Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03914/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th January 2019	**On 7th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMMAD BABAR KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma, Direct Access Counsel

DECISION AND REASONS

1. Although the Secretary of State is the Appellant I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State to refuse his application for indefinite leave to remain on the ground of long residence on 19th January 2018. First-tier Tribunal Judge Taylor allowed the appeal in a decision promulgated on 22nd October 2018.

The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Birrell on 20th November 2018.

3. The background to this appeal is that the Appellant came to the UK on 23rd September 2006 with leave to enter as a student which was extended until 31st December 2008. His leave was subsequently extended as a Tier 1 (Post-Study) Migrant until 21st June 2016. On 18th June 2016 he applied for indefinite leave to remain as a Tier 1 Migrant which was varied to an application on the basis of long residency.

4. The Secretary of State refused that application under paragraph 322(5) of the Immigration Rules, which provides a discretionary Ground of Refusal where -

> "The undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations or the fact that he represents a threat to national security".

This led to refusal under paragraph 276A (ii) and (iii).

5. The basis for the refusal was that, in his application for extension of his leave to remain in March 2011 and in a further application in June 2013, the Appellant had misstated his earnings during the relevant tax years. The income claimed in the two applications by the Appellant was not consistent on each occasion with the tax return submitted to the HMRC where the Appellant had declared earnings below those claimed in his immigration applications. The Secretary of State considered that the Appellant had not submitted a credible explanation for the discrepancy in the financial information submitted and decided that it was appropriate to refuse the application.

6. The First-tier Tribunal Judge noted as a preliminary matter that it was accepted by the Presenting Officer that the Appellant's wife and oldest child had been granted leave to remain on the basis of Article 8 of the European Convention on Human Rights on 17th August 2018. The judge considered the oral and documentary evidence and noted that in the reasons for refusal letter there is no suggestion that there have been any gaps in the Appellant's lawful leave in the UK and that the Respondent had not suggested that the Appellant dishonestly inflated his earnings in the UK in order to obtain leave. Accordingly, the judge considered that the sole allegation on which the application was refused is that the Appellant submitted a false tax return for the years 2011 and 2012 in that his self-employment income was understated.

7. The judge considered the evidence at paragraph 12 noting that no evidence of dishonesty or deceit had been submitted to the Tribunal. The judge also took into account the evidence from the Appellant that he discovered the error when he started employment at Barratts in August 2014 when he checked his first P60 and noticed that he was paying more tax than when he was self-employed and that he arranged for amended returns to be submitted. The judge considered it a material

consideration that, several months prior to his application for indefinite leave to remain, the Appellant submitted amended figures to HMRC, received an amended tax demand and agreed payment terms. At paragraph 9 the judge noted the Appellant's oral evidence that the total additional tax for the two relevant tax years was £25,236 and that payment terms had been agreed at £200 per month. The judge found; "there can be no suggestion that the Appellant only agreed to pay additional tax due to pressure by the Respondent" considering that the chronology suggests that the Appellant voluntarily agreed for amended returns to be submitted. The judge noted that the Appellant stated that he relied on his accountant and took into account the fact that the accountants had submitted an unchallenged letter which admits liability for the error. The judge found no supporting evidence for the allegation that the Appellant had been deceitful or dishonest, at most in his view the Appellant could be accused of being less than careful by failing to check the figures given to him by his accountant. The judge considered it "most significant" that HMRC did not consider the matter to be one which warranted a penalty or reference to the police and that HMRC were satisfied to deal with the matter by way of a payment schedule, interest and a late payment penalty, and that nothing in HMRC's actions suggest that they consider that the Appellant had been dishonest or deceitful as alleged by the Respondent. At paragraph 13 the judge noted that the Appellant had not been found guilty of any offence or even reported for consideration for an offence and there is no suggestion that he is a threat to national security. The judge concluded at paragraph 14 that the Appellant had met the requirements of paragraph 276B to be granted indefinite leave to remain in the UK and, as the Immigration Rules are designed to be compliant with the ECHR, he decided that the appeal should be allowed.

The grounds of appeal

8. There are three grounds advanced in the Grounds of Appeal. It is contended in the first ground that the decision conflicts with the approach in **Abbasi JR/13807/2016** where the Tribunal said at paragraph 73;

> "73. The explanation in such 'self-employed income' cases such that the accountant can be blamed has been given short shrift **R (on the application of Samant) v Secretary of State for the Home Department [2017] UKAIT JR/6546/2016**. Essentially the applicant must take responsibility for his own tax affairs. Not only would the applicant have supplied the figures to his accountant, he would have checked them and would individually have received a tax bill.
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> 74. The applicant was responsible for his own tax affairs and, having been self-employed, would have been sent a tax bill for which he was personally liable".

It is therefore contended that the attempt to blame a third party is misconceived.

9. It is contended in the second ground that the Tribunal erred in its consideration of HMRC evidence, finding that the decision of HMRC not to pursue any further penalty against the Appellant is "most significant". It is contended that this also

conflicts with the guidance in **Abbasi** at paragraph 75 where the Tribunal said that the fact that HMRC had not yet seen fit to issue a penalty notice is neither here nor there as HMRC has leeway within which to issue a penalty notice or institute proceedings and that, 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. It is contended that the First-tier Tribunal erred in this case as any decision by HMRC has no relevance to the indefinite leave to remain claim and so the findings by the Tribunal on this basis fall away. It is contended that the judge therefore made unsafe findings in light of the fact that the HMRC point was at the core of the Tribunal's findings.

10. It is contended in the third ground that the Tribunal misdirected itself in its approach to paragraph 322(5) of the Rules in equating that paragraph with criminal convictions and threats to national security and in failing to appreciate that tax evasion can also engage paragraph 322(5).

Discussion

11. In granting permission to appeal First-tier Tribunal Judge Birrell highlighted the recent 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)**.

12. At the hearing before Mr Sharma pointed out that the decision in **Khan** had been before the First-tier Tribunal Judge. He referred to the skeleton argument which was before the First-tier Tribunal and in particular paragraphs 47 and 48 which referred to the decision of Mr Justice Spencer in the case of **Khan** (which had not yet been reported) and set out the guidance given in the case.

13. At the hearing before me Mr Whitwell referred to the guidance given at paragraph 37 of the decision in **Khan** which is summarised in the head note.

14. At paragraph 37 the Tribunal said;

> "In order not to fall into the trap which I consider that the Secretary of State (or those acting on her behalf) fell into on this occasion, it may assist for me to give some guidance in relation to the decision-making process where there have been discrepancies between previous applications for Leave to Remain (with points claimed on the basis of earnings or profits) and tax returns which have been made covering the same period. This guidance stems from my observations at paragraphs 32-34 above:
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> (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.

(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.

(iv) However, 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: far from it. Thus, the Secretary of State is entitled to take into account that, even where an accountant has made an error, the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.

(v) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.

(vi) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

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

(2) 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;

(3) 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;

(4) 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.

(vii) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then 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/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.
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> (viii) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached."

15. At the hearing before me Mr Whitwell submitted that it was not enough for the Appellant to simply blame his accountant for an error in relation to an historical tax return. However, in my view it is clear that the judge did not simply accept an assertion on behalf of the Appellant. The judge clearly took account of the Appellant's evidence in relation to this. The judge took into account that the Appellant had discovered the error when he started employment in Barratts in August 2014 [8 and 12] and the Appellant arranged for amended returns to be submitted and that this occurred several months before he applied for indefinite leave to remain. When the Appellant submitted amended figures, he received an amended tax demand from HMRC and agreed payment terms. The judge also noted that by the time the refusal letter was issued in January 2018 the Appellant was paying the additional tax by agreed instalments and that this was not connected to the decision by the Secretary of State. The judge found that the chronology suggests that the Appellant voluntarily agreed for amended returns to be submitted. The judge also took into account that the Appellant said that he relied on his accountants and that his accountants submitted an unchallenged letter which admits liability for the error. Accordingly, it is clear to me that the judge examined the circumstances of the discrepancy between the Appellant's income declared in his previous applications for leave to remain and the income declared to the HMRC. This is exactly within the guidance set out in the decision of **Khan** at paragraphs 2, 3 and 4, in particular at paragraph 4 where the guidance states that if realising the accountant's error the applicant has not taken steps within a reasonable time to remedy the situation this could justify a conclusion that the applicant has been deceitful. In this case the judge did exactly as set out in the guidance in paragraph 6 in the decision of **Khan**, considering the evidence from the accountant, the evidence from the Appellant as to when he realised an error had been made and what steps he took to remedy the situation, and when those were taken. Accordingly, I find no error in the judge's approach to this matter and the first ground has not been made out.

16. It is contended in the second ground that the judge erred in his consideration of the evidence about the approach taken by HMRC. The judge said at paragraph 12;

> "I find it most significant that HMRC did not consider the matter to be one which warranted a penalty or reference to the police. HMRC were satisfied to deal with the matter by way of a payment schedule, interest and a late payment penalty. Nothing in the actions of HMRC suggests that they consider that the Appellant had been dishonest of deceitful, as alleged by the Respondent".

However, in my view it is clear that the judge considered that the decision of HMRC not to impose any penalty on the Appellant was a significant and relevant factor. I accept Mr Sharma's submission that the decision by HMRC in these circumstances is of some relevance as HMRC is charged with countering tax evasion and has legal responsibilities in relation to this matter. It is clear from reading this decision that whilst the judge considered that it was a relevant factor it was not a determinative factor.

17. It is contended in the third ground that the judge misdirected himself in relation to paragraph 322(5) of the Rules. Mr Sharma accepted that it appeared at paragraph 13 that the judge concentrated on the fact that the Appellant had not been found guilty of any offence or reported for consideration for any offence and that there is no suggestion that he is a threat to national security. However, he pointed to the last sentence in paragraph 13 where the judge said *"On the available evidence I cannot be satisfied that the Appellant has been dishonest or deceitful as alleged and I cannot be satisfied that he has demonstrated that his remaining in the UK would be undesirable under paragraph 322(5)"*. I accept that this is an implicit reference to the other factors in paragraph 322(5) which refers to an Appellant's conduct, character or associations and not just to convictions or threat to national security. In any event, apart from the allegation in relation to the tax returns, there was no other evidence before the judge reflecting negatively on the Appellant's conduct, character or associations. Accordingly, any error in relation to the approach to paragraph 322(5) is not material.

18. Looking at the decision as a whole I find that the judge clearly followed the guidance given in the case of **Khan**. I find that there is no error in the judge's approach to the allegation of deception. I accept it is clear that the judge considered that the Respondent discharged the initial evidential burden in relation to the allegation of dishonesty. The judge obviously considered that the Appellant's innocent explanation was sufficient and it is clear that the judge did not accept that the Secretary of State had discharged any legal burden upon him.

19. In my view the decision is sound and there is no material error.

Notice of Decision

20. There is no material error of law in the decision of the First-tier Tribunal.

21. The decision of the First-tier Tribunal will stand.

22. No anonymity direction is made.

Signed Date: 31st January 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I maintain the fee award made by the First-tier Tribunal.

Signed Date: 31st January 2019

A Grimes
Deputy Upper Tribunal Judge Grimes