Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01907/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2018	**On 05 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NOSHERWAN ADIL KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha of the Specialist Appeals Team
For the Respondent: Mr A Jafar of Counsel instructed by Mayfair Solicitors

DECISION AND REASONS

The Respondent

1. The Respondent (the Applicant) is a Pakistani born on 19 August 1986. He is single and has no dependants. On 15 May 2007 he entered with leave as a student. He obtained further leave within the Points-Based Scheme which expired on 10 September 2017. On 17 August 2016 he applied for indefinite leave to remain as a

Tier 1 (General) Migrant which application on 26 July 2017 he renewed or varied to an application for indefinite leave on the basis of 10 years' lawful residence.

The SSHD's decision

2. On 19 December 2017, the Appellant (the SSHD) refused the Applicant's application by reference to paragraphs 322(5) and 276B of the Immigration Rules because the Respondent considered the Appellant had been deceitful or dishonest in his dealings with HM Revenue & Customs or UK Visas and Immigration or both. The Respondent came to this conclusion because on 13 September 2016 the Applicant had submitted amended tax returns for the year ending 5 April 2011.

3. In the original tax return for the year ending 5 April 2011 the Applicant had declared a self-employed income of £12,362 and in his application for further leave under the Points-Based Scheme of 29 March 2011 he had declared a self-employed income of £27,158.

4. On 17 August 2016 the Applicant had applied for indefinite leave which application he had withdrawn on 19 August 2016 after being requested to provide evidence of his tax affairs. On 13 September 2016 he had submitted an amended tax return for the year ending 5 April 2011 and on 8 September 2017 HMRC issued a revised tax calculation showing self-employed income of £27,158.

Proceedings in the First-tier Tribunal

5. The Applicant appealed and by a decision promulgated on 22 October 2018 Judge of the First-tier Tribunal Adio accepted the reasons given by the Applicant for the need to have amended his 2011 tax return and why the amendments had not been submitted until 13 September 2016. He concluded the Applicant had not been deceitful or dishonest and allowed the appeal.

6. The SSHD sought permission to appeal on the basis the Judge had erred in law. It was not open to the Applicant to place the blame on his accountant for supplying incorrect information in his 2011 tax return because he was responsible for filing a timely and correct tax return. He had not explained why he had not made an appropriate check of the information given in the original 2011 tax return, as was his obligation. The SSHD relied on the judgment in *R (Abbasi) v SSHD JR [2016] UKUT 13807* and referred to the timing of the filing of the amended tax return.

7. On 20 November 2018 Judge of the First-tier Tribunal Pickup granted permission to appeal.

The Upper Tribunal Proceedings

Submissions for the SSHD

8. Ms Cunha relied on the grounds and referred to the recent judgment in *R (Shabaz Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC)*, in particular paragraphs 27(iv) and 32-34. At paragraph 16 of his decision the Judge

had placed undue reliance on the fact that HMRC had not sought to levy any penalty on the Applicant.

9. She referred to the test identified in *R (Shabaz Khan)* at paragraph 37(iv) which states:

> "… 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 taxpayer to confirm that the return was accurate and to have signed the tax return, and furthermore that 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 full of the accountant or, alternatively, the Applicant's failure to remedy the situation itself justifies a conclusion that he has been deceitful or dishonest …"

The Judge had needed to look at the Applicant's overall knowledge at the relevant time and not just the matter of the claimed error on the part of his accountant. The Judge also not addressed the issue of delay in submitting an amended return to HMRC shortly before making an application to UKVI for indefinite leave to remain. The Judge had not questioned the character of the Applicant in the light of his substantial breach of HMRC's requirements. Further, the Judge had not made an assessment whether the explanation proffered by the Applicant's accountant was plausible.

10. The error corrected in the amending return was substantial, a matter of some £12,300. There was no evidence for any explanation for the delay in submitting the amended return but the Judge had failed to comment on this. The references from several of the Applicant's friends did not address the issues which were or should have been before the Judge.

11. In this light the Judge's decision was not safe and so should be found to contain a material error of law.

Submissions for the Applicant

12. Mr Jafar submitted the Judge had noted and set out the evidence about the delay in submission of the amended return at paragraphs 6-9 of his decision. He had considered and accepted the explanations from the Applicant and his accountant and noted the lack of any HMRC penalty. The SSHD had taken issue with only one tax return and the Applicant had address this when interviewed by the SSHD as mentioned at paragraph 10 of his statement of 10 September 2018.

13. He referred to the ministerial statement to the House of Commons on the SSHD's approach to applications for Indefinite Leave to Remain where there is an issue about an applicant's tax returns and the deployment of paragraph 322(5) as a basis for refusal. In particular, he drew my attention to the comment at Hansard: Commons/2018-06-13/debates/F984D928 at page 34 of 36:-

> "In 50 of the cases we have considered, there has been a discrepancy in excess of £10,000 between the income claimed to HMRC and the income claimed to UKVI, and 34 of the applicants only sought to amend their tax returns within the 12 months preceding the submission of an application."

14. I note in the Applicant's case the discrepancy is in excess of £10,000 and he delayed amending the relevant tax return for several years. The amendment was made shortly after the first application for indefinite leave and just within 12 months of the amended or renewed application leading to the decision under appeal.

15. The SSHD had failed to identify what in the Judge's decision amounted to a material error of law. He referred to paragraph 14 of the Applicant's Response on the Procedure Rule 24 relying on paragraph 21 of the judgment of Collins J in *R (Samant) v SSHD [2017] UKUT*

> "… there is some force in submission that the fact that no penalty has been imposed, which would be the case if HMRC did not take the view that there was any carelessness, let alone dishonesty, then why should the Home Office, or UKBA as it then was, take a different view…… that it is only if there was a deliberate failure to produce proper figures that 322(5) should properly be applied. If he was indeed badly advised or if it was me carelessness, that would not on its own sufficed justify 322(5)."

Collins J had given weight to the letter from the accountant in *R (Samant)*. Mr Jafar referred to paragraph 34 in *R (Shahbaz Khan)* in which Spencer J had noted the SSHD was obliged to consider evidence pointing in each direction and should justify any conclusion by reference to that evidence.

16. Judge Adio had set out the Applicant's immigration history, referred to the amendment of a single year's tax return and the explanation for that amendment by his accountant. The Judge had found that explanation innocent and given reasons for such finding. The SSHD had not argued the case that the Judge failed to consider evidence or that his fact-finding exercise was perverse. It was for the Judge to assess whether the Applicant had been dishonest or deceitful. While HMRC's criteria for the imposition of a penalty may not be the litmus test for deceit or dishonesty, the fact that no penalty had been imposed was a relevant consideration which the Judge was entitled to and did take into account at paragraph 16 of his decision.

17. The 2011 return had been the Applicant's first return in which he had been assisted by a student accountant who had made an "input" error and the Judge had been entitled to reach the conclusion that this was innocent. There was no material error of law in the Judge's decision.

Response for the SSHD

18. Ms Cunha emphasised that the Applicant had been under a duty to check his tax return and had failed to give an explanation for this omission in his witness statement and at the hearing before the Judge.

19. She referred again to paragraph 37(4) of *R (Shahbaz Khan)* and argued that the Judge had not taken adequate account of this at paragraphs 14 and 16 of his decision. Mr Jafar interjected that this was a new point which had not previously been pleaded in the grounds or in the original submissions for the SSHD.

20. Ms Cunha responded that the Judge had failed to take a holistic approach to the consideration of the evidence and that the reasoning in paragraphs 3, 6, 7 and 12 of his decision was deficient and the decision should be set aside. Mr Jafar interjected again that the grounds for appeal argued that the Judge had given undue weight to evidence but to succeed on the basis of the grounds for appeal as pleaded the SSHD had to show the Judge's findings were perverse.

Consideration

21. The SSHD at page 3 of the reasons for refusal of indefinite leave referred clearly to the possibility the Applicant had been deceitful or dishonest in his dealings with HMRC or UKVI. The evidence at the hearing before Judge Adio focused exclusively on the dealings of the Applicant with HMRC. The issue of his dealings with UKVI was not addressed in cross-examination or in submissions and this is fairly reflected in the Judge's decision.

22. The SSHD's grounds for appeal do not raise the matter of the Applicant's dealings with UKVI. Looked at in the context of the entire grounds for appeal, the reference to the earnings disclosed to UKVI in the first ground for appeal is based on UKVI accepting the income declared to HMRC as the actual income for purposes of assessing the application for further leave. On this basis and having regard to the focus of the proceedings in the First-tier Tribunal, I find the SSHD has not taken the point that the Applicant's original under-declaration of income to HMRC requires him positively to prove his income in any way other than by showing what income has been declared to and accepted by HMRC.

23. The "input" error referred to by Mr Jafar was the inputting of the Applicant's net profit as turnover and then deducting expenses; in effect deducting expenses twice over. The fact remains that neither the SSHD nor the First-tier Tribunal has seen evidence to support the claimed net profit. The SSHD has not pursued this latter issue at any stage subsequent to the date of the decision under appeal.

24. The Judge accepted the explanation of both the Applicant and his current accountants that the error had arisen as mentioned in the preceding paragraph and the accountants' professional view that since HMRC had not levied any penalties and the tax been paid in full there was no evidence of deceit or dishonesty on the part of the Applicant. It was not argued that the Judge had failed to consider any relevant evidence or given inadequate reasoning for his conclusions. There was no submission of perversity on the part of the Judge.

25. The authorities provide that the decision maker must look at the evidence in the round before reaching a decision, for which reasons must of course be given, to show that an individual has been deceitful or dishonest in dealings with HMRC or UKVI.

The Judge did so and the grounds for appeal did not argue that he had been perverse in the conclusions which he reached.

26. An application for permission to appeal is not the appropriate place for either party to seek to re-open the First-tier Tribunal hearing because of a desire to argue the case on a different basis. In this appeal, it is evident the SSHD put his case on the basis of what the Applicant had declared to HMRC and had not sought to argue that regardless of his dealings with HMRC, he had to show evidence beyond that which was submitted with the original application for leave to remain to establish the genuineness of his claimed earnings declared to HMRC.

27. For these reasons, the SSHD has failed to show that there is a material error of law in the decision of the First-tier Tribunal and it shall therefore stand.

Anonymity

28. There was no request for an anonymity direction and having considered the appeal I find none is warranted.

SUMMARY OF DECISION

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

The effect is that SSHD's appeal is dismissed and the Applicant's appeal is successful.

Anonymity direction not made.

Signed/Official Crest Date 23. i. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal