Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10925/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On February 12, 2019	**On February 19, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ZAID OLAYLWOLA OLANREWAJU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: Mr Tallacchi, Counsel, instructed by Farani Solicitors

DECISION AND REASONS

1. Whilst the respondent is the appellant in these proceedings before me, I hereafter refer to the parties using terminology used in the First-tier Tribunal. The appellant in the First-tier Tribunal will hereafter be referred to as "the appellant" in these proceedings, and the respondent will be referred to as "the respondent".

© CROWN COPYRIGHT 2019

2. The appellant entered the United Kingdom on May 19, 2007 with entry clearance as a student. His leave was extended until July 31, 2010. On February 15, 2010 the appellant was granted leave to remain as a Tier 1 Highly Skilled (Post-Study Worker) migrant and this leave was extended until June 17, 2006. He made an application for indefinite leave to remain based on his period of time spent here as a Tier 1 Migrant, but this was refused on December 2, 2016. The decision was administratively reviewed but the decision was maintained on January 12, 2017.

3. On January 23, 2017 the appellant applied to remain on the basis of family/private life and this was some later varied to an application for long residence under paragraph 276B HC 395 on June 22, 2017. The respondent refused this application on April 30, 2018.

4. The appellant appealed this decision on May 14, 2018 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and his appeal came before Judge of the First-tier Tribunal Hodgkinson on November 20, 2018. In a decision promulgated on November 28, 2018 the Judge concluded that the respondent had not discharged the burden of proof placed on him in establishing that the appellant had practised dishonesty or deceit with reference to his earlier tax returns and in particular with reference to the figures for employment and self-employment that were set out in his 2011 and 2013 Tier 1 applications. The Judge found as a fact that the respondent had neither established that the appellant had intentionally deflated or intentionally inflated his income nor had it been established that any anomalies in the appellant's figures were with the intention to evade tax or dishonestly secure further leave to remain.

5. The respondent sought permission to appeal on December 13, 2018 and Judge of the First-tier Tribunal Holmes found it arguable there had been an error in law and that the grounds of appeal had merit. In giving permission he found that the Judge had arguably failed to understand or failed to apply current jurisprudence (Khan [2018] UKUT 384) and in particular it was arguable the Judge had erred in the weight attached to the fact that HMRC had neither prosecuted nor issued a financial penalty against the appellant.

SUBMISSIONS

6. Mr Avery submitted the Judge's approach was flawed. The grounds of appeal set out in some detail today's challenge. The Judge placed weight on the fact no action had been taken by HMRC over the incorrect reporting of income but Mr Avery submitted that following the decisions in R (on the application of Samant) v SSHD [2017] UKAITUR JR/6546/2016 and Abbasi JR/13807/2016 the Judge erred as the Tribunal had made it clear that there are a multitude of reasons why the HMRC does not prosecute or apply a penalty and as such this should not be determinative of whether the appellant used deception. It was obvious to anyone that there was a major difference between an income of £4,485 and £64,816. Whilst the Judge considered the evidence from para 28, the Judge wrongly concluded the figures did not matter when

the figures were at the heart of the issue.

7. Mr Tallacchi urged the Tribunal to reject this appeal. The Judge had made specific findings on credibility and had made numerous findings of fact which were set out throughout his decision and, in particular, at paragraphs 38, 44 and 45 of his decision. The Judge accepted his explanation for not including the income on his tax return and concluded the respondent had not rebutted the appellant's explanation. Put simply the Judge accepted the appellant's explanation that he did not believe his Nigerian earnings had to be declared because he had already paid tax on that element of his income in Nigeria.

8. I reserved my decision.

FINDINGS

9. In refusing the appellant's application the respondent placed weight on discrepancies between income figures disclosed on his Tier 1 Highly Skilled (General) Migrant applications 2011 and 2013 compared to the income disclosed to HMRC. In particular the tax year ended April 2011 the only income disclosed to HMRC was his PAYE employment of £4485.61 whereas he had previously informed the respondent that he had self-employed income totalling £64,816.06. It is in this area that Mr Avery argues the Judge has erred in law in the way that he approached this evidence at the original hearing.

10. In response to this submission Mr Tallacchi refers to the examination carried out by the Judge and the fact that the Judge had rejected respondent's claim that he had satisfied the burden of proof and he referred to the evidence provided by the appellant that he argued was accepted as being an innocent explanation for the error.

11. The Tribunal in Khan provided guidance on how courts should deal with cases such as these and whilst that case is a Judicial Review appeal nevertheless the guidance issued is of assistance. The Tribunal should consider the following:

    (a) 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.

    (b) 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.

    (c) 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.

(d) 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.

(e) 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.

(f) 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):

(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.

(g) 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.

(h) 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.

12. As Mr Avery points out there is a substantial difference between the figure provided to the HMRC and the figure provided to the respondent. In the absence of an innocent explanation the guidance provided by the Court is that the Secretary of State is entitled to draw an inference that the appellant has been deceitful or dishonest and therefore he should be refused indefinite leave to remain within paragraph 322(5) of the Immigration Rules.

13. In this appeal, the appellant provided an explanation and the Judge was provided with various documents including a document entitled UK/Nigeria Double Taxation Agreement. The Judge recorded the respondent had satisfied initial evidential burden considered in Khan but went onto accept the appellant's contention that he had not practised deception.

14. Mr Avery criticises the Judge for not setting out adequate reasons as to why he reached the conclusions he did, but it is not necessary for the Judge to set out everything that is contained within the statement. It is clear from this decision that the Judge was aware of the evidence. He had set out in considerable detail the decision letter and had then gone on to summarise the appellant's case at paragraph 31 of his decision. The Judge accepted that the explanation contained within both his statement and oral evidence were plausible and therefore the respondent had to demonstrate, on the balance of probabilities, that his explanation should be rejected. Importantly, the Judge reminded himself that respondent had to demonstrate that the appellant had practised deceit, deception or dishonesty.

15. The grounds of appeal pointed to paragraph 34 of the Judge's decision and the fact that the Judge placed weight on the fact that the HMRC had not taken action against the appellant. However, contrary to the grounds of appeal the Judge did not find the respondent had not satisfied the relevant burden of proof because HMRC took no action but in considering the case the Judge stated it was a factor he had taken into account in considering whether deception or dishonesty had been practised by the appellant.

16. At paragraph 38 of the decision the Judge recorded the appellant's oral evidence to be that he had not declared self-employed Nigerian earnings in his UK tax returns because those earnings had been taxed at source in Nigeria and were not consequently liable to UK tax. Mr Avery submitted that this was not a finding but reading paragraph 38 as a whole it is clear that the Judge accepted the submission

advanced namely that what the appellant stated was consistent with the content of the UK/Nigeria Double Taxation Agreement. Again, the Judge did not reject the respondent's submission on this point alone but stated it would be a factor to take into account when assessing the appellant's credibility.

17. The Judge considered the evidence of the appellant's income from Nigeria and accepted that documents had been submitted to the respondent and at paragraph 42 the Judge concluded there was a "wealth of documentation" which supported his claimed activities.

18. Mr Avery argued that the Judge should undertaking a detailed analysis of the figures and that his finding at paragraph 44 was flawed. If this appeal had simply been over the nondisclosure in tax documents of £60,000 then many of the points advanced by Mr Avery would have merit but this was an appeal in which the appellant claimed that tax had been paid already and that he did not believe he had to disclose this information on his UK tax return. In other words, he was not acting dishonestly. The tax on £60,000 would have been considerably more than the £3000 that was due and owing to the tax authorities.

19. The Judge therefore had an explanation and as he correctly stated in his decision the respondent had to demonstrate the appellant had practised dishonesty or deceit with reference to his earlier tax returns and with reference to his Tier 1 applications the 2011 and 2013.

20. The Judge had correctly identified the issue in this case and the relevant evidence in respect of that matter. He had at some length set out the burden and standard of proof where such assertions of deception were made by the respondent and the shift in such burden of proof.

21. He had found the evidence disclosed in his judgment, that the respondent had discharged the evidential burden. He had thereafter examined the evidence and explanations put forward by the appellant and concluded that the appellant has provided an innocent explanation that satisfies the minimum level of plausibility.

22. Thereafter he had examined whether the Respondent had shown that that innocent explanation should be rejected and whether therefore the Respondent discharged the legal burden. He had looked at the relevant evidence in not insignificant detail.

23. The Judge was mindful of the legal tests applicable. He was aware of the salient evidence in this case and whilst not required to deal with each and every matter had adequately considered all relevant facts and provided reasons for his findings. He had approached that evidence with care and in a fair manner. Whilst it could not be said that all Judges would necessarily have reached the same conclusion it was not an irrational conclusion that was reached by the Judge and does not disclose a material error of law.

Notice of Decision

There is no error in law. I uphold the original decision

No anonymity direction is made.

Signed Date 12/02/2019

Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I uphold the decision to make a fee award in this case.

Signed Date 12/02/2019

Deputy Upper Tribunal Judge Alis