Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03452/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 December 2018	**On 08 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QAISER JAVED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma of Counsel instructed by Awan Legal

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Broe promulgated on 17 October 2018 in which he allowed Mr Javed's appeal against a decision of the Secretary of State for the Home Department dated 17 January 2018 to refuse leave to remain in the United Kingdom.

2. Although before me the Secretary of State is the appellant and Mr Javed is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and Mr Javed as the Appellant.

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3. The Appellant is a citizen of Pakistan born on 27 November 1979. He entered the United Kingdom on 24 July 2007 as a student with leave to enter valid until 30 November 2008. On 15 November 2008 he made an application for leave to remain as a Tier 1 Highly Skilled migrant which was successful, leave being granted until 8 July 2011. On 11 March 2011 the Appellant applied for further leave to remain as a Tier 1 (General) Migrant, which was granted until 19 May 2013. A further application in the same capacity was made on 22 April 2013 and granted until 14 May 2016. On 14 May 2016 the Appellant made an application for indefinite leave to remain as a Tier 1 (General) Migrant. This application was varied for leave to remain under the family /private life route on 9 March 2017, and again varied for indefinite leave to remain on the basis of long residence on 20 July 2017.

4. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 17 January 2018, with particular reference to paragraphs 276B(ii)(c), 276B(iii) and paragraph 322(v) of the Immigration Rules.

5. In the course of considering the Appellant's application the Respondent obtained details in respect of his tax returns from the Inland Revenue, and considered the information disclosed by HMRC alongside the details of the Appellant's earlier applications for variation of leave to remain. In particular it was noted that for the tax year 2010/2011 the Appellant had originally declared to the Revenue that he had received £9,895 from all employments and £7,845 from self-employment - the total income declared was £17,850 (including £75 interest received on savings). This was in contrast to the information provided with the Appellant's application of 11 March 2011, in which he had claimed receipts of £33,185 from self-employment and further receipts from employment making a total sum for earnings of £57,024.88. It may be noted that the tax return for 2010/2011 was filed on 23 January 2012.

6. The Respondent also noted the details of the original tax return for the year 2012/2013 in which the Appellant declared £29,570 pay from all employments and £398 profit from self-employment - making a total declared income of £29,968. It may be seen that this particular tax return was filed on 25 April 2014. As such, the 2012/2013 tax return was filed almost contemporaneously with the application made for further leave to remain on 22 April 2013. In that application - in contrast to the information provided to HMRC - the Appellant declared to the Secretary of State that he had earnings of £56,046.05 between 11 April 2012 and 10 April 2013: he claimed £26,200 from self-employment and further sums of income from employment with G4S and Carillion.

7. Necessarily it may be seen that the sums declared to HMRC were significantly lower than the sums declared to the Secretary of State.

8. The RFRL notes that the Appellant secured points under the Tier 1 element of the points-based system in the context of his immigration applications by reason of his declared earnings. Had the earnings been declared in a similar way to those declared to the Revenue, the Appellant would not have scored sufficient points to secure the further grants of leave to remain.

9. The Secretary of State in the RFRL states:

> *"It is considered 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 UKVI to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant."*

10. It is also stated in the RFRL:

> *"You provided accountant's letters, prepared accounts and dividend vouchers declaring your income to the Home Office, therefore it is not credible that your accountant would then declare a lower income to HMRC, at a later date when completing your tax return. It was your responsibility to ensure that your tax return was submitted on time with correct information and by failing to do so it is considered that you have been deceitful or dishonest in your dealings with HMRC and/or UKVI."*

11. The Appellant appealed to the IAC.

12. The appeal was allowed for the reasons set out in the Decision of First-tier Tribunal Judge Broe promulgated on 17 October 2018.

13. The Respondent has raised a challenge to that decision, and permission to appeal to the Upper Tier Tribunal was granted by First-tier Tribunal Judge Froom on 8 November 2018.

14. The Appellant has filed a Rule 24 response (also described as a Skeleton Argument) dated 18 December 2018 resisting the Secretary of State's challenge.

15. Before the First-tier Tribunal the Appellant sought to explain the tax returns as originally filed as being essentially matters of innocent or careless mistake - the blame resting with his accountants for the mistake in the first place. He emphasised that his current accountants had sought to rectify matters by correspondence with HMRC commencing in December 2015, and that in due course amended returns had been filed that were in accordance with the information declared to the Secretary of State in the content of the immigration applications; the Revenue had amended the

Appellant's tax information accordingly, and had not imposed any penalty in this regard.

16. It was also a feature of the evidence before the First-tier Tribunal that the Appellant claimed to be in a relationship with an EEA national and to have had a daughter through that relationship. A birth certificate was produced at the hearing (see Decision at paragraph 13), and the EEA national partner attended to give evidence in support of the Appellant's appeal.

17. It should be noted that the principal appeal was a human rights appeal. Essentially the Appellant's case was advanced on the basis that absent the concerns in relation to the tax issues and the discrepancies between the tax returns and the information declared to the Secretary of State, there would be no basis for the engagement of paragraph 322(5) of the Immigration Rules, and therefore the Appellant would qualify for indefinite leave to remain under paragraph 276B: accordingly, if there were no real cause for concern in respect of the tax matters the refusal to grant the Appellant leave to remain in the UK amounted to a disproportionate interference with the private and/or family life established in the UK.

18. It is not clear that there was any formal application to seek to raise a new matter in respect of the EEA position - albeit that the factual circumstance of the Appellant's relationship was raised at the hearing. In this context I note that in the event, notwithstanding the fact that evidence was advanced with regard to the relationship and the birth of a daughter, the First-tier Tribunal Judge made no specific findings of this relationship - and also did not attempt to consider the case by reference to the EEA Regulations or otherwise by reference to Treaty rights.

19. I do observe, however, that there was a discrepancy between the evidence of the Appellant and the evidence of his purported partner as to the nature of their relationship. This is apparent from paragraphs 16 and 19 of the Decision. At paragraph 16 the Judge records that the Appellant said "*that they live together and there is no-one else living in the house, their daughter lives with him*". However, at paragraph 19 the Judge records the supposed partner as stating "*She and the child live with her mother because she needs support. Living with the Appellant was too stressful*".

20. It is plain there was a fundamental discrepancy between those testimonies - which on any reading, without more, undermines the Appellant's credibility.

21. Be that as it may, the focus of the First-tier Tribunal Judge's consideration and Decision was in relation to the issue raised in the RFRL with regard to the Appellant's tax affairs and declarations of income to the Respondent in the course of earlier applications.

22. In this context the First-tier Tribunal Judge referred to what was at that time an unreported judgment that had been brought to his attention by the Appellant's representative. The Judge refers to this case at paragraph 22 of his Decision, but misquotes the reference number: it should read **R v SSHD JR 3097**, not 30397. This case has now been reported as **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)**.

23. The Judge unobjectionably briefly summarised the guiding principles to be derived from **Khan** (paragraph 23), before addressing the specifics of the Appellant's case at paragraphs 24-26 - which contain the findings and reasons for allowing the appeal:

> *"24. There is no dispute that there are discrepancies between the Appellant's tax returns for 2010/11 and 2012/13 and that figures given in his applications to the Respondent. He provided a letter from the accountants he engaged in 2015 in which they confirm his explanation of how the errors were identified and rectified. He filed revised returns which were accepted by HMRC. The Appellant provided documentary evidence of the revised calculations and the arrangements for the outstanding payments to be made.*
>
> *25. I have given careful consideration to the evidence of the Appellant. I find it significant that he chose to address these problems in 2015 which was not a time when he had an application for leave to remain on the immediate horizon. It was also before the Respondent's concerns about such matters became widely known.*
>
> *26. Against that background I find the Appellant's account credible and am not persuaded that he acted dishonestly. I find that the Respondent was wrong to refuse the application under the provisions of paragraphs 322(5) and 276B. The decision is therefore a disproportionate interference with Article 8 rights."*

24. Mr Sharma, in the course of his submissions before me, asserted that the Judge had in substance identified three discernible bases for concluding that the Appellant's account of an innocent error - rather than dishonesty - was credible and to be accepted. In short, those three points were: that there had been an error on the part of the accountant; that the Appellant had attempted to rectify the problem prior to any issue being raised by the Secretary of State; and that HMRC had not imposed a penalty upon the Appellant.

25. It seems to me that the first of those matters is, on its own, of no particular favourable weight or significance. In the abstract, if it is established that an accountant has made an error, this merely raises the question of whether in signing the erroneous return an applicant was merely careless rather than dishonest. The fact of the error does not inevitably resolve the issue of honesty. Plainly, one of the matters that will need to be

taken into account in evaluating whether the applicant merely innocently endorsed the accountant's error, is the nature and extent of the error. I return to this in the context of the instant case below.

26. I acknowledge that the timing of any rectification of errors in tax returns is a relevant matter in evaluating an applicant's honesty. However, as Mr Sharma equally acknowledged, it is unlikely to be determinative in and of itself.

27. Because I have ultimately determined that the decision in the appeal must be set aside for the reasons set out below, I do not propose to dwell greatly on the particular issue of timing. Moreover, it seems to me that any meritorious criticism of the Judge's approach to the issue of timing is rooted in disagreement rather than identification of error of law. Accordingly, I observe no more than that whilst the evaluation of this particular factor was a matter open to the First-tier Tribunal Judge, it appears at the very least generous to say that there was no application immediately on the horizon in late 2015 given that the Appellant's leave to remain was due to expire on 14 May 2016, particularly bearing in mind the time it might take to prepare an application.

28. As regards the absence of a penalty from HMRC, I have indicated above that it is clearly the case that there was no such penalty. The Judge also noted as much in rehearsing the Appellant's evidence - "*no penalty was imposed*" (paragraph 15). However, this aspect of the case does not find its way into the Judge's reasoning at paragraphs 24-26. It does not appear to me on the face of the Decision that the Judge placed any particular reliance favourable to the Appellant upon the absence of a penalty – notwithstanding Mr Sharma's articulation of it as being a basis for the Judge concluding that the Appellant's claim to have been innocent in respect of errors in his tax returns was credible.

29. Moreover in this regard it seems to me that absent any further information, the mere fact of the absence of a penalty is of extremely limited value. It is to be recalled that these matters were raised and dealt with by HMRC prior to the Appellant's application - and therefore prior to the Secretary of State contacting HMRC to seek information as to his tax affairs. In the circumstance there is no reason to believe that HMRC would have been alerted to the potential advantage to the Appellant in immigration terms in claiming a level of income different from the level declared to HMRC.

30. From HMRC's 'mono-visual' perspective, it had a taxpayer seeking to make further tax payments on the basis of an unsolicited unilateral declaration that his accountant had previously made an error. Whilst Mr Sharma submitted that there was a statutory obligation on HMRC pursuant to Schedule 24 of the Finance Act 2007 to

consider imposing a penalty, and that HMRC appears to have exercised a choice not to impose a penalty, in my judgement the exact basis upon which any such decision was made is not apparent on the face of the documents. It seems to me that it might require something further – for example by way of the Appellant filing his correspondence with the Revenue – before it could be concluded that there were no concerns about the Appellant's integrity.

31. Even if the basis upon which HMRC had determined that no penalty was appropriate were established, whilst this would be a relevant matter, it would not be determinative and would not obviate the duty upon the Tribunal to make an independent assessment of all of the circumstances as to whether the Appellant had been careless or dishonest. This is particularly so given that the information before the Respondent, and in turn the Tribunal, was not from the same 'mono-visual' perspective of HMRC: necessarily it also included the evidence of the Appellant's declarations to the Respondent in support of his earlier applications, which were not obviously matters to which HMRC was privy when handling the Appellant's request to amend his tax returns to pay more tax.

32. Accordingly, I do not accept Mr Sharma's submission that the Judge identified three bases in support of his conclusion as to the Appellant's honesty and credibility. It seems to me that the Judge only identified two such bases, as set out at paragraphs 24 and 25 of the Decision. In so far as it is suggested that there was a third basis to support such a conclusion, it would have required a far more nuanced approach and evaluation than is to be found in the Decision before any particular weight could have been placed upon it. In the event, as I have indicated, I do not accept that the Judge did place any particular weight on the absence of a penalty from HMRC.

33. I have noted above that there is scope for disagreement with the substance of the Judge's assessment in respect of timing, but that this does not constitute identification of an 'error of law'. I am satisfied, however, that error of law is discernible in respect of the Judge's overall consideration of the Appellant's state of mind when making discrepant declarations as to income.

34. In my judgment the decision of the First-tier Tribunal is deficient in not including any specific focus on the state of mind of the Appellant at the time of the submissions of his tax returns and/or his applications for leave to remain. Of course the subsequent events – including in particular the voluntary amendments to his tax returns - may assist in evaluating what his state of mind might have been.

35. However, the Judge's decision is devoid of analysis or evaluation of the particular circumstances in which the Appellant could have submitted a tax return on 23 January 2012 declaring an income of £17,815, having as recently as March 2011 told

the Home Office that he was earning £57,877: it was incumbent on the Judge to consider and determine whether it was plausible that he had declared that sum to the Secretary of State and a different sum to the Revenue carelessly rather than dishonestly.

36. Similarly - and perhaps more pertinently bearing in mind the contemporaneous nature of the application for leave to remain and the tax return - the same exercise was required in respect of the circumstance in which the Appellant had submitted to the Secretary of State on 22 April 2013 that he his earnings were £56,046.05, whereas he had declared to the Revenue on 25 April 2013 that his earnings were only £29,968.

37. In the absence of any such analysis and evaluation, the decision – which in effect was essentially to determine the appeal on the basis of the assertion that errors had been made by the Appellant's accountant which he had later sought to rectify - was inadequately reasoned and otherwise failed to engage adequately with the issues.

38. For completeness I note that Mr Sharma submitted that the Respondent had not adequately pleaded the challenge in a way that reflected the errors identified above, and moreover had wrongly relied upon an unreported decision in the grounds in support of the application for permission to appeal. It seems to me that the substance of the challenge that I find is made out is encompassed at paragraph 1(d) of the Secretary of State's Grounds of Appeal, which refers to the discrepancies between the monies declared varyingly to HMRC and the Respondent and argues "*that the appellant cannot possibly be ignorant of such large discrepancies in the figures provided*". I have not place any particular reliance upon the unreported decision cited in the Grounds of Appeal, and indeed have not descended to any sort of analysis of it herein; it does not seem to me that it unduly influenced the grant of permission to appeal – and in any event there has been no formal challenge to the grant of permission to appeal.

39. In all of the circumstances I find that the decision of the First-tier Tribunal Judge is inadequately reasoned and is accordingly to be set aside for error of law.

40. The decision in the appeal will require to be remade with all issues at large; it is appropriate that this be done before the First-tier Tribunal by a Judge other than First-tier Tribunal Judge Broe.

41. I do not propose to make any specific directions in this regard: standard directions will suffice. It is a matter for the Appellant (with the assistance of his advisors) if he now wishes to bring forward further evidence including - if available - any correspondence with HMRC that might relate to the issue of imposing (or not

imposing) a penalty, or any other evidence as to correspondence with either of his accountants or otherwise.

42. Mr Sharma mentioned the potential EEA ground, and enquired whether or not it had been treated as a 'new matter', in respect of which the Respondent would have to give consent before the Tribunal could exercise any jurisdiction. Mr Bramble indicated that he was not aware of any formal application in this regard, but could not otherwise assist. It seems to me that this is in the first instance, again, a matter for the Appellant (with his advisors) to consider as to how to take forward; it is not a matter for the Tribunal at the present time.

43. Finally I make some observations in respect of the utilisation of paragraph 322(5) of the Immigration Rules. I have quoted in the early part of this decision relevant passages from the RFRL. The RFRL appears to identify the problematic conduct of the Appellant in the alternative. He either misrepresented his circumstances to HMRC for financial gain by reducing his liability to tax; or he misrepresented his circumstances to the Secretary of State to secure an immigration advantage.

44. It seems to me a question arises as to whether paragraph 322(5) can be made out, or supported, on alternative bases - or whether it is necessary for the Secretary of State (and in turn the Tribunal) to reach a specific conclusion as to either scenario A or scenario B - is the Secretary of State required 'to nail his colours to a particular mast'. I have only entertained the briefest of discussions with the representatives in this regard, and so do not purport to resolve it. Rather I merely identify the potential issue and the – perhaps not fully formulated – observations of the parties.

45. Mr Sharma suggests that for the sake of certainty, and bearing in mind the burden and standard of proof in this regard, and the requirements of procedural fairness, the Secretary of State is required to be clear as to a specific allegation. On the other hand, Mr Bramble suggests that if whichever way the matter is looked at there must have been unsatisfactory conduct one way or the other, then that should be enough to engage 322(5).

46. It may be that this will be an issue with which the First-tier Tribunal Judge will need to engage in remaking the decision. However Mr Sharma told me that he understood that there is a case to be heard in the Court of Appeal in which this type of issue is likely to be explored: it may be that by the time the matter comes back before the First-tier Tribunal there will be something by way of definitive guidance. Indeed, in light of any such guidance it may be necessary for the Secretary of State to seek to amend the contents of the RFRL. However, these are matters for the future, and I make no specific direction or further observation.

Notice of Decision

47. The decision of the First-tier Tribunal contained an error of law and is set aside.

48. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Broe, with all issues at large.

49. No anonymity direction is sought or made.

Signed: Date: 5 March 2019

Deputy Upper Tribunal Judge I A Lewis