UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBER: HU/07609/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 26 February 2019

Decision and Reasons Promulgated
On: 28 March 2019

Before
Deputy Upper Tribunal Judge Mailer

Between
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SYED MUHAMMAD SHAHZAD ASGHAR
ANONYMITY DIRECTION NOT MADE

Respondent

Representation
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr A Alam, Haider & Hasan

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.

2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Phull, promulgated on 1 December 2018, allowing the claimant's appeal against the decision of the secretary of state to refuse his application for indefinite leave to remain in the UK on the basis of ten years' long residence.

3. The claimant's application, made on 16 July 2016 for indefinite leave to remain as a Tier 1 (General) Migrant, was varied on 9 May 2017 to an application for indefinite leave to remain on the basis of ten years' long residence [2].

4. His application was refused on 14 March 2018 pursuant to paragraph 322(5) of the Immigration Rules. The basis for the refusal was that for the tax year ending April 2011 the claimant declared gross income from self employment of £8348, a net income of £7462 which is significantly lower than the net income of £36,988.36 he claimed when making his Tier 1 (General) application on 5 April 2011. The respondent contends that the initial declared income to HMRC would have equated to zero points in the previous earnings category on his Tier 1 (Migrant) application dated 5 April 2011 rather than the 20 points that he claimed.

5. HMRC data confirmed that on 10 May 2016 they received an amended 2010-2011 tax return from the appellant declaring the said increase. This original return was filed on 28 January 2012.

6. The fact that he retrospectively declared these claimed earnings to HMRC four years after his original tax return was filed in January 2012, and approximately two months prior to submitting his application for indefinite leave did not satisfy the secretary of state that he had not previously been deceitful or dishonest in his dealings with HMRC and/or UK Visas & Immigration. There would have been a clear benefit to him either by failing to declare these full earnings to HMRC with respect to reducing his tax liability, or by falsely representing his earnings to UKVI to enable him to meet the points required to obtain leave to remain under the Tier 1 (General Migrant) Scheme.

7. Although he has provided a copy of a letter dated 8 October 2014 addressed to HMRC, that document cannot be relied upon as he provided no documentary evidence in his application to demonstrate that this letter was ever sent to or received by HMRC.

8. It was his responsibility to ensure that his tax return was submitted on time with the correct information and by failing to do so it is considered that he has been deceitful or dishonest in his dealings with HMRC and/or UKVI.

The appeal to the First-tier Tribunal

9. In a decision promulgated on 11 December 2018, First-tier Tribunal Judge Phull allowed the claimant's appeal. She found that he had provided a reasonable explanation with documentary evidence and there was no evidence to suggest that he has been involved in any criminality [18].

10. She found on balance that his calls to HMRC and their advice did not call into question his character, conduct and associations. She found him to be a credible witness.

11. She noted the secretary of state's contention that the claimant submitted his tax return for 2010-2011 on 10 May 2016, which is four years and three months after his original tax return filed on 28 January 2012.

12. She found at [14] however that the letter of 8 October 2014 refers to the amended tax return as attached, and therefore found that this was submitted to HMRC in 2014. There was a further letter dated 12 November 2014 from the claimant to the respondent referring to the fact that the amended tax return being submitted on 8 October 2014 had

attached the SA 302 employment history and letter to HMRC as well as the tax return. The 2012-2013 revised tax calculation showed that tax was deducted.

The appeal to the Upper Tribunal

13. On 11 January 2019, First-tier Tribunal Judge Parkes granted the secretary of state permission to appeal on the basis that it is arguable that the approach taken by the Judge did not pay sufficient attention to the guidance in R (on the application of Khan) v SSHD (Dishonesty: Tax Return: Paragraph 322(5)) [2018] UKUT 00384 (IAC), and did not fully address the figures and reasons given by the claimant for re-opening his tax affairs and the timing of events.

14. Ms Isherwood on behalf of the secretary of state referred to the grounds seeking permission to appeal. She submitted that Judge Phull failed to take into account or resolve a conflict of fact or opinion on a material matter. She failed to resolve the issues of whether the claimant acted dishonestly by either over declaring his income to UKVI in his leave to remain applications, or whether he under declared his income to HMRC in order to reduce his tax bill. The Judge incorrectly focused on the fact that he amended his tax return and paid tax owed.

15. The findings do not address the reasons for why the claimant sought to amend his tax returns. Nor did she address why there was such a large delay in seeking to address this issue or the reasons why there were such large discrepancies in his declared income to UKVI and HMRC.

16. She submitted that Judge Phull failed to apply the reasoning of the Upper Tribunal decision in R (on the application of Khan), when assessing whether the claimant acted dishonestly in relation to his dealings with UKVI or HMRC. In particular, she did not follow the recommended steps in Khan when assessing his actions and focused solely on whether he has repaid money to HMRC.

17. She submitted that the Judge has not provided reasons for why it is accepted that the claimant would not have been aware of the error sooner, given that his tax liability would have been lower than expected and why this was not rectified sooner. It was thus a material error in the assessment of his actions.

18. In addition, Judge Phull erred in referring to Home Office policy guidance and finding at [16] that as the claimant has not been found guilty of any criminal activity, paragraph 322(5) does not apply. 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 he has been deceitful.

19. Ms Isherwood referred to the detailed chronology set out in the reasons for refusal. It is not evident that the Judge dealt with the fact that the claimant made an earlier application on a false basis and was accordingly not entitled to the points claimed.

20. She referred to the paragraphs in the headnote in Khan. There was a significant difference between the income claimed in the previous application and that declared to HMRC. The

claimant is expected to have known of his earnings. In a nutshell, the Judge did not properly deal with the fact that the claimant obtained leave on a false basis.

21. In reply, Mr Alam, who represented the claimant before the First-tier Tribunal, noted that in the reasons for refusal, the secretary of state referred to the claimant's explanation. The Judge had to deal with this.

22. At page 4 of the reasons for refusal the secretary of state referred to the claimant's answer to question 14 of the tax questionnaire he filled in: He was asked whether he ever needed to correct or resubmit his tax return during any period of his self employment to which he answered 'yes'. He claimed that the reason his tax return was incorrectly submitted was "confusion of fiscal and financial years" which he stated was discovered "in 2013 when HMRC sent some tax payable." He stated that the cause of the error was "month in different fiscal years," and he contacted HMRC for further advice.

23. Mr Alam referred to the letter of support that the claimant submitted with his completed questionnaire dated 12 November 2017. In it he stated that he only submitted one month calculation to HMRC in January 2012, and eleven months should have been adjusted in the next fiscal year. In the next fiscal year "I did not work on self employment basis. Again I sent it to HMRC as a small calculation and forgot to adjust the remaining months."

24. The secretary of state did not accept his explanation and referred to a letter dated 8 October 2014 addressed to HMRC. That document could not be relied upon however as the claimant has not provided any documentary evidence in his application to show that this letter was ever sent to or received by HMRC.

25. Mr Alam submitted that the issue was when the claimant amended the records. It is asserted by the secretary of state that in his amended 2010-2011 tax return he submitted on 10 May 2016 that there was a declaration of an increase in net earnings from self employment from £7462 to £36,988, which was being made four years and three months after his original tax return was filed on 28 January 2012.

26. The claimant, however, has always asserted that he did not effect this amendment only about two months prior to submitting his application.

27. In that respect, Mr Alam referred to two documents in the secretary of state's bundle. At G1, the claimant sent a letter to HMRC on 8 October 2014 in which he stated that he has reviewed his income tax self assessment 2010-2011 and pointed out a mistake in his online tax return in his sales figures. The amount should be £45,336 but this was not declared. That affected the net profit which is now £36,988.

28. He stated that he needs to amend this as soon as possible and when he spoke to HMRC by telephone, one of the tax advisers there suggested that he send a written letter mentioning the mistake. He "herewith" makes the amendment in the sales figures and enclosed the amended tax return. He requested that appropriate adjustments be made and the revised calculation for his tax consideration be given as soon as possible so he

can arrange a quick source to make the tax payment on time. He also asked for the reissue of the SA 302 for the revised amount.

29. Mr Alam submitted that the Judge did in fact refer to this letter in her decision at [14] and [16]. Moreover, the claimant gave oral evidence to this effect.

30. The second document Mr Alam referred to is in produced in the secretary of state's bundle at E1. This is a letter sent by the claimant to the Home Office on 12 November 2017. In that letter, which he headed "Confusion", the claimant asserted that he was self registered as a self employed person in 2010. His first financial year was 28 February 2011. Due to confusion in fiscal and the financial year, he only submitted a one month calculation to HMRC in January 2012 and 11 months should be adjusted for the next fiscal year.

31. The next fiscal year he did not work on a self employment basis. Again, he sent this to HMRC as a small calculation and forgot to adjust the remaining months. In September 2013 he realised that HMRC sent the tax calculation amount which was less than he expected to pay. He avers that he started contacting HMRC over the phone and they did not understand him "for a long time". Finally one of the HMRC advisers suggested to him that he should send an amended tax return of 2010-2011, which was then sent in October 2014.

32. Mr Alam submitted that the First-tier Tribunal Judge considered these amendments and referred to them. She found his explanation to be credible. Having found that he made mistakes, his conduct was not deceitful.

33. The Judge noted at [5] that the claimant received a tax bill from HMRC in 2013, and at the end of that year, he contacted HMRC but they did not understand his query. In 2014 he again called HMRC and they advised him to file an amended tax return for 2010-11 which he did, and submitted it in May 2016. The claimant has never had accountants assisting him.

34. The secretary of state noted in the refusal letter that they received an amended 2010-2011 tax return on 10 May 2016 declaring an increase in net earnings from self employment. It was open to the Judge to make the credibility findings that she did. She looked at the differences in the round. She accepted that there was a mistake made over the fiscal years.

35. He submitted that the challenge to the secretary of state 'has been to the factual findings and not the claimant's credibility'.

36. Mr Amal referred to [32] in Khan, where the Judge stated that the starting point seemed to be that where the secretary of state discovers a significant difference between the income claimed and the previous application for leave to remain and the income declared to HMRC, she is entitled to draw an inference that the claimant has been deceitful or dishonest and therefore she would be refused ILR within paragraph 322(5) of the Immigration Rules.

37. However, it does not follow that in all such cases a decision to refuse ILR will be lawful. Where an applicant has presented evidence to show that despite the prima facie inference he was not in fact dishonest but only careless, the secretary of state is presented with a fact finding task which must be carried out fairly and lawfully. She needs to remind herself that 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 and therefore the evidence must be cogent and strong although, as the authorities show, the standard of proof remains on the balance of probabilities.

38. He submitted that it is evident from the First-tier Tribunal Judge's decision that she was well aware of the correct approach to be taken.

Assessment

39. First-tier Tribunal Judge Phull guided herself appropriately when determining the appeal by reference to the respondent's policy guidance of 11 January 2018 which was in force at the time [13].

40. She noted the submission with regard to the burden of proof at [9]. Counsel on the claimant's behalf identified the issues, namely, whether the claimant has been dishonest and whether the secretary of state has established that. The initial burden is on the secretary of state.

41. There is no doubt that when considering the credibility of the claimant, Judge Phull considered the explanation of the failure to declare income in 2010 which was well below that which he later declared in May 2016. She had regard to the secretary of state's contentions that the claimant submitted his tax return for 2010-2011 on 10 May 2016, which is four years and three months after his original tax return filed on 28 January 2012. She noted that in 2013 he received a tax bill from HMRC and at the end of that year contacted HMRC who did not understand his query. A year later he again called them and he was advised to submit an amended tax return for 2010-2011 which he then submitted in May 2016. He did not have any accountants assisting him at the time.

42. The claimant gave an explanation as to the "confusion" that arose. He sent a letter to HMRC on 8 October 2014 in which he stated that he has reviewed his income tax self assessment 2010-2011 and pointed to a mistake in his online tax return in his sales figures. That affected the net profit. He stated that he needed to amend this as soon as possible and when he spoke to HMRC by telephone, a tax adviser there suggested that he send a written letter setting out the mistake.

43. He then made an amendment in the sales figures and closed the amended tax return. It was the claimant who requested that appropriate adjustments be made and the revised calculation for his tax consideration be given as soon as possible so as to arrange a quick source to make the tax payment on time.

44. Judge Phull referred to these letters relating to revised tax calculations both at [14] and [16]. The claimant also gave evidence, supported by a letter in the secretary of state's

bundle at E1 where he stated that he was self registered as a self employed person in 2010. Due to confusion in the fiscal and financial year, he only submitted a one month calculation in January 2012 and 11 months should accordingly be adjusted for the next fiscal year. It was in 2013 that he realised that the HMRC tax calculation figure was less than he expected to pay. He then started contacting them by telephone and they took a long time to understand.

45. The secretary of state complains that the Judge did not pay sufficient attention to the guidance in Khan and did not fully address the figures and the reasons given by the claimant for re-opening his tax affairs and the timing of the events.

46. Whilst it is correct that the Judge did not have regard to the judicial review decision in R (on the application of Khan) v SSHD, supra, the decision in Shen (Paper appeals; proving dishonesty) [2014] UKUT 00236 was produced to her. The Tribunal in Shen also considered the inference to be drawn with regard to deliberate deception, concluding that it is always open to a claimant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the secretary of state to answer that evidence. At the end of the day, the secretary of state bears the burden of proving dishonesty.

47. Having set out all the relevant evidence, Judge Phull found that the explanation that the claimant gave with regard to amending his tax return was plausible. There was no evidence to suggest that the claimant had been involved in any criminality and his calls to HMRC, and their advice, does not call into question his character, conduct and associations.

48. Unlike Khan, the claimant did not blame an accountant for the "mistake" with regard to the historic tax returns. Mr Justice Spencer held in Khan that where there is 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 he has been deceitful or dishonest and that he should be refused ILR within paragraph 322(5) of the Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.

49. Where the applicant has presented evidence to show that despite the prima facie inference, he was not in fact dishonest but only careless, the secretary of state must then decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.

50. In considering whether he has been dishonest, regard must also be had to the steps he has taken to remedy the situation and if so, when they were taken and the explanation for any significant delay.

51. Judge Phull was satisfied that it was not merely an assertion that the appellant was making. She had regard to the steps he had taken to remedy the situation as long ago as 2013/2014 and had produced consistent documentation, including letters between himself and HMRC. This evidence was considered by the Judge.

52. In the circumstances, the conclusion that the claimant's explanation of the error was plausible and that he had not been deceptive, was a decision that was rationally open to Judge Phull on the facts presented and was sufficiently reasoned.

53. In summary, Judge Phull has properly and lawfully addressed the key substantial issues in the appeal, namely, whether the claimant is of good character, given the allegation of dishonesty relating to his tax return. It was lawfully open to her to allow the appeal on human rights grounds, having found that the claimant had shown that he could meet the requirements of paragraph 276B of the Immigration Rules and that there would accordingly be no public interest in his removal given that he had been lawfully in the UK for ten years, speaks English and is financially independent.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal allowing the appeal on human rights grounds is upheld.

No anonymity direction is made.

Signed Date 21 March 2019

Deputy Upper Tribunal Judge Mailer