Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02604/2018
HU/12362/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st January 2019	**On 4th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

MR ALI AFZAL (FIRST APPELLANT)
MRS BRERA SHAFIQUE (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J Gajjar, MYM Solicitors
For the Respondent: Ms Everett, a Senior Home Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal L Murray promulgated on 9th October 2018 following a hearing at Columbus House in Newport on 24th September 2018.

2. At the appeal hearing before me today in the Upper Tribunal, the Claimant has been represented by Mr Gajjar of Counsel and the Secretary of State has been represented by Ms Everett, the Senior Home Presenting Officer.

3. Although Mr Afzal and Mrs Shafique were the Appellants before the First-tier Tribunal, as this is the Secretary of State's appeal for the purposes of clarity in this decision I will refer to Mr Afzal and Mrs Shafique as 'the Claimants' and to the Secretary of State as the 'Respondent' or 'the Secretary of State', so it is clear given that the Secretary of State is the Appellant before the Upper Tribunal, so there is no confusion.

4. The Claimants are husband and wife and although Mrs Shafique made a separate application and she has a separate appeal number, it was agreed by the Respondent at the hearing before the First-tier Tribunal that effectively her appeal was dependent upon that of her husband, Mr Afzal, and that if his appeal succeeded so did hers.

5. At the First-tier Tribunal it was found that Mr Afzal's application for leave to remain under paragraph 276B of the Immigration Rules on the basis of long residence, was refused by the Secretary of State pursuant to a consideration of paragraph 322(5) of the Immigration Rules as amended, on the basis that a ground upon which leave to remain, or variation of leave to remain, in the United Kingdom should normally be refused under subparagraph (v) is '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.' The Respondent considered it undesirable for him to remain in the United Kingdom because it was considered that he had been deceitful or dishonest in his dealings with HMRC by failing to declare his claimed income or earnings, by falsely representing his income in order to obtain leave to remain in the United Kingdom.

6. Judge Murray when setting out the application reasons for refusal letter went on to state that the information that the Claimant had included with his previous Tier 1 applications was compared with the information provided by HMRC regarding earnings he declared to them for the tax years 2009 to 2010, 2010 to 2011, and 2012 to 2013. He had submitted a Tier 1 application for leave to remain on the 31st June 2011. In this application he declared earnings of £37,987 over the period from 11 March 2010 to 10 March 2011 and he was awarded points based on this income. He claimed that these earnings were from salaried employment of £6000 for the period 31st January 2011 to 28th February 2011 and self-employed earnings of £31,987 for the period 11 of March 2010 to 10 March 2011. HMRC data showed that he filed a 2009/2010 tax return in which he declared £13,108 in earnings and a 2010/11 tax return on which he declared £12,847 in earnings. HMRC data showed that he declared on his self-assessment tax return for 2009/10 filed on 27 January 2011 that he had a turnover of £2175 and a loss of £2210. On 3 February 2011 he received a self-assessment repayment of £425.43.

7. In the original refusal it was stated that according to the information he had provided to HMRC over both tax years of 2009/10 and 2010/11 Mr Afzal declared a total earning of £25,955, but had declared earnings of £37,987 for the 12 months from 11 March 2010 to 10 March 2011 when he applied for further leave to remain. It was stated that it would therefore be impossible for him to have had a turnover and profit as claimed.

8. Mr Afzal submitted a Tier 1 general application for leave to remain on 18 June 2013. In this application he claimed £38,414.24 in earnings over the period from 1 August 2012 to 31st March 2013 and he was awarded points based on this income. He claimed that these earnings were from salaried employment with Islamic Relief of £15,242 and Marks & Spencer of £5450. He also claimed to have received dividends of £17,221 during the period 1st August 2012 to 31st of March 2013 which fell into the financial year 2012 to 2013. HMRC's data show that he filed a 2012 – 2013 tax return in which he declared £20,692 in earnings. According to the information he had provided to HMRC for the tax year 2012 to 2013 he declared a total of £20,692, but had declared earnings of £38,414.24 for a further eight months from 1 August 2012 to 31 March 2013 when he applied for further leave to remain. HMRC data showed that he received dividends of £17,721 in the following tax year of 2013/14. However, there was no record that he had declared an income from dividends to HMRC for the financial year 2012 – 2013.

9. The Secretary of State acknowledged that paragraph 322 (5) of the Immigration Rules was not a mandatory refusal, however the evidence submitted did not satisfactorily demonstrate that the failure to declare to HMRC at the time his self-employed earnings declared on the previous application for leave to remain in the United Kingdom as a Tier 1 Migrant was a genuine error. It was noted that there would have been a clear benefit to Mr Afzal either by failing to declare his full earnings to HMRC with respect to reducing his tax liability or by falsely representing his earnings to UK Visas and Immigration to enable him to meet the points required to obtain leave in the United Kingdom as a Tier 1 migrant. It was therefore concluded by the Secretary of State that he did not meet paragraph 276B (ii) (c) of the immigration rules and his application for indefinite leave to remain on the grounds of long residence was therefore refused.

10. Judge Murray when considering the Claimants' appeal noted that he heard evidence from both Claimants and went on in his findings between paragraphs 17 and 35 to make findings in respect of the Claimants' appeal. The judge quite properly considered the situation under paragraph 322(5) of the Immigration Rules, that being the basis upon which the Secretary of State refused the Claimants' application.

11. The judge noted at paragraphs 22 and 23 that in coming to his conclusions he had to consider whether or not the Claimant had employed dishonesty or deception and that such a refusal would not be based upon genuine mistakes.

12. The judge stated at paragraph 26 that the Claimant relies upon two letters from his accountants to support his case that he had not employed dishonesty or deception in relation to his declaration of earnings to HMRC. The first was the letter at page 53 of his bundle dated 1 May 2018. The judge stated:

> "26. … *First Accountancy Ltd, state that they confirmed that they were acting as his accountants and were responsible for preparing and filing his self-assessment tax returns for the years 2012/13 and 2013/14. They state that during these years, the Appellant was director and sole shareholder of Techno Consultancy Ltd. They state that Techno Consultancy Ltd had its financial year ending on 31 July, which would overlap with the personal tax*

year of the Appellant, since the tax year for self-assessment closes on 5 April. Any dividends paid up to 31 July of a calendar year will be declared in the tax return of the following year. They state that therefore dividends paid to the Appellant from Techno Consultancy Ltd during the financial year from 9 July 2012 to 31 July 2013 were declared in his self-assessment for the tax year 2013/14 and not 2012/13. They further state that to the best of their knowledge and belief, this treatment is correct in declaring a dividend in either tax year and will not have given any tax relief to the Appellant. They also confirm that during the dealings with him they had found him honest and trustworthy.

27. *The second letter from the Appellant's accountants is at page 54 of his bundle and is dated 15 May 2018. In this letter his accountants state they write to clarify matters pertaining to his self-assessment tax return for the year 2010 to 2011. They state that they were appointed his accountants for the year ending 5 April 2013 and had been responsible for the filing of his self-assessments since their appointment to date. In February 2016, the Appellant asked to provide all the records for the last six years in order to make his ILR application. Upon reviewing his tax records for the last six years they discovered that his self-assessment income had been omitted from his self-assessment tax return for the year 2010/2011. They therefore informed the Appellant and suggested he file an amended tax return for the year with HMRC. They also wrote to his previous accountants who were responsible for preparing and filing his self-assessment tax returns in that period to enquire about that omission but they had not received any response. Upon receiving instructions, they identified and rectified under sections 29 and 36 of the Taxes Amendments Act 1970 without imposition of any penalties for him for the tax year 2010/2011 and on 16 May 2016 which included his self-assessment income of £31,987. This amended tax return was accepted by HMRC and the Appellant paid any outstanding taxes immediately. His accountants state that they believe the omission was genuine on his part and they had been acting for him for the last number of years and believed he was an upright and law-abiding person.*

28. *The Appellant has produced the letters from HMRC dated 15 June 2016 to confirm that his tax return for the year ended 5 April 2011 was amended on 19 May 2016. The letter states that the Appellant did not send the amendment at the right time and they viewed this as a failure to take reasonable care with his tax affairs for the period. This meant that he had more income tax to pay. They had made an assessment and updated his self-assessment statement to include this. As of 15 June 2016 his self-assessment statement showed that he was due to pay a total of £2480.99 which included the additional tax due on their assessment. At page 58 of the Appellant's bundle is a further letter informing him of the liability to pay tax. According to the Appellant's accountant he paid the imposition of outstanding taxes immediately. "*

13. The judge went on in paragraph 29 to say that the Respondent has not suggested that the Claimant has not paid any tax that he is owing and the judge found that HMRC

had taken no further action after the Claimant had amended his tax return. The judge found that the Claimant's accountant's letters fully explained why there were seeming inconsistencies in both the 2012/13 and 2013/14 years, namely the fact that dividends were paid or declared in the tax return of the following year and that in relation to the tax years 2010/11 the Claimant's self-assessment income had been omitted from his tax return, but his representatives acted immediately to correct the error when it was discovered.

14. The judge stated, the fact that no further action was taken against the Claimant was strong evidence it was not considered that any fraud had been committed. The judge said it was also clear that his present accountants took steps to find out from his previous accountants why this income had been omitted from his previous tax return but no response was made.

15. The judge acknowledged that whilst it is true that the Claimant was ultimately responsible for the information on his tax return, he was acting under the instruction and advice of professionals and the judge stated he considered it to be of relevance that his current accountants have been unable to obtain a response from his previous accountant. The judge therefore found that Mr Afzal had made an honest and genuine mistake which has subsequently been corrected and all monies paid due and that account was plausible and supported by documentation both from HMRC and the accountants. The judge found that it was a genuine mistake and that he had not used deception or dishonesty with his dealings with HMRC or the Home Office and that there is nothing in his conduct, character, associations or otherwise which rendered it undesirable for him to remain in the United Kingdom.

16. The Secretary of State seeks to appeal against that decision for the reasons set out within the Grounds of Appeal. That document is a matter of record and therefore I do not intend to read it out in its entirety but in summary, it is argued that the First-tier Tribunal Judge made a material misdirection in law.

17. At paragraph 1 it is argued the Tribunal erred in taking into account that no penalty had been imposed by HMRC and that the ultimate responsibility for the tax return lies with the taxpayer and it is argued that the Tribunal deviated from the appropriate way of assessing such circumstances and that the Judge should have had regard to the judicial review cases of **Samant JR/6546/2016** and **Abbasi JR/13807/2016** in which it was said that findings which make findings relating to the relevance of the actions that the HMRC take against Claimants. The quotation is made from paragraph 22 of **Samant** which states:

> "*The difficulty again here is that we have no evidence from the Revenue as to whether they did consider the question of penalty or what steps, if any, they decided to take and the reasons why they decided as they did. It, in my judgement, cannot be assumed that in every case, having regard to what one knows to be the pressures on HMRC, that they would have gone through the exercise that maybe they should have gone through, and decided that they were satisfied that there was not even carelessness. It seems to me that in any given case, depending on the amounts, depending on the circumstances, HMRC may well decide that the effort in reaching particular conclusions frankly is not*

> *justified in all the circumstances. I am afraid that I do not think that the fact that HMRC has decided not to take further action can indicate that the decision of the Secretary of State is one which was irrational*."

Paragraph 75 of **Abbasi** was quoted in which it was stated:

> "*That HMRC has not yet seen fit to issue penalty notice is neither here nor there. No doubt HMRC has leeway within which to issue a penalty notice or institute proceedings and time would only start running when the declaration was made in late 2015. (I note the letters to HMRC were undated). In any event what the HMRC does or does not do is not necessarily relevant to actions by the Secretary of State in deciding applications for indefinite leave to remain.*"

In the Grounds of Appeal the Secretary of State argued that if that approach had been adopted then the Tribunal would have decided that action or inaction by HMRC was of no relevance to the immigration matter and that the Claimant is responsible for his own tax affairs and that cannot be passed to the accountant. It was further argued in paragraph 5, there was a gap in the evidence and there is no evidence to support the assertions that the Claimants had made regarding his previous accountants and there is nothing from those accountants to assist the Claimant and that the evidence from his new accountant was not tested by cross-examination.

18. In paragraph 6 of the grounds it is argued that ultimately the liability for handling errors rests with the Claimant who is ultimately responsible for the tax declaration and that he should have reasonably suspected that he was not declaring the right amount given that HMRC had paid him money, given that he conducted his business at a loss rather than the amount he declared to UKVI for the benefit of his ILR application. The duration of the errors, it is argued, do not support the Tribunal's finding of an innocent mistake. It is argued that given the sums involved and timing of the efforts to rectify the errors, the application of paragraph 322(5) was quite proper and the Tribunal erred in not pursuing this approach.

19. Permission to appeal in this case was granted by First-tier Tribunal Judge Keith on 14th December 2018 who noted that following the Upper Tribunal decision in the case of **R (on the application of Khan) (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** that for an Claimant to blame his or her accountant will not be an end to the matter and that the Claimant will have known of their earnings, so that where an Applicant does not remedy the situation within a reasonable time that may allow a conclusion of deceit or dishonesty. It was said that the decision may disclose an arguable error of law or a chance of the judge taking account of the irrelevant matters or as to how the conclusion on delay impacted upon the Claimants' credibility. Permission to appeal on both grounds was given.

20. I am most grateful to the helpful submissions of both Ms Everett on behalf of the Secretary of State and also Mr Gajjar on behalf of the Claimants which I have fully taken account of in reaching my decision, which are recorded within the Record of Proceedings although I refer to the relevant parts of any of those submissions when making my findings.

My Findings on Error of Law and Materiality

21. Although in this case the Secretary of State seeks to rely upon both the cases of **Samant JR/6546/2016** and **Abbasi JR/13807/2016** and quotes paragraph 22 of **Samant** and paragraph 75 of **Abbasi**, both of those cases were judicial review cases rather than statutory appeals, but as Mr Gajjar on behalf of the Claimants quite correctly points out and is also quite properly conceded by Ms Everett on behalf of the Secretary of State, those cases were dealing with the question of rationality in terms of whether or not it was irrational for the Home Office to look beyond whether or not HMRC had imposed a penalty or not. The Secretary of State was, in those cases, found not to be irrational in terms of looking beyond a simple failure to impose a penalty or whether penalty had been imposed. In **Samant** Mr Justice Collins made the point there that there was no evidence from the Revenue as to whether they considered the question of penalty or what steps, if any, they decided to take and the reasons why they decided as they did. He said 'In my judgment, it cannot be assumed that in every case, having regard to what one knows to be the pressures on HMRC, they would have gone through the exercise that maybe they have gone through, and decided that they were satisfied that there was not even carelessness' at [22]. The Court in **Abbasi** made the point at [75] that what HMRC does or does not do is not necessarily relevant to actions by the Secretary of State in deciding applications for indefinite leave to remain. But what those cases were saying was that the question as to whether or a penalty was imposed is not determinative of the application in that case, or in this case, the appeal.

22. The fact that it was found that the Secretary of State was not acting irrationally in terms of not simply relying upon whether penalty is imposed does not mean, as argued in paragraph 4 of the Grounds of Appeal, that the question of imposition of a penalty or otherwise is irrelevant to the immigration matter has not relevance. Quite clearly, as properly conceded by Ms Everett, had there been a penalty imposed that is something that the Secretary of State herself would have wanted to rely upon in saying that this was in evidence of dishonesty.

23. But unlike in the **Samant** case, in the case of these two Claimants, the First-tier Tribunal Judge quite properly made reference to a letter from HMRC to Mr Afzal dated 15th June 2016 in which the HMRC stated:

> "Your amendment to your tax return for the year ended 5th April 2011 should have been with us by 31st January, twelve months after the end of the tax year to which the tax return relates. For example the amendments to the 2011/12 tax return should have been received by us by 31st January 2014.
>
> However we did not receive this amendment until 19th May 2016. You did not send us your amendment at the right time. We view this as a failure to take reasonable care with your tax affairs for the above period. You have more income tax to pay."

The Judge went on to find that there was actually additional tax to pay totalling £2,480.99. Unlike in **Abbasi,** in this case the HMRC has provided evidence in that letter as to what their view as to the late amendment to that tax return was, namely

that it was a failure to take reasonable care with his tax affairs for the above period by Mr Afzal. Quite clearly, that in itself is not determinative of the matter and the judge had to consider all of the evidence in the round, which the Judge did in this case, but it was evidence the judge was entitled to take into account. That clearly is relevant evidence. The suggestion from the Secretary of State that it should have been ignored, is in my judgment, simply wrong.

24. The Secretary of State goes on to argue that there are gaps in the evidence and although the Claimant sought to blame his previous accountants and tax advisors, there was no evidence from them in support of his assertions and that is was said that he had visited the accountant's previous office had been unable locate their new offices and there was nothing from the accountants to assist the Claimant. In that regard, it is true that there was no evidence from the previous accountant, but the judge did take that into account. At paragraph 27 of the judgment the judge noted that the new accountants had written to the previous accountants who were responsible for preparing and filing his self-assessment tax returns in the period and to enquire about that omission, but they had not received any response. The judge again also noted that responsibility for paying the taxes and for getting the tax returns correct lay with the Claimant. However, the Judge heard from the Claimants and considered the evidence before the Tribunal and accepted the explanations for the seeming inconsistencies. It is not an error of law for a Tribunal to believe a Claimant. The Judge was entitled to accept the explanations on the evidence available.

25. In this case the First-tier Tribunal Judge has made clear findings which are cogent and well-reasoned, that in respect of the discrepancies for one of the tax years that that resulted for the 2012/13 and 2013/14 years that that resulted from an overlap of the dividends payable with the financial year for Techno Consultancy Ltd ending on 31st July, which would overlap with the personal tax for the Claimant, as the tax year for self-assessment closed on 5th April.

26. In respect of the other discrepancy in terms of the self-assessment income having been omitted from the self-assessment tax return for the year 2010/11 the judge found that once that discrepancy had been spotted by the Claimants' new accountants that the amended tax return was filed and that the Claimant had paid the tax due and owing immediately upon the tax returning being accepted by HMRC. The judge accepted that effectively these were innocent mistakes and that the Claimant Mr Afzal had not exercised dishonesty in respect of his dealings with the Home Office or HMRC and that it was a genuine mistake on his part. In my judgment those were findings open to the judge on the evidence in this case.

27. Although Ms Everett quite properly argues that obviously there was a long delay before the amended tax return was put in, obviously the Judge has taken account of that delay, as also did the HMRC authorities when noting that there had been that delay in terms of the period between the 31st January 2014 when any amendments to the 2011/2012 tax return should have received by them in the time that they actually did receive that amendment in 2016. The judge was entitled to consider the fact that the HMRC themselves had not found that was dishonest but was simply a failure to

take reasonable care by Mr Afzal with his tax information. The judge has considered the question of dishonesty and deception and has given clear, cogent and sufficient reasons for finding that this was an innocent mistake.

28. The Upper Tribunal decision in the case of **R (on the application of Khan) (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** clearly states that the fact that whether or not an Appellant seeks to blame his or her accountant will not be the end of the matter and that failure to remedy the situation within a reasonable time may allow a conclusion of deceit or dishonesty, however it is not authority that it has to be treated as deceit or dishonesty. It is still a matter for the judge having considered the evidence and having heard from the witnesses including in this case the two Claimants themselves as to whether dishonesty had been exercised. The case of **Khan** is not authority for the fact that delay in and of itself is conclusive on that issue. The judge had the benefit of hearing from the two Claimants and made findings on credibility and their honesty which were open to him on the evidence.

29. In those circumstances the decision of First-tier Tribunal Murray does not disclose any material error of law and is maintained. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

30. The decision of First-tier Tribunal Murray does not contain a material error of law and is maintained. The Secretary of State's appeal is dismissed.

31. The First-tier Tribunal Judge did not direct there to be any anonymity direction and no such direction has been sought before me and I therefore do not order anonymity in this case.

Signed Date 31st January 2019

R McGinty
Deputy Upper Tribunal Judge McGinty