UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: HU/02814/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 30 January 2019

Decision & Reasons Promulgated
On: 20 February 2019

Before
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SAIMA SULTANA
ANONYMITY DIRECTION NOT MADE

Respondent

Representation
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar, Counsel, Imperium Chambers

DECISION AND REASONS

1. I shall refer to the appellant as the Secretary of State and to the respondent as the claimant.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Carroll, who allowed the claimant's appeal against the Secretary of State's decision to refuse her application for indefinite leave to remain on the basis of ten years' residence.

3. The claimant's application made on 8 May 2017, was refused by the Secretary of State pursuant to paragraph 322(5) of the Immigration Rules. It was contended that the information she submitted in connection with her Tier 1 application relating to self

employment earnings was significantly different from the information she had declared to HMRC for self employment during the tax year 2010 to 2011.

4. The explanation she has provided for her amended tax returns was not accepted. "… As there was such a large discrepancy, i.e. profit from self employment for tax years ending 2011 having been amended on 11 November 2017 from £1,625 to £14,066, it is therefore not considered to be an acceptable or credible explanation….". The fact that she retrospectively declared these claimed earnings to HRMC was not sufficient to satisfy the Secretary of State that she had not previously been deceitful or dishonest in her dealings with HMRC and/or UK visas and immigration [7].

5. Judge Carroll set out the provisions of paragraph 322(5) of the Rules – a discretionary provision permitting the Secretary of State to refuse an application. She set out the Secretary of State's policy guidance in relation to 322(5):

> "The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams, are those that involve criminality, a threat to national security, war crimes or travel bans.
>
> A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control".

6. Copies of the figures originally submitted by the claimant and the amended figures subsequently submitted in 2017 were in the Secretary of State's bundle. Judge Carroll noted that there was a clear discrepancy between the figure initially given by the claimant for profit, namely £1625 and the amended figure of £14,066 – [11]. After submitting the application giving rise to the decision under appeal the claimant was asked by the Secretary of State to complete a questionnaire which was produced in the Secretary of State's bundle. The claimant was asked a number of questions at part 14 of the questionnaire about the tax return for 2010/11, and she stated that the confusion arose in part because the tax amount "… was splitting into two years (2009/10 - 2010/11) so that's ended with few unintentional errors in the self assessment submission."

7. The claimant went on to state in response to question 14(b) that before submitting the application giving rise to the decision under appeal she went to an immigration advisor and was told that she needed to get an SA302 and her employment history from HMRC. Once that documentation was received, she was referred to an accountant and she instructed that accountant to review her tax affairs. The accountant then found the discrepancy in the 2010/11 return and advised her to contact HMRC to rectify the matter [12].

8. It was only on 11 November 2017 that she submitted a revised Self Assessment return. The Judge noted however that in fact, as appears from the correspondence exhibited, the

amended tax return was received by HMRC on 24 January 2017. In the same letter, HMRC apologised for having taken so long to amend the self assessment tax return [13].

9. Judge Carroll stated that no other issues arose in relation to any of the subsequent tax returns submitted by the appellant and HMRC has not sought to impose any penalty upon her for the amendment [14].

10. She was therefore satisfied in the light of all the evidence that there was no deception on behalf of the appellant in failing to declare all relevant income in the 2010/2011 tax return. She had taken all necessary steps to remedy the situation and HRMC has imposed no penalty upon her. She has not been involved in criminality or any conduct of the type referred to in the Secretary of State's policy guidance. She has never attempted to cover up the mistake made in the tax return initially submitted and fully disclosed the information to the Secretary of State in the questionnaire [15].

11. The claimant also produced character references and evidence relating to her employment. She has been employed since January 2012 on a permanent basis as a Deputy Network Manager at a health centre.

12. She stated that no reason has been relied upon by the Secretary of State other than the discrepancy in the two tax returns when refusing her application for indefinite leave to remain.

13. She found that the Secretary of State's decision to invoke paragraph 322(5) is inconsistent with her own policy guidance. The claimant has been in the UK for ten years lawfully and continuously and in the light of the evidence she concluded that the decision under appeal is disproportionate. [18]

14. On 28 November 2018, First-tier Tribunal Judge P J M Hollingworth granted permission to appeal on the basis that the Judge had arguably fallen into error by taking into account the fact that HMRC had imposed no penalty upon the claimant. It is arguable that the outcome has been affected.

15. Mr Melvin on behalf of the Secretary of State submitted that the Judge erred in her approach and assessment as to whether the claimant has acted dishonestly by placing significant emphasis on the fact that HMRC has not sought to impose any penalty upon her for the amendment or taken any action against her.

16. He submitted that this approach is incorrect. He referred to two judicial review decisions from the Upper Tribunal. In R (on the application of Samant) v SSHD [2017] UKAITUR JR 6546/2016 the Tribunal held that it seemed that in any given case, depending on the amounts and circumstances, HMRC may well decide that the effort in reaching particular conclusions frankly is not justified in all the circumstances. The fact that HMRC has decided not to take further action did not indicate that the decision of the Secretary of State is one which was irrational.

17. Mr Melvin also referred to the decision in Abbasi v SSHD JR/13807/2016 where the Tribunal held that the fact that HMRC has not yet seen fit to issue a penalty notice is

neither here nor there. No doubt HMRC has leeway to issue a penalty notice or institute proceedings and time would only have started running when the declaration was made in late 2015. In any event, what the HMRC does or does not do is not necessarily relevant to actions by the Secretary of State in deciding applications for indefinite leave to remain.

18. He submitted that Judge Carroll has accordingly erred in placing significant weight in her reasoning on the fact that the claimant has not been penalised for submitting incorrect returns. Her assessment of the claimant's dishonest actions in respect of her declared income is flawed as a result.

19. He also referred to the Home Office Review of Applications by Tier 1 (General) migrants refused under paragraph 322(5) of the Rules, published on 22 November 2018.

20. He submitted that the approach is set out in the headnote of the decision of Mr Justice Martin Spencer in R (on the application of Khan) v SSHD (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384:

> "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 should be refused ILR within paragraph 322(5) of the Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.
>
> 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 influence of deceit/dishonestly.
>
> 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.
>
> For an applicant simply to blame his 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 taxpayer to confirm that the return was accurate and to have signed it. Further, the applicant will have known of his earnings and will have expected to pay tax on them. 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.
>
> 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):
>
> (a) whether the explanation for the error by the accountant is plausible;
>
> (b) 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; why the applicant did not realise that an error had been made because of his liability to pay tax was less than he should have expected;)
>
> (c) 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."

21. Mr Melvin submitted that the Judge erred in failing to provide adequate reasons for her findings. The Secretary of State has followed the relevant guidance and reached a conclusion which is sustainable in the circumstances.

22. On behalf of the claimant, Mr Gajjar adopted his Rule 24 response. The First-tier Tribunal Judge did not make any material error of law. The authorities relied on, namely, Samant and Abbasi were both judicial review cases where the rationality of the decision was raised. In such case there is a wide latitude afforded to the Secretary of State. Neither Judge was able to conclude that the Secretary of State had been irrational in departing from HMRC's assessment.

23. Further, the Secretary of State's grounds are selective when referring to the decision in Samant. At [22] Collins J stated that the difficulty is that there is no evidence from the Revenue as to whether they did consider the question of penalty or what steps, if any, they decided to take and the reasons they decided as they did.

24. In contrast to that situation, the claimant produced at p.47 a letter from HMRC, dated 24 August 2017. The claimant was informed that they did not propose to take any action to recover any tax potentially lost for the year ended 5 April 2011, in respect of the changes suggested in her amended tax return.

25. HMRC stated that as the claimant did not make the amendments to the tax return within the time frame allowed, they viewed this as a failure to take reasonable care with her tax affairs for that period. Where a person fails to take reasonable care with their tax affairs the relevant Act sets the time limit within which HMRC can issue an assessment to collect the lost income tax. The time limit to raise such an assessment ran out on 5 April 2017 and that is why they could take no action to collect the additional tax due as suggested in her return.

26. Mr Gajjar submitted that this is not the language of dishonesty. A decision maker must distinguish between carelessness on one hand and dishonesty on the other.

27. He referred to a report by the TACS Partnership. In the executive summary, it is stated that HMRC have a duty to consider action where an inaccurate return has been made by a taxpayer under relevant legislation. The legislation draws a distinction between inaccuracies that arise because of the carelessness of the taxpayer and those due to the deliberate actions of the taxpayer.

28. HMRC confirm that a key difference between these two categories is the level of knowledge of the taxpayer at the time of the submission of the inaccurate return. To be treated as having deliberately submitted an inaccurate return, the taxpayer has to be

shown to have had knowledge that he was submitting such a return. Where a taxpayer erroneously believes he is submitting a correct return, he cannot be guilty of deliberately making an inaccurate return. This will be the case even though a prudent taxpayer would have known of the inaccuracy, or would have taken steps to seek advice. When HMRC confirm that an inaccurate return will be treated as due to the carelessness of the taxpayer (applying the penalty regime that applies to such behaviour) then they are confirming that the taxpayer did not knowingly submit an incorrect return. Mr Gajjar noted that the HMRC approach to inaccuracies in returns was not before Mr Justice Collins.

29. He submitted that First-tier Tribunal Judge Carroll had regard to the bundle of the Secretary of State as well as the claimant's supplementary witness statement. She has gone through the chronology of events. She noted that no issue arose in relation to any of the other subsequent tax returns submitted by the claimant.

30. Accordingly, unlike the decision in Samant, where there was an absence of a penalty without any indication as to why this was so, or how HMRC had characterised his conduct, in the claimant's case, HMRC *did* assess her conduct, finding it to have been a failure to take reasonable care - p. 46.

31. He submitted that in the claimant's case, HMRC when advised of the discrepancy, did not propose to recover any tax that had potentially been lost, let alone to impose a liability on her. However, notwithstanding this, the claimant made the relevant payment which is a strong indicator in favour of her character and conduct.

32. He referred to the decision of Upper Tribunal Judge Canavan, also a judicial review, in the application of Shaik JR/8324/2017. The applicant asserted that he only made one mistake that needed to be amended. Although Secretary of State failed to make findings relating to the penalties imposed by HMRC, she found it is unlikely that this would have made any material difference to the outcome of the application for the reasons given by Collins J in Samant.

33. First-tier Tribunal Judge Carroll stated that she was satisfied in the light of all the evidence that there had been no deception on the part of the claimant in failing to declare all relevant income in her 2010/2011 tax return. Nor was she simply looking at HMRC's position, that no penalty was imposed upon her. She also referred to the fact that the appellant had not been involved in criminality or any conduct of the type referred to in the respondent's policy [15].

34. The fact that no further issues raised in respect of the claimant's other tax returns is significant as it shows that there was not a pattern of discrepancies indicative of a pattern to save substantial sums of money from HRMC by under-declaring her income [14].

35. Mr Gajjar referred to the decision in Khan [2018] UKUT 384 at [37(vii)]. Mr Justice Spencer stressed the fact that the Secretary of State is likely to want to see evidence going beyond mere assertion, in a case such as the present, where the explanation is that the claimant was distracted by his concern for his son's health. There should be

documentary evidence about that matter. If there was, the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the applicant has been deceitful or dishonest.

36. Mr Gajjar submitted that there was such evidence produced before First-tier Tribunal Judge Carroll.

37. Mr Melvin in reply contended that the Judge made no findings as to why paragraph 322(5) was not made out. When the claimant returned to the UK in 2011, she had six years to deal with HMRC before making her application.

Assessment

38. The Secretary of State contends that the First-tier Tribunal Judge erred in her approach as to whether the claimant has acted dishonestly for the purpose of paragraph 322(5) of the Rules, by placing significant emphasis on the fact that HMRC had not imposed a penalty or taken action against her. It is asserted that what HMRC does or does not do is not necessarily relevant to the actions by the Secretary of State in deciding applications for indefinite leave to remain. It is contended that her assessment relating to the claimant's dishonest actions was accordingly flawed.

39. I have had regard to the judicial review decisions relied on by the Secretary of State in this respect. In those applications, the court considered the rationality of the Secretary of State's decision in departing from HMRC's assessment to find that the individuals had been dishonest. In such cases there is a wide margin afforded to the Secretary of State before irrationality can be shown. Neither Judge concluded that the Secretary of State in those cases had been irrational.

40. As already noted, Judge Carroll did not simply have regard to HMRC's actions in not imposing a penalty, but has considered the circumstances of the case as a whole when assessing the claimant's asserted innocent explanation.

41. In the claimant's case, HMRC had in fact assessed her conduct and found that she had in effect failed to take reasonable care. That is set out in the letter sent to her at A46. Further, when HMRC was advised of the discrepancy, no attempt was made to impose a liability upon her. The claimant nevertheless made the relevant payment.

42. I have had regard to the Home Office review of applications by Tier 1 (General) migrants refused under paragraph 322(5) of the Rules, published on 22 November 2018. That paragraph states that applications to extend individuals' stay in the UK should normally be refused if their character and conduct means that it is undesirable for them to remain in the UK. That includes applications under the ten year long residence provisions.

43. I have also considered HMRC's approach to inaccuracies in returns set out in the executive summary: the legislation draws a distinction between inaccuracies that arise because of the carelessness of the taxpayer and those due to the deliberate actions of the taxpayer.

44. It is evident that First-tier Tribunal Judge Carroll has considered the evidence as a whole and not simply base her conclusion on the basis that HMRC had not imposed a penalty on the claimant. At [15] she stated that she has had regard to all of the evidence and concluded that there was no deception on the part of the claimant in failing to declare all relevant income in her 2010/2011 tax return.

45. In that respect, she found that the claimant took all necessary steps to remedy the situation and that HMRC has imposed no penalty. Further, the claimant has not been involved in criminality or any conduct of the type referred to in the Secretary of State's policy guidance. Nor had she attempted to cover up her mistake in the tax return initially submitted and fully disclosed the information to the Secretary of State in the questionnaire sent to her.

46. It is also evident that she sought to provide an innocent explanation in her responses to the tax questionnaire – a factor borne in mind by Judge Carroll at [11-12]. She also concluded that the claimant's amended 2010/2011 tax return was received by HMRC on 24 January 2017, p. 53, and that HMRC also apologised for taking so long to amend the self assessment tax return. It is accordingly not correct, as asserted by the Secretary of State, that it was only on 11 November 2017 that she submitted a revised self assessment return.

47. First-tier Tribunal Judge Carroll has properly taken into account as part of her assessment, the various character references and evidence relating to the claimant's employment [16]. Nor was any other adverse factor raised against the claimant apart from the tax returns [14]. She found that there was no pattern of discrepancies with regard to any of the other subsequent tax returns.

48. She had regard to the claimant's circumstances set out in her detailed statement. She had filed the discrepant return at a time when she had been absent for some time in Pakistan as her mother had been diagnosed with an illness and she lost her father on 13 March 2010.

49. Her mother was diagnosed with Ascites in her liver in January 2011 and tuberculosis in September 2011. She visited Pakistan between October 2011 and 30 December 2011. The return in question was filed in January 2012. She had filed the return herself.

50. She had attempted to engage an accountant to file her return but he was unable to do so, given the short time available.

51. She found that these factors cumulatively gave rise to an innocent explanation as to why she was distracted and paid less attention to her tax returns than she might otherwise have done. Those were factors which were part of the assessment when considering whether or not she was dishonest, or merely careless (Khan, supra, at headnote [v]).

52. Moreover, she had produced medical evidence including the death certificate relating to her father, as well as a hospital letter for her mother and her own medical evidence - A 93-115.

53. She concluded in the light of all the evidence that there was no deception on the claimant's part when failing to declare all relevant income in her 2010/2011 tax return.

54. I find that First-tier Tribunal Judge Carroll has given sustainable reasons for her findings.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed Date 14 February 2019

Deputy Upper Tribunal Judge Mailer