Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09571/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 March 2019	**On 20 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ROSTYSLAV SALNIKOV
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms L Kenny, Senior Home Office Presenting Officer
For the Respondent: Ms G Davison, Counsel, Direct Access

DECISION AND REASONS

Background

1. The appellant is the Secretary of State and the respondent is Mr Salnikov. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where the appellant was Mr Salnikov who is a citizen of Ukraine born 3 March 1986 who applied to the respondent on 16 October 2016 for indefinite leave to remain on the basis of long residency. In a decision dated 5 April 2018 the Secretary of State refused that application. In a decision promulgated on 18

October 2018, Judge of the First-tier Tribunal Mitchell allowed the appellant's appeal on human rights grounds.

2. The background to this case, in summary, is that the appellant's application was refused under paragraph 276B(iii) and under paragraphs 322(5) on the basis that when the appellant made an application for leave on 12 October 2010 as a Tier 1 (General) Migrant he claimed earnings of £42,406 derived from self-employment between 12 August 2009 and 10 August 2010. He made a further application on 15 October 2012 declaring previous earnings of £45,611 derived from self-employment between 16 August 2011 and 15 September 2012. On both applications he was awarded 25 points in relation to the previous employment and earnings. However the Secretary of State confirmed that the appellant's income for tax year ending April 2010 was £13,633, for the tax year April 2011 was £5,930, for the tax year ending April 2012 was £12,422. (A previous decision of the First-tier Tribunal was set aside and remitted by that Tribunal on 24 August 2018 as the Notice of Hearing was not received by the appellant.)

3. The respondent relied on paragraph 322(5) of the Immigration Rules which provides as follows:

> "Grounds on which leave to remain and variation of leave to remain to enter or remain in the United Kingdom should normally be refused:
>
> (v) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security; …".

4. The judge in his findings accepted that the appellant had not provided incorrect information to the Secretary of State or attempted to deceive in any of his applications. The judge went on to consider the appeal under Article 8 and considered the public interest considerations but was satisfied that the appeal fell to be allowed.

5. The appellant appeals with permission on the grounds that the judge made a material misdirection of law in finding that the earnings figures used by the appellant in his applications for Tier 1 leave could take into account the tax deductible expenses of the appellant's business. It was argued that this was an incorrect interpretation of the Immigration Rules where paragraph 25 of Appendix A provides:

> "Where the earnings are the profits of a business derived through self-employment or other business activities:
>
> (a) the earnings that will be assessed are the profits of the business before tax. Where the applicant owns a share of the business the earnings that will be assessed are the profits of the business before tax to which the applicant is entitled."

6. It was the Secretary of State's contention that the judge erred in finding that the figures provided by the appellant to the Home Office for the purposes of immigration applications and to HMRC were not discrepant. It was asserted that the income declared for his immigration application should have been the same income declared to HMRC and that both should be net profit before tax from the self-employment, after deducting business expenses.

Error of Law Discussion

7. Ms Kenny on behalf of the Secretary of State adopted the grounds of appeal. It was her submission that the Judge of the First-tier Tribunal erred in not following the correct procedure including as highlighted in **R (on the application of Khan) v Secretary of State for the Home Department (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)**. This provides guidance including as follows:

   (i) 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. Such an inference could be expected where there is no plausible explanation for the discrepancy.

   (ii) Where an applicant has presented evidence to show that, despite the prime facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation and evidence is sufficient, in her view, to displace the prime facie inference of deceit/dishonesty.

   (iii) 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.

   (iv) For applicants 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 taxpayer 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 of dishonesty.

   (v) When considering whether or not the applicant is dishonest or maybe careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which their evidence (as opposed to asserted):

      (i) whether the explanation for the error by their accountant is plausible;

(ii) whether the documentation which can be soon 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 what 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."

8. However, this was not a case, like the paradigm case discussed in **Khan,** where an applicant had disclosed a high income to the Home Office and then subsequently made lower tax returns. It is the appellant's case all along that his applications for leave contained his gross earnings whereas the HMRC figures were net of his expenses.

9. Although Ms Kenny submitted that the judge erred in not following the steps in **Khan** and in not finding that the Secretary of State was entitled to draw an inference of dishonesty and then considering whether there was an innocent explanation, as noted at (i) of the head note of **Khan** the Secretary of State is entitled to draw an inference "where there is no plausible explanation for the discrepancy". The judge in the First-tier Tribunal was satisfied that there was a plausible explanation for the discrepancy in income, in that the appellant has always maintained, and the judge accepted for the adequate reasons given, that he had extensive expenses.

10. The judge found at [19] including as follows:

> "The appellant in his applications for the Tier 1 leave contained the gross earnings whereas figures given to the respondent by HMRC are net. The appellant has had extensive expenses. Although it requires a degree of application the appellant's account of his income and the figures revealed to the respondent from HMRC are largely congruent. The earnings of the appellant seem to be the profits of the business before tax. He is registered as self-employed and seems to have appropriately provided the correct figures to the Secretary of State as he has provided the gross figure rather than the net figure. There is no evidence that the appellant has acted dishonestly or deceitfully to the Secretary of State. …".

11. The judge went on to find that he was satisfied that the appellant had not provided incorrect information to the Secretary of State or attempted to deceive in any of his applications.

12. Although not specifically pursued by Ms Kenny, the grounds of appeal were preoccupied largely with the interpretation of what earnings should be assessed by the Home Office in applications. As relied on in the Secretary of State's grounds, these are assessed as the profits of the business before tax. The Application to set

aside/grounds of appeal to the First-tier Tribunal (which was in effect Counsel's arguments before the Judge of the First-tier Tribunal) considered the guidance on Tier 1 applications which includes as follows:

> "Assessment of previous earnings
>
> 91. We will assess your earnings. If you are in salaried employment (including a director of a company for example) we will assess your gross salary before tax. This also includes self-employed applicants who draw a salary from their business. If you earned the money in a country with no tax system, we will consider your total earnings for the period.
>
> 92. If you are self-employed and have chosen to retain the profits within the business your earnings were limited to the share of the business's net profits to which you are entitled. The appropriate proportion of the net profit of the business (that is after tax and outgoings) can therefore be counted as your gross salary. We will only consider profits made during the appropriate twelve month earnings period for which you are claiming."

13. The judge also had before him Appendix Z to the Immigration Rules which considers the attributes for Tier 1 Migrants. This states including as follows:

> "24. Where the earnings take the form of a salary or wages, they will be assessed before tax (i.e. gross salary).
>
> 25. Where the earnings or the profits of a business derived through self-employment or other business activities:
>
> (a) the earnings that will be assessed are the profits of the business before tax. Where the applicant only has a share of the business, the earnings will be assessed on the profits of the business before tax to which the applicant is entitled, and
>
> (b) the applicant must be registered as self-employed in the UK and must provide the specified evidence.
>
> …".

14. It was the applicant's case before the First-tier Tribunal and which was accepted by the judge that the appellant believed "before tax" referred to a gross figure and therefore the appellant provided a gross figure. The Secretary of State has not specifically disputed that the appellant's business had made the actual gross profit figures he claimed, rather it is the appellant's claimed interpretation of the immigration rules which the Secretary of State claimed to be dishonest.

15. Although the Secretary of State's grounds rely on the judicial review case **R (Varghasa) v Secretary of State for the Home Department [2017] JR/5167/2016**

which the authors of permission for grounds stated rejected the argument that gross self-employed income could be relied on, the extract did not support that argument and, as accepted by Ms Kenny, there was nothing further before me that might support such a conclusion.

16. Even if I am wrong and the judge should have accepted that the Secretary of State had established a prime facie case that the appellant had been deceitful (which I am satisfied has not been established) and should have considered whether there was an honest explanation, the judge was clearly of the view that the appellant had provided a plausible explanation for any discrepancy. It is plain therefore that any such error would not be material as the judge, having reviewed the evidence before him including the appellant's account of his income and the figures provided to HMRC together with the statements in support (including from his auditors and accountants) accepted the appellant's explanation that he believed that he could submit gross profit, before the deduction of expenses, as innocent. I am not satisfied that there is any material error in the judge's decision in effect that, at worst, the appellant had innocently confused what was gross and net income, in terms of the deduction of expenses, for the purposes of his application.

17. Even if the appellant was not permitted, in his immigration applications, to submit the gross profits of the business before the deductions of expenses, the judge was entitled to find for the adequate reasons he gave, which could not be said to be irrational, that there was no dishonesty in the appellant's approach.

18. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

No anonymity direction was sought or is made.

Signed Date: 19 March 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

I maintain the decision of the First-tier Tribunal to make a fee award.

Signed Date: 19 March 2019

Deputy Upper Tribunal Judge Hutchinson