Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15807/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 February 2019	**On 28 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEHFOOZ HAJRAT ALI KHAN
[NO ANONYMITY DIRECTION MADE]

Claimant

Representation:
For the claimant: Mr S Muquit, instructed by Deccan Prime Solicitors
For the appellant: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Traynor promulgated 17.12.18, allowing on human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 19.11.17, to refuse his application made on 8.8.17 for Indefinite Leave to Remain on the basis of 10 years continuous lawful residence in the UK pursuant to paragraph 276B of the Immigration Rules.

2. The application was refused on consideration of the general grounds for refusal under paragraph 322(5), which in turn led to refusal under paragraph 276D and refusal on suitability grounds under paragraph 276ADE consideration of private life.

3. In essence, the Secretary of State considered it was undesirable for the claimant to remain in the UK on the basis that he had been dishonest or deceitful in his dealings with HMRC and/or immigration authorities, either failing to declare by a significant margin his claimed self-employment earnings, or by falsely representing his income in order to obtain Leave to Remain in the UK.

4. First-tier Tribunal Judge Grimmett granted permission to appeal on 10.1.19, finding it arguable that the judge erred by failing to consider and apply R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC).

Error of Law

5. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal as to require it to be set aside and remitted to the First-tier Tribunal at Taylor House.

6. Mr Muquit submitted that Khan had not been promulgated before the day of the hearing before Judge Traynor on 8.8.18. However, Khan was heard by Mr Justice Spencer on 14.2.18 and the decision was promulgated on 3.5.18. The First-tier Tribunal decision of Judge Traynor was not promulgated until 17.12.18. In the circumstances, Khan is a decision that should have been considered by the First-tier Tribunal.

7. At (iv) of the headnote in Khan, the Upper Tribunal held that "for an applicant to simply 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."

8. In order to avoid falling into a trap on the issue of discrepancies between HMRC declared earnings and claims made in immigration applications, in Khan Mr Justice Spencer also set out a number of relevant factors when considering whether or not an applicant has been dishonest or merely careless, as well as the extent to which they are evidenced as opposed to merely asserted:

   (a) Whether the explanation for the error by the accountant is plausible;

   (b) 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;

(c) Why the applicant did not realise than an error had been made because his liability to pay tax was less than he should have expected;

(d) 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. Mr Muquit drew my attention to various parts of Judge Traynor's decision to suggest that even though Khan was not considered, the substance of the decision of the First-tier Tribunal took account of all relevant factors. For example, reliance was placed on [24], [30], [36] and [37] where the claimant claimed that the error was made by his previous accountants and only discovered by his present accountants, that he had tried without success to contact the previous accountants, and that he had not been cross-examined on this evidence. My attention was also drawn to the HMRC letter dated 9.2.17 at F1 of the claimant's bundle in which active consideration was given to whether any penalty charge should be pursued.

10. However, it is clear that Judge Traynor placed considerable weight on the fact that the alleged outstanding liability had been discharged and at [42] that HMRC had allegedly fully accepted the claimant's explanation for the under-declaration and in consequence waived the penalties which might otherwise have been payable. I find that the First-tier Tribunal failed to follow even the principle of the recommended steps when assessing the claimant's actions, effectively absolving him of any responsibility to ensure that his tax returns were correct. No reasons have been provided for accepting that the claimant would not have been aware of the errors sooner, particularly given that his tax liability would have been significantly lower than expected, given that the earnings were under-declared by approximately £15,000 on a total income of £24,000 so that he only declared £9,000. Further the decision is absent of any findings or reasoning as to why the judge disregarded the fact that the discrepancy was not rectified sooner than it was, several years later. Of course, the suspicion of the Home Office was that he had either inflated his income for the purpose of making an immigration application, or had dishonestly under-declared his income to HMRC.

11. The approach taken at [36], [40] and [42], is that the judge appears to have taken the actions of HMRC as being at least in part determinative of the claimant's innocence, These findings ignored the Upper Tribunal's approach to the relevance of HMRC action in similar cases.

12. In its grounds of application for permission to appeal, the Secretary of State relied on the Judicial Review decision in R (on the application of Samant) v SSHD [2017] UKAITUR JR/6546/2016, where at [22] the Upper Tribunal pointed out the difficulty when there is no evidence from HMRC as to whether they did consider the question of penalty or other steps and their reasoning for deciding, as they did in this case to accept the late underpayment and not to pursue penalties. The Upper Tribunal held

that it cannot be assumed that in every case HMRC would have gone through the exercise they perhaps should have to conclude there was no culpability. "It seems to me that in any given case, depending on amounts, depending on the circumstances, HMRC may well decide that the effort in reaching particular conclusions frankly is not justified in all the circumstances. I am afraid I do not think that the fact that HMRC has decided not to take further action can indicate that the decision of the Secretary of State is one which is irrational."

13. Similarly, at [75] of Abbasi, the Upper Tribunal stated, "That HMRC has not yet seen fit to issue a penalty notice is neither here nor there. No doubt HMRC has leeway within which to issue a penalty notice or institute proceedings and time would only have started running when the declaration was made in late 2015… In any event what the HMRC does or does not do is not necessarily relevant to actions by the Secretary of State in deciding applications for indefinite leave to remain."

14. Whilst the HMRC letter referred to above indicates that the failure to make amendment to the 2011-12 tax return until 31.1.17 was viewed as a failure to take reasonable care with his tax affairs, it does not go as far as accepting the claimant's explanations, as the judge has suggested. The reasons for mitigating any penalties was cited as comprising elements of mitigation based on his disclosure, cooperation, and giving access to the information. On the evidence, there was little to indicate that there had in fact been any error by the previous accountants. Similarly, no adequate explanation was offered as to why the claimant would not have signed or confirmed the accounts submitted in which he should have realised any error. This was not the case of a minor accounting error and the gross discrepancy does not appear to have any adequate explanation. The evidence as far as it went was consistent with the claimant having inflated his claimed income in his previous immigration application and having realised in 2017 the difficulty this now placed him in sought to resolve the discrepancy in the only way he could by falsely claiming a previous under-declaration of income and paying the back taxes due. The timing of him doing this appears to be at the very least convenient to his making the application a few months later, in August 2017. The First-tier Tribunal does not appear to have given the alternative explanation for the discrepancy any serious consideration but merely accepted the claimant's account.

15. In all the circumstances, I find that the decision of the First-tier Tribunal does disclose material errors in the assessment of the evidence so that it should be set aside and remade.

Remittal

16. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there

has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

17. In all the circumstances, I remit this appeal for a fresh hearing in the First-tier Tribunal and do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal at Taylor House.

Signed *DMW Pickup*
Deputy Upper Tribunal Judge Pickup
Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I make no fee award.

Reasons: The outcome of the appeal remains to be determined.

Signed *DMW Pickup*
Deputy Upper Tribunal Judge Pickup
Dated