Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05545/2018
HU/11751/2018
HU/11752/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2019	**On 27 March 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SKV
MRS RV
MR AV
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Ms K Pal. Presenting Officer
For the Respondents: Mr S Bellara of Counsel instructed by Legend Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellants as the appellants herein. They are citizens of India and are husband and wife aged 36 and 33 respectively, and the third named appellant is their 4 year old child. Any reference to the appellant is a reference to the first named appellant. The appeals of

the second and third named appellants depend on the outcome of the appeal in respect of the first appellant. There is no dispute that the appellant had been lawfully resident in the UK for over ten years, having arrived in 2007 and having leave to remain until December 2016. He was joined by his wife and child in 2013 and 2014 respectively. The Secretary of State refused the appellant's application applying paragraph 322(5) of the Rules. The basis for the refusal is summarised by the First-tier Judge as follows:

> "10. The Respondent states that the First Appellant, when making an application in April 2010, claimed to have an income of £35,778 from both self-employment and PAYE employment. In May 2017, he was asked by the Respondent to complete a tax questionnaire and to provide evidence of his earnings for his years of self-employment. In response to the questionnaire he confirmed that he had needed to correct a tax return in the past and provided details of those corrections [122]. He had, in fact, only declared £20,460 in earnings to HMRC in the year 2010/11. If his true earnings had been declared to them, the Respondent stated, he would not have been granted leave.
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> 11. The First Appellant denied that he had intentionally made false representations to either the Respondent or HMRC. That was his first year of trading and he knew little of the tax system and therefore, having passed over the relevant paperwork to his accountant, he relied on them to file his return accurately – he had not checked it himself. The matters only came to his attention in December 2015, when he and his father were considering buying some land in India and he was required to provide tax details of his earnings in UK. He said that he and his father were buying this land from savings and that no mortgage loan was required. He was challenged therefore as to why any prospective purchaser would need to know his tax affairs, when all he and his father had to do was show evidence of those savings. He was not really able to explain, simply stating that information was required. He contacted his accountant, who rectified the error without delay and he repaid the tax due, of £8912 and was given a penalty of about £400. The Accountant, Right Solutions Ltd, provided a letter, dated 2 October 2018 stated that they had acted in error at the time. He was also challenged as to why it took until August 2016 for the payment to be made and he said that that was how long HMRC took to process the matter. HMRC had not accused him of dishonesty.
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> 12. He was asked as to whether he had made a complaint to the Accountant's professional body, particularly concerning the risk the negligence had posed to his immigration status and said he had not, as the Accountant had apologised and agreed to discount future bills, also taking account of the penalty he'd had to pay".

The judge considered the submissions made on behalf of the Secretary of State. Reliance was placed on the refusal decision. The fact that the tax arrears had been paid did not mean that the appellant had behaved honestly.

2. The appellant's Counsel referred to the case of **Shaik v Secretary of State [2017] UKUT JR/8324** which indicated that:

> "A single mistake (albeit a significant one) in the first tax return he was required to file might be viewed in a different light to a series of mistakes that are corrected at a later date ... the fact that there was evidence to indicate that the returns filed after 2010/11 were not amended (as is the case in this appeal) was a relevant consideration".

It was pointed out that this was the appellant's first tax year and reference was made to **Samant v Secretary of State [2017] UKUT JR/6546/2016** which indicated that if it were accepted by an accountant that the error was theirs "this would be an exceedingly powerful point in his favour". The First-tier Judge made the following findings:

> "15. I do not consider that the Respondent is able to rely on paragraph 322(5), in respect of the tax liability. The Respondent's own guidance (January 2018) indicates that *'the main type of cases you need to consider for refusal under paragraph 322(5) ... are those that involve criminality, a threat to national security, war crimes or travel bans ... this may include cases where a migrant has entered or facilitated a sham marriage'*. There is no criminal act here; the First Appellant declared the 'error' and has voluntarily repaid the money. The burden is on the Respondent to show dishonesty on the Appellant's part and I don't consider that the Respondent has discharged that burden, for the following reasons:
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> (i) the Appellant has provided an alternative explanation for the under-declaration, namely his Accountant's error, backed up by correspondence from that Accountant (**Samant**). I have no reason to doubt that evidence. I don't consider any failure to complain about the Accountant to be significant, when the error has been rectified and the Appellant is content that he will not be out of pocket.
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> (ii) The Appellant has stated that he trusted his Accountant, it was his first year of trading and he had no knowledge of such matters.
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> (iii) His tax affairs have been in order for the subsequent five years (**Shaikh**).
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> (iv) While his explanation as to how he discovered the error was unclear, it's not entirely implausible that an Indian property vendor may require the documentation he has referred to".

3. In dealing with the human rights appeal the judge took into account the fact that the appellant on his findings met the relevant requirements of the Rules and weighed up the public interest considerations, noting that on his findings the appellant had not breached the Rules. The appellant met the financial requirements and all the appellants spoke English. While the appellant's status had been precarious it was not appropriate to attach "no weight" to it. It was not a period of time that should be entirely discounted in all the circumstances. Reference was made to **Treebhawon [2017] UKUT 13 (IAC)**. The judge accordingly found that removal from the UK would be a disproportionate interference with the family's right to respect for private life. He allowed the appeal under Article 8. In applying for permission to appeal the Secretary of State argued that the judge had erred in paragraph 15 of his determination in considering that cases that fell for consideration under paragraph 322(5) were criminal cases. 322(5) called into question a person's character or

conduct to the extent that it was undesirable to allow them to remain in the UK and this approach was a much lower standard than that used by the Tribunal. The judge had applied an artificially high standard and his findings were unsafe. If the Tribunal had applied "this wider standard" it may well have reached a different set of findings. In the second ground it was argued that the Tribunal had erred in having regard to the appellant reimbursing payment of tax arrears. It was submitted that this was irrelevant given that it did not go to the motives of the appellant at the time that the financial discrepancy occurred. In granting permission to appeal the First-tier Tribunal Judge noted that it was hard to see why the judge had erred in referring to criminal cases since all the judge had done was to quote from the Secretary of State's own guidance. However, the judge had gone on to find that the burden was on the respondent to show dishonesty on the appellant's part which was not arguably not the case under paragraph 322(5).

4. At the hearing Ms Pal referred to the guidance under paragraph 322(5). This reads:

> "The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.
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> A person does not need to have been convicted of a criminal offence for this provision to apply. 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 it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control. If you are not sure the evidence to support your decision is reliable, then speak to your line manager or senior caseworker".

Ms Pal submitted that the judge had not set out the guidance in full. The key thing to consider was whether there was reliable evidence. The judge had applied too high a standard of proof. The appellant had had to pay a penalty which is a significant factor. This had not been taken into account. The judge had materially erred in law and his error had impacted on his findings in paragraph 20.

5. Counsel submitted that the judge had given a blow by blow account of the evidence and had referred to the penalty in paragraph 11 of the decision. There had been no express challenge to the judge's assessment of the appellant's credibility. It was claimed the judge had misunderstood paragraph 322(5). He did not simply say that paragraph 322(5) was not applicable. He had gone on to make proper findings in the ensuing subparagraphs. He had adopted a careful belt and braces approach. Ms Pal made no reply to these submissions although I noted she had lodged a judicial review case – **Abbasi JR/13807/2016** and she referred to there being a "plethora" of such cases.

6. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was flawed in law. I

note that the Secretary of State's position was indicated in the refusal notice at page 6 where it was stated:

> "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 the PAYE and self-employed earnings claimed on your Tier 1 application of 13 December 2010 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 & Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant".

7. Towards the top of page 7 of the decision it was stated:

> "The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom in light of your character and conduct. She is satisfied that you have misrepresented your earnings and have changed what you have represented in respect of your earnings to HM Revenue & Customs and/or UK Visas & Immigration for the purpose of reducing your tax liability or for the purpose of obtaining leave to remain or both".

It does not appear to have been the Secretary of State's case that the appellant had simply made an innocent error. The respondent's representative at the hearing indeed stated at paragraph 13(v) that the reasons put forward for the error did not mean "that the appellant has behaved honestly in this matter". The case of **Abbasi** which Ms Pal had lodged was of course a judicial review case, the test was one of rationality. In such cases as was said in paragraph 77 of the decision "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". The decision taken by the Secretary of State in this case may or may not have been rational but of course that was not the issue to be determined by the First-tier Tribunal. This was an appeal and while it would have been open to the judge to have found that the appellant had been dishonest, he did not do so. It is apparent from the decision itself and from the submissions made on behalf of the respondent that the appellant's honesty was in question. I am not satisfied that the judge misdirected himself as claimed or that the standard of proof that he applied was too high. He made a careful examination of the facts and was guided by reference to the authorities put before him and was properly entitled to conclude as he did. I do not find that the judge materially erred in law in referring to criminal cases, nor in failing to consider the fact that the appellant had paid a penalty – reference is made to this at an earlier stage of the decision.

8. The appellant gave oral evidence before the First-tier Judge and he had been entitled to accept the appellant's explanations for what had happened and to resolve the submissions in his favour. Having properly directed himself he did not arguably err in law in allowing the appeal under Article 8.

9. For the reasons I have given the appeal of the Secretary of State is dismissed and the decision of the First-tier Judge shall stand.

Anonymity Direction

As one of the appellants is a 4 year old child I deem it appropriate to make an anonymity order in this case.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The First-tier Judge made no fee award and in the premises I make none.

Signed Date 25 March 2019

G Warr, Judge of the Upper Tribunal