**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: HU/09074/2018**
**HU/16357/2018**

**THE IMMIGRATION ACTS**

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| **Heard at** Field House | **Decision & Reasons Promulgated** |
| **On** 4 February 2019 | **14 February 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**TAHIR SALEEM**
**SHAISTA PARVEEN**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr J Dhanji (counsel) directly instructed by the appellants.

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Seelhoff promulgated on 15/11/2018, which allowed the Appellants' appeals.

Background

3. The appellants are spouses. The First Appellant was born on 13/04/1985. The second appellant was born on 8/10/1981. On 29/03/2018 the Secretary of State refused the Appellants' applications for leave to remain in the UK.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Seelhoff ("the Judge") allowed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 10/12/2018 Judge Parkes gave permission to appeal stating inter alia

> 3. The grounds argue that the Judge erred in placing too much weight on the approach of HMRC in contrast to the guidance in the case of Khan [2018] UKUT 384 (IAC) having regard to the adverse findings made against the appellant. There is no reference to Khan in the decision and the approach of HMRC may have been misconstrued.
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> 4. The grounds disclose arguable errors of law and permission to appeal is granted.

The Hearing

5. For the respondent, Mr Duffy moved the grounds of appeal. He told me that the Judge placed too much weight on the fact that HMRC did not penalise the appellant. He argued that HMRC will not impose penalties on people who report themselves for an understated income tax return and offer payment. He told me that the question that the Judge should have determined is whether or not the appellant deliberately underreported earnings to HMRC for financial benefit. He told me that the Judge's findings are unsafe, and relied on Khan [2018] UKUT 384 (IAC). He asked me to set the decision aside and remit this case to the First-tier Tribunal.

6. (a) For the appellants, Mr Plowright relied on the rule 24 response which the appellants (themselves) served. He told me that the decision in Khan [2018] UKUT 384 (IAC) postdates promulgation of the Judge's decision. He told me that the Judge adopted the well-established approach of determining whether or not a prima facie case of dishonesty is made out, and then considers the explanation given by the appellant.

(b) Mr Plowright told me that the Judge writes a careful consideration of the evidence. The Judge takes account of the evidence from a representative of an accountancy firm, and that, in fact, the Judge follows the guidance in Khan [2018]

UKUT 384 (IAC). He told me that at [40] and [44] of the decision, the Judge accepts the explanation provided by the accountant. He reminded me that the weight to be attached to each strand of evidence is a question for the Judge at first instance. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. The Judge's decision was promulgated on 15 November 2018. The decision in Khan [2018] UKUT 384 (IAC) it was promulgated on 3 May 2018, but was only reported on 16 November 2018.

8. R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) held that (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.

9. The Judge's findings of fact start at [37] of the decision. At [38] the Judge sets out an accurate summary of the financial discrepancies in this case. For the tax year ending 2011 the second appellant's tax returns identified profit of just £2013, when in fact her profit was more than 10 times that sum - £23,489. The figures for the year to 2013 given to HMRC showed a profit from self-employment of only £694, when the accurate figure is £30,649.

10. The Judge heard evidence from a junior member of a firm of accountants. The accountants say that inaccurate figures were produced to HMRC through the negligence of a trainee accountant in their firm. The Judge finds at [44] that the second appellant's management of business affairs was shockingly negligent and reckless. The Judge finds

> "I do not consider that the appellant has an adequate excuse for failing to realise that such errors were made however that amounts to a finding of negligence or carelessness."

11. The Judge concludes [44] by finding that the second appellant's "negligence and carelessness" does not engage the suitability requirements of the rules. At [45] the Judge finds that the appellants have not been dishonest.

12. The degree of enquiry required by the guidance given in headnote four in the rubric to Khan has not been followed. The Judge's finding that the second appellant has been shockingly negligent & reckless, and that her accountants committed appalling errors, cannot be reconciled with the guidance that blaming an accountant is not the end of the matter. Enquiry into the appellant's state of knowledge, particularly why the appellant believes that having earned a significant income their liability to income tax is negligible, is missing from the decision.

13. This is perhaps an unusual case. There are differences between declared income and actual taxable income which one might expect to be obvious to the appellant. There is evidence that the accountants make an admission of negligence. But the fact-finding exercise is incomplete because there is no enquiry into the appellant's state of knowledge about the ability to repeatedly earn significant sums of money and not attract liability to income tax. There is an absence of fact-finding about the timing of the realisation that accounting errors had been made. There is an absence of fact-finding about the figures provided to the accountants. There is an absence of fact-finding about who signed the tax returns.

14. The Judge's finding at [44] that the second appellant does not have an adequate excuse for failing to realise errors were made is entirely inconsistent with the Judge's finding that the respondent is wrong to rely on paragraph 322(5) of the immigration rules. The guidance given in Khan was given the day after the Judge's decision was

promulgated, but the guidance given in Khan is consistent with the earlier decisions in Samant v SSHD [2017] UKAIT JR/6546/2016 and Abassi JR/13807/2016.

15. Because the fact-finding exercise is incomplete and because the decision the Judge reaches is not consistent with what is said at [44], the decision is tainted by material error of law. I set it aside. I consider whether I can substitute my own decision. The material error of law in the decision relates to an inadequacy of fact finding. I cannot substitute my own decision. Further fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

17. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

18. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Seelhoff.

**Decision**

**19. The decision of the First-tier Tribunal is tainted by material errors of law.**

**20. I set aside the Judge's decision promulgated on 15 November 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.**

Signed  Date 13 February 2019

Deputy