Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11708/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th March 2019	**On 28th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHSIN RIAZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Miss P Solanki, instructed by Legal Rights Partnership

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a national of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State of 9th May 2018 to refuse his application for indefinite leave to remain in the UK based on ten years' continuous residence. First-tier Tribunal Judge Bart-Stewart allowed the appeal in a decision promulgated on

17th December 2018. The Secretary of State now appeals with permission granted by First-tier Tribunal Judge Gumsley on 21st January 2019.

3. The background to this appeal is that the Appellant arrived in the UK on 15th September 2007 with entry clearance as a student and was granted leave to enter in that capacity until 31st December 2010. He was granted further leave to remain as a Tier 1 (Post-Study Worker) until November 2011 and subsequent leave to remain as a Tier 1 Highly Skilled Migrant until 2013 and then again until May 2016. On 28th April 2016 he applied for indefinite leave to remain as a Highly Skilled General Migrant and on 18th August 2017 this was varied to an application for indefinite leave to remain on the basis of ten years' continuous residence.

4. The Secretary of State considered the application under paragraph 276B of the Immigration Rules. However the application was refused with reference to paragraph 322(5) of the general grounds of the Immigration Rules on the basis that with his application dated 23rd March 2011 for leave to remain as a Tier 1 (General) Migrant the Appellant claimed that he had previous earnings of £51,212 during the period from 1st March 2010 until 28th February 2011. In that application he stated that he was employed by Mercury Security with gross earnings of £16,836 and that he received dividend vouchers from self-employment of £37,875.55 for the period from 31st August 2010 until 17th February 2011. However according to the reasons for refusal letter HMRC checks show that the Appellant's tax return for 2010/11 was only filed on 22nd March 2016, four years and two months after the end of the accounting year for 2010/11 on 31st January 2012. Therefore it was considered that, although in his application of 23rd March 2011 he stated that his income was £51,212 during the period 1st March 2010 to 28th February 2011, he did not file a tax return for this period until 22nd March 2016 just before he made his application for indefinite leave as a Tier 1 Migrant on 28th April 2016.

5. The First-tier Tribunal Judge considered this issue in the decision and concluded at paragraph 30 of the decision that there is insufficient evidence that the Appellant's actions were deliberate or intended to deceive and that the Secretary of State had not made out the allegation that false representations were made or the Appellant failed to disclose material facts for the purpose of obtaining his previous variation of leave. The judge found that his conduct was not such as to give rise to refusal under paragraph 322(5) of the Immigration Rules.

6. In the grounds of appeal the Secretary of State contends that the First-tier Tribunal Judge erred in her approach to the appeal by failing to apply the reasoning of the Upper Tribunal in the decision on **R (On the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** when assessing whether the Appellant acted dishonestly in relation to his dealings with UKVI or HMRC. The Secretary of State set out the guidance set out in head note (v) of **Khan** and submitted that the judge had not followed the recommended steps in **Khan**. It is contended in the grounds that at paragraph 26 of the decision the First-tier Tribunal Judge did not find the explanation for the accountant's error to be plausible or credible. It is argued that the

First-tier Tribunal Judge failed to provide reasons why it was accepted that the Appellant would not have been aware of the errors sooner given that his tax liability would have been significantly more than expected as no tax return was made. It is also contended that there are no findings as to why the significant discrepancy was not rectified by the Appellant sooner given that he will have been aware that he did not receive a tax bill for the tax year in question. It is argued therefore that the judge erred in her assessment of the Appellant's actions by failing to consider the suggested factors set out 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.*
>
> *(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.*
>
> *(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. Judge Spencer also said at paragraph 32 that the starting point is, where the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, he is entitled to draw an inference that the applicant has been deceitful or dishonest and therefore should be refused indefinite leave to remain within paragraph 322(5) of the Immigration Rules. The judge noted however that it does not follow that in all such cases a decision to refuse ILR would 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. The judge notes that the Secretary of State needs to remind himself:

> "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. I accept that the judge did not specifically refer to the decision of **Khan** and the guidance given therein. However I accept Miss Solanki's submission that the decision of **Khan**, which was not reported at the time of the hearing in the First-tier Tribunal, was before the judge as it was contained in the bundle at pages 141 onwards. I accept that it was also referred to in the skeleton argument before the First-tier Tribunal.

10. In my view it is clear that the judge did in fact take the approach set out in the decision of **Khan**. At paragraph 26 the judge considered the accountant's explanation for the late filing. The accountant's explanation that they considered that the onus was on HMRC to send a tax return to the Appellant was considered not to be plausible and the judge pointed out that it was not clear why the Appellant would have had to make several calls to HMRC rather than the accountant simply file the return once the omission was noted.

11. The judge went on to assess the Appellant's evidence and all of the documentary evidence. At paragraph 28 the judge considered the evidence that the net dividend for the tax year from 2010/11 was recorded as having been paid between August 2010 and February 2011 by the company SRA Security Services. The judge went on at paragraph 29 to note that there was no evidence that the late filing of the tax return for 2010/11 led to any reduction in the Appellant's tax liability at the time. There was no actual underpayment of tax. In fact the judge noted that the HMRC calculations show self-assessment repayments by HMRC to the Appellant and repayments of PAYE which amounts to almost the same amount deducted from the dividends. The judge said:

> "This tends to support the Appellant's account that he understood that the appropriate tax had been deducted from the dividends and paid over as part of the company's tax liability. Having considered the statement from HMRC, which does not show underpayment, I consider that this does not support the motives attributed to the Appellant by the Secretary of State and the allegation of dishonesty."

12. It appears therefore that the judge concluded on the evidence that there was no underpayment of tax overall. I accept Miss Solanki's submission that the judge has worked through the steps set out in **Khan**. I accept, as submitted in her skeleton argument, that the Tribunal is not required to quote dicta from a series of authorities (**EA v Secretary of State for the Home Department [2017] EWCA Civ 10**). I also accept that the judge is not expected to repeat the case law or the law in a tick box fashion (**Quarey, R (On the application of) v Secretary of State for the Home Department [2017] EWCA Civ 47**).

13. In this case, when the judge's decision making is analysed it is clear that she did in fact follow the guidance set out in **Khan**, by examining the evidence put forward by the Secretary of State and the evidence put forward by the Appellant and concluding on that evidence that the allegation of deception had not been made out.

14. In my view the judge's conclusions were open to her on the evidence before her and no material error has been disclosed.

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 is made.

Signed Date: 25th 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: 25th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes