Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: HU/03924/18

THE IMMIGRATION ACTS

At: Field House
On 21 January 2019

Decision & Reasons Promulgated
On 1 February 2019

Before:

UPPER TRIBUNAL JUDGE JOHN FREEMAN

Between:

SULEMAN IDREES

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Paul Richardson (counsel instructed by Chauhan)
For the respondent: Miss Alexandra Everett

DETERMINATION AND REASONS

1. This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Anita Coaster), sitting at Newport on 26 June 2018, to dismiss a human rights appeal by a citizen of Pakistan, born 1983.

2. The appellant arrived as a student in 2007, and had further leave to remain as a tier 1 general migrant till 2016. Before that ran out, he applied for indefinite leave to remain, which in 2017 he varied to an application for the same on a long residence basis. On 27 January 2018 that was treated as a human rights application, but refused, because of what had happened in 2010 – 11. For that year, he had declared an income of £19, 962 to HM

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

Revenue and Customs [HMRC], which would not have been enough for him to get further leave to remain; but to the Home Office he had claimed no less than £35,508.59.

3. The appellant blamed his former accountant for what had been a discrepancy of nearly 50%. In 2012 he had gone to another firm, who had advised him he was £671 in arrears on the previous year, and should ask HMRC for his 'paperwork'; but he did not do so. He had also paid the first accountant £3,000 in cash, without a receipt, on the basis that it would be used to settle his tax bill, and another £300 by way of fees; but, when he went to his office to look for him, he was no longer there. The appellant neither sought the help of the police, nor any regulatory agency. However in May 2016 he did file an amended return for 2010 – 11, and paid the £4,000 required by HMRC to settle the arrears, without being required to pay a penalty.

4. The judge took a great deal of trouble with her decision, and made detailed findings of fact at paragraphs 37 - 46, in which she rejected the explanation put forward by the appellant. The reason permission to appeal was given was on her approach to particular points, set out in the grounds of appeal (very clearly and concisely drafted by Mr Richardson) which may as well be taken in order.

5. Grounds 1 and 2 go together: here the judge is criticized for not making a finding as to whether the appellant had misled HMRC, or the Home Office, as to his income for 2010 – 11. This is said to be important in reaching a decision (which the judge is also criticized for not doing) as to whether any misconduct involved justified refusing the application under paragraph 322 (5), rather than on its merits. That part of paragraph 322 is headed 'Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused', implying a discretion under the Rules, which was for the judge to review and, if necessary, reconsider for herself.

6. The rule itself, so far as relevant, requires consideration of 'the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct …'. There is a very useful decision, on judicial review, discussed before me, by Martin Spencer J in *Khan (Shahbaz)* (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC), and it is worth setting out the judicial head-note here.

> (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 prima 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 prima facie inference of deceit/dishonesty.*

7. That decision includes further useful guidance on the approach to be adopted (by the Secretary of State, but of course also for judges on appeal) at paragraph 37: sub-paragraphs (i) and (ii) represent what appears in the head-note.

(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.

8. Sub-paragraph (v) requires factors on both sides to be considered, while (vi) directs attention to the following questions:

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.

9. Entirely realistically, the grounds of appeal do not criticize the judge for failing to note the principle set out by Martin Spencer J at (iii): she was clearly very well aware of the consequences for the appellant of his appeal being dismissed on 322 (5) grounds. The remaining principles fully bear out the approach taken by the judge in rejecting the appellant's explanation, and so I return to grounds 1 and 2.

10. Clearly, on the judge's findings of fact, either HMRC or the Home Office had been grossly deceived about the appellant's income in 2010 – 11. As Mr Richardson accepted, it was of course in his interests to minimize his income for tax, and to maximize it, at least to the level required by the Rules, for immigration purposes. The way the judge dealt with this point appears at her paragraphs 46 – 48:

46. … I find that the Appellant has failed to discharge the standard of proof to rebut the initial allegation made by the Respondent that the Appellant had been dishonest in his dealings with the Revenue and/or the Home Office. The Respondent had sufficient grounds to justify raising the allegation. The burden of proof was then on the Appellant to give a reasonable explanation for his conduct. He failed to do so. His account was not credible.

47. I find that due to the lack of a plausible explanation for the Appellant's conduct which could show on the balance of probabilities that he was honest in his dealings with the Respondent

> and/or the Revenue at the relevant time, the Respondent was entitled to reach a conclusion on the balance of probabilities that the Appellant had perpetrated a deceit to either pay less tax for 2010/11 or to obtain immigration status he was not entitled to. Both statutory bodies were misled by the Appellant. There were reasonable grounds therefore for the Respondent to refuse to exercise its discretion in the Appellant's favour under paragraph 322 (5).
>
> 48. … I do not find it necessary for the Respondent to reach a conclusion on whom the Appellant intended to deceive as obviously both statutory bodies were deceived at different times and I do not accept that the deceptions were innocent and inadvertent.

11. Further criticisms are made on that passage under grounds 3 and 4, to which I shall turn in due course. However, subject to those, it seems to me that grounds 1 and 2 do not show any material error of law on her part. The appellant had, as she also pointed out at 48, not chosen to admit which office he had deceived; instead he had given an explanation, which she was fully justified in rejecting, for the detailed reasons she gave. This was, as is usually the case, the main function of a first-instance judge: to consider the facts impartially, and to reach reasoned findings on them.

12. It is hard, if not impossible, to imagine any reasonable decision-maker not taking the view that a dishonest discrepancy of this proportion, even some years before, made it undesirable in the public interest that the perpetrator should be allowed to remain in the United Kingdom. This must be equally so, whether the victim of the deceit had been HMRC or the Home Office.

13. In the light of this conclusion, I shall now turn to grounds 3 and 4, which also go together. Ground 3 criticizes the judge for taking what may be called a judicial review approach, rather than considering the case for herself, as required on a statutory appeal. On a literal reading, the words she used at 47 – 48 ("the Respondent was entitled to reach a conclusion …") do support this criticism. However, when the judge's decision is read as a whole, it is clear that she was doing what she was required to do for herself, which was to reach her own reasoned findings of fact on the explanation put forward by the appellant. In reality, there is nothing in this ground.

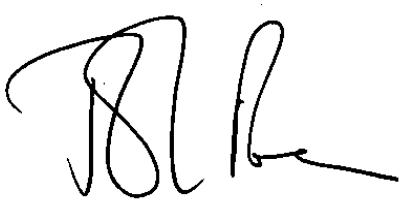
14. Ground 4 blames the judge for her approach to the burden of proof. The correct approach is set out in a number of decisions referred to, of which the most recent is *Shen* (Paper appeals; proving dishonesty) [2014] UKUT 236 (IAC). Taking it from the judicial head-note:

> *(2) Where an application form etc is false in a material way, this may be relied on by the Secretary of State as prima facie evidence establishing dishonesty. … But it is always open to an appellant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the Secretary of State to answer that evidence. At the end of the day the Secretary of State bears the burden of proving dishonesty.*

15. In this case, the judge concluded that the appellant's explanation did not reach that level of plausibility: she gave detailed and valid reasons of her own for this. Mr Richardson fairly acknowledged that, though the judge's generic self-direction at 25 put the burden of proof on the appellant, on the balance of probabilities throughout, what she said at 46 came closer to the right test. While the judge could have expressed herself more

accurately in terms of the authorities, she had considered the appellant's explanation for herself, and found it wholly implausible. There was in reality nothing the respondent needed to answer or rebut.

Appeal dismissed



(a judge of the Upper Tribunal)

22 January 2019