Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05798/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 July 2019	**On 8 August 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

IMRAN ALI RAZA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, Counsel, instructed by Burney Legal Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of the First-tier Tribunal (Judges Loke and Neville – "the panel"), promulgated on 17 December 2018, in which it dismissed the Appellant's appeal against the Respondent's decision of 14 February 2018. This refusal was in relation to a human rights claim made on 25 November 2016. That claim was predicated upon the Appellant's assertion that he had resided in the United Kingdom on a continuous lawful basis for ten years. This, he said, would make it disproportionate to remove him from this country. In refusing the claim the Respondent relied on discrepancies in the Appellant's earnings as between those set out in an application for further leave to remain as a Tier 1 (General) Migrant (the application having been made on 30 March 2011) and those

declared to HMRC at the relevant time. The discrepancies related in particular to claimed earnings from self-employment. The Respondent concluded that the discrepancies were on account of dishonest conduct by the Appellant. In light of this, para. 322(5) of the Immigration Rules applied, with the consequence that the Appellant could not succeed under the Rules, on the basis of suitability. Further, there were no exceptional circumstances requiring a grant of leave on Article 8 grounds outside of the context of the Rules.

The panel's decision

2. Having set out background to the appeal, at para. 16 of its decision, the panel said the following:

> "In the Tier 1 application of 30 March 2011, the appellant claimed to have an income of £36,822.71. These earnings comprised of £6,425.71 from employment and £30,397.00 from self employment. For the same period, the appellant declared £3,382.00 in income to HMRC. Plainly this is a substantial difference. The appellant failed to pay any tax for 2010-2011, and failed to amend this until 2016, a significant length of time later."

3. The panel took the view that this state of affairs permitted the Respondent to discharge the evidential burden of raising an issue of deception against the Appellant. The panel then turned to the question of whether the Appellant had provided an innocent explanation. It made reference to the decision of Khan (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) (the guidance in Khan has been approved, subject to one particular modification by the Court of Appeal in Balajigari [2019] WLR(D) 232).

4. At para. 20 the panel sets out its reasons for finding that the Appellant had failed to provide an innocent explanation such as to satisfy the minimum level of plausibility. In the circumstances, it is appropriate to set these reasons out in full:

> "a) The appellant had settled his accounts for 2010-2011. This is clear from the fact that he submitted his accounts to the Home Office for the Tier 1 application. Therefore he would have been aware of his earnings and have expected to pay tax thereon;
>
> b) Aspire accountants have provided no documentation to explain or admit any error;
>
> c) There is no evidence of any correspondence between the appellant and Aspire accountants, which we would expect to exist in these circumstances, to support the appellant's account that he had confronted Aspire Accountants when he realised they had failed to submit his tax;
>
> d) The appellant failed to take any action against Aspire accountants when a significant error was claimed to have been discovered by him. Given Aspire accountants completely failed to carry out the service they had been paid to do for the Appellant, with severe consequences, we would

have expected the appellant to have taken some action. At the very least we would have expected a complaint to have been made to them in writing. The appellant's explanation for failing to complain, namely that he had no proof against Aspire accountants is simply not correct. The Appellant had the accounts prepared by Aspire accountants, and the records from HMRC which indicated there was no SA02 (sic) for the year 2010-2011;

e) The appellant has taken steps to make the amendment in his tax return, and we are aware that he is paying the required tax in instalments. However, the amendment was not made until 2016;

f) The fact that the appellant was going through a busy period in his life in 2010-2011 may have excused his failure to remember that he had to pay tax in the short term. However, in our view this does not excuse his failure to recall his liability for five years. The appellant's tax liability the following year 2011-2012 was £1,500.00. In that year he only declared £14,492.00 from employment, less than half the income received in 2010-2011. If the failure to submit a tax return for 2010-2011 was simply an error, we would have expected the following tax year's liability to have triggered the appellant's recollection that he had not paid any tax the preceding year, despite having earned over twice as much income. In the circumstances (sic) do not find his explanation for this significant delay to be a satisfactory one."

5. On the basis of these reasons the panel concluded that the Appellant had been "deceitful and dishonest". It also found that the dishonesty related to the Appellant's dealings with HMRC and not to the Respondent. It was said that the Appellant's conduct engaged para. 322(5) of the Rules and this, when taken in the context of a consideration of all other relevant factors including the Appellant's family life in the United Kingdom, led to the ultimate conclusion that Article 8 would not be breached by the refusal of the human rights claim.

The grounds of appeal and grant of permission

6. The grounds of appeal are focused on two particular points. First, that when setting out what was said to be a material aspect of its reasoning in para. 20(f), the panel confused the way in which tax paid on earnings from employment with that in which it is paid on earnings from self-employment. In respect of the former, tax was deducted at source through PAYE, whilst in the latter it was calculated on the basis of a tax return and was paid in one or two lump sums (usually January and July in any given year). The grounds assert that the panel appeared to proceed under the misapprehension that the nature of the payment of tax and liabilities was the same for both types of earnings. Second, it is said that the panel failed to consider a letter from the Appellant's new accountants which supported his case that he had been unaware of the failures of his previous accountants until the problem was uncovered by the new accountants in 2016.

7. Permission to appeal on both grounds was granted by Upper Tribunal Judge Clive Lane on 10 June 2019.

The hearing

8. It is right to say that at the hearing before me there was a degree of discussion and cogitation as to the precise meaning of para. 20(f) of the panel's decision. In summary, Mr Gajjar, in line with the grounds of appeal, submitted that the panel had not compared like with like as regards the source of the earnings and the nature of the manner in which tax liabilities arising from employment and self-employment are paid. He submitted that the confusion was material as para. 20(f) represented an important aspect of the panel's reasoning on the serious issue of the Appellant's dishonesty. He also submitted that a failure to consider the new accountants' letter was material in that it went to underpin the Appellant's assertion that whilst he may have been careless in the past, he had not practised deception.

9. Ms Cunha submitted that on a proper reading of para. 20(f) in conjunction with para. 20(a), the panel was essentially saying that because the Appellant had had to pay tax on the employed income in 2011-2012, he should have realised that he was due to pay tax on earnings from the previous year where he had earned more than twice as much, albeit most of that emanating from self-employment.

10. At the end of the hearing I reserved my decision.

Decision on error of law

11. Not without a degree of hesitation, and having considered the panel's decision holistically, I conclude that it contains two material errors of law.

12. The first relates to para. 20(f). Whilst Ms Cunha's interpretation of this important aspect of the panel's reasoning was not without merit, I have come to the conclusion that Mr Gajjar's reading of it is to be preferred.

13. The first point to make is that at the beginning of that sub-paragraph the panel indicate that the Appellant's busy lifestyle at the relevant time "may have excused his failure to remember that he had to pay tax in the short term". What led to the panel's conclusion against the Appellant was his failure to have subsequently appreciated that he had not paid any tax for the 2010-2011 tax year. It is correct that the Appellant had earned over twice as much in that tax year as in the subsequent tax year of 2011-2012. However, there had been an important (and undisputed) change in the Appellant's circumstances: he had moved from having earnings derived largely from self-employment with some from employment in the previous tax year, to deriving earnings solely from employment in the next tax year. It is the case that tax due on employed earnings is deducted at source through PAYE: thus, there is no tax return and no consequent communication from HMRC of any tax

liability. It follows that the rationale that the employed earnings and the tax due therefrom should have triggered the Appellant's recollection is undermined. In short terms, the panel was not comparing 'like with like' in terms of the nature of the earnings and how tax liabilities arising therefrom differed.

14. I have of course considered paragraph 20(f) in the context of the other reasons provided by the panel. Paragraph 20(a) is relevant. On the face of it, it provides a good reason for why the Appellant should have realised that there would be tax payable for the earnings obtained in 2010-2011. On the other hand, this point needs to be seen in context of what the panel then said at the beginning of paragraph 20(f) in respect of the Appellant being busy and that this had perhaps provided an excuse for a failure to remember to pay tax in the "short term".

15. The reasons set out in 20(b)-20(d) relate to the Appellant's original accountants Aspire Accountants. Those reasons have not been challenged and they were clearly open to the panel on the evidence (or more specifically the lack thereof).

16. In my view, if, as I find it does, paragraph 20(f) contains erroneous reasoning, and that passage were to be excised from the panel's findings as a whole, it cannot be said that the outcome on the important issue of dishonesty would inevitably have been the same. The omission of paragraph 20(f) *could* have made a material difference. This is particularly so in view of the fact that the panel was primarily concerned with the question of whether the Appellant had provided an innocent explanation, satisfying the minimal level of plausibility. In other words, the threshold was not especially high.

17. There is a material error of law here.

18. I turn to the issue of the letter from the Appellant's new accountants. This ground of challenge does not carry the same strength as the first. Nonetheless, it is the case that the panel did not consider this item of evidence. On its face, the letter indicates that these accountants had "uncovered" the error in relation to the tax return for 2010-2011. Whilst in no way decisive, it did lend some credence to the Appellant's assertion that whilst he may have been careless/negligent in respect of the 2010-2011 tax return, he may not have been dishonest. I also consider that the accountants' letter was potentially relevant to the question of the delay between the relevant tax year and the amendments made in 2016, with reference to what the panel said at paragraph 20(e) of its decision. This is an additional material error.

19. On the basis of the above, I conclude that the panel's decision must be set aside.

Disposal

20. In respect of the disposal of this appeal, Ms Cunha expressed the view that this matter should be retained in the Upper Tribunal for a re-making decision to be made in due course. Mr Gajjar submitted that in view of the nature of the Appellant's case and any errors going to the question of credibility (which of course incorporates

dishonesty on the Appellant's part), this case should be remitted to the First-tier Tribunal.

21. Remitting a case is very much the exception to the presumption that matters should be re-decided in the Upper Tribunal. I have had regard to paragraph 7.2 of the Practice Statement. This is a case which in my view requires remittal to the First-tier Tribunal.

22. The question of the Appellant's conduct is quintessentially one of credibility. The errors I have identified go to the heart of that issue. The effect of the errors is that none of the panel's findings can stand. Therefore, what is now required is a wholesale revisiting of all relevant matters, chief amongst them the question of the Appellant's alleged dishonesty. That requires fact-finding followed by an assessment of his Article 8 case within the context of the Rules and without.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

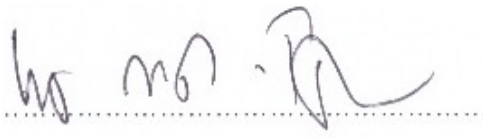
I remit this appeal to the First-tier Tribunal.

I make no anonymity direction.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal for a complete rehearing and with no preserved findings of fact;**

2. **The remitted appeal shall not be heard by Judges Loke and Neville.**



Signed Date: 2 August 2019

Upper Tribunal Judge Norton-Taylor