Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04161/2018
HU/06135/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 5 February 2019	**On 12 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR SHIRISH KUMAR BANDU – 1st Appellant
MRS JYOTSNA BOYAPALLY – 2nd Appellant
(Anonymity orders not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Sharma of Counsel
For the Respondent: Mr C Avery, Home Office Presenting Officer

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellants

1. The Appellants are both citizens of India and are husband and wife respectively. They appealed against a decision of the Respondent dated 24 January 2018 to refuse to grant them leave to remain in the United Kingdom. Their appeals were allowed by Judge of the First-tier Tribunal Adio sitting at Hatton Cross on 13 September 2018.

The Respondent was granted permission to appeal that decision and the matter came before me to determine whether there was a material error of law in the determination such that it fell to be set aside, and directions given for the rehearing of the appeal. For the reasons which I set out in more detail below, I find that there were material errors of law in the First-tier Tribunal's determination and I have directed that the appeal be remitted back to the First-tier Tribunal to be reheard.

2. The first Appellant (who I shall refer to as "the Appellant") entered the United Kingdom on 10 February 2006 with entry clearance as a student which was subsequently extended. He was granted further leave to remain until 18 August 2011 as a Tier 1 (Post-study) Migrant. This was extended until 15th of July 2016. He subsequently made an application for indefinite leave to remain the refusal of which has given rise to these proceedings. The 2nd Appellant's appeal is dependent on the appeal of her husband.

The Explanation for Refusal

3. The application for indefinite leave to remain was refused under paragraph 322 (5) of the Immigration Rules which states that leave to remain should normally be refused because of the undesirability of permitting a person to remain in the United Kingdom in the light of their conduct.

4. When the Appellant applied for leave in 2011 he claimed to have an income of £35,929.56p for the period 2010/2011. He was awarded 20 points under the "previous earnings" category for earnings between £35,000 and £40,000. In May 2016 the Appellant declared to HMRC a total income received of £21,386 for that same period 2010/2011. Had he declared this to the Respondent he would have received zero points for previous earnings as they were under £25,000. The Appellant on that same declaration then amended the figures declared to HMRC so they now matched the figure declared to the Respondent. The Respondent pointed to a similar pattern of inconsistent declarations for subsequent years. The Respondent did not accept that the failure to declare the correct earnings to HMRC was a genuine error. In the light of this conduct the application for indefinite leave to remain was refused.

The Decision at First Instance

5. The Judge correctly directed himself that as the case had raised an issue of deception the initial burden was on the Respondent but as that was discharged (because of the discrepancy in the tax figures) the Appellant was obliged to provide an innocent explanation. The Judge accepted the Appellant's explanation, that he had not been dishonest, because HMRC had not taken any further punitive action against the Appellant indicating that the Appellant was not making a false representation or deception. The Appellant had not been prompted before dealing with the issue of the under declarations. I assume that what the Judge meant by that was that the Appellant had not been prompted by the Respondent. The Appellant does seem to have received a letter from HMRC on 17 November 2015 which prompted him to act.

6. The Judge noted that the Appellant had tried to make a complaint against his previous accountants but to no avail. The Respondent's decision was declared to be disproportionate because the Appellant had not falsely declared his income or self-employed earnings to HMRC in 2010/2011 and 2012/2013. There had been a genuine error due to the actions of his accountants and because of the Appellant's own lack of knowledge of tax affairs. He had wrongly repeated the mistake in 2012/2013. The appeal was allowed.

The Onward Appeal

7. The Respondent's onward appeal argued that it was not relevant that HMRC had not taken further action against the Appellant as the interests of HMRC and the Respondent were quite different. The Appellant was responsible for his own tax affairs and this responsibility could not be passed on to his accountant. The Appellant was responsible for signing off each year's tax return thereby that he had consented to each return. If there was an inaccuracy it was the Appellant's responsibility. The Appellant had benefited from not paying the correct tax on time as he did not correct his liability until five years later. Paragraph 322 (5) was engaged.

8. Permission to appeal was granted by Judge of the First-tier Tribunal Hollingworth on 7 December 2018 who noted that it was arguable that the Judge had attached undue weight to the fact that HMRC had not taken any further action against the Appellant. It was unclear to what extent the weight attached to that point had affected the outcome. Arguably the Judge should have set out a fuller analysis of the relationship between the nature of the error found to be genuine on the part of the Appellant, the criteria for the payment of tax in the context in question and the figures relating to that context. A fuller analysis was required of the degree of understanding of the Appellant in relation to the basis proceeded upon by his previous accountants for the completion of the tax return in question.

9. The Appellant responded to the grant of permission by filing a response under rule 24 which argued that the determination was legally sound and sustainable. The grounds of appeal were essentially a disagreement with the decision. HMRC were statutorily bound to consider imposing a penalty. The fact that they had chosen not to issue a penalty was therefore relevant. The rule 24 response sought to argue that the case of **Abbasi JR/13807/2016** was wrongly decided. The Appellant's behaviour was not deliberate and there was no attempt to conceal the error of the accountants. It was open to the Appellant to lay the blame on his accountant.

The Hearing Before Me

10. At the hearing before me the Presenting Officer argued that there might be operational reasons why HMRC did not investigate the Appellant's conduct further than they had. It was very expensive to pursue a proper investigation. It was far easier for them to accept the Appellant's error and take the back payment.

11. It was not clear what the Judgement by "not prompted" (see paragraph 5 above). The complaint made against the accountants was made very late. There was nothing to show that it led anywhere. Reliance was placed on the Upper Tribunal decision of **Khan [2018] UKUT 384** (also cited in the rule 24 response). That case offered guidance to the approach to be adopted in these cases. Accountants did send tax returns to their clients for approval before being lodged with HMRC. It was baffling how the Appellant could miss such a substantial discrepancy as in this case.

12. In reply, counsel relied on the rule 24 response. Where there was a deliberate misstatement by a taxpayer a penalty had to follow. The Appellant had been approached in 2015 in relation to his employed income which led to another accountant finding the previous errors. It was not necessarily the case that every client of an accountant was expected to sign the tax return. It was not sufficient for the Respondent to make a complaint against the Appellant that he was not careful enough in his tax dealings, there had to be evidence of a more deliberate action and that had not been made out. If a material error of law was found the case should be remitted back to the First-tier. The Presenting Officer agreed with remittal.

Findings

13. The operative paragraph in this case, 322 (5), is a discretionary ground for refusal not a mandatory one. In a case such as this the essential question is whether the Respondent can establish with sufficient cogency of evidence that the Appellant has been dishonest in his dealings either with the Respondent or with HMRC or both. Guidance as to the correct approach in assessing the question of the Appellant's honesty was provided by Mr Justice Spencer in the case of **Khan**. The head note to that case reads:

> "(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.*
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> (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.*
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> (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.*
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> (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."

14. For the Respondent to be able to establish a material error or errors of law in the decision of the First-tier Tribunal the Respondent must show that the First-tier Tribunal did not assess the question before it of the Appellant's dishonesty in a sufficiently reasoned way. The discrepancy in the figures of itself raised a suspicion because the difference in amounts declared to the respective government departments was so substantial. The question then was whether there was a plausible explanation for the discrepancy in the figures.

15. The Judge appears to have placed a great deal of weight in finding plausibility in the absence of punitive proceedings taken by HMRC. It was in my view a material error of law for the Judge to place the weight that he did on that aspect of the case in the absence of evidence of the practice of HMRC. There may indeed be an obligation on HMRC to take steps to recover tax due but that is far from saying that there is an obligation to prosecute in all cases where income has not been correctly declared. As the Respondent submitted, there may be sound operational reasons why HMRC would wish to husband their resources and concentrate on some aspects of tax evasion to the exclusion of other defaults. The reason why the Judge placed such weight on the absence of punitive proceedings is not adequately reasoned and amounts to an error of law.

16. The 2nd reason why the Judge found the Appellant's explanation plausible was because the Appellant put the blame for the problems which had arisen on his accountants. This aspect is considered in Khan which expresses a degree of scepticism about attempts to blame accountants by pointing out: (a) that the taxpayer will have authorised the tax return submitted and (b) that the Appellant would be taken to know what his income was, in this case especially so given that he was both employed and self-employed. I do not consider that either of these issues was adequately addressed in the determination of the First-tier Tribunal. How a complaint made very late in the day against the accountants was sufficient to deal with the two points (a) and (b) above, raised in Khan was again inadequately addressed.

17. I consider that there were such material errors of law that the decision of the First-tier Tribunal should be set aside. The next issue is what arrangements should be made for the rehearing of the appeal. Both parties indicated that if I found a material error of law they would ask the Upper Tribunal to remit the case back to a differently constituted First-tier Tribunal for rehearing. In deciding whether to remit, I bear in mind the Senior President's Practice Direction. I do not consider that this is a case where the facts have largely been established. The discrepancy in the figures appears to be agreed but the key issues were the Appellant's motivation and responsibility. This is more properly decided by the First-tier Tribunal.

18. An issue to be determined will be whether the Appellant was aware of the contents of the tax return being submitted on his behalf and if he was not why not. The Appellant should file and serve a supplemental statement at least 14 days before the remitted hearing indicating more clearly what he did or did not know about the tax returns submitted on his behalf. That goes to the issue of his honesty or dishonesty and is not a proper matter to be dealt with by the Upper Tribunal acting as a primary decision maker. The matter should be remitted back to the First-tier Tribunal for a proper consideration of the Appellant's honesty in the light of the guidance put forward by the Upper Tribunal.

19. The points made by Judge Hollingworth in granting permission to appeal are also relevant (see paragraph 8 above) and they should be addressed by the parties at the re-hearing. **Khan** was a judicial review decision but considerable weight is to be attached to it because of the seniority of the Tribunal and the relevance of the issues it decides. The appeal will be remitted back to the First-tier Tribunal at Hatton Cross to be heard by any Judge other than Judge of the First-tier Tribunal Adio.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I direct that the rehearing of this appeal should be remitted to the First-tier Tribunal to be heard de novo.

The Respondent's appeal is allowed to that limited extent.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 11 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision in this case I also set aside the fee award. The issue of a fee award will have to be determined at the rehearing of this appeal in the First-tier Tribunal.

Signed this 11 February 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge