Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02033/2018**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 28 January 2019 **On 15 February 2019**

Before

UPPER TRIBUNAL JUDGE PITT
H H STOREY, JUDGE OF THE UPPER TRIBUNAL

Between

MS WAHIDAH KHANAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, instructed by Eden Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision dated 22 June 2018 of First-tier Tribunal Judge Grimmett which refused the human rights appeal of the appellant.

2. The appellant is a citizen of Pakistan, born on 25 August 1980.

3. The appellant came to the UK on 3 September 2006 and had leave to remain in various categories until 20 August 2016. On 10 August 2016 she made an application for indefinite leave to remain (ILR) as a Tier 1 (General) Migrant. On 9 May 2017 she varied that application to one for ILR on the basis of long residence.

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4. The respondent refused the application for ILR on long residence grounds in a decision dated 20 December 2017. The respondent applied paragraph 322(5) of the Immigration Rules. This states that an application may be refused on the following basis:

> "The undesirability of permitting the person concerned to remain in the United Kingdom in light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;"

5. The respondent considered that the appellant had been:

> "… deceitful or dishonest in your dealings with HMRC and/or UK Visas and immigration by failing to declare the true amount of claimed self-employed earnings to HMRC at the time and/or by falsely representing your self-employed income to obtain leave in the United Kingdom."

6. The specific discrepancies in the declarations to HMRC and to the respondent were identified as follows. In a Tier 1 (General) Migrant application submitted on 5 April 2011 the appellant stated that her net earnings for self-employment for the period 1 December 2010 to 12 March 2011 amounted to £40,000.08. Information from HMRC showed that in the tax year ending April 2011 her declared net earnings for self-employment amounted to £4,990.

7. Also, in a Tier 1 (General) Migrant application submitted on 12th July 2013, the appellant stated that her net earnings for self-employment for the period 2 July 2012 to 22 June 2013 amounted to £25,530. The respondent acknowledged that this period of earnings spanned two separate tax years. Nevertheless, information received from HMRC showed that in the tax year ending April 2013 the appellant's declared earnings for self-employment amounted to £830. In the tax year ending April 2014, her declared earnings for self-employment amounted to £1,540. Accordingly, the combined earnings for the tax years ending in April 2013 and April 2014 amounted to £2,370.

8. The respondent did not accept the appellant's explanation for the discrepancies, finding that a registered accountant would not knowingly submit a self-assessment tax return on the appellant's behalf declaring earnings which were lower than those she had actually earned and that had been declared to UKBA.

9. The appellant appealed against the decision of the respondent. The appeal was heard before First-tier Tribunal Judge Grimmett on 13 June 2018.

10. In her decision promulgated on 22 June 2018, the judge set out in paragraphs 4 to 8 the respondent's reasons for refusal. In paragraph 9, the First-Tier Tribunal set out the correct legal test where there was an allegation of dishonesty.

11. The judge summarised in paragraphs 11 to 15 the evidence provided by the appellant on the difficulties she had been experiencing at the time of the alleged discrepant declarations to HMRC and the respondent. The judge addressed the best interests of

the appellant's child in paragraph 11, finding that they lay in being with the parents, wherever that might be.

12. In paragraph 12 the judge recorded the appellant's evidence that she had not been able to pay much attention to her tax affairs because of personal issues from 2010 onwards which had caused her to suffer from acute depression. Her mother had passed away in January 2012 at the time that she was completing the 2011 tax return. Her first husband divorced her at the same time and she was required to travel on numerous occasions backwards and forwards to Pakistan to deal with these matters. In addition, her former husband hacked her documents and she lost financial business documents.

13. In paragraph 13 the judge noted the appellant's evidence that she divorced her first husband and remarried in 2013 but further difficulties followed because her new mother-in-law became ill, again requiring many visits to Pakistan and her mother-in-law died in March 2014.

14. In paragraphs 14 and 15 the judge recorded the appellant's evidence on how the discrepancies had occurred and been corrected. The appellant maintained that she appointed new accountants at the end of 2015 and it was those accountants who noted the discrepancies. Together with those accountants the appellant arranged to pay the correct amount of tax for the years in question. HMRC accepted a back payment of £15,328.24 in August 2016. The judge also noted in paragraph 15 that the appellant had set out her explanation for the discrepancies in a questionnaire sent to her by the respondent prior to a decision being made on her ILR application.

15. The First-tier Tribunal then went on to consider the appellant's explanation of a previous accountant being responsible for the mistakes in the earlier tax returns. The judge's reasoning in paragraphs 16 to 23 is as follows:

> "16. There is no evidence save the appellant's oral evidence that it was a previous accountant who prepared the accounts. The appellant claimed that she was unwell because of her various personal problems at that time and did not look at the accounts or deal with them in any way. She must, however, have supplied the accountant with the information necessary to prepare accounts. She says she did not subsequently contact either the accountant or his professional body to make a complaint against him despite the fact that, on her evidence, she had to pay a second accountant to prepare amended accounts and the documents show that there was significant interest of over £2,000 to be paid to the Inland Revenue as a result of what she says is her previous accountant's error.
>
> 17. Notwithstanding her various problems she says that she appointed the new accountant by the end of 2015, that he worked on the previous accounts to be in a position to advise HMRC of the correct figures. There was not, however, any evidence from that accountant about how he re-calculated the figures or what information he had that enabled him to do so nor how he became aware that the previous figures submitted to HMRC were incorrect.
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> 18. The appellant is a very intelligent young woman who has studied in the UK and worked hard to establish what is now a successful business. I do not believe,

were the position as she claims namely that she was subject to significant negligence on the part of her previous accountants, she would not have taken some action either to bring him to account or to recover from him the additional costs that she has had to pay as a result of what she says was his negligence. There is nothing from her to show even that the incorrect figures put forward to HMRC were prepared by accountants. If, as she claims, she is no longer in touch with the accountant she could have obtained information from HMRC as to who lodged the returns on her behalf and what, if any, correspondence there was with the accountant but there is nothing to show that she has used any other, other than her current accountants to deal with her tax affairs.

19. The appellant produced no evidence from the current accountants to confirm that it was they who noted the errors in the earlier accounts. She has not explained why they should be looking at her old accounts or what led them to suspect that there were errors in them, bearing in mind that she claims her previous accountants have not returned any documents to her.

20. It is for the respondent to show that there may have been fraud perpetrated. I am satisfied that they have done so in light of the incorrect information which it is accepted was submitted to the Inland Revenue. The appellant has not discharged the burden of then showing an innocent explanation for the differences in the information provided to HMRC and to the respondent. She has provided nothing to show that she had an accountant prior to the current one. She has not shown who lodged the tax returns. If what she says is true she could have obtained such information from HMRC but she has failed to do so. She has not shown that the accountant prepared the figures that were submitted to HMRC and she has not shown what information she provided to her previous accountants.

21. None of the documents that she would have lodged with her first accountants for the accounts to be prepared and submitted to the Inland Revenue have been lodged. She is making no more than a bare assertion that unknown accountants have acted negligently and she must do more than that to show that the information provided in her name to HMRC was incorrect information lodged by others without her knowledge.

22. The appellant has failed to explain what information she provided to her current accountants that enabled them to prepare fresh calculations as she claims the documents provided to the first accountant were never returned to her.

23. I was satisfied, therefore, that the appeal must fail under paragraph 322(5). I was not satisfied that the appellant has shown that information was provided by anyone other than herself to HMRC prior to the appointment of her current accountants. Her conduct, therefore, means that she should not be permitted to remain in the United Kingdom."

16. The First-tier Tribunal went on to dismiss the Article 8 ECHR claim.

17. The appellant appealed against the decision of the First-tier Tribunal but permission was initially refused by the First-tier Tribunal in a decision dated 16 August 2018. She renewed her application and permission was granted by the Upper Tribunal on 16 October 2018. In line with the thrust of the argument put forward in the grounds

before the Upper Tribunal at that time, the grant of permission found that it was arguable that the First-tier Tribunal had failed to engage with the argument advanced on behalf of the appellant that paragraph 322(5) of the immigration rules did not apply to situations involving under-declared income.

18. Before us, it was accepted that the respondent was entitled to consider discrepant financial declarations such as those shown in the evidence here as matters capable of coming within the provisions of paragraph 322(5). Mr Turner conceded, sensibly, that this was the approach taken in leading case law, in particular, the reported Upper Tribunal case of **R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5))** [2018] UKUT 00384 (IAC), a decision of the honourable Mr Justice Martin Spencer. The headnote of that case indicates clearly that paragraph 322(5) can be applied in these circumstances, stating:

> "(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."

19. The argument before us, therefore, focused on the rationality of the First-tier Tribunal Judge's findings, and, in particular, the weight placed in those findings on the appellant's explanation for not realising the incorrect declarations during the period 2010 to 2016. Mr Turner approached these findings in various ways, maintaining that the judge had not properly balanced the personal issues of the appellant against the absence of evidence from the earlier tax returns and the later amendment of payments to HMRC. He maintained that the judge's approach to this evidence did not follow the guidance in paragraph (v) of the headnote of **Khan**:

> "(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."

20. In our judgment, having set out accurately in paragraphs 11 to 15 the appellant's evidence in support of an "innocent explanation", it was then a matter for the judge to decide the weight to be given to that explanation in the context of the evidence as a

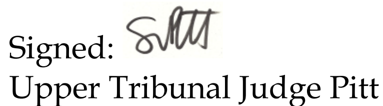
whole. The judge was not required to accept the appellant's assertion of the previous accountants being responsible for the misdeclarations. She was entitled to look for the documentation from those earlier declarations or from the re-calculation in 2016 both of which, from the appellant's evidence, could properly be assumed to exist. The judge was entitled to find that the appellant had shown herself to be competent in other areas of her life, setting up her business, and that this factor, together with the absence of evidence about the previous incorrect tax returns and re-calculation in 2016 undermined the claim that previous accountants were responsible, not the appellant. Even though the decision was made prior to **Khan** being published, the judge's approach to these parts of the evidence is entirely in line with the guidance in paragraph (v) of the headnote.

21. We did not, therefore, find an error in the approach of the First-Tier Tribunal to the appellant's evidence on how the discrepant declaration came to be made. The correct legal test was applied to the material evidence and the reasons given were rational and open to the judge.

22. For these reasons, the grounds do not disclose an error of law in the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: 

Date: 12 February 2019

Upper Tribunal Judge Pitt