Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04671/2018
HU/10476/2018

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 25 February 2019	**On 01 March 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ADNAN NASIR
AYESHA IBRAHIM

Respondents

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr R Halim, Counsel instructed by Clyde solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge

Bulpitt promulgated on 23 November 2018 ("the Decision") allowing the Appellants' appeals against the Respondent's decision dated 25 January 2018 refusing the Appellants' human rights claims made in the context of an application for indefinite leave to remain by the First Appellant based on ten years' lawful residence with the Second Appellant as his dependent. Since the focus of the Decision and the Respondent's refusal turns on the position of the First Appellant I refer to him hereafter as the Appellant.

2. The basis of the Respondent's refusal of the Appellant's application is that there was a discrepancy between self-employed income declared to HMRC for the tax year ending 5 April 2013 and that declared to the Home Office in order to obtain leave to remain at that time. The application was therefore refused by the Respondent applying paragraph 322(5) of the Immigration Rules ("the Rules") on the basis that his character and conduct were such that his continued presence in the UK was not conducive.

3. The Judge heard oral evidence from the Appellant and accepted that he had not been dishonest and that the discrepancy was due to an error by his accountants. He therefore concluded that the Appellant's character and conduct did not render his presence undesirable and since he otherwise met the Rules based on his ten years' unlawful residence, the appeals should succeed on human rights grounds.

4. The Respondent challenges the Decision on the basis that the Judge made a material misdirection of law on a material matter by failing to apply case-law in this area. I note that this case is not the only one of its kind. Indeed, as is evidenced by the document entitled "Review of Applications by Tier 1 (General) Migrants Refused under Paragraph 322(5) of the Immigration Rules" published by the Home Office on 22 November 2018, there have been 1,697 applications of a similar nature refused under the same provision of the Rules which involve a similar factual context to these appeals. As I pointed out in the course of Mr Melvin's submissions, however, that does not mean that all applicants who have wrongly declared income to either of the Home Office or HMRC have all done so dishonestly. Much turns on the facts of the case.

5. Permission to appeal was granted by First-tier Tribunal Judge Mark Davies on 18 December 2018 in the following terms so far as relevant:

> "…
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> [2] It is arguable that the Judge did not place sufficient weight on the fact that it is, as a matter of law, the personal obligation of every tax payer when completing his or her tax return to ensure that the details provided are true and correct. He or she cannot abrogate that responsibility to his or her accountant or any other person.
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> [3] The grounds and the decision do disclose an arguable error of law."

6. The matter comes before me to decide whether the Decision contains a material error of law. Both parties accepted that, if I found there to be an error of law in

the Decision, since the challenge is effectively to the credibility findings made by the Judge, it would be appropriate for the appeals to be remitted to the First-tier Tribunal for re-hearing and reconsideration of the Appellant's credibility.

Decision and Reasons

7. I begin with the way in which the Judge approached what was the central issue in this case, namely whether the Appellant acted dishonestly or genuinely was unaware of the accountant's error based on the evidence before the Judge.

8. I begin by noting that the discrepancy was a significant one, in the single sum of £30,000. The Appellant's case is that, in the tax year in question, he earned £20,593.91 as an employee and £31,148 as self-employed running a business called ADN Solutions, a business he had started in 2010. Those are the figures declared to the Home Office. The figures provided to HMRC for the same year, though, were £21,250 employed income and only £1,145 self-employed income.

9. The error is described in a letter from his then accountant, ZG Consultants dated 11 October 2018 in the following terms:

> "…We can confirm that an administrative error was made while submitting our clients' tax return for the period stated above. The error for the first time was triggered to our client and eventually to us by Home Office's Refusal Notice dated 25 January 2018. Please be advised that the error was not a deliberate act but was a pure human error and after finding out the error, the revised return was submitted to HMRC with a same explanation as here. We can also confirm that HMRC accepted the revised tax return for the above-mentioned tax year without imposing any penalty to our client and confirming that the error was not a wilful act but an administrative mistake."

10. As Mr Melvin pointed out in submissions, that letter does not really explain the error at all, particularly in light of the significant amount involved. Being somewhat generous to the accountants, the only assumption which one can make to explain the error is that a "3" was missed off a five-figure sum and only a four-figure sum was included (as the figures are otherwise very similar). However, the tax difference between the two should have been evident to any competent accountant. Nor is it quite correct to suggest that HMRC did not impose any penalty since they did charge the Appellant interest. That, Mr Halim says, is further reason why the blame for the error should not be placed at the door of the Appellant since he did not stand to benefit. That ignores, though, as Mr Melvin pointed out, that the benefit was of a grant of leave in 2013 where, if the correct figure for self-employed income were the £1,145 declared to HMRC, the Appellant would not have scored sufficient points for a grant of leave.

11. The Judge set out at [9] of the Decision the facts which were not disputed and include the discrepancy between the earnings declared to the Home Office and

HMRC in the relevant tax year. The Judge also set out the evidence at [16] to [28] of the Decision, including reference to the Appellant's earnings in previous and subsequent years. As I pointed out in the course of submissions, there was a clear dip in self-employed income from ADN Solutions in the tax year immediately prior to the tax year in question but in the year before that, the self-employed income was not dissimilar to that declared to the Home Office in the 2013 tax year. The Appellant's bundle includes the tax calculations for the other years but, as Mr Melvin points out, does not include the accounts relating to ADN Solutions. I assume, however, that those must have been produced to the Respondent at the time when leave was sought in 2013 to evidence the Appellant's income. Those are not produced by the Respondent to support the discrepancy on which reliance is placed or to draw attention to any other inconsistencies. I assume therefore that the accounts would show the figures declared to Home Office rather than those declared to HMRC. That does not of course mean that the figures declared were genuine but if the Respondent relies on over-declaration of income to him, I would expect him to produce the evidence on which that assertion is based.

12. The Judge had regard to the reasons given by the Respondent as recorded at [10] of the Decision as follows:

> "…The respondent says that the first appellant has therefore been dishonest in his dealings either with the respondent when applying for leave to remain or the HMRC when declaring his taxable income. In either event the respondent asserts that this is conduct which means it is undesirable for the appellant to be granted indefinite leave to remain."

13. Having recorded the Respondent's reasons and the evidence before him, the Judge set out his reasons for his decision on this issue as follows:

> "[29] It is accepted that the first appellant's self-assessment tax return for the year ended 5 April 2013 was incorrect and that as a result the first appellant paid far less tax that year than he should have done. It is also not in dispute that this error was only exposed when enquiries were made as part of the respondent's consideration of his application for indefinite leave to remain. Although it is not expressly conceded by the respondent there is compelling evidence that following the error being exposed the first appellant has corrected the tax return to HMRC and is repaying the tax owed. The core facts relating to the issue in dispute are therefore not controversial. What is hotly disputed is what inference should be drawn from these facts. The respondent says that the inference to be drawn is that the first appellant was dishonest in his dealings with HMRC and therefore it is undesirable for him to be permitted to remain in the United Kingdom. The appellant by contrast states that this was a simple error for which he was not responsible and which he did not appreciate until it was drawn to his attention years later when he immediately made recompense.
>
> [30] I was provided with a number of unreported decisions from the Upper Tribunal after hearing cases which were factually similar to this one. Those decisions demonstrate that there are cases where erroneous tax returns have been found to amount to conduct and character which means

it would be undesirable to permit an applicant to remain in the United Kingdom and also that there are cases where erroneous tax returns have been found not to amount to such conduct and character. As I stated during submissions I find these unreported cases to be of very limited assistance on what is quite clearly an issue which turns on its facts.

[31] I find that it is more likely than not that the self-assessment return for the year ending 5 April 2013 was completed by ZG Consultants, accountants employed by the first appellant for the purpose of managing his tax and business account affairs. I make this finding based on the letter from ZG consultants, the fact the business accounts are shown to have been prepared by ZG consultants and the fact that tax calculations prepared by HMRC on 01 November 2017 show ZG consultants acting on behalf of the first appellant. Accordingly I find it was the G [sic] consultants who erroneously recorded the first appellant's self-employment income in that tax return.

[32] I have gone on to consider what awareness of the error the appellant had at the time and whether the error was made deliberately and for a dishonest purpose. The error itself is a stark one and not an error one would expect competent accountants to make. The first appellant states that he doesn't recall signing tax returns before they were submitted. The return itself would demonstrate incontrovertibly whether he had signed it and in these circumstances I am wary of the failure to include it in the appellant's bundle. Irrespective of whether he signed the return, as a professional business consultant the first appellant will have been aware that he was responsible for the contents of his tax return. Again, regardless of whether he signed the self-assessment return, when he received his tax bill for the year it will have been apparent to the first appellant that it was for less money than the previous year despite him earning £30,000 more. These are all factors which tend to suggest that the first appellant must have been aware of the error and therefore it was made for dishonest purposes.

[33] Factors which suggest that the first appellant might not have been aware of the error include the fact that he did task professional accountants to complete the tax return and would therefore be entitled to place some reliance on their competence. It is apparent that the first appellant relied on ZG consultants without any adverse issue in other regards for example to prepare the business accounts. It is also well recognised that the calculation of a person's tax obligations is a complex process. This is best indicated by the change in the first appellant's personal tax obligations when his income changed from self-employment to dividends from company in the following tax year ending 5 April 2014. This change saw the tax paid by the appellant personally reduce while the company paid corporation tax. It is also relevant that the erroneous return in 2013 does appear to be an anomaly with no issues being taken over the returns in the surrounding years and the first appellant paying considerable sums of interest in those years. Finally the response of the appellant in making a revised return, agreeing a payment plan and sticking to that payment plan are all indications that this was a genuine error which the first appellant is keen to put right.

> [34] Balancing the factors which suggest that the 2013 tax return was a dishonest one against the factors which suggest it was a genuine error I attach particular weight to the appellant's response following the discovery of the discrepancy. I also attach particular weight to the fact that his tax returns in the surrounding years have not been challenged and these have resulted in him paying significant amounts of tax on his income. Finally I take regard of the fact that at the time of the tax return in question the son of the first and second appellants was born, plus the first appellant had two demanding jobs as a Pizza Hut manager and business consultant. In these circumstances and having engaged professional accountants to make his tax return I find that it is more likely than not that the failure to provide the correct information to HMRC about the first appellant's income from self-employment in the tax year ending April 2013 was a genuine error and was not a dishonest attempt to evade his tax obligations."

14. I turn then to the Respondent's grounds of challenge. The only ground pleaded is that the Judge made a misdirection in law. It is said that the Judge failed to take into account the decisions of the Tribunal in R (on the application of Samant) v Secretary of State for the Home Department [2017] UKAITUR/6546/2016 and Abbasi v Secretary of State for the Home Department (JR/13807/2016). It is said that the Judge has failed to note the point that the Appellant is responsible for his own tax affairs. This is the point which found merit with Judge Davies when granting permission.

15. As Mr Halim points out, those decisions relate to judicial reviews where the issue is whether the Respondent reached a decision which is outside the reasonable range of responses. By contrast, a Judge hearing an appeal is expected to reach findings on the facts which this Judge has done.

16. I am satisfied that there is no error disclosed by this point. The Judge expressly notes the Appellant's responsibility for his tax returns at [32] and notes the absence of documents to show that the Appellant did not sign this tax return. Further, although the Judge at [30] may have erred in not giving weight to case-law put to him insofar as that included the cases of Samant and Abbassi, on the basis that those are unreported (as substantive judicial review decisions are all reported), nonetheless I accept Mr Halim's point that they have limited relevance in terms of the legal issues which apply as they are judicial review decisions.

17. The other case on which the Respondent relies however 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) falls into a slightly different category. Although that also is a decision in a judicial review, it is a decision which includes a headnote providing reported guidance. Although, as Mr Halim points out, that too is guidance when dealing with judicial reviews, he did accept that particularly (iv) and (v) of the headnote can apply by analogy to a Judge dealing with an appeal.

18. It is not clear to me whether the case of Khan was before Judge Bulpitt. It is not cited. However, since that is not a point which Mr Halim took, I assume that it was – it appears to have been reported prior to the hearing of these appeals.

19. The part of the headnote in Khan to which the Respondent refers is at (iv) and (v) as follows:

> "(iv) 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.
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> (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):
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> 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;
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> iii. Why the Applicant did not realise that an error had been made because his liability to pay tax was less then 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."

20. The point raised at (iv) is dealt with by the Judge at [32] of the Decision. I have already explained why I am satisfied that there is no error in that regard. Dealing with the points made at (v) of the headnote, although I accept that the Judge did deal with these matters, as I pointed out to Mr Halim, he appears to have found against the Appellant on all those issues. I therefore queried whether it was open to the Judge thereafter to accept as credible the Appellant's testimony. However, as Mr Halim also pointed out, the list at (v) is not said to be exhaustive (evidenced by the use of the words "inter alia"). The Judge balanced the evidence for and against the Appellant and reached a conclusion which was open to him on that evidence.

21. That brings me on to the alternative submission made by Mr Melvin namely that the Judge's conclusion was irrational. As Mr Halim pointed out, the Respondent did not plead this in the grounds and it is not a point on which permission was given. In any event, I am not satisfied that there is an error of

law in this regard. Whilst it may not have been the decision I would have reached on this evidence, I cannot say that it was not a conclusion open to the Judge for the reasons he gave.

22. There is one further point which is identified obliquely at (e) of the grounds and was mentioned briefly by Mr Melvin in his submissions which I also deal with it and that is whether it can be said that the Judge failed to take into account the Respondent's alternative case that, rather than being an under-declaration of income to HMRC, the Appellant had over-declared income to the Home Office in order to obtain leave in 2013. However, there is no indication that the Respondent advanced a positive case in this regard. I recognise that the Respondent cannot know which of the set of figures put forward to HMRC and Home Office are false and which true; hence the reliance on a case put in the alternative. However, as I have already observed above, there must have been documents put to the Respondent in 2013 which satisfied him at the time as to the earnings claimed.

23. At the very least, if the Respondent wishes to argue in the alternative that the dishonesty relates back to the application for leave to remain made in 2013, I would expect him to produce the evidence which was provided to him at the time about earnings in order to identify the discrepancies. Even in the absence of such evidence, the Respondent could be expected to explain to the Judge the benefit which the Appellant would have derived which he would not otherwise have obtained and why. It does not appear from the Decision that this was the way in which the Respondent argued the case in these appeals. The Judge has noted the reference in the reasons for refusal letter but absent further evidence or submissions putting a positive case on this basis, I am not satisfied that there is any error of law in the Judge's failure to deal with it thereafter.

24. The Respondent's grounds do not disclose an error of law in the Decision. I uphold the Decision with the consequence that the Appellants' appeals remain allowed.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Bulpitt promulgated on 23 November 2018 with the consequence that the Appellants' appeals stand allowed

Signed Dated: 27 February 2019
Upper Tribunal Judge Smith