Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05147/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2018	**On 12 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YASAR NAWAB

Respondent

Representation:
For the Appellant: Mr C. Avery, Home Office Presenting Officer
For the Respondent: Mr J. Gajjar, Counsel.

REASONS FOR FINDING AN ERROR OF LAW

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge Swinnerton promulgated on 5 October 2018 after a hearing at Hatton Cross on 27 September 2018. The appeal arose because by a decision that was made in February 2018 the Secretary of State refused the application of Mr Nawab for indefinite leave to remain in the United Kingdom based on long residence. I shall refer to Mr Nawab as 'the appellant' as he was before the First-tier Tribunal. The issue is a relatively short one to determine. The Secretary of State relied upon a discrepancy in the accounts that the appellant had provided for the purposes of the payment of tax to

HMRC in which he had previously declared that he was earning or had earned £10,392. It is accepted that this was wrong and was wrong by a huge margin. Indeed the correct figure was something in the region of £39,000 a discrepancy of something like £29,000. It is the appellant's case that he was simply careless and that it was in large measure, indeed perhaps entirely, the fault of his accountants who prepared accounts which the appellant carelessly did not check and which he sanctioned by signing them but he did so in all innocence. That in my judgment is an entirely fanciful submission to be making, looking at the scale of the dishonesty which was occurring here.

2. First, accountants work on instructions from the client. Those instructions must contain written material, bank statements, vouchers, invoices, receipts, fares and a whole measure of documentary evidence upon which an accountant would produce his figures. It may be that there will be some matters which he will consider and attribute to, perhaps, a different year or he may consider that some may be deductible from gross income and others not, but he works on material which is supplied by the appellant. The appellant would wish the Tribunal to believe was that he provided all of the material that was necessary in order to produce his accounts showing that he had an income of something like £39,721 but, by some carelessness on the part of the accountants (dishonesty is not alleged) this was put into a drawer or marginalised or disregarded so that, notwithstanding the clear evidence of income in the form of taxable income of £39,000, the accountant somehow mismanaged what was happening and provided a figure which was one quarter of the reality. We have not got the material that the appellant supplied to his accountants or his instructions. In many circumstances, accountants, perhaps conventionally, return the written material. It is, of course, not their own material. The bank statements, vouchers, bills, receipts and invoices are all the property of the tax-payer and one would expect them to be returned, certainly if it were asked. We do not have therefore an insight into what the instructions were that the accountants were provided with such as to have created such an elemental error of misstating the taxable income so that it was only one quarter of the actual sum.

3. Second, accountants owe a professional duty to a client not to lie or to be frank when they have made a mistake. The appellant relies upon contact that he has had with his former accountant, a company called Qadeer & Company, in which they wrote a letter dated 22 July 2018 for the benefit of the Tribunal where they say that they have filed the initial tax returns for the years 2010-11 and 2013-14 for the appellant and "*there are some miscalculations identified and rectified with HM Revenue & Customs by his new accountant.*" They may well be saying that, because the error was an understatement which expanded from an initial declared taxable income of £10,000 to one of £39,000, this was something by way of a '*miscalculation*'. I do not take that to mean that they were saying that they were the ones at fault. Indeed I would not expect them to say, '*Our client provided us with wrong information.*' I would expect them to be as careful as they might be in trying to avoid declaring their client to be dishonest. They end the letter by saying, '*We apologise for any inconvenience caused to Mr Nawab regarding this.*' I do not regard this an admission, as professional persons, that they were in dereliction of their professional duties and, if that had been the

case, I would have expected them to have said it perfectly plainly and I do not see it in that letter.

4. There is a third reason. The third reason is that there is a significant difference between the years that are relevant. Inevitably, if the appellant had been doing approximately the same amount of work as appears to have been the case from year 1 to year 2, then one would expect the earnings to be approximately the same. That is not the case as far as this appellant is concerned. He must have known his approximate earnings; that he was working the days that he was working; the time that he was working; the amount of hours he was putting in; the contract sums that he was generating, such that they could not conceivably have resulted in an income of £10,000. That would have been an incredible bonus to somebody: to find, having worked long hours and received large sums of money, that the accountants, as if by some form of magic, could have reduced that figure to £10,392. It is a fiction that it is the fault of the accountant. But it is also a fiction that the appellant when confronted with tax payable on the sum of £10,000 would not have known exactly that he was underpaying tax.

5. One would expect the current accountants to also be wise to what happened and they, too, have written a letter. The letter is dated 17 September 2018. Once again, it is addressed for the benefit of the Tribunal. It states that the previous accountant had declared the total income incorrectly for the tax years 2010-2011 and 2013-2014. '*We informed our client about this and he instructed us immediately to rectify the mistake.*' I do not read into the statement that this was the fault of the previous accountants. The fact that the appellant has accepted that he is wrong is not of any evidential value in establishing whether or not he was acting dishonestly. It merely indicates that, when confronted with the disparity (the disparity, of course, which benefited him for the purposes of tax but was not so beneficial when it came to other purposes) he was bound to have to accept he was wrong.

6. It is also said that the fact that HMRC took no action, except to require payment, is a material factor. For my part, that is a matter that one should properly take into account but it is difficult to speculate upon the reasons for a failure to take action on the part of HMRC. I am not even going to suggest what the number of reasons might be because it is speculation. However the important matter to take into account is that what HMRC decided to do is nothing to the point. It was for the First-tier Tribunal Judge to make of the evidence what he would and, in this case, the Judge had before him this stark difference between the figure which was subsequently selected as being the accurate figure of £39,000 odd and the original figure of £10,000 odd. It was for him to determine whether that established dishonesty. He accepted that there was a significant difference in income and he found that the respondent was entitled, regardless of the appellant's return for the tax year ending April 2014, to have drawn an inference that the appellant had been deceitful and dishonest. It begs the question, therefore, as to what material there was for the Judge to find that this was carelessness and no more than carelessness rather than dishonesty.

7. He does so, at least in part, by reference to the response of HMRC which appears to be his principal driving reason. He does not deal with the matters that I have raised: that the accountants work on instructions; that those instructions are based on written material provided by the appellant; that the appellant himself is provided with a copy of the accounts when they are prepared and signs them; that accountants have a professional duty to their client not to lie and to be frank if they have made a significant (in this case an enormous) mistake. The Judge does not deal with the large discrepancy (which he acknowledges resulted in an under-charge running into several thousands of pounds). Nor does he deal with the fact that an individual (whilst he may not know the minutiae of his accounts and the contents of his account) knows roughly the scale of his earnings, the scale of his work, the scale of his receipts and the scale of the outgoings such as to provide him with a very clear insight into the reality, were he to be presented with a tax assessment which is so vastly different from the earnings he must have known he was generating during the course of the year.

8. It is said that this was a start-up business and therefor he naively thought that he only earned £10,000. I cannot see how the Judge could have thought this. It was a material consideration for him to assess separately whether or not the appellant could really have known that the earnings were so much greater than he had signed off. In these circumstances, I simply do not accept the submissions made that the case-law supports this argument and that it was open to the Judge to find carelessness. It was, and is always, a requirement for a Judge to give adequate reasons why he considered that the appellant was careless and not dishonest. For the reasons that I have provided, I am quite satisfied that the reasoning of the Judge is wrong. It will require the determination to be set aside and for the matter to be reconsidered and the decision re-made.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL

Date 10 January 2019