Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/10671/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th February 2019	**On 8th March 2019**

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NARESH BABU PEDDI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr John McGirr, Senior Home Office Presenting Officer
For the Respondent: Mr Zain Malik, instructed by AWS Solicitors

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department and to avoid confusion I shall refer to the Secretary of State as being, "the claimant". The respondent is a citizen of India who was born on 25th October 1984.

2. The respondent appealed to the First Tier Tribunal against the claimant's decision of 26th April, 2018 refusing to grant him indefinite leave to remain in the United Kingdom on the basis of having completed ten years residency. His appeal was heard by First-tier Tribunal Judge Bibi, sitting at Taylor House on 15th November 2018. The claimant asserted that the respondent's immigration history and documents provided meant that his application fell for refusal under paragraph 322(5) of the Immigration Rules.

3. As part of his previous Tier 1 (General) leave application dated April 2011, the claimant's records showed that the respondent had claimed that his previous earnings were £36,475.0,7 covering the period 1st April, 2010 to 1st April 2012. The claimant also claimed that as part of a Tier 1 (General) leave to remain application dated 29th May 2013, Home Office records showed that the respondent's claimed previous earnings were £35,886.13 during the period 6th May, 2012 to 5th May, 2013. However information provided to the claimant by HMRC showed a different situation. This showed a lower income. In the case of one complete financial year it showed difference of some £9,000 and in another financial year it showed a difference of £4,000. In the year 2013/2014 a similar comparison showed a difference of just under £200.

4. The claimant did not accept the respondent's explanation for these errors which he said were errors made by his previous accountants. The claimant concluded that the respondent had been deceitful or dishonest in his dealings with either the Revenue or with the UK Borders Agency. The claimant concluded that the respondent amended his tax return only when intending to submit an application for settlement.

5. The judge examined all the evidence and this included a statement from the respondent's current accountant. The judge was satisfied that the claimant had discharged the evidential burden by supplying evidence of significant discrepancies between the income figures submitted by the respondent to HMRC for the purposes of tax and those submitted to the claimant for the purpose of obtaining leave. She correctly went on to address the issue of discrepancy, but she found that the respondent had put forward an innocent explanation for the discrepancy for the tax year 2013/2014, indeed she was satisfied as to the respondent's explanations for the three discrepancies. She concluded that the respondent had been credible and noted that he paid back overdue tax to HM Revenue and Customs, acknowledging the error made by his accountants. She concluded that the claimant had not discharged the burden of demonstrating that it was not probable that the respondent used deception in declaring his income to either HMRC or inflated his earnings to the claimant. What she said at paragraph 49 is this,

> "The most that can be said about him is that he was somewhat naïve, placed too much trust in his accountant and failed to exercise sufficient scrutiny himself of the figures they submitted to the HMRC on his behalf. The refusal is right to say that the ultimate responsibility for ensuring that the correct information is given to HMRC fell on the respondent rather than his accountants. Yet the [claimant] does not (and realistically could not) argue that this was to amount to conduct or character such as to engage paragraph 322(5)."

She refers there to *AA (Nigeria) v Secretary of State* [2010] EWCA Civ 773. She found at paragraph 50 that the respondent's factual basis for engaging paragraph 322(5) was not made out. She allowed the respondent's appeals.

6. I am most grateful to Mr Malik and to Mr McGirr today for their assistance. Mr Malik who was also Counsel in *Khan v Secretary of State for the Home Department*

(dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC) pointed out that it was a decision in a judicial review. He took me to the guidance at paragraph 37 and I feel I can do no more than to express the hope that in future if similar applications are made by applicants that Presenting Officers are asked to familiarise themselves with paragraph 37 of the decision and not simply the headnote.

"37. In order not to fall into the trap which I consider that the Secretary of State (or those acting on her behalf) fell into on this occasion, it may assist for me to give some guidance in relation to the decision-making process where there have been discrepancies between previous applications for Leave to Remain (with points claimed on the basis of earnings or profits) and tax returns which have been made covering the same period. This guidance stems from my observations at paragraphs 32-34 above:

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

(ii) 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.

(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) 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.

(v) 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.

(vi) 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.

(vii) 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.

(viii) 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."

7. The respondent repaid the under paid tax as soon as his attention was brought to the matter and the judge was entitled to conclude as she did at paragraphs 41, 43, 45, 46, 48, 49. She accepted the respondent's innocent explanation and on that basis to allow the respondent's appeal. I find there to be no errors of law and the decision is upheld.

Richard Chalkley
A Judge of the Upper Tribunal.

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason. The appeal was allowed.

Richard Chalkley
A Judge of the Upper Tribunal.