Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04920/2018
HU/06221/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 13 February 2019	**On 03 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMAD MOMTAZUL KABIR
MRS MISTNJANNATUL FERDOUS
(NO ANONYMITY DIRECTIONS MADE)

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Presenting Officer
For the Respondent: Mr Z Malik of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondents are citizens of Bangladesh and are husband and wife. As the appeal of the wife rests or falls with that of her husband, I shall consider the appeal of the husband. However, for the sake of convenience, I shall continue to refer to the latter as the "appellant" and to the Secretary of the State as the

"respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent refusing his application for indefinite leave to remain based on his 10 years continuous lawful residence in the United Kingdom pursuant to paragraph 276B of the immigration rules. The appellant's appeal was allowed by First-tier Tribunal Judge Andonian in a decision promulgated on 3 October 2018.

3. Permission to appeal was at first refused by First-tier Tribunal Judge Kelly in a decision dated 25 October 2018 and subsequently allowed by Upper Tribunal Judge Kekic on 2 January 2019 stating that it is arguable that the First-tier Tribunal Judge erred in considering whether the appellant had misrepresented his earnings to UKVI or to HMRC and whether that warranted refusal under paragraph 322 (5).

4. Thus, the appeal came before me.

5. The First-tier Tribunal Judge allowed the appellant's appeal and found that the appellant had not misrepresented his earnings to UKVI or to the HMRC but had only been "careless" for signing his tax return but had not deceitful or fraudulent. The Judge stated that he accepts on the civil balance of probabilities having regard to the appellant's evidence and the documentation provided with respect of his accountants and that the appellant should be given the benefit of doubt as to his good character and conduct. The Judge concluded that the appellant's explanation has discharged the burden of proof incumbent upon him on the civil standard of proof.

6. Paragraph 322 (5) provides that 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 the decision that the person's behaviour calls into question their character and or conduct and all their association to the extent that it is undesirable to allow them to enter or remain in the United Kingdom.

7. The respondent's position is that the appellant did misrepresent his earnings deliberately in order to gain an advantage. The respondent in his grounds of appeal states that the First-tier Tribunal Judge erred in his assessment of the discrepancies in the tax returns by submitting one set of returns for HMRC and another to the respondent. The respondent stated that the appellant's failure to recognise his underpayment of tax, his delay in rectifying the error with HMRC and the timing of the payment of arrears coincided with his claim for indefinite leave to remain. This demonstrates deliberate intent on the part of the appellant as opposed to mere carelessness. The respondent argued that this was a misdirection in law for the Judge's failure to provide adequate reasons on material matters. The grounds states that the appellant acted in a way that was calculated to delay paying income tax until it became absolutely necessary which was just before he had to make his application for leave to remain under the 10-year route. The appellant failed to make accurate

declarations of his tax liability at the time this liability arose. It was stated that had the First-tier Tribunal had properly considered paragraph 322 (5) it may well have reached a different conclusion. The Tribunal should have addressed this issue and its failure to do so renders the decision incomplete.

8. When a respondent makes an allegation of fraud, it is trite law that the burden of proof rests on the respondent to establish any contested precedent fact on a balance of probabilities. There was no dispute which the appellant and the First-tier Tribunal Judge acknowledged that there were discrepancies in the accounts that he submitted to HMRC and to the respondent. Therefore, the Judge accepted that the respondent had satisfied his burden of proof at a *prima facie* level.

9. The Judge then considered the appellant's explanation to decide whether it was a deliberate attempt by the appellant to mislead the respondent and the HMRC or whether it was mere carelessness on the appellant's part and that there was no dishonesty or deceit involved. The Judge considered the appellant's explanation that the appellant's two sets of different accountants had made a mistake and the appellant signing them was merely careless.

10. The issue for me to decide is whether the Judge made a material error of law in his reasoning for accepting the appellant's explanation for the discrepancies in his submission of tax returns.

11. This reasoning is at paragraph 62 of the decision. The First-tier Tribunal Judge in deciding that the appellant had not been deceitful or dishonest, took into account the evidence of a default judgement against the accountants of 12 June 2018 for £9877.98. The Judge also considered the evidence provided by the appellant which essentially related to the appellant's complaints about the accountant. He also considered the evidence of the appellant's solicitor's complaints to the Association of International Accountants on 1 August 2018 and submitted amended tax returns which the appellant claims that the accountants delayed in submitting. This flurry of activity was generated after the respondent brought to the attention of the appellant the irregularities in his accounts.

12. At the hearing it was submitted by Miss Jones that it is not credible that two different sets of accountants made mistakes and that each time the appellant was merely careless in signing them. The respondent referred to the 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)** (1) 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. Such an inference could be expected where there is no plausible explanation for the discrepancy; (2) 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 inference of deceit/dishonesty; (3) 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; (4) 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; (5) 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 there is a plausible explanation for why it is missing;

(iii) 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;

(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.

13. The Judge while he accepted the communication to the solicitor after the anomalies were brought to the attention of the appellant in the respondent's reasons for refusal letter, he did not question whether there was any communication between the Applicant and his accountant at the time of the tax return. He also did not address the question as to why the appellant did not realise that an error had been made because his liability to pay tax was less then he should have expected given his earnings. These were important issues to be addressed which the Judge failed to do and thereby fell into material error.

14. Having considered the decision by First-tier Tribunal Judge, I find that the matters set out in the case of **Khan** were not considered by the First-tier Tribunal Judge when allowing the appellant's appeal. I agree with the respondent that the decision is incomplete without a full analysis of paragraph 322 (5) and that had this been done arguably a different decision might have been reached.

15. I therefore decide that the decision of the First-tier Tribunal Judge should be set aside as it contains a material error of law as he gave inadequate reasons for believing the appellant in light of all the evidence. I direct that the appeal be remitted to the First-

tier Tribunal for findings of fact to be made in a de novo hearing. I direct that the appeal be placed before any First-tier Tribunal Judge other than Judge Andonian at the first available date

DECISION

The Secretary of State's appeal is allowed, and the appeal is remitted to the First-tier Tribunal

Signed by
Mrs S Chana
A Deputy Judge of the Upper Tribunal Dated this 18th day of February 2019