IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

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

Field House
London

Hearing date: 14 February 2018

THE QUEEN
(ON THE APPLICATION OF SHAHBAZ KHAN)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HONOURABLE MR JUSTICE MARTIN SPENCER

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Mr Gajjar, of Counsel, instructed by Allied Law Chambers Solicitors, appeared on behalf of the applicant.

Mr Malik, of Counsel, instructed by the Government Legal Department, appeared on behalf of the respondent.

(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.

APPLICATION FOR JUDICIAL REVIEW
APPROVED JUDGMENT

MR JUSTICE MARTIN SPENCER:

Introduction

1. Pursuant to permission to bring judicial review proceedings granted by Upper Tribunal Judge Finch dated 3 November 2017, the Applicant seeks an order quashing the decision of the Respondent Secretary of State dated 19 January 2017 whereby she refused the Applicant's application made on 22 November 2016 for indefinite leave to remain ("ILR") in the United Kingdom as a Tier 1 (General) migrant, that decision being affirmed on administrative review on 2 March 2017.

2. The basis for the application for judicial review is that it was irrational and unlawful for the Respondent to conclude that the Applicant had acted in the way which justified action under Paragraph 322(5) of the Immigration Rules and in particular she did not have a proper basis on which to conclude that the Applicant had acted with dishonesty and deceit in relation to a tax return made in respect of the tax year ending 5 April 2012.

3. It is the Respondent's case that the decision to refuse ILR was lawful and rational, that it was fully justified by the evidence and was in accordance with principles and precedents laid down by previous case law.

The Facts

4. The Applicant is now aged 47 having been born on 26 December 1970 and his wife, Riffat is 54 having been born on 1 January 1964. They have two sons, A1 born in March 2001 (17) and A2 born in July 2007 and aged 10.

5. On 16 February 2009, the Applicant was granted leave to enter as a Tier 1 (General) migrant for a period of three years until 16 February 2012 and he arrived with his family in the UK on 4 July 2009.

6. On 18 January 2012, the Applicant submitted an in-time application for leave to remain which was granted the same day and remained valid until 16 February 2014. In that application, he claimed that he had earned £36,000 in the period 16 May 2011 to 30 December 2011 from salaried employment as a director of AAS Professionals Ltd. However, at some stage later in 2012, a tax return was submitted in which only the sum of £7,650 was declared for the year from 6 April 2011 to 5 April 2012.

7. On 20 January 2014, the Applicant made a further application to extend his leave which was granted on 6 February 2014 for a further period of three years expiring on 6 February 2017.

8. On 20 July 2016, the Applicant made an application for ILR as a Tier 1 (General) migrant. Some five days previously, on 15 July 2016, his accountants had written to HMRC stating that an internal audit had revealed that there had been an error in the tax return for 2011/2012 and an amended tax return was filed. That letter stated:

> "Recently it has come to our attention during our internal audit that an incorrect year end submission was made to HMRC. After detailed enquiry we found out that before the submission the computer that was used to file the year-end report was not working properly with the software. One of our former consultant who we used for submitting year-end reports to HMRC did not confirm the figures and end up submitting an incorrect year-end report with a total of £7,650 annual gross salary. This year-end report only provided with December 2011 salary of £4,500 and January 2012's salary of £3,150. The months from May 2011 to November 2011 were omitted out of the report we therefore request you to please see enclosed the amended report providing the difference from the £39,150 (actual gross salary) - £7,650 (submitted to HMRC) equals £31,500 (the difference)."

The letter calculated a short-fall in tax paid of £14,719.13.

9. The first refusal of ILR was contained in a letter from the Home Office (UKVI) to the Applicant dated 20 July 2016. The application for ILR was rejected pursuant to Paragraph 322(5) of the Immigration Rules which relates to the refusal of leave to remain on the grounds of "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct, character or associations or the fact that he represents a threat to national security." The letter contained the following:

> "At your appointment on 20 July 2016 at Sheffield Premium Service Centre you were asked to complete a questionnaire regarding your economic activities and

your earnings from your employment. Question 9 of the questionnaire asked: Q – are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income? A – you ticked "Yes" to indicate you are satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income. There is a considerable discrepancy between the amount of salaried earnings claimed to UKVI to the amount of salaried earnings you declared to HMRC. It is acknowledged that Paragraph 322(5) of the Immigration Rules is not a mandatory refusal, however the evidence submitted does not satisfactorily demonstrate that the failure to declare to HMRC at the time any of the self-employed earnings declared on your previous application for leave to remain in the United Kingdom as a Tier 1 (General) migrant was a genuine error. It is noted that there would have been a clear benefit to yourself either by failing to declare your full earnings to HMRC with respect to reducing your tax liability or by falsely representing your earnings to UK Visas and Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) migrant.

The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom based on the fact that you have been deceitful or dishonest in your dealings with HMRC and/or UK Visas and Immigration by failing to declare your claimed self-employed earnings to HMRC at the time and/or by falsely representing your self employed income to obtain leave to remain in the United Kingdom."

10. On 22 November 2016, the Applicant submitted a further application for ILR and, in support of that application, further evidence was provided at the request of the Secretary of State on 28 November 2016. That evidence included a letter from the Applicant's accountants, Accounts & Tax World, dated 14 November 2016. That letter stated as follows:

"UK Visas and Immigration Centre
To whom it may concern
Re: AAS Professional Ltd – Shahbaz Ahmad Khan
NI number: [ ]

Dear Sir or Madam,
We are the accountants for the above mentioned company and for Dr Shahbaz Ahmad Khan. During the year-end 5 April 2012, the P35/P14 was submitted to HMRC with the information of an employee Dr Shahbaz Ahmad Khan holding NI number [ ]. We confirm that the employee was on a salary from May 2011 to December 2011 of £4,500 gross per month and from January 2012 £3,150 gross for the month making a total of £39,150 annual gross salary. It has come to our attention that an incorrect year-end submission was made to HMRC. After detailed enquiry, we found out that before the submission we had a problem with our IT system and the software was not working properly. One of our former consultant who we used for submitting year-end reports to HMRC did not confirm the figures with responsible person and end up submitting an incorrect year-end report with a total of £7,650 annual gross salary. This year-end report only

provided with December 2011 salary of £4,500 and January 2012's salary of £3,150. The months from May 2011 to November 2011 were omitted out of the report.

We would like to confirm that this was just a clerical error plus software issue, not our client intentions. We apologise for any inconvenience this may have caused."

11. The application for ILR was further considered by the Respondent and refused on 19 January 2017. The reasons for the decision given were as follows:

"Consideration has been given to your application dated 18 January 2012 when you applied for leave to remain in the United Kingdom as a Tier 1 (General) migrant and claimed 40 points for earnings of £36,000 in the period 16 May 2011 to 30 December 2011. Your earnings were from one source: salaried employment as a director of a limited company, AS Professionals Ltd.

When assessing your application of 22 November 2016 for indefinite leave to remain as Tier 1 (General) migrant, consideration has been given to the information you have provided to HMRC concerning your income from all employment.

The information you provided to HMRC about your salaried employment as a director of a limited company had a direct impact on your tax liability and the amount of tax you would be required to pay. The information you provided to UKVI about your salaried employment as the director of a limited company was required in order for you to obtain your Tier 1 (General) visa. On investigation it is clear that there are significant differences in the information you initially provided to HMRC and the information you provided to UKVI.

When reviewed, it was apparent to UKVI the earnings from salaried employment as the director of a limited company you had declared for the tax year 2011 to 2012 on your application was significantly different from the information you had declared to HMRC. You had UKVI salaried earnings of £36,000 in the period 16 May 2011 to 30 December 2011 for your application dated 18 January 2012.

Information provided to us from HMRC confirms that for the year 6 April 2011 to 5 April 2012 you originally only declared £7,650. On 20 July 2016 you made an application for indefinite leave to remain which was refused on character and conduct as you failed to declare your full earnings for the tax year 06 April 2011 to 05 April 2012. You have now made a further application for indefinite leave to remain and provided a letter from your accountant dated 14 November 2016 which provides an explanation regarding the substantial discrepancy and a letter from HMRC dated 9 September 2016 stating your records have been amended and asking for the increased tax liability to be paid.

Your amended tax returns to HMRC are acknowledged and it [is] recognised you have a revised tax liability figure from HMRC. However, it is considered you should have taken reasonable care to ensure your tax returns were correctly submitted. This would include verification that your returns had been submitted to HMRC with the correct earnings declared. Although your accountant stated that the error was a clerical one on their part it is taken that as your earnings are based on turnover, minus costs, equals profit we would consider this to be routine work that is not complex and therefore you should have taken reasonable care to ensure

> the correct returns had been submitted to HMRC. Further, it is only after being called to account within your previous refusal that you have reviewed and amended your returns.
>
> The fact that you have retrospectively declared these claimed earnings to HMRC is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with HMRC and/or UK Visas and Immigration.
>
> Your actions in declaring different amounts of income to HMRC and UKVI lead to the conclusion that in light of your character and conduct it will be undesirable to allow you to remain in the United Kingdom. Your character and conduct with regards to declaring your income would lead to a refusal of your application under general grounds paragraph 322 (5) of the Immigration Rules. Whilst a refusal under paragraph 322 (5) of the Immigration Rules is not a mandatory decision, it is considered your actions in declaring different income to HMRC and UKVI would mean that a refusal under paragraph 322 (5) is appropriate."

The Secretary of State also considered the Applicant's application for ILR under paragraph 245CD of the Immigration Rules and found that the Applicant did not meet the requirements of that paragraph because the Secretary of State did not accept that the earnings claimed in the application were genuine earnings from salaried employment as the director of a limited company.

12. On 2 February 2017, the Applicant applied for Administrative Review of the Respondent's decision of 19 January 2017 on the basis that she had "applied the Immigration Rules incorrectly". The application included the following additional submissions:

> "In relation to the discrepancy, the accountant responsible for filing the returns had communicated the underpayment of taxes in a letter dated 15 July 2016 and 26 August 2016. Indeed, the correspondence was acknowledged by the HMRC according to their letter dated 9 September 2016. The SSHD has not properly assessed this context, and it was, we submit, incumbent upon the SSHD to clarify with HMRC the correct position. Particularly, given the extent of the co-operation between the two departments in liaising with one another. The Applicant never had the intention to deceive the Home Office and this is very much evident from HMRC letter dated 9 September 2016 that he did correspond on 15 July 2016 with HMRC even before applying for settlement application on 20 July 2016. Home Office failed to give any importance to this regard while considering Applicant's intentions.
> …
> Essentially, in the previous five years of tax returns, there has been one period owing to an innocent mistake perpetrated by the financial adviser, who was obliged

> to file the said accounts in the correct manner, which has resulted in the Applicant's settlement application being refused. We submit that decision is unlawful, as the SSHD has failed in her duty to ascertain the position from the other government department. The further assessment in the current application is similarly unlawful as no attempt has been made by the SSHD to ascertain the genuineness of the income relied upon. … It is clear that the underpayment of tax arising from the error on the part of the accountant firm "Accounts & Tax World" was made clear to HMRC prior to the application for settlement being made in the penultimate application (see attached letter from HMRC dated 9/9/16)."

13. Additionally, the application for Administrative Review drew attention to the Respondent's guidance in respect of paragraph 322(5) of the Immigration Rules as follows:

> "When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that this is undesirable to allow them to enter or remain in the UK."

14. The Administrative Review was carried out on 2 March 2017 and the decision of 19 January 2017 was maintained. The reasons for maintaining the decision include the following:

> "Whilst you claim that the fault with your tax return was the error of the accountant who completed this return, and despite the letter from said accountant taking the blame for the mistake, the onus is on you to ensure the information provided to all government departments is accurate at the time of submission. As your accounts are not deemed to be particularly complex it is ultimately your responsibility and not your accountant's to ensure that the figures are correct before submission. We do acknowledge that the tax returns have recently been amended and the overdue tax paid, however, this is not enough to satisfy the Secretary of State that the initial discrepancy caused them to question your character and conduct when dealing with government departments. The advantage to you of either decreasing your income to lower your tax liability, or inflating your income to ensure your Tier 1 leave to remain application is approved, is noted by the Secretary of State. This applies regardless of any recent amendments made. Moreover, we do appreciate that the discrepancy only occurred with one of your tax returns and that the [law] does not define certain time scales for amending your tax returns, but as it is UKVI's responsibility to ensure that the migrants granted settlement are of good character and conduct it is imperative that we take into account all aspects of previous earnings and investigate any variation as and when [it] occurs."

In relation to the paragraph 245CD determination, the review decision stated that the original caseworker had not assessed the Applicant's current earnings in the light of the concerns raised over the genuineness of previous earnings but that he had been refused ILR under paragraph 322(5), this being a refusal on the basis of character and conduct. It was stated:

> "The original caseworker has not refused your application on the grounds of deception therefore there is no burden of proof from the Secretary of State in that regard."

These proceedings

15. A pre-action protocol letter was sent on 23 March 2017 challenging the decisions of 19 January 2017 and 2 March 2017 and a letter of response dated 28 March 2017 from the Secretary of State refuted the allegations in the PAP letter and maintained that the decision of the Secretary of State was lawful and consistent with the relevant Immigration Rules.

16. An application seeking permission to apply for judicial review was made supported by a statement of facts dated 13 May 2017. Paragraph 3 of the statement of facts made reference to the health of one of the Applicant's children, A2, who was treated for a brain tumour. It was pleaded:

> "Given what was happening to his child at the time of the 2012 application for further leave to remain, the Applicant was constantly pre-occupied with the safety and well-being of his child – who was undergoing life-saving treatment. This was a factor affecting the otherwise rigorous attention given by him to his tax returns. It was for these reasons and the error on the part of his accountant that the Applicant's tax return for 2012 was incorrect. But for the reasons mentioned in the foregoing affecting the Applicant's said child, the Applicant's oversight of his tax returns was, uncharacteristically, not as rigorous as would ordinarily be the case.
>
> The main burden of the statement of facts was that, in making her decision, the Secretary of State had in effect substituted her own view of the tax return in question for that of HMRC. Thus, it was pleaded that "it is not for the SSHD to

> introduce her own interpretation of the workings of HMRC." Given that HMRC were satisfied with the explanation in 2016 for the erroneous tax return relating to the tax year ending 6 April 2012 and accepted the amended tax return, it was pleaded that: "The SSHD has failed to explain why, in her judgement, her view of a tax filing correction is the better view than the tax authorities' view – who neither rebuked/criticised nor took any step towards punishing the Applicant for making a mistake in filing his return for the relevant 2011/2012 period. "

It was further stated that the Secretary of State had failed to act in a fair manner in determining whether the Applicant had actually met the financial requirements qualifying him for the requisite points according to the points based system requirements and that she had failed to follow the guidance entitled "General grounds for refusal" which includes the following:

> "When deciding whether to refuse under this category, the key thing is to consider if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or their conduct and/or their associations to the extent it is undesirable to allow them to enter or remain in the UK."

17. In detailed grounds of defence, the Secretary of State pleads that the kind of arguments advanced by the Applicant in this case have been considered in a string of previous cases and have been rejected on a consistent basis. I shall refer to these judgments and what they signify for the purposes of the court's determination of this application at paragraph 27 below. Other aspects of the detailed grounds of defence are dealt with in the arguments adduced on behalf of the Secretary of State for the purposes of the hearing 14 February 2018 and are dealt with below.

18. On 8 November 2017, permission to apply for judicial review was granted by Upper Tribunal Judge Finch who stated the following:

> "(9) In the refusal letter, the Respondent did take into account the evidence provided by the Applicant's accountants but did not provide any reason for concluding that they themselves were seeking to deceive her when they said that the discrepancy had arisen because of a clerical error. Furthermore there was only one discrepancy amongst many years of returns and supporting documents and

> there was no history of the Applicant using deception. Counsel for the Applicant also submitted that it was reasonable for the Applicant to rely on the skills of his professional accountant."

Having stated that the previous decisions relied upon by the Respondent were fact specific and that the Respondent must exercise her discretion in the particular circumstances of each individual case, UTJ Finch decided that "it is arguable that it was irrational and unlawful to conclude that the Applicant had acted in a manner which justified action under paragraph 322 (5) of the Immigration Rules."

UTJ Finch also stated that it was

> "arguable that the Respondent's own decision-making was contradictory and therefore irrational. For example, on p3 of her decision dated 19 January 2017, in the paragraph starting "Your amended tax returns", the Respondent both asserts that the Applicant should have taken reasonable care to ensure your tax returns were correctly submitted and that retrospectively declaring his income to the HMRC is not sufficient to satisfy her that the Applicant had not previously been deceitful or dishonest."

It was said that the decision reached by the Respondent was arguably irrational and unlawful by reference to *Royal Brunei Airlines v Tan* [1995] UKPC 4 where Lord Nicholls said that "carelessness is not dishonesty".

19. Subsequently, the Applicant has filed a response to the Respondent's detailed grounds of defence on 31 December 2017 and a supplementary response on 15 January 2018 which, again, incorporate the arguments which were marshalled for the purposes of the hearing before me.

The Hearing

20. For the purposes of the hearing on 14 February 2018, both parties submitted skeleton arguments which were then elaborated upon in oral submissions.

The Applicant's submissions

21. In his skeleton argument, Mr Gajjar first focuses on the refusal letter of 19 January 2017 where the Secretary of State stated:

> "However it is considered that you should have taken reasonable care to ensure your tax returns were correctly submitted. This would include verification that your returns had been submitted to HMRC with the correct earnings declared"

Later in the letter there is further reference to the failure of the Applicant to take reasonable care to ensure that the correct returns had been submitted to HMRC. It is submitted by Mr Gajjar that the refusal letter read as a whole does not support the Secretary of State's allegation of deception and dishonesty and did not satisfy the burden or standard of proof for establishing dishonesty. Reliance is again placed on the dictum of Lord Nichols in the *Royal Brunei Airlines* case and also on the decision of the Supreme Court in *Ivey v Genting Casino Limited* [2017] UKSC 67 at paragraph 74 where it was said:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct is honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

On this basis, it is submitted that the references to carelessness in the decision letter show that the test for dishonesty has not been made out.

22. A further important, indeed principal, part of the Applicant's argument was that, by accepting that the mistake had been theirs, the Applicant's accountants "fell on their sword" by confirming that a clerical error had occurred in relation to the tax

return for 2011/2012 owing to a combination of a software issue and a human error on their part. In this regard, reliance is placed upon the decision of Mr Justice Collins in *R (on the application of Samant) v Secretary of State for the Home Department* JR/6546/2017. In that case, as here, the Secretary of State refused an application for indefinite leave to remain on the basis that the Applicant had made tax returns, in particular for the year ending April 2013, which did not coincide with the figures put to the Secretary of State in relation to his earnings. In that case, the decision maker had said:

> "Were it accepted that the figure declared to the Home Office was an accurate representation of your earnings between February 2012 and January 2013, your actions in failing to declare your earnings in full to HM Revenue and Customs would lead your application to be refused under paragraph 322 (5) of the Immigration Rules based on your character and conduct, as it would be considered that you had been deceitful or dishonest in your dealings with HM Revenue and Customs."

Mr Justice Collins reminded himself that the test to be applied in establishing dishonesty is on the balance of probabilities but "it has often been said that the more serious an allegation the greater the level of probability, if that is the right way of putting it, that has to be established and there is no question that in order to establish dishonesty the higher level of the balance has to be applied, albeit this is still the balance of probability." He then went on to say this (and this lies at the heart of the Applicant's submission in this case):

> "11. The difficulty, as I see it in the case put by the Applicant, is that he has asserted that he was given particular advice that would enable him to put in the expenses that he relied on to reduce his tax liabilities, but there is no evidence produced by either the original accountants Oasis, who made the report, or any subsequent accountant who may have spotted the error and dealt with it. If it were accepted by a representative of the accountants that he was so advised, that would be an exceedingly powerful point in his favour. Equally, of course, it would be damaging to him if it were not accepted that any such advice had been given."

Whilst the issue in *Samant's case* was whether the Applicant had legitimately reduced his tax liability by claiming expenses which were not properly claimable but which he had been advised were claimable by his accountant, and so was not the same error as in the present case, it is submitted by Mr Gajjar that the principle is the same: if an error in a tax return, whether in relation to the expenses that can be claimed or the earnings that are stated, is attributable not to the dishonesty of the Applicant but to an error by the accountants, then that is not dishonesty. In contradistinction to *Samant's case*, here the Applicant has submitted to the Secretary of State evidence from his accountants acknowledging that the mistake was theirs and therefore it is submitted that the finding of dishonesty is unjustified and irrational. Carelessness is insufficient and the references to carelessness in the decision letter shows that the Secretary of State has misdirected herself.

23. It is further submitted by Mr Gajjar on behalf of the Applicant that there is nothing implausible about the evidence from the Applicant's accountant that the error in the 2012 tax return was wholly the accountant's fault. It is pointed out that lack of genuineness in relation to the letter of 14 November 2016 from the accountant is not part of the reasons for the Secretary of State's decision. This is in contrast to the submissions made on behalf of the Respondent where it is stated:

> "The letter then suggests that there was 'just a clerical error plus software issue'. This is simply incredible. It is very difficult, if not impossible to believe that a significant amount just disappeared from the figures and no-one (including the Applicant) noticed until 15 July 2016."

Thus, Mr Gajjar submits that, in seeking to uphold this decision, the Respondent is going significantly further than the decision letter itself.

24. It is further pointed out that there is a significant error in the decision letter where it states:

> "Further, it is only after being called to account within your previous refusal that you have reviewed and amended your returns."

From the chronology, it is observed that this is not correct: the Applicant, through his accountant, wrote to HMRC on 15 July 2016 which was five days before the application of 20 July 2016.

25. Finally, Mr Gajjar refers to the decision letter of 19 January 2017 where the Respondent states:

> "The fact that you have retrospectively declared these claimed earnings to HMRC is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with HMRC and/or UK Visas and Immigration."

In this regard, it is submitted that the Respondent has misdirected herself as it is not for the Applicant to satisfy the Secretary of State that he has not previously been deceitful or dishonest but rather it is necessary for the Secretary of State to be satisfied on plausible and credible evidence that the Applicant has been deceitful or dishonest. He reminds the Tribunal of the test for dishonesty set out in *Royal Brunei Airlines v Tan* [1995] UKPC 4 where Lord Nicholls stated that acting dishonestly, or with a lack of probity, means not acting as an honest person would in the circumstances and that carelessness is not dishonesty. This was endorsed by the Supreme Court in *Ivey v Genting Casino Limited* [2017] UKSC 67 at paragraphs 74 where it was said:

> "When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the acts. … when once his actual state of mind as to knowledge or belief as to facts is

established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people."

In this context, it is submitted that the test for dishonesty was not made out and at best all the Secretary of State could properly have found that the Applicant had been negligent in failing to verify the work of his accountants.

The Respondent's submissions

26. On behalf of the Secretary of State, Mr Malik set out five propositions of law which he said (and Mr Gajjar confirmed), are not in dispute. These are as follows

(i) The question as to whether a person's character or conduct is questionable for the purposes of paragraph 322(5) of the Immigration Rules is a question for the Secretary of State to consider and determine. The Secretary of State is the primary decision maker with the relevant expertise and is charged by parliament to finding the facts and exercising judgement. The Secretary of State's findings and conclusions may be challenged only on conventional public law grounds. A judicial review of a decision to refuse an application under paragraph 322(5) of the Immigration Rules is not a merit-based appeal and the issue for the reviewing court is whether the decision taken by the Secretary of State falls within the range of reasonable responses.

(ii) The legality of the Secretary of State's decision to refuse an application for leave to remain under paragraph 322(5) of the Immigration Rules must be assessed by reference to the material that was before the decision maker when the decision was made. Thus evidence or explanations put forward

by an applicant either with his subsequent application for administrative review or during the course of judicial review proceedings are not relevant. In this regard, I am referred to *R (Giri) v SSHD* [2016] 1 WLR where the Court of Appeal rejected the submission on behalf of the Applicant that whether one of the grounds for refusing leave actually existed was a precedent fact for determination by the court. It was held that the question whether an applicant for leave to remain had failed to disclose a material fact for the purposes of paragraph 322(1A) of the Rules was not a precedent fact for determination: the question for determination by the court was whether the Secretary of State's decision was reasonable and lawful. At paragraph 19, Richards LJ stated:

> "The key point is that the statute confers the power on the Secretary of State, or the immigration officers acting on her behalf, to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State or her officials, in the exercise of that power and in reaching their decision, to determine which provisions of the Rules apply and whether relevant conditions are satisfied, including the determination of relevant questions of fact. On the reasoning in *X v Khawaja* and *X v Bugdaycay*, their findings on such matters are open to challenge in judicial review proceedings only on *Wednesbury* principles; it is not a situation that their powers depend on some precedent fact the existence of which falls to determination by the court itself."

(iii) The Secretary of State is entitled to refuse a person's application under paragraph 322(5) of the Immigration Rules if she rationally concludes that he has not been completely honest or transparent in relation to his income either with the Home Office or with HMRC. This is consistent with the text of the Rule and the Secretary of State's published guidance.

(iv) The Secretary of State is entitled to refuse a person's application under paragraph 322(5) of the Immigration Rules on the basis of matters

concerning his tax even if HMRC has taken no action against the Applicant.

(v) It is not a defence for a person who has been refused under paragraph 322(5) of the Immigration Rules on the basis of matters concerning his tax return to say that his accountant or agent was responsible for the discrepancies. A person is personally responsible for his tax matters and dealings with HMRC. In relation to the burden and standard of proof, Mr Malik referred again to *Giri* at paragraph 36 where Richards LJ referred to his previous judgment in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB468 where he had said at paragraph 62:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find an allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

In *Giri*, Richards LJ went on to point out that his statement of principle in the previous case had been subsequently approved by the House of Lords in *In Re D (Secretary of State for Northern Ireland intervening)* [2008] 1WLR1499 (see per Lord Carswell at para 27). Again, in the case of in *Re B (Children) (Care proceedings: standard of proof) (CAFCASS intervening)* [2009] AC 11, Lord Hoffman stated:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

Richards LJ, in *Giri*, also referred to the case of *NA (Pakistan)* [2009] UKAIT 31 where the Tribunal said:

> "However, we do agree … that the consequences of refusal under part 9 can be serious and that is certainly true for persons such as the three claimants who, depending on findings of fact made by the Tribunal may find themselves, if removed from the UK, faced with a five to ten year re-entry ban … whilst we would note that Lord Hoffman in *Re B* emphasised that the seriousness of the consequences do not require a different standard of proof, we do accept that for the Respondent to satisfy us he has discharged the burden of proof on him on the balance of probabilities he would, in the context of this type of case, need to furnish evidence of sufficient strength and quality and he (and the Tribunal) would need to subject it to a 'critical', 'anxious' and 'heightened' scrutiny."

Richards LJ was concerned that the expression "heightened scrutiny" should not be treated as a surrogate for the application of a "heightened standard of proof" but otherwise approved the approach of the Tribunal as being consistent with the authorities on the standard of proof.

27. In response to Mr Gajjar's reliance on the case of *Samant*, Mr Malik referred me to a series of subsequent cases where applicants had "jumped on the band wagon" but the Tribunal had rejected evidence blaming the accountants. Thus:

(i) In *Kamal v Secretary of State for the Home Department* (Case number JR/11417/2016) a decision of Upper Tribunal Judge Gleeson of 31 August 2017, the Applicant had made discrepant declarations of his employed and self-employed income for the tax year 2010-11 as follows:

(a) On 6 April 2011 in his Tier 1 application, the Applicant claimed total earnings of £40,665.74.

(b) In his HMRC tax return for the same year, the Applicant claimed and paid tax on total earnings of £12,330.

(c) On 13 January 2014, almost three years after filing his incorrect tax return, the Applicant notified HMRC of an under declaration for 2010/2011 but the new figures disclosed a continuing discrepancy of almost £8,000 between the April 2011 declared income and the January 2014 adjustment. In that case, a letter from the Applicant's accountants cut no ice with Judge Gleeson. He said:

> "The letter from the accountants accepting responsibility takes matters no further: the responsibility for accounting properly for income is always that of the tax payer and the difference here is so huge that the Respondent was unarguably entitled to consider that the Applicant could not have overlooked it innocently."

(ii) *Parveen and Saleem v SSHD* (Case number JR/9440/2016): this was another decision of Upper Tribunal Judge Gleeson on 1 August 2017. Again, indefinite leave to remain was refused by the SSHD based upon a significant under-declaration in tax returns in 2011 and 2013 which conflicted with the income figures given in historic visa applications. Thus:

(a) On 31 March 2011 the Applicant claimed 20 points for earnings of £38,092.79 for the period 3 February 2010 to 4 February 2011 which included earnings from self-employment of £23,849 but in the declaration to HMRC for the same period, the self-employment income was declared as £2,013, not £23,849.

(b) On 11 May 2013 the application for a visa disclosed self-employed income of £32,340 but, on the HMRC return, the

Applicant declared only £694 for self-employed earnings. There was no tax return at all for the year ending April 2014. In May 2016 when the Applicant and her husband were preparing for their application for ILR, they visited the accountant who admitted to filing two incorrect returns and it was their case that the accountant did not tell them at the time that he had filed no return at all for 2014.

Judge Gleeson stated:

> "The principal Applicant has personal responsibility for her tax returns. She would have been aware that she paid much less tax than would normally have been due on such a large of amount of self-employed income. The difference in her claimed income is not marginal nor is the difference in liability to tax. The additional tax to be paid is over £15,000."

Again, the attempt to blame the accountants cut no ice with

Judge Gleeson who stated:

> "61. It is beyond credit that the principal Applicant could have mistaken the amount chargeable to tax for the small self-employed income she declared for the correct tax charged for the large income now relied upon, however incompetent her accountants may have been."

(iii) *Pathan v SSHD* (Case number JR/12657/2017) a decision of Upper Tribunal Judge Rimington dated 27 October 2017. In this case, when making a previous application for Tier 1 leave on 1 April 2011, the Applicant had claimed to have earned £23,436 net profit as a self-employed sole trader during the period from 1 August 2010 to 28 February 2011. However, checks with HMRC revealed that for the financial year ending April 2011, he had declared a net profit from self-

employed trading in the sum of £7,948 a discrepancy of £15,488. Again, the Applicant sought to blame his accountants at the relevant time. In answer to a questionnaire he had stated "the first accountant … did mistakes and submitted wrong amount for year 2010/11. So I changed the accountant and sent revised self return". In refusing ILR, the SSHD had noted that prior to submitting his tax return for the period 2010/11, the documents needed to prepare it would have been supplied by the Applicant to the accountant dealing with his tax affairs. Furthermore the Applicant would have had sight of the tax calculation issued by HMRC. Thus, if an error had occurred, the Applicant would have noted it and contacted HMRC immediately. It was the Applicant's responsibility to ensure his tax return was submitted both on time and with the correct information and that by failing to do so it was considered he had been deceitful or dishonest. In her judgment, Judge Rimington found that the SSHD was rationally entitled to reject the Applicant's explanation that his previous accountants were to blame and to hold him responsible for the information provided to HMRC in 2011 and to conclude that the failure to declare the true position, either to HMRC or to UKVI in 2011 was not a genuine error. She went on to say:

> "40. Insofar as it was stated that the Applicant was not an accountant and was at worst negligent, the decision maker gave a clear and cogent reason why it was considered his explanation was not accepted. The Applicant was responsible for the returns on his behalf to the HMRC. His MBA certificate which he obtained in 2008 was submitted as part of his Tier 1 application showed that he had taken and managed to pass the "Managing Finance Unit" and was therefore familiar with the financial business practice."

In relation to the mistake by the accountant, Judge Rimington said:

> "46. It is correct that accountants can make mistakes but the information that was before the Secretary of State was that the Applicant had a Masters in Business Administration, not least a finance module and the Secretary of State in her reasoning considered that not only had he provided the financial information to the accountant, but even if the accountant had made an error, it was considered that the Applicant would have contacted the HMRC immediately on receipt of his own tax documentation to correct such an error. In effect the Secretary of State had stated that the Applicant delayed and waited nearly five years to submit a revised figure to HMRC and that was a matter of days before he made an application for indefinite leave to remain."

The application for judicial review was dismissed and the decision of the Secretary of State was upheld. Mr Malik submits that the facts in *Pathan* were very similar to those in the present case. He rejected any suggestion that only those who have studied accountancy are capable of understanding their tax obligations. He pointed out that the Applicant in the present case ran his own company and could be expected to have known his obligations to HMRC.

(iv) *Abbasi v SSHD* (Case number JR/13807/2016), a decision of Upper Tribunal Judge Rimington dated 9 January 2018. In this case, when applying for leave to remain in December 2010, the Applicant had stated he had earned £43,926 from self-employment in his business entitled "Abbasi Accountancy and Financial Services" for the period 1 November 2009 to 31 October 2010. In a further application in July 2013 he had stated that his income for the period 1 July 2012 to 30 June 2013 had been £53,504.44. However, HMRC records indicated that the Applicant had not paid tax as required on those earnings and the Secretary of State refused ILR pursuant to paragraph 322(5) of the Immigration Rules. The Applicant's case was that as soon as he discovered that his previous accountants had

made a mistake about his tax liabilities for his self-employed income, he had taken steps to remedy the default and that he had explained this to the Respondent when he applied for ILR. In dismissing the application for judicial review, Judge Rimington stated:

> "76. In my view, on the facts, there was a solid foundation on which the Secretary of State could make a rational decision. On the facts as presented the Secretary of State's response was unarguably within the range of reasonable responses. She asked herself the correct question on the relevant facts. The Applicant knew he was self-employed and had for at least three tax years made a nil declaration for self-employed earnings which supported an application to UKVI; it was not the case that earnings were just a discrepancy. It is unarguable that dishonesty could be inferred.
>
> 77. I list my reasoning found in relation to ground (iii). Deficiencies in tax returns and failure to pay tax can infer dishonesty and it is open to the Secretary of State to apply paragraph 322 (5) to such cases."

28. In his written submissions, Mr Malik sought to rely on other previous decisions of the UTIAC in similar vein: *Varghase* (Case number JR/5167/2016), *Kawos* (Case number JR/4700/2016), *Vellanki* (Case number JR/11008/2016), *Majumder* (Case number JR/4700/2016) and *Menon* (Case number JR/7719/2016). Mr Malik submitted:

> "The Upper Tribunal is respectfully invited to follow this consistent line of authority in relation to cases concerning paragraph 322 (5) of the Immigration Rules and tax matters, and dismiss the Applicant's claim."

29. Mr Malik referred to the statement of facts dated 30 March 2017 in which the Applicant had relied upon the brain tumour of his younger son, A2 and where it was pleaded:

> "Given what was happening to his child at the time of the 2012 application for further leave to remain, the Applicant was constantly preoccupied with the safety and well being of his child – who was undergoing life saving treatment. This was a factor affecting the otherwise rigorous attention given to his tax returns. … But for the reasons mentioned in the foregoing affecting the Applicant's said child, the

> Applicant oversight of his tax returns was, uncharacteristically, not as rigorous as would ordinarily be the case."

Mr Malik submitted that there were two difficulties with this pleading: first, these matters had not been put to the SSHD before she reached her decision and had not been part of the evidence relied upon by the Applicant when he made his application for ILR in November 2016 although, given the decision of 20 July 2016, the Applicant would have known that the tax return for the year ending April 2012 would be at the front of the SSHD's decision and therefore any matters pertinent to why that tax return had been made when it was false would be important. Secondly, the actual medical evidence relied upon suggested that the symptoms which led to the resection of the tumour on 6 March 2013 had arisen relatively recently, but the tax return would have been made in the course of 2012, before the concern over the child's health would have arisen. Thus, in a letter from Great Ormond Street Hospital for Children to the Home Office dated 16 November 2016, a social worker, Miss Marina Ellis, had stated:

> "That A2 had presented with an episode of seizures in January 2010 but after the family returned to the UK in April 2011 'A2 remained well' until March 2013 when he again presented to Newham University Hospital with severe headaches and vomiting – he immediately had a scan and was found to have a brain tumour."

30. In summary, Mr Malik submitted that it has not been shown that the Secretary of State's decision was irrational or unlawful. He referred to the guidance which stated:

> "The key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK."

He submitted that the Secretary of State, on the basis of sound reasoning and reliable evidence, had found that the Applicant's behaviour was such that it fell within paragraph 322(5) of the Immigration Rules as it called into question his character and conduct and that she had been fully entitled to exercise her discretion to refuse the Applicant's application for ILR.

31. If he was wrong about that, Mr Malik further submitted that, in any event, judicial reviews should be refused pursuant to Section 31 of the Senior Courts Act 1981 whereby the High Court (and, by derivation, this Tribunal) must refuse to grant relief on an application for judicial review "if it appears to the court to be highly likely that the outcome for the Applicant would not have been substantially different if the conduct complained of had not occurred." In this regard, Mr Malik submits that there was ample ground upon which the Secretary of State could have called into question the bona fides of the letter of 14 November 2016 from the accountant. Thus he submitted (at paragraph 30 of his written submissions):

> "No details were provided as to this alleged IT "problem". It is not clear which software was being used and why it was "not working properly". The letter then seeks to blame a "former consultant" who "did not confirm the figures with responsible person". The letter does not even name this former consultant or responsible person. The letter then suggests that there was "just a clerical error plus software issue". This is simply incredible. It is very difficult, if not impossible, to believe that a significant amount just disappeared from the figures and no-one (including the Applicant) noticed until 15 July 2016. It was on that date, it appears, when the accountants amended the accounts for the tax year 2011/12. It is noteworthy that it was just five days before the Applicant made his application for indefinite leave to remain."

Discussion

32. The starting point seems to me to be that, 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 (as here), she 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. However, it does not follow that, in all such cases, a decision to refuse ILR will 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. In that regard, she needs to remind herself 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.

33. It is further the case, in my judgment, that 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. 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 taxpayer 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. Thus, in this case the Applicant did not pay tax of almost £15,000 when he would have expected to do so and the Secretary of State is therefore entitled to ask why, put on notice in this way that something was wrong, the "mistake" had not been remedied earlier.

34. 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 would be not merely entitled

but 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 was rational and the evidence had been properly considered, the decision of the Secretary of State could not be impugned. In my judgment, the fifth proposition of law proposed by Mr Malik, although not contested by Mr Gajjar, in fact goes too far. It is too broad or extreme a proposition to suggest that it cannot be a defence for a person who has been refused ILR pursuant to paragraph 322(5) on the basis of a discrepancy between his tax return and a previous application for leave to remain to say that his accountant or agent was responsible for the discrepancy on the basis that each person is personally responsible for his own tax matters and dealings with HMRC. Otherwise, whenever she discovers such a discrepancy, the Secretary of State would be entitled to refuse ILR without further consideration of the reason for the discrepancy and whether it in fact betrays a lack of honesty on the part of the Applicant. Thus, it seems to me that an error by an accountant may afford a reason for an Applicant to show that he has not been dishonest but, at most, careless (or perhaps even not that). Thus, whilst it would normally be the case that an Applicant would soon become aware of the error because of his unexpected lack of a liability to pay tax, if the Applicant could show that he was so distracted by other matters – here the serious illness of a child undergoing life saving brain surgery with subsequent treatment, rehabilitation and chemotherapy – then the Secretary of State would have to consider very carefully whether that did in fact afford a good reason for the Applicant's failure to appreciate that his tax liability was less than expected and therefore notify the authorities sooner than he had done so. The Secretary of State would also need to put into the balance the kind of

matters relied upon by Mr Malik at paragraph 30 of his written submissions referred to in paragraph 31 above deciding whether there was or was not a genuine error on the part of the accountants or whether this is simply an attempt to "pull the wool over her eyes". The Secretary of State would certainly be entitled to be suspicious of evidence blaming an accountant: as the experience of the UTIAC shows, illustrated by the cases relied upon by Mr Malik, this is all too easily a way for an Applicant to excuse behaviour which calls into question their character or conduct within the guidance. Thus, in my judgment the Tribunals in the previous cases have rightly been sceptical as to whether an assertion that a discrepancy between a tax return and an application for leave to remain was simply attributable to an error on the part of the accountant, particularly given the safeguards which are known to exist whereby an Applicant should have been asked to verify the information submitted to HMRC and to sign a tax return.

35. Applying the above to the decision in this case, although it seems to me that the Secretary of State could have lawfully and legitimately refused the Applicant's ILR on the basis of the material before her – and in this regard I note that there was no statement from the Applicant fully setting out his case as to how it came about there had been a false tax return submitted and I further note that there were aspects of the accountant's letter of 14 November 2016 which could have led the Secretary of State to doubt its credibility as submitted by Mr Malik - in my judgment the reasoning set out in the decision of 19 January 2017 and the Administrative Review of 2 March 2017 shows that the Secretary of State has not asked herself the correct questions or gone about her decision-making process in the correct way. Firstly, as Mr Gajjar submitted, there is nothing in the decision of

the Secretary of State to indicate that she did not accept that the letter of 14 November 2016 from the accountant was wholly genuine and true. Secondly, the important paragraph of the decision letter starting with the words "Your amended tax returns to HMRC are acknowledged and it [is] recognised you have a revised tax liability figure from HMRC. However, it is considered you should have taken reasonable care to ensure your tax returns were correctly submitted" (see paragraph 10 above) seems to rely upon the failure of the Applicant to exercise "reasonable care". In my judgment this betrays a lack of understanding on the part of the Secretary of State of the important difference between carelessness and dishonesty and the need rigorously to consider whether this was or was not dishonesty rather than carelessness. Thirdly, the decision of the Secretary of State wrongly states that it was only after being called to account within his previous refusal that the Applicant had reviewed and amended his returns. He had in fact done so before the previous refusal and although the Secretary of State could have asked herself why this had only been done five days before the application and not significantly earlier, she did not do so. Fourthly, the reversal of the burden of proof in the final sentence of that paragraph indicates that the Secretary of State has misdirected herself in relation to her fact-finding task in deciding whether the Applicant had been dishonest or merely careless. In my judgment, this error is compounded in the Administrative Review of 2 March 2017 where it is stated:

> "However, the original caseworker has not assessed your current earnings in light of the concerns raised over the genuineness of previous earnings; you have also been refused under paragraph 322 (5) which is a refusal on the basis of your character and conduct. The original caseworker has not refused your application on the grounds of deception, therefore there is no burden of proof upon the Secretary of State in that regard."

Whilst this may be a reference to the decision to discount any points for earnings in the application of 20 November 2016 and therefore refuse ILR under 245CD(e) of the Immigration Rules, that seems to me to ignore the fact that the basis for ignoring those earnings was that there had been the previous discrepancy between the application for leave to remain in 2012 and the tax return for the year ending 5 April 2012 and the doubt arising from that discrepancy. The derivation of both the decision under paragraph 322(5) and paragraph 245CD (e) was or should have been a finding of deceit or dishonesty on the part of the Applicant in relation to the tax return for the year ending 5 April 2012.

36. For the above reasons, I quash the decisions of the Secretary of State on the basis that they were not reached in accordance with a proper and lawful approach to the fact-finding task which lay before the Secretary of State in relation to this application. Furthermore, I reject the submission that I should refuse judicial review pursuant to Section 31 of the Senior Courts Act 1981. Although the Secretary of State could have relied upon the various matters which, Mr Malik says, cast doubt on the bona fides of the accountant's letter, all those matters and arguments were capable of being relied upon at the time as they do not refer to any new evidence or matters which were not capable of being discerned by the decision maker, and yet the decision maker does not to do so. It would go much too far for me now to put myself in the shoes of the decision maker and conclude that it is highly likely that the decision would have been no different had the Secretary of State directed herself properly. As I have said, to make a finding of dishonesty with the consequences which ensued for this Applicant and his family is a serious and anxious finding which involves very careful consideration of the

evidence and arguments each way. The evidence and arguments would have to be much clearer and stronger than they are in this case for me to be able to reach that conclusion.

Guidance

37. In order not to fall into the trap which I consider that the Secretary of State (or those acting on her behalf) fell into on this occasion, it may assist for me to give some guidance in relation to the decision-making process where there have been discrepancies between previous applications for Leave to Remain (with points claimed on the basis of earnings or profits) and tax returns which have been made covering the same period. This guidance stems from my observations at paragraphs 32-34 above:

    (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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.

    (ii) 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.

(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) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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.