Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07763/2018**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On March 5, 2019	**On March 28, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS NADIA MUHAMMAD ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Tan, Senior Home Office Presenting Officer
For the Respondent: Mr Ahmed, Counsel, instructed by Mamoon Solicitors

DECISION AND REASONS

1. Whilst the respondent is the appellant in these proceedings before me, I hereafter refer to the parties using terminology used in the First-tier Tribunal. The appellant in the First-tier Tribunal will hereafter be referred to as "the appellant" in these proceedings, and the respondent will be referred to as "the respondent".

2. The appellant, a Pakistani national, who entered the United Kingdom as a student on May 21, 2007. She was subsequently granted leave to remain as a Tier 1 (Post Study) Migrant until August 11, 2011. She applied for leave to remain as a Tier 1 (General) Migrant on February 2, 2011 but this was refused by the respondent. She re-applied on April 4, 2011 and was granted leave to remain as a Tier 1 (General) Migrant until June 20, 2013 but this was subsequently extended until July 16, 2016.

3. On July 14, 2016 she applied for indefinite leave to remain as a Tier 1 (General) Migrant but before the application was considered she sought to vary that application on May 24, 2017 when she applied for indefinite leave to remain under 276B HC 395 on the grounds of long residence. The respondent refused this application on March 20, 2018 under paragraph 322(5) HC 395 and paragraph 276ADE HC 395.

4. The appellant appealed that decision on March 28, 2018 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

5. Her appeal was heard by Judge of the First-tier Tribunal Mather on August 20, 2018 and in a decision promulgated on August 31, 2018 she allowed the appellant's appeal finding that the refusal under paragraph 322(5) HC 395 was not made out and that as the appellant satisfied the requirements of paragraph 276B HC 395 she should succeed under article 8 ECHR.

6. Grounds of appeal were lodged on September 10, 2018 by the respondent in which it was argued that the Judge had materially erred because accepting her explanation that it was her accountant's fault.

7. Permission to appeal was initially refused by Judge of the First-tier Tribunal Andrew on September 21, 2018 but Upper Tribunal Judge Kekic granted permission on all grounds finding it arguable the Judge's decision was flawed.

8. A Rule 24 response dated February 26, 2019 submits that following the guidance in R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC) the Judge's approach could not be faulted.

9. No anonymity order is made.

SUBMISSIONS

10. Mr Tan adopted the grounds of appeal and submitted the Judge erred by simply accepting the appellant's explanation without more evidence to support her claim. The appellant had produced nothing from the previous accountants nor evidence from HMRC about what view, if any, they had of the understated income declarations. There was no evidence that the appellant had made any attempt to find out from the previous accountant why the figures were so wrong. Whilst her accountants stated they had filed updated accounts the Judge approached the assessment incorrectly. There was limited evidence from her current accountants in

the sense there was only one letter. At page G3 there was evidence the appellant had been aware of a previous problem for tax year 2012/2013 and the Judge failed to consider this point or consider why the appellant had not queried the 2009/2010 and 2010/2011 tax returns at that time. There was, he submitted, an acceptance of the appellant's explanation without having regard to factors the Tribunal in Khan said should be considered.

11. Mr Ahmed adopted his skeleton argument and submitted the respondent's submissions amounted to a mere disagreement. The only issue in this appeal was whether para 322(5) HC 395 was engaged. The Judge had the letter from accountants at page 21 of the appellant's bundle and the refusal letter. At para 14 of her decision, the Judge set out the appellant's claim and recorded the appellant stated she had not signed the returns and had not seen them. When she received the refusal letter she took action. The accountants had to obtain the evidence and having done so filed amended tax returns. Due to the shortness of time no further evidence obtained from the previous accountant and HMRC. At para 24 the Judge found no deception or dishonesty on the part of the appellant. He invited the Tribunal to uphold the decision.

12. I reserved my decision.

FINDINGS

13. The appellant had applied for indefinite leave to remain under paragraph 276B HC 395 albeit this was an amendment to her original application. Having varied her application on May 24, 2017 the respondent sent her representatives a tax questionnaire on October 27, 2017 which was responded to on November 23, 2017. Based on her answers, checks were made with HMRC and against her previous immigration applications. The respondent noted there was a discrepancy between what she had disclosed to HMRC and what had been disclosed to the respondent.

14. On her HMRC tax return she declared a net income from self-employment of £10,449 for 2009/2010. For the tax year 2010/2011 she declared a net income of £6,249 giving a total self-employed income for 2009-2011 of £16,743. However, on Application form dated April 4, 2011 for Tier 1(General) Migrant she declared her income as £45,123.42.

15. The respondent refused the application under paragraph 322(5) HC 395 on March 20, 2018 giving reasons for that decision.

16. By the time the appeal came before the Judge Mather, the appellant had engaged accountants who wrote a letter dated July 27, 2018. In that letter they advised that the appellant had told them the HMRC records did not reflect her self-assessment earnings and that she had tried to contact her previous accountant but had been unable to reach them. They had obtained copies of her returns and had filed revised tax returns. In her witness statement dated August 1, 2018 the appellant stated she never saw the relevant tax returns and she accepted she was negligent in not asking for copies. She denied any dishonesty.

17. At the original hearing the appellant had adopted her statement and it was submitted in her behalf that as she had not been dishonest, paragraph 322(5) HC 395 was not made out. At paragraph 19 the Judge stated, "Given the actions taken by the appellant and her accountants, I am not persuaded the appellant did not make an innocent mistake in her application of April 4, 2011".

18. At the date this appeal was heard the Tribunal had not handed down the guidance in Khan but the principles would still apply.

19. The Tribunal in Khan provided guidance on how courts should deal with cases such as these and whilst that case is a Judicial Review appeal nevertheless the guidance issued is of assistance. The Tribunal should consider the following:

    (a) 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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.

    (b) However, 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 is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.

    (c) 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.

    (d) However, 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: far from it. Thus, the Secretary of State is entitled to take into account that, even where an accountant has made an error, the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return, and furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If, realising this (or wilfully shutting his eyes to the situation), the Applicant has not taken steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude either that the error was not simply the fault of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules.

    (e) Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is

rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.

(f) There will be legitimate questions for the Secretary of State to consider in reaching her decision in these cases, including (but these are by no means exclusive):

(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.

(g) In relation to any of the above matters, the Secretary of State is likely to want to see evidence which goes beyond mere assertion: for example, in a case such as the present where the explanation is that the Applicant was distracted by his concern for his son's health, there should be documentary evidence about the matter. If there is, then the Secretary of State would need to weigh up whether such concern genuinely excuses or explains the failure to account for tax, or at least displaces the inference that the Applicant has been deceitful/dishonest. The Secretary of State, before making her decision, should call for the evidence which she considers ought to exist, and may draw an unfavourable inference from any failure on the part of the Applicant to produce it.

(h) In her decision, the Secretary of State should articulate her reasoning, setting out the matters which she has taken into account in reaching her decision and stating the reasons for the decision she has reached.

20. Mr Ahmed argued that the Judge did unwittingly follow the above guidance, but I cannot agree with that submission. The Tribunal made it clear that a statement from the appellant that it was the accountant's fault is not enough. It was incumbent on the Judge to enquire what steps had actually been taken to support her explanation. In this appeal there was no written evidence from either the previous accountant or HMRC. These documents were of importance in circumstances where the understated income was in excess of £27,000. The Tribunal in Khan made clear that the Tribunal must look behind the assertion and I am satisfied that this was not done. The appellant had amended her 2012/2013 tax return so clearly she had some knowledge of her tax affairs as long ago as 2016.

21. The Judge did not have the benefit of having the decision of Khan before her and I have to say the practice of including unreported decisions in the bundle was also unhelpful.

22. The respondent was entitled to find there was dishonesty and it was then the responsibility of the appellant to place sufficient information before the respondent and Judge to raise a plausible explanation. In allowing the appeal as she did the Judge fell into error and in such circumstances, I set aside the decision.

23. Oral evidence and further documentary evidence is needed in this appeal and I therefore remit the matter back to the First-tier Tribunal for a hearing before a Judge other than Judge of the First-tier Tribunal Mather. I remit the matter back to the First-tier Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

Notice of Decision

There is an error in law. I set aside the original decision and remit the matter back to the First-tier Tribunal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007.

Signed Date 05/03/2019

Deputy Upper Tribunal Judge Alis