18 of her decision. The Judge went on to make a clear finding that the Applicant had not practised deceit and had given a satisfactory and honest explanation for the under-declaration and had accepted that it was an innocent mistake. There was no material error of law in her decision which should be upheld.

10. He went on to address the issue raised by Ground three of the SSHD's permission application that the Applicant was responsible and could not properly seek to shift that responsibility to his accountant. The Judge had dealt with this in her decision and had found in favour of the Applicant. The decision should be upheld.

Response for the SSHD

11. Ms Isherwood responded that the submissions for the Applicant did not address the issue of the declaration of total income in the Applicant's 2010/2011 tax return. He could not put all the blame on his accountant. He had a degree in accountancy and finance and had signed the returns. There was no explanation why it was not until early 2016 the Applicant had reported the under-declaration and he had failed adequately to address this in his statement.

Reconvened hearing

12. Subsequent to the hearing on 06 December I decided to seek submissions on whether the Applicant had truthfully represented his earnings to the SSHD when he had sought further leave. In the event the Tribunal's administration listed the appeal for a reconvened hearing. Prior to the hearing each party made further written submissions and Applicant submitted further copies of documents extracted from bundles previously submitted with a letter of 27 February 2019 from his present accountants who had not been instructed during or in respect of any fiscal period relevant to the appeal.

Submissions for the SSHD

13. Ms Isherwood submitted that it was incorrect to focus on the fact that HMRC had not charged any penalty in respect of the 2016 amendment to the Applicant's 2011 tax return. The SSHD had not queried the earnings of some £46,000 which the Applicant had claimed in his application for further leave and for which she had been given the requisite points under the Points—based System and yet he had claimed a lower figure in his application for indefinite leave. The SSHD had explained in the reasons given to refuse the indefinite leave application that this was not considered to have been an innocent error. HMRC had found the Applicant's conduct to be unreasonable as mentioned in the letter at page 15 of the Appellant's bundle. Signing off his accounts and tax return was the responsibility of the Applicant who had knowledge of financial matters. This aspect of the Applicant's responsibility had not been addressed by his present accountants in their letter of 27 February 2019. The latest bundle from the Applicant sought to re-argue the figures of income and tax declared. For the reasons given at the previous hearing the Judge's decision should be set aside.

Submissions for the Applicant

14. Mr Paramjoorthy highlighted that the variance in the relevant figures was a claimed income of £46,223 in the Applicant's application and £37,627 disclosed in form SA 302 prepared by HMRC. The importance of the difference was that if the Applicant's earnings for the year ending 5 April 2011 which were relevant to his 2011 application for further leave were £37,627 and not £46,223 then he would have below the threshold of £40,000 and would have been awarded fewer (and by implication insufficient) points under the Points-based System.

15. He referred to page 11 of the bundle submitted for the day's hearing. This is a letter from HMRC to the Appellant of 21 February 2017 disclosing that National Insurance contributions had been paid on his earnings of £4,743.05 from Aser Consultancy for the year ending 5 April 2011. This was income from employment to which the Applicant had referred in reply 14 to the SSHD's financial questionnaire sent subsequent to his application for indefinite leave: see p.11 of today's bundle. I noted the accountants' letter of 27 February 2019 confirmed the Aser Consultancy earnings were income from employment. Income tax and National Insurance was deducted at source by the employer under the PAYE scheme.

16. The Applicant had shown that he had earned the income in 2010/11 claimed in his application for further leave and that tax due in respect of the earnings from employment by Aser Consultancy which he had not declared in his 2011 tax return had been deducted and paid by the employer in 2010/11. The First-tier Tribunal's decision contains no material error of law.

Conclusion

17. I accept the submissions made by Mr Paramjoorthy which I have outlined in the two preceding paragraphs. Consequently, I find the Applicant has shown that he did have the income disclosed in his 2011 application for further leave. I find that he has paid tax on those earnings. Indeed, the letter of 27 February 2019 from the Applicant's accountants suggests that the Applicant has in fact pay tax twice on the Aser Consultancy earnings: once under the PAYE scheme and again after he amended his 2011 tax return. The SSHD has not identified any other inaccuracy, error, misrepresentation or similar in any of the Applicant's tax returns or applications made to the SSHD for further leave.

18. I conclude this factual background is what the First-tier Judge found. I note the guidance, in particular at paragraph 37, given in *R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384*, namely:

> (i) 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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.
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> (ii) However, 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 is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.
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> (iii) 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.

19. In this light, it is evident the decision of the First-tier Tribunal that paragraph 322(5) of the Immigration Rules is not applicable to the circumstances of the Applicant is sustainably and adequately reasoned, notwithstanding that the Judge did not refer to the judgment in *Khan* reported on 3 May 2018. The decision does not contain a material error of law such that it should be set aside. It shall stand and the SSHD's appeal is dismissed.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain an error of law and shall stand. The consequence is that the appeal of the SSHD is dismissed and the Applicant's original appeal has been allowed.

No anonymity direction is made.

Signed/Official Crest Date 22. 03. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal