Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05476/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th March 2019	**On 01st April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TAIMOOR AHMED ABBASI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: Ms K Turner of Counsel, Direct Access

DECISION AND REASONS

1. Although the Appellant in these proceedings is the Secretary of State 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 made on 10th February 2018 to refuse his application for indefinite leave to remain in the UK on the basis of ten years' long residence. First-tier Tribunal Judge Robertson allowed the appeal in a decision dated 15th

November 2018. The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge O'Callaghan on 15th September 2018.

3. The background is summarised at paragraph 7 of the First-tier Tribunal Judge's decision. There it is stated that the primary reason the Respondent refused the application was under paragraph 322(5) of the Immigration Rules on the basis of the Appellant's conduct. In his Tier 1 general leave application made in 2011 the Appellant claimed to have had an income from self-employment. He claimed to have a turnover of £62,788 and gross dividends of £51,188.89 for the period 1st October 2010 to 4th April 2011. On this basis he was awarded 30 points under the previous earnings category and leave to remain was granted. It subsequently came to light that there were discrepancies in the figures provided and that no self-employment earnings had been recorded by HMRC for the tax year 2010/11. It appears that amendments were made to the tax returns for 2010/11 and a tax calculation for HMRC now shows dividends of £51,188 and pay from all employment of £5,324. These amendments were only made after a request was made by the Home Office for further information and were made in the knowledge that the Appellant would be called to account when applying for leave. The Respondent did not accept that a genuine error occurred but considered that the Appellant had failed to provide an explanation as to why amendments had been made to his tax return. The Respondent concluded that the Appellant's character and conduct in relation to declaring his income led to a refusal of his application under the general grounds in paragraph 322(5) of the Immigration Rules and that this accordingly led to a refusal under paragraph 276B of the Immigration Rules.

4. The First-tier Tribunal Judge considered the evidence from the Secretary of State and that from the Appellant and found the Appellant's explanation in relation to his tax return to be plausible and did not accept that paragraph 322(5) was a valid ground for refusal. The judge took into account the Appellant's circumstances and concluded that interference with the Appellant's right to family and private life was not proportionate and allowed the appeal.

5. It is contended in the Grounds of Appeal that the First-tier Tribunal Judge made a material misdirection of law in failing to follow the reasoning in the decision in **R (On the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)**. Reliance is placed on head notes (iv) and (v) of the decision in **Khan** and it is contended that the judge did not follow the recommended steps in **Khan** when assessing whether the Appellant acted dishonestly in his dealings with HMRC. It is further contended that the judge failed to follow the guidance in the cases of **R (On the application of Samant) v Secretary of State for the Home Department [2017] UK AIT JR/6546/2016** and **Abbasi JR/13807/2016** in that she placed significant emphasis on the fact that the Appellant had not been penalised or prosecuted by HMRC for submitting incorrect or late tax returns. It is contended that the view of HMRC regarding the treatment of arrears is not relevant to an assessment under paragraph 322(5) and that this does not address the possibility that the original tax returns were correct but the Appellant falsified higher earnings in order to qualify under Tier 1.

6. As highlighted in the grant of permission to appeal the decision in **Khan** was reported after the oral hearing in this appeal but prior to the promulgation of the judge's decision and reasons. The judge granting permission considered it arguable that the judge had not followed the steps now identified as applicable by the Upper Tribunal in **Khan**.

7. In the case of **Khan** Mr Justice Martin Spencer set out the approach which should be followed as follows:

> *"(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. Such an inference could be expected where there is no plausible explanation for the discrepancy.*
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> *(ii) 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.*
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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.*
>
> *(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.*
>
> *(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):*
>
> *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."*

8. Mr Justice Spencer stated in paragraph 32 of the decision that the starting point is that, where the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and in the income declared to HMRC, she 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. However it states that it does not follow that in all such cases a decision to refuse ILR will be lawful. 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 which must be carried out fairly and lawfully. Spencer J said that the Secretary of State needs to remind him or herself:

> "That a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence he is denied settlement in this country is a very serious finding with serious consequences and therefore the evidence must be cogent and strong although as the authorities show the standard of proof remains on the balance of probabilities."

9. The First-tier Tribunal Judge made findings in relation to this issue at paragraphs 13 and 14 of the decision. The judge began by accepting that the Respondent was entitled to make an adverse inference of dishonesty from the evidence of a large discrepancy between the apparent figures declared to the HMRC and the relevant tax return and the actual income earned which was submitted to the Respondent. This is consistent with paragraph (i) of the guidance in the head note in the case of **Khan**.

10. The judge then went on to say that the decision was based on information from HMRC that no self-assessment tax record was held for the years 2010/11. The judge accepted the evidence in a letter from HMRC that the tax return for 2010/11 was received late on 5th August 2016 and was not amended. The judge found on the balance of probabilities that the tax return was in fact filed late rather than having been an amended tax return. The judge did not consider it likely that the Appellant gained any immigration advantage as a result of failing to submit his tax return at the appropriate time.

11. In my view it is clear that the situation outlined in paragraph 13 and accepted by the judge differs from the scenario in **Khan** where the tax return understated tax payable.

12. The judge went on to consider this further at paragraph 14 where she noted that the 2010/11 tax return was the first one to be submitted by the Appellant as a self-employed person. The judge said that:

> "Whilst it is not sufficient simply to blame the accountant I have heard from the Appellant that his personal circumstances at that time were particularly stressful. He was challenging the Home Office decision in relation to leave and his mother was ill. I note that his financial affairs were scrutinised at that time by the Home Office but it was not picked up that no return had been filed. The responsibility does of course lie with the Appellant but I find his explanation for the oversight to be plausible."

13. It is clear that the judge accepted the Appellant's explanation for the failure to lodge a tax return. The judge also found that the Appellant had made efforts to rectify his accounts with HMRC upon realising the error. The judge therefore took into account the Appellant's actions. I note the Appellant's evidence that he had become self-employed since September 2010 and hired an accountant who had failed to submit his tax return and that the Appellant was going through a difficult time as his mother was receiving chemotherapy and he had been refused leave to remain which was subsequently overturned. The Appellants evidence was that he had been stressed and depressed which had contributed to the closure of the business. The judge noted the Appellant's evidence that the Appellant did not realise the error until he was organising his affairs for a mortgage application and his evidence that it was a genuine mistake. It is clear that the judge took into account all of the Appellant's evidence as set out at paragraph 8 and that she accepted the Appellant's explanation in relation to the failure to lodge a tax return in 2010/11.

14. The judge considered the issue of HMRC's actions at the end of paragraph 14 where she said; *"I note in particular that he has incurred no financial penalties as a result. Had HMRC found deliberate tax avoidance he would have been penalised".* The Secretary of State has criticised this finding in light of the decisions in **Samant** and **Abbasi** however it is clear to me that the judge took this into account as one factor rather than a determinative factor in relation to this matter.

15. In my view it is clear looking at the decision as a whole that, although the judge did not make explicit reference to the decision of **Khan** or the guidance therein, there is no material error because the judge's approach was consistent with that taken in the decision in **Khan**. The judge considered all of the evidence, found that the Secretary of State was entitled to make an adverse inference of dishonesty and then engaged with the evidence from the Appellant finding that it was not enough to simply blame the accountant and looking at the facts and the evidence as to why there was a discrepancy between the income declared in the Appellant's application for leave to remain and the failure to file a tax return. In my view the judge gave sustainable reasons for accepting the Appellant's explanations. The findings were open to her on the evidence.

Notice of Decision

The decision of the First-tier Tribunal does not contain a material error of law.

The decision of the First-tier Tribunal will stand.

No anonymity direction was sought or ordered.

Signed Date: 27th March 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: 27th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes