Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06337/2018 (P)
HU/09717/2018 (P)

THE IMMIGRATION ACTS

Decided Without a Hearing under Rule 34	**Decision & Reasons Promulgated**
On 17 September 2020	**On 30 September 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JASMEET SINGH BHATIA
SHILPA KRISHNAMRAJU

Respondents

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer (written submissions)
For the Respondents: Louis Kennedy, Solicitors (written submissions)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Harrington) which allowed the respondents' appeals under Art 8 of the ECHR against decisions of the Secretary of State taken on 17 February 2018 refusing each of the respondents' indefinite leave to remain based upon long residence under para 276B of the Immigration Rules (HC 395 as amended).

2. The basis of the Secretary of State's refusal was, in reliance on para 322(5) of the Immigration Rules, that the first respondent had been dishonest in declaring discrepant incomes in his HMRC tax returns for the tax years 2010/2011 and 2012/2013 and in earlier applications made by him for Tier 1 leave on 29 March 2011 and 10 March 2013, following which he was granted further leave to remain on both occasions. The second respondent is the first respondent's wife. Her claim under the Immigration Rules was as his dependant.

The Appeal

3. Following the decision of Judge Harrington, the Secretary of State was granted permission to appeal by the First-tier Tribunal (Judge J M Holmes) on 18 April 2020.

4. Thereafter, in the light of the COVID-19 crisis, directions were issued by the UT (UTJ L K Smith) on 15 May 2020 indicating a provisional view that the error of law issue could be determined without a hearing and seeking further submissions from the parties in relation to the error of law issue and also as to whether the appeal could be determined without a hearing.

5. In response to those directions, the Secretary of State filed further submissions dated 11 June 2020 indicating that she agreed with the UT's provisional view that the case was suitable to be determined without a hearing. The respondents filed further submissions on 15 June 2020 (as a rule 24 response) seeking to maintain the judge's decision but indicating that they requested an oral hearing.

6. The Secretary of State filed submissions by way of reply on 5 August 2020 in support of her appeal that the judge had erred in law in allowing the appeal under Art 8.

7. In the light of the party's submissions, and having regard to the interests of justice and the overriding objective of determining the appeal justly and fairly, despite the invitation by the respondents for there to be an oral hearing, I am satisfied that it would be in the interests of justice to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Vice Senior President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom.

8. One further procedural matter concerns an application made by the respondent's solicitors for anonymity on the basis that the appeal involves documentary evidence containing information about the respondents' daughter and son and also the financial details of the first respondent. In my judgment, this is not an appropriate case to be anonymised on the basis put forward by the respondents. Neither the fact that the appeals concern the financial situation of the first respondent, nor that the circumstances of the respondent's children is, or would be if the appeal decision to be remade, require that the appeals be anonymised. No significant details of the respondent's children are, in any event, disclosed in this determination.

Background

9. The first respondent was born on 5 September 1984 and the second respondent was born on 28 August 1984. They are both citizens of India and are married.

10. The first respondent entered the UK in September 2006 with valid leave as a student. He remained in the UK until May 2009 when he returned to India before re-entering the UK on 25 June 2009 with entry clearance as a Tier 1 (Post-Study) Migrant. He remained as a Tier 1 Migrant with leave valid until 2 June 2016.

11. The second respondent entered the UK on 5 January 2011 with valid leave.

12. On 24 May 2016, the first respondent applied for further leave to remain as a Tier 1 (General) Migrant with the second respondent as his dependant. On 31 March 2017, the respondents varied their application for leave to one based upon long residence under para 276B of the Immigration Rules (HC 395 as amended) and seeking indefinite leave to remain.

13. On 12 December 2017, the Secretary of State requested that the first respondent complete a tax questionnaire and provide various historic financial documents. The first respondent replied under cover of a letter dated 7 January 2018. In his response he declared that some of his previous tax returns contained errors which he had subsequently discovered and corrected.

14. In his Tier 1 application dated 29 March 2011, the first respondent had claimed total earnings of £49,684.96 consisting of employment income of £21,999.96 and self-employed income (as a director of a UK company) of £36,560.

15. For the tax year 2010/2011, the first respondent did not declare his employment income to HMRC. Also, for that tax year 2010/11 the first respondent declared self-employed income of only £2,685.

16. In his Tier 1 application dated 10 May 2013, the first respondent claimed total earnings of £42,500.77 consisting of from employment income of £35,298.77 and self-employed income (as a director of a UK company) of £7,202.

17. For the tax year 2012/2013, the first respondent declared to HMRC total earnings of £34,187 including self-employed income of £1,166.

18. It was the first respondent's case that it was only after HMRC carried out routine checks on 3 April 2013 that the discrepancies were discovered. On 26 May 2016 the first respondent submitted amended tax returns for the relevant tax years 2010/2011, 2011/2012 and 2012/2013.

19. On 12 February 2018, the Secretary of State refused the respondents' applications for ILR on the basis of para 322(5) of the Rules and the differential in income submitted as part of the first respondent's tax returns for the tax years 2010/2011 and 2012/2013 by contrast to income claimed in his Tier 1 applications.

The Judge's Decision

20. At the hearing before Judge Harrington, the first respondent gave oral evidence. He also submitted a detailed written witness statement. The contents of this evidence is summarised by the judge at paras 19 and 24 of her determination as follows.

21. First, as regards the first respondent's witness statement, the judge (at para 19) summarised it as follows. I have omitted evidence not relevant to his financial circumstances:

> "a. he accepts that there are discrepancies in the income declared to HMRC and that declared to the Home Office;
>
> b. the 12 month periods that he claimed income for in his Tier 1 applications did not match the tax years exactly;
>
> c. he filed amendments to the figures declared to HMRC for the 2011, 2012 and 2013 financial years on 26 May 2016. This was before his application for ILR on the basis of long residence;
>
> d. as advised by his accountant, he split the income of £36,560, as declared on his First-tier 1 application, into the 2011/2012 tax years which is why his amendment for 2011 was only to £19,855;
>
> e. he also declared £7,202 for self-employment in the amendment for y-e 2013;
>
> f. he would have scored 20 points for income on the basis of his employment income from May 2012 to April 2013 which was accepted at £35,298.77. He would have been awarded 35 points for a Masters, 5 points for UK experience and 20 points for being under 30 so he would have obtained the necessary 80 points;
>
> g. the Home Office should have considered his good character generally and his integration in considering whether to exercise discretion to refuse;
>
> …"

22. Secondly, as regards the first respondent's oral evidence, in respect of which he was cross-examined by the Secretary of State's representative, the judge set out his evidence at para 24 as follows. Again, I have omitted evidence not relevant to his financial circumstances:

> "a. he has an academic qualification in computer science which does not include book keeping/accountancy;
>
> b. for his accounts, he gave the accountant: dividends, bank statements, invoices and all other related documents; he gave everything he had;
>
> c. he did not receive any letter querying his earnings during his Tier 1 applications;
>
> d. (when asked what he thought cause the error) it could be a number of things. A trainee accountant was due to handle the case. He was not asked to come back and sign documents. They told him to just wait for the tax bill and then pay it;

e. (when asked whether he thought the bill he received was wrong) his whole focus was to pay it on time. Looking at things now he should have checked the figures but he was very busy with work and his personal life;

f. in 2011 his wife came to the UK and his whole mind was to settle her in the UK. His wife got a job in Leeds and he was travelling every weekend, juggling work and his personal life;

g. in 2013 his wife was pregnant, she had a few medical issues and his focus was on helping her out which was very stressful;

h. he never intentionally misled anyone. He was very upset and distressed by all this. This is the 4th time he has come to court. All his income is genuine. He is a bit upset with his old accountant;

i. he is now up-to-date with his HMRC payments;

….

k. (when it was put to him that he would have noticed the significant discrepancies) he is not very good with figures and with accounting. He put all his faith in a professional accountant;

l. in 2013 he was eligible for Tier 1 without putting his self-employed forward, he was eligible on just the Nationwide earnings;

m. (when asked about his new accountant) he doesn't know whether his accountant has experience in immigration cases but he is a proper accountant. His accountant prepared the amended documents and submitted them to HMRC. The accountant said the company year doesn't end in March. He did what they advised:

n. he accepted the self-employment earnings declared in April 2013 were significantly different to what he earned;

o. (when it was put to him that he was dishonest in order to order to obtain a Tier 1 visa) he never misled anyone. He always conducted himself honestly. When he realised he had made sure it was all sorted;

…

v. before he applied, he collected all the documents. He couldn't contact his old accountant – he tried calling and visited the office which was closed – so he went to his new accountants. His new accountants got the documents from HMRC and they realised the problem;

w. he changed accountants in 2014. He changed his job completely and opened a limited company. His friends said go with this accountant that he was also working with so he went with that accountant;

x. he was discussing his old returns with his new accountant because with the application he had to submit all documents for five years;

y. he is not sure whether his tax returns were submitted online or in paper form;

z. he is not sure whether his accountants asked him to sign a blank return;

aa. the figures for his Tier 1 applications were prepared by his accountant. As far as he is aware the Respondent only accepted information from accountants;

bb. when he made his earlier Tier 1 applications he submitted bank statements to the Home Office."

23. Having set out the submissions of the Secretary of State and the respondents respectively in paras 25 and 26 of her determination, the judge went on to make a number of factual findings at paras 27–41.

24. At para 27, the judge stated that she had considered both the oral evidence of the first respondent and the entirety of the written evidence submitted.

25. At para 28 the judge noted that:

> "Neither party chose to explore the mathematics of the First Appellant's various tax returns or immigration applications in any detail and the original applications were not before me. In particular, whilst the dates of the immigration applications have been provided it is not clear what time periods the account submitted covered, the requirement being for a 12 month period in the 15 months prior to the application."

26. At para 29 the judge directed herself that she considered the "totality of the evidence" in determining whether the first Respondent was dishonest.

27. At paras 30–40, the judge gave her detailed reasons for concluding that the Secretary of State had not established that the first respondent was dishonest. It is helpful to set these reasons out in full:

> "30. I find that the information provided by the First Appellant to the Respondent in his immigration application was accurate and the information provided to HMRC was inaccurate. I reached this conclusion because the Respondent states that the source documentation (wage slips, bank statements, accounts/invoices, accountant's letter and income summary) was provided with the applications and I conclude that even the most cursory of glances would have noticed if the non-employment income shown in the source documentation was significantly lower than that claimed.
>
> 31. I turn to consider whether the Respondent has proved that the inaccurate information provided to HMRC was provided deliberately and dishonestly by the First Appellant.
>
> 32. Clearly accountants, in common with all other professionals, are capable of making mistakes and so it is not wholly implausible that this occurred.
>
> 33. The Respondent suggests that the First Appellant should have known that the figures were incorrect. I do not accept this argument because:
>
> (a) the differing time periods as between the immigration and tax accounts means that cross-referencing, even if undertaken, is not straightforward;

(b) the tax system is not straightforward. For example, there are a number of allowances which are permitted, differing rates on different types of income and expenses which are allowed for company/sole trader accounts but which are not liable for tax purposes. Consequently, I do not accept that an individual without tax accountancy training (i.e. an individual like the First Appellant) would be able to easily tell that the tax bill did or did not coincide with their income;

(c) the First Appellant does not claim that he checked his tax returns or that he was provided with a tax calculation (i.e. one showing the working). Whilst he remains personally liable for the errors even if he did not check the returns, and consequently should have checked them, I take judicial notice that people do not always act in a prudent manner and so I cannot infer that the First Appellant did check the documentation.

As a result, I do not find from the mere fact that there were differences that the First Appellant must have known and, therefore, must have been dishonest.

34. I have borne in mind that there is no direct evidence from the First Appellant's accountants (old or new) before me and consequently that I am entirely reliant on the First Appellant's oral evidence and the documentary evidence. Whilst there is no requirement for corroborative evidence is a factor which may affect my conclusions on credibility.

35. There are also other factors which I have considered when deciding whether the First Appellant was dishonest.

36. I consider the failure to conclude the First Appellant's employment income to be a clear indication that the accountant has made an error. The whole point of PAYE is that the information is automatically notified to HMRC and so no-one could sensibly have expected to 'get away' with not declaring PAYE income. As a result, I conclude that the failure to declare the First Appellant's PAYE income was an error, and a significant one, by the Appellant's then accountant. This suggests a lack of competence.

37. The amendments made by the First Appellant's tax returns are also relevant. If the amendments had been motivated purely by tidying-up his returns for immigration purposes, I would have expected the figures to be identical to those declared in his immigration applications. This is not the case. As he states he was advised by his new accountants, the income which was within a single year for immigration purposes has been allocated to two tax years. This is strong evidence of a wish to ensure that the information given to HMRC is correct, not merely convenient.

38. I have also borne in mind that the First Appellant has made prompt applications to maintain lawful immigration status, including returning to India to make an entry clearance application when required and this shows a respect for UK law.

39. The First Appellant has given a credible explanation for why and how the mistakes in his tax returns came to his attention. Moreover, the explanation only came to light in response to questions I posed. I consider this is an

> important factor because it suggests that he has not fabricated and planned to give his explanation in advance as if that was his intention he would have ensured that this evidence was given, not simply relied upon the chance that I would ask a relevant question. As a result, I cannot infer from the fact that he corrected his tax returns, that he knew, at the point of submission, that they were incorrect.
>
> 40. Having considered the totality of the evidence and the parties' submissions, I conclude that the Respondent has not proved that the First Appellant was dishonest. While there are undoubtedly inaccuracies in the tax returns and an absence of corroborative evidence from the accountants, I find the First Appellant's explanation to be coherent and I find that the surrounding circumstances are all consistent with the errors not being as a result of the First Appellant's dishonesty but merely the result of errors.
>
> 41. Consequently, the refusal under 322(5) is not appropriate and, as the Respondent accepts, the First Appellant meets the requirements of the Rules for ILR on the basis of long residence."

28. The judge then went on in para 41 to find that, the Respondents having established that they met the requirements for ILR, the interference with their private life was not proportionate and was a breach of Art 8.

The Secretary of State's Challenge

29. Reading the Secretary of State's grounds of appeal together with her further submissions, a number of points are made.

30. First, it is submitted that the judge failed to apply the approach set out in the case of R (Khan) v SSHD [2018] UKUT 384 (IAC). In particular, the judge was wrong to accept the first respondent's evidence that the discrepancy arose as a result of the error by his accountant without any evidence supporting that either from his original accountant or his more recent accountant. Reliance is also placed upon Balajigari and others v SSHD [2019] EWCA Civ 673 at [106] where it is said that in an earnings discrepancy case, such as the present, it is unlikely that a tribunal will accept a mere assertion from an individual that their accountant was responsible for the discrepancy without a full and particularised explanation of what the mistake was and how it arose.

31. Secondly, the Secretary of State contends that the judge failed to give adequate reasons for a finding that the first respondent was a victim of careless accounting and not guilty of dishonestly misleading either the Home Office or HMRC as to his income.

32. Thirdly, in the Secretary of State's reply to the respondents' submissions, it is contended that the judge failed to give adequate reasons for concluding that the information supplied to the Secretary of State was correct and that the figures submitted to the HMRC (at least originally) were inaccurate. The judge's reasoning is premised solely on the fact that the documentation sent to the Secretary of State with the applications was reliable rather than, as the Secretary of State contended in

the alternative, the first respondent had never in fact earned that money and so his self-employment was fictitious.

Discussion

33. The Secretary of State's case relies principally on the decision of the Upper Tribunal in Khan where Martin Spencer J gave guidance as to the proper approach in income discrepancy cases where it is alleged that an individual is dishonest, either in his declaration of income to the HMRC or in his claimed income made in an application for leave to the Secretary of State. The guidance is set out in paras (i)–(v) of the judicial headnote 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."

34. In Balajigari, that approach was largely approved by the Court of Appeal apart from the caution expressed at [42] in relation to the "starting point" set out in paras (i) and (ii) of the headnote in Khan. In Balajigari, Underhill LJ (with whom Hickinbottom and Singh LJJ agreed) said this ([42]):

> "42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a *suspicion* that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation one sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."

35. At [43], the Court approved Martin Spencer J's view at [30(iii)] in Khan that the standard of proof was a "balance of probabilities" but that a finding of dishonesty was a serious finding with serious consequences. Underhill LJ said this:

> "… despite the valiant attempts made by Ms Anderson on behalf of the Secretary of State before us to argue the contrary, we consider (as Martin Spencer J did) that the concept of standard of proof is not inappropriate in the present context. This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences. Accordingly, we agree with Martin Spencer J that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty."

36. The guidance in Khan, as approved in Balajigari, was principally directed to the Secretary of State reaching a decision on a particular immigration application and the guidance arose in the context of judicial review of an adverse decision. It is, nevertheless, generally applicable to a decision-maker when considering an income discrepancy case, including a judge hearing an appeal in the First-tier Tribunal.

37. Of course, in an appeal a judge is likely to have the advantage of hearing an appellant give evidence and be cross-examined. In a case where there is no appeal, but there is a challenge by way of judicial review to the Secretary of State's decision, there will, at best, have been an interview which the individual will have been given

an opportunity to deal with any allegation of dishonesty. Indeed, as a requirement of fairness that was one of the issues decided by the Court of Appeal in Balajigari. That is likely to be a less informative exercise than if the individual gives evidence and is cross-examined by a representative of the Secretary of State and a judge is then required to make an assessment of that individual's credibility.

38. The decision in Khan (as approved in Balajigari) did not, in my judgment, set out a straightjacket as to the approach that should be followed by a decision maker in reaching a decision on whether an individual has acted dishonestly. The decision provides a helpful guide, and no more than that, as to how a decision maker should approach that task. The Court of Appeal in Balajigari noted (at [40]) the points made in Khan were "by way of general guidance". The Court clearly took the view that each case must turn upon an individual factual assessment.

39. Nevertheless, the case law beginning in Khan and concluding in Abbasi (rule 43; para 322(5): accountants' evidence) Pakistan [2020] UKUT 27 (IAC) and Ashfaq (*Balajigari*: appeals) [2020] UKUT 226 (IAC), does emphasise that an individual's claim that any error was that of their accountant, and not dishonestly made by them, is *likely* to need to be supported by evidence from that accountant (see Khan at [37(vii)]). So, in Abbasi the UT stated, as set out in the judicial headnote, that:

> "… where an individual relies upon an accountant's letter admitting fault in the submission of incorrect tax returns to Her Majesty's Revenue and Customs, the First-tier or Upper Tribunal is unlikely to place any material weight on that letter if the accountant does not attend the hearing to give evidence, by reference to a Statement of Truth, that explains in detail the circumstances in which the error came to be made; the basis and nature of any compensations; and whether the firm's insurers and/or any relevant regulatory body has been informed. This is particularly so where the letter is clearly perfunctory in nature."

40. Likewise, in Ashfaq, as set out in the judicial headnote, the UT stated that:

> "The explanation by any accountant said to have made or contributed to an error is essential because the allegation of error goes to the accountant's professional standing. Without evidence from the accountant, the Tribunal may consider that the facts laid by the Secretary of State establish the appellant's dishonesty."

41. The forensic importance of evidence from the accountant who submitted the tax return, and indeed oral evidence or evidence supported by a statement of truth from him, is emphasised in these decisions. However, the decisions are necessarily made in the context of the "general guidance" given in Khan and approved in substance in Balajigari. I do not understand the UT in any of the subsequent decisions to have laid down as a legal requirement that in order to succeed an appellant *must* produce supporting evidence from the relevant accountant. In Khan, Martin Spencer J acknowledged that it was relevant to take into account "a plausible explanation" why supporting evidence from an accountant was missing (see [37(vi)ii)]). In Balajigari, the Court of Appeal (at [106]) went no further than stating that it was "unlikely" that a tribunal would be prepared to accept a mere assertion from an applicant. The Court of Appeal went on to note that a mere assertion simply of 'a

mistake' "without a full and particularised explanation of what that mistake was and how it arose" might be important.

42. Production of supporting evidence from the accountant may be expected but it cannot, in my judgment, be a mandatory requirement without which an appellant would not be able to shift the evidential burden by establishing an innocent explanation so that the respondent will have discharged the legal burden of establishing dishonesty on the part of the individual. It cannot be, in my judgment, that an individual cannot be believed that a mistake was that of his accountant in the absence of evidence from that accountant. There may be cases where it is simply impossible, or not reasonably practicable, to obtain evidence from the initial accountant. The accountant may be untraceable (as appears to have been the case in this appeal) or no longer be practising or willing to assist the appellant in presenting their case.

43. An individual's case may not be as strong without the supporting evidence from an accountant, but, applying a fact-sensitive approach, an individual's case cannot always be impossible of proof without such evidence. Each case will depend upon an assessment of the evidence available, including the underlying creditworthiness (or not) of the individual and what, if any, other documentary evidence exists to support the individual's case. It will, of course, be relevant to consider why such evidence is not forthcoming and, in my judgment, the case law does not impose any rigid requirement that such evidence should always be produced.

44. I do not accept the submission that the judge failed to give adequate reasons for her conclusion that the that the declared income in the first respondent's leave applications was correct. At para 30, the judge gave sustainable reasons why she accepted that the evidence established that the declaration of income to the Secretary of State was accurate and that that disclosed to HMRC in his initial tax returns for 2010/11 and 2012/13 was mistaken. It may well have been part of the respondents' case that one or other of the declarations (whether to HMRC or the Secretary of State) was wrong but not necessarily that the income declared to the Secretary of State was correct. That point is made in the Secretary of State's written reply to submissions. But, the submissions summarised at para 25 of the judge's determination made on behalf of the respondent do not spell that out. In any event, it was open to the judge to find, on the basis that the supporting documents submitted with the first respondent's applications for leave included documents from his bank and wage slips and an accountant's letter, had not been shown to lack authenticity or not be genuine.

45. In my judgment, the judge gave detailed and sustainable reasons for her findings. At para 33 onwards, the judge gave her reasons for finding (at para 40) that the first respondent had shown an 'innocent explanation', namely that he had inadvertently (perhaps carelessly but not dishonestly) submitted inaccurate tax returns in 2010/11 and 2012/13 and, as a consequence, the Secretary of State had not established that he was dishonest. I have set out the relevant paragraphs (31-40) of her determination above.

46. The judge recognised at para 34 that there was no "direct evidence" from the first respondent's old or new accountants. She recognised that his claim rested entirely upon her assessment of his oral evidence and the documentary evidence. She was clearly alive to the issue and the import of the guidance in Khan on this issue (see also para 40).

47. The judge made the point that the "mathematics" of the first respondent's various tax returns and immigration applications were not part of either parties' case before her. It was an entirely reasonable and relevant factor to take into account the fact that the omission of the first respondent's PAYE in his tax return was an error which an individual could not expect to "get away with" since PAYE income is automatically notified to the HMRC. The judge was entitled to take that into account as being more consistent with a mistake (probably a careless one) by the first respondent's accountants rather than a deliberate, dishonest failure by the first respondent to include that income in his tax return. Likewise, as regards the first respondent's self-employed income, even in the absence of a mathematical calculation, the judge was entitled to accept the first respondent's evidence that the self-employed income for each of the relevant tax years did not precisely correspond to the self-employed income for the accounting periods covered by his accounts submitted to the Secretary of State in his applications for leave. The first respondent had given clear evidence that the self-employed income had to be apportioned between the relevant years and that was why the figures did not precisely match up. The judge was entitled to accept this evidence which was certainly supportive of the first respondent seeking to act honestly vis-à-vis the HMRC and not seeking to align his tax returns with the documents submitted to the Secretary of State as "merely convenient". The judge was also impressed by the fact that the first respondent gave his explanation, not in advance of the hearing and not in his evidence-in-chief, but rather in answer to a question from her. That was, a matter which she was entitled to take into account in determining whether or not she believed his evidence and whether it was fabricated and planned rather than honestly given.

48. The judge had the benefit of hearing the first respondent give oral evidence which was subject to cross-examination by the Secretary of State's representative. The judge was required to assess whether she found the first respondent's evidence, and the first respondent himself, to be credible. She bore in mind the guidance, albeit without specific reference to the case itself, in Khan, in particular noting the absence of supporting letters from the first respondent's accountants. She gave detailed, careful and reasonable reasons for accepting the first respondent to be a credible witness and for accepting his account that the discrepancy arose from a mistake made by his accountants and not through his own dishonesty. The judge was clearly alive to the issue, referred to in Khan, that an individual is responsible for his own tax returns. That is, of course, self-evident. However, the fact that an individual is responsible for his return, which he should have signed, does not mean that he or she necessarily read and appreciated that the contents of his return were inaccurate and that, therefore, an inference can be drawn that the tax return has been made dishonestly. Signing a document is not the same as reading a document and

appreciating its contents are inaccurate. Formal responsibility for the tax return is not the same as saying that the taxpayer was dishonest when submitting it.

49. An appellate court or tribunal should be cautious in interfering with a trial court or First-tier Tribunal's findings of fact reached after hearing oral evidence from witnesses. The assessment of that evidence is quintessentially primarily a matter for a trial judge. Provided there is no misdirection in law (and there are none in these appeals), all relevant matters are taken into account, and cogent and adequate reasons given for a rational or reasonably reached conclusion, then the appellate court or tribunal must respect the fact-finding of the judge even if the appellate court or Tribunal would not necessarily have reached the same conclusion on the evidence.

50. In my judgment, the judge was entitled to accept that the first respondent had an 'innocent explanation' even in the absence of supporting documentation from his accountant. Having directed herself correctly that the Secretary of State had to establish on a balance of probabilities that the first respondent was dishonest, the judge considered all the evidence and gave cogent and adequate reasons for a rational and reasonable conclusion that the Secretary of State had failed to discharge that legal burden.

51. Consequently, the judge did not err in law in reaching her finding that it had not been established that the first respondent was dishonest and so para 322(5) of the Immigration Rules did not apply. It was not suggested before the judge, nor in the grounds of appeal, that given that finding the first respondent did not meet the requirements of the long residence rule in para 276B and, given that he met the requirements of that rule, both his (and his wife's) removal would breach Art 8 of the ECHR.

Decision

52. The decision of the First-tier Tribunal to allow the respondents' appeals under Art 8 of the ECHR did not involve the making of an error of law. Those decisions, therefore stand.

53. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
25 September 2020

TO THE RESPONDENT
FEE AWARD

Judge Harrington made no fee award on the basis that her decision was materially influenced by information not before the initial decision-maker. No submissions were made that the fee award should be other than made by the judge. Having dismissed the Secretary of State's appeal and upheld Judge Harrington's decision, I affirm her decision that no fee award is made.

Signed

Andrew Grubb

Judge of the Upper Tribunal
25, September 2020