Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09260/2018
HU/11395/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th April 2019	**On 08th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MR ZEESHAN MUKHTAR
(2) MRS HUMMA NOREEN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr S Whitwell (Senior HOPO)
For the Respondents: Mr L Youssefian (Counsel)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Beach, promulgated on 28th November 2018, following a hearing at Taylor House on 7th November 2018. In the decision, the judge allowed the appeal of the Appellants, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

2. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal.

The Appellants

3. The Appellants are husband and wife. Both are citizens of Pakistan. The First Appellant, who is the principal Appellant, was born on 1st March 1980. The Second Appellant, his dependent wife, was born on 27th January 1985. On 11th August 2016, the First Appellant applied for leave to remain as a Tier 1 (General) Migrant, and on 23rd February 2017 he applied to various applications for indefinite leave to remain, on a long residence basis, given that he had entered the UK on 4th January 2007, as a student, and remained here since then. The decision appealed against is dated 5th April 2018, and it is a decision whereupon the Respondent refused the First Appellant's application for indefinite leave to remain in the UK with his dependent wife.

The Judge's Decision

4. In what is a detailed and well-compiled decision, the judge observed how the First Appellant had in 2008 applied to remain in the UK as a Tier 1 (Highly Skilled Post-Study) Migrant, for which he had been granted leave to remain in that capacity until 20th October 2010. He had gone on to establish a business in this country, where he was a sole trader, and the business was called ZMS Associates. He was self-employed from 1st February 2010 until 1st February 2011, however, when he worked as an IT consultant. During that time, the First Appellant, who claimed to be earning £40,430.65, the First Appellant had declared zero tax liability.

5. For the other years, there had been an amended tax return filed for the years 2009 to 2010, for 2010 to 2011, and for 2012 to 2013. In 2016, when it came for the First Appellant to make an application for indefinite leave to remain, on the basis of ten years' residence in the UK, the First Appellant checked his tax matters. He claims he went to a friend to discuss the tax matters. His friend checked his affairs. His friend told him that he would need an SA302 form (paragraph 11). His accountant, Sarmand & Co, completed his tax returns for the year ending 2010 and the year ending 2011. He received a letter from his accountant asking him to check the tax return, sign and approve it. The principal Appellant said that "the email had since been deleted" (paragraph 13).

6. When asked at the hearing why he did not realise that he received a zero tax liability for the year 2010 to 2011, the principal Appellant said he was "not a specialist in accountancy". He said that in 2016 he was discussing matters with his friend and his friend suggested that he could check his account. He said that his friend looked through and told him that there were anomalies. The First Appellant's account then goes on to show that:-

> "he had checked because he was due to make an application for ILR and agreed that this was the case. He denied checking because he thought that he would be discovered and said that he just thought that he should check as he was making his application" (paragraph 14).

7. The judge went on to identify with clarity the issue that fell for determination. Under paragraph 322(5), the question was whether the Appellant's character, conduct and associations were such that it was undesirable for him to be granted indefinite leave to remain. This was on account of his failure to disclose his income to the HMRC, "(it having been accepted in a previous appeal decision that he did earn a self-employed profit of £40,430.65)" (see paragraph 31 of the decision). The judge raised the possibility as to whether this "was an innocent mistake and, if it were an innocent mistake, what impact, if any, the Appellant's failure to properly check his tax return has on his application for indefinite leave to remain in the UK" (paragraph 31).

8. The judge observed that the First Appellant was sent his tax return by his accountants and asked to sign it off, and he did this without properly noticing the self-employed income had not been declared. It was only in 2016 that he thought it would be sensible to check his tax affairs "before he made an application for indefinite leave to remain in the UK" (paragraph 32). The judge did not find the Appellant to be a "particularly impressive witness" (paragraph 33).

9. There was an accountant's letter, which was equally cryptic. It appeared to suggest that "We were not his accountants and advised him to contact specialist tax accountants to do a full due diligence on his tax return matters" (paragraph 33). It was unclear to the judge whether this suggested that somebody else was acting as the First Appellant's accountants, or whether it implied that these were not his accountants for the purposes of his tax returns in question (paragraph 34).

10. The judge's decision was that the First Appellant was guilty simply of an innocent mistake. This is because the First Appellant had "declared his company dividends in his tax returns suggesting an Appellant who is not seeking to deliberately fail to disclose income".

11. Secondly, if the First Appellant was deliberately setting out to defraud the authorities then one would have expected him "to have continued to mis-declare such income". Third, this was not a case of "an appellant who has disclosed a lower amount from self-employment than that earned by him but a case where all the income from self-employment has been missed off the tax return" (paragraph 36).

12. Finally, this was consistent with the First Appellant's own explanation given at the hearing before Judge Beach that "he simply did not properly check the tax return, rather that he deliberately sought to reduce his tax liability " (paragraph 36).

13. Against this background, the judge was firmly of the view that this was an Appellant who "has voluntarily taken steps to amend his tax returns and that he has provided a plausible explanation for his incorrect tax return which is not inconsistent with the evidence before me" (paragraph 37). On one view, it is clear that these conclusions were ones to which the judge was perfectly entitled to come to, as a fact-finding Tribunal, who had heard the evidence, and had looked at the documentation before the Tribunal, to ensure the level of consistency between the two.

Grounds of Application

14. However, the Secretary of State then appealed the decision. In so doing, the Secretary of State stated that the decision of Judge Beach was unsustainable for a number of reasons.

15. First, the First Appellant had simply left off a sum of £40,430.65 from his tax liability for the tax year 2010 to 2011, and this could not be simply designated as an oversight.

16. Second, the case law is clear that the First Appellant is personally responsible for his own tax affairs and should be fully aware of the amounts declared to the HMRC. In **Abbasi (JR/13807/2016),** the Tribunal stated that, "the explanation in such 'self-employed income' cases such that the accountant can be blamed has been given short shrift", as demonstrated in **Samant [2017] UKAIT UR (JR/6546/2016)**. This is because:-

> "essentially the applicant must take responsibility for his own tax affairs. Not only would the applicant have supplied the figures to his accountant, he will have checked them and would individually have received a tax bill" (paragraph 73).

17. Third, the Upper Tribunal decision in **Khan [2018] UKUT 00384**, makes it clear in head note (iv) that:-

> "*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, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty*".

18. Moreover, head note (v) of **Khan**, also makes it clear that when considering whether an applicant is dishonest or merely careless, the Secretary of State should consider:-

> "*i. Whether the explanation for the error by the accountant is plausible;*
>
> *ii. Whether the documentation which can be assumed to exist … 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 …*".

19. In this case, of course, lest it be forgotten, the First Appellant did himself, voluntarily before making his application, "take steps within a reasonable time to remedy the situation". Moreover, this is also a case where the First Appellant is not actually

blaming his accountant directly. As the decision of Judge Beach made clear, the First Appellant throughout accepted that he was responsible for his own tax affairs. In fact, he had even said that he had received an e-mail from his accountants (which he claims to have deleted by the time of the hearing) which had asked him to check his tax affairs before he proceeded any further.

20. However, permission to appeal was nevertheless granted in this case by the Tribunal on 27th December 2018, with it being noted that the responsibility of the First Appellant for tax on earnings of £40,430.65, where he was self-employed between 2010 and 2011, could simply not have been arguably explained in this way.

Submissions

21. At the hearing before me, on 12th April 2019, Mr Whitwell, appearing as Senior Home Office Presenting Officer, on behalf of the Respondent Secretary of State, handed up a "Respondent Skeleton Argument", which contained a section on "Introduction" and a section on "Submissions". In the latter section, there was a paragraph 2 which dealt with an aspect which had not been raised either before the Tribunal below or in the Grounds of Application to this Tribunal now. This stated that the judge below records (at paragraph 31) that it was accepted in a previous decision that there had been an earned self-appointed profit of £40,430.65. However, in the light of the additional evidence from the HMRC and the thrust of the Respondent's case, the judge appears to have treated the earnings as determinative, rather than a starting point.

22. The refusal letter, however, was clear that the case was being argued both ways. It was made clear (at page 4 of 9) that the First Appellant was either misleading the UKVI for the purposes of an earlier application dated 18th October 2010, or the First Appellant was misleading the HMRC about his tax liability. To that extent, the judge had considered the appeal only so far as it related to the First Appellant's conduct with respect to his dealings with the HMRC. Mr Youssefian immediately objected to the inclusion of this submission, on the basis that it formed no part of the earlier case on behalf of the Secretary of State before Judge Beach, and formed no part of the application in the Grounds of Appeal.

23. When I asked Mr Whitwell whether he had actually made a written application to amend his Grounds of Application, he submitted that he had not. However, he suggested that the additional ground formed part of the "Respondent's Skeleton Argument", and would amount to "an application for an amendment". I cannot agree with this. I conclude that Mr Youssefian is justified in his objections to the inclusion of this ground. Not only has there been no written application for an amendment of the Grounds of Application, but the Respondent's skeleton argument does not even contain a reference to this new ground in the "Introduction" but consigns it to the "Submissions" section of the skeleton argument, and even then does not include a prefatory remark of an application to amend grounds.

24. Mr Whitwell proceeded with his other submissions, to which Mr Youssefian did not properly take any exception, and these submissions amount to four distinct points.

First, the judge did not find the explanation for the error by the accountant to be plausible, making clear that "the accountant's letter does not state the reasons for all the errors", and "… it is unclear whether they are stating that they were not his accountants for the purpose of his tax returns or whether they mean that they were not his accountants when he returned to query those returns". This was contrary to **Khan [2018] UKUT 00384**, where it was stated that it is a legitimate question for the Secretary of State, to consider "whether the explanation for the error by the accountant is plausible" (paragraph 37(vi)(i)).

25. Second, Mr Whitwell submitted that there was no plausible reason why the documentation, such as the correspondence between the First Appellant and his accountant, where he claims to have been alerted by the accountant to check his tax affairs had gone missing. The First Appellant had stated that "the email had since been deleted" (paragraph 13). The judge should have considered whether this was a plausible explanation. Indeed, the First Appellant did not have the bundle of documents sent to his accountants (see paragraph 27 of the decision), even though this was available recently to him. This too was contrary to **Khan** (supra) at paragraph 37(vi)(ii), where it was stated that it is a legitimate question for the Secretary of State as to whether the documentation which can be assumed to exist has been disclosed or there is a plausible explanation for why it is missing.

26. Third, the judge did not grapple with the First Appellant not realising that an error had been made on his declared return, given his tax liability for the tax year of 2010 to 2011, was not just less than expected, but was zero. This is despite him earning a sum of £40,430.65. The judge had simply recorded this in oral evidence. It was not enough to accept the Appellant's answer that he was "not a specialist in accountancy" (paragraph 14). This was contrary to **Khan** (supra) at paragraph 37(vi)(iii), where it was stated that it is a legitimate question for the Secretary of State as to 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.

27. Finally, the judge did not appear to take into account the fact that the First Appellant, at the date of the hearing, still owed the HMRC the sum of approximately £9,000 (see paragraph 11 of the decision), given that the tax return was amended in June 2016, which was approximately five years after the end of the tax year in question. There had been a significant delay and the return was only checked in contemplation of his application for indefinite leave to remain (paragraph 14).

28. For his part, Mr Youssefian, made the following submissions. First, that taken cumulatively, the appeal by the Secretary of State was simply a disagreement with the decision of the judge below, which was in many respects favourably disposed towards the Respondent, in observing that the First Appellant was not in an impressive witness, and that he had been personally responsible for his tax affairs. The judge was clear that "the accountant's letter does not state the reason for the errors" (paragraph 34). The judge had followed the reasoning to be applied in a structured and step-by-step fashion, before concluding with the question as to whether the First Appellant was simply negligent to the extent that he failed to properly check his tax return, or whether he was actually dishonest or deceitful. It

was only then that the judge concluded that the First Appellant had not been deliberately dishonest (paragraph 38).

29. The reason for all of this, submitted Mr Youssefian, was that there was in this case no pattern of dishonesty. There was simply one case, between 2010 and 2011, where the tax liability had been left off. This in itself was directly addressed by the judge when the judge observed that, had the First Appellant wished to dishonestly avoid tax altogether, he would have "disclosed a lower amount from self-employment than that earned by him" (paragraph 36).

30. Second, the judge was clear that this was an Appellant who "has voluntarily taken steps to amend his tax returns and that he has provided a plausible explanation for his incorrect tax return which is not inconsistent with the evidence before me" (paragraph 37). Accordingly, the judge had approached the matter entirely as it should have been done and the attack on the decision was simply a disagreement with the conclusions drawn. Indeed, there was no allegation for the tax years 2012 to 2013 and from 2013 to 2014. Insofar as Mr Whitwell had referred to the case of **Khan [2018] UKUT 00384**, it had to be remembered that this was a judicial review case, where the task for the Tribunal was one of ascertaining "irrationality", which was not the issue before this Tribunal.

31. Finally, it cannot be emphasised strongly enough that because of the seriousness of the allegation, namely that an applicant has been "dishonest" to such an extent that "his character, conduct or associations mean that it is undesirable for him to be granted indefinite leave to remain in the UK", the burden upon the Secretary of State is all too often not easy to discharge, on well-known principles, namely, that the more serious the consequence for an applicant, the greater the burden upon he who alleges dishonesty. This was one such case, submitted Mr Youssefian, and the First Appellant, on properly found facts by the Tribunal, had only been guilty of negligence, and not outright dishonesty.

Error of Law

32. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision. I come to this conclusion, notwithstanding Mr Youssefian's able and commendable efforts to persuade me otherwise. My reasons are as follows.

33. First, the judge alluded to the possibility (at paragraph 36) that the Appellant had to furnish amended tax returns for the years 2009 to 2010, for 2010 to 2011, and for 2012 to 2013, and that this "could be indicative of an Appellant who does not take sufficient care over his tax affairs". It is, of course, true, as the judge also points out in the same paragraph, that the fact that the First Appellant had "declared his company dividends in his tax returns" suggested an applicant "who is not seeking to deliberately fail to disclose income". Nevertheless, it does not follow that for him not to declare any income at all for the years 2010 to 2011, is actually any different from a person who discloses a "lower amount from self-employment than that earned by him" (paragraph 36). In order to properly decide this question, it is important to

apply the strictures, that Mr Whitwell has pointed out to me, in the recent decision in **Khan [2018] UKUT 00384**.

34. Second, in the same way, the First Appellant claimed to have received an e-mail from his accountant "asking him to check the tax return, sign and approve it" (paragraph 13), but this was an e-mail which he failed to then produce before the Tribunal, alleging that he had deleted it (paragraph 14). It was incumbent upon the judge to decide whether this was a plausible explanation. Again, the decision in **Khan [2018] UKUT 00384** requires that such consideration be given.

35. Third, the First Appellant amended his tax documents in June 2016, prior to making his application for indefinite leave, but it had still taken him some six years to amend his tax returns, and there are amounts that are still unpaid on these returns.

36. Finally, the fact that the First Appellant is a businessman raises a question as to whether he could really so easily explain away his failings with respect to his tax affairs. These are all matters which will need to be reconsidered again by the Tribunal below, and in particular the application of the decision in **Khan [2018] UKUT 00384**, and this being so, the appropriate course of action for this Tribunal is to remit the matter below to be decided by a judge other than Judge Beach. Accordingly, in remaking my decision, I conclude that the matter properly falls to be remitted back to the First-tier Tribunal.

Notice of Decision

37. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. I remit the decision back to the First-tier Tribunal, to be determined by a judge other than Judge Beach, pursuant to Practice Statement 7.2(b) of the Practice Directions.

38. No anonymity direction is made.

39. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 3rd May 2019