Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06063/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2018	**On 31 January 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TEENA JOHN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The respondent (hereafter the claimant) entered the UK in 2006 as a student and after being granted a further period in the same capacity was first granted leave to remain as a Tier 1 (Post-Study Work) Migrant and then as a Tier 1 (General) Migrant with leave valid until 2 July 2016. Just before expiry of her leave she applied for ILR on the basis of ten years continuous residence. On 16 February 2018 the appellant (hereafter the Secretary of State or SSHD) refused her application under paragraph 322(5) of the Immigration Rules:

> "…because as part of your Tier 1 General leave to remain application of 4 April 2011 you claimed to have an increase of £39,486.44 from all sources between 01 April 2010 and 31 March 2011, including £4,538.44 for pay-as-you earn (PAYE) employment and £34,948 from self-employment. On this basis you were awarded 20 points under the 'previous earnings' category (for earnings between £35,000 and £39,999.99). That is you declared a figure above the minimum to obtain these points towards the overall 80 points required in order to granted leave under Tier 1 General."

2. The SSHD went on to note that records showed that for tax year 6 April 2010 to 5 April 2011 the claimant originally declared earnings (total income) of £5,305, the source of income being from self-employment. The SSHD observed that if she had submitted earnings of £5,305 to UKVI in support of her leave to remain application dated 4 April 2011, "then you would have received 0 points for previous earnings… and you would have been 20 points short of obtaining leave under your Tier 1 (General) application and you would not, therefore, have been granted leave to remain." Observing that the claimant had subsequently amended the figures declared to HMRC so they were more in line with those claimed to UKVI, the SSHD noted that the claimant's accountant (Heartlands Financial Services Ltd) only made contact with HMRC with a view to amending these figures on 6 May 2016. This delay of several years indicated, stated the SSHD, "that you had little intention of correcting the error promptly and as such shows little respect for the UK tax laws". The SSHD did not accept as a credible explanation that a registered accountant would submit a self-assessment tax return declaring earnings which were considerably lower than the client's actual earnings.

3. Having found that paragraph 322(5) applied against the claimant, the SSHD also refused her under paragraph 276B(ii) and (iii).

4. The claimant's appeal came before Judge Aujla of the First-tier Tribunal (FtT). The claimant gave oral evidence at her appeal and produced a bundle of documentation in support. In a decision sent on 17 October 2018 Judge Aujla outlined her appeal on human rights grounds. The judge summarised her oral evidence at paragraph 26:

> "26. The Appellant gave oral evidence at the hearing. She confirmed her name and address and stated that she was born on 24 April 1983. Her witness statement dated 01 October 1918 was correct and she adopted the same as her evidence. She stated that she was working during the relevant year. She had become pregnant and later lost the child during that period. Furthermore, her father had also been diagnosed with various complaints during that period after which he passed away. She was under extreme stress at that time. The tax return for the relevant year was prepared by her agent who was Vijay Karee. He was associated with a firm of accountants. She did not know whether he was qualified in accountancy. There were no criminal proceedings taken against her. She was currently working for Hilton Metropole Hotel. She had been assessed to pay £8,000 income tax for the income during the relevant year which she was paying in instalments. She started making payments from 2016. The correct income

figures were supplied to HMRC on 06 May 2016 by her accountants. That was before she made the application on 30 June 2016."

5. At paragraph 31 the judge stated:

> "31. I observed the Appellant give evidence with care. I have no reason to doubt her credibility. An error was clearly made in declaring her income to HMRC. She had given to her agent all the relevant documentation. When she discovered that there had been a mistake, her accountants, Heartlands Financial Services Ltd, wrote a letter to HMRC on 06 May 2016 in which the correct income figures were provided for the relevant year. As a result of that corrected information, HMRC had issued the Appellant with an assessment under which she was liable to pay £8000 income tax which she had been paying by instalments since 2016."

6. Having turned to consider whether the claimant come within any of the categories set out in the Home Office guidance for refusal under paragraph 320(5), and having found that the claimant did not come within any of the categories, the judge concluded at paragraphs 34 – 35 that:

> "34. An error was clearly made in declaring her income to HMRC. She was working as a business consultant. She had given to her agent all the relevant documentation. There was clearly an error made in declaring the income to HMRC. When she discovered that there had been a mistake, his accountants, Heartlands Financial Services Ltd, wrote a letter to HMRC on 06 May 2016 in which the correct income figures were provided for the relevant year. As a result of that corrected information, the HMRC had assessed the Appellant income tax liability and she was discharging that liability since 2016.
>
> 35. I particularly bear in mind the fact that the correct information was supplied to HMRC on 06 May 2016, before the Appellant made her application on 30 June 2016. I also take into account the Appellant personal circumstances during that period, including her pregnancy and miscarriage, which I have no reason to reject."

7. The SSHD's grounds submitted that the judge's reasoning amounted to a material misdirection of law in that he had effectively absolved the claimant of blame for the large discrepancies and appeared to accept that the claimant's accountant was to blame. That conflicted with the guidance given by the Upper Tribunal in **R (on the application of Samant) v SSHD** [2017] UKUT JR/6546/2016 and **Abbasi** JR/13807/2016 wherein it was said it was the applicant who must take responsibility for his own tax affairs. It was argued that the judge was wrong to treat as significant the fact that the HMRC had not taken action to criminally prosecute the claimant.

8. In amplifying the SSHD's grounds before me Mr Howells prayed in aid the repeated case of **R (on the application of Khan) v SSHD (Dishonesty, tax return, para 322(5)** [2018] UKUT 384 (IAC).

9. At the hearing before me I heard submissions from Mr Howells for the SSHD. The claimant, who represented herself, gave a brief response.

10. I have no hesitation in rejecting the SSHD's grounds. Two matters lead me to this conclusion.

11. The first is that nowhere in the grounds does the SSHD take issue with the judge's positive credibility findings. As already noted, the claimant gave oral testimony before the judge and the judge went on to find at paragraph 31 that he had no reasons to doubt her credibility. If the claimant was credible, then she had failed to declare her earnings for the tax year 2010/11 not because of any dishonesty or improper purpose but simply because she was under extreme stress at the time and relied on her agent. It was open to the SSHD in the grounds to challenge the positive credibility finding but that was not done.

12. Second, none of the cases relied on by the SSHD establish that it is necessarily an error of law for a judge to accept a claimant's explanation for submitting an incorrect tax return based on an accountant mistake. What is set out in the headnote to **Khan** is 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 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.
>
> (iii) In approaching the 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 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, given that the accountant will or should have asked the tax payer 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 or dishonesty.
>
> (v) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):

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."

13. It is clear from (ii) that where an applicant has presented evidence to show he or she was not in fact dishonest the decision maker has to decide whether that explanation and evidence is sufficient. That is what Judge Aujla did in this case.

14. It is clear from (v) that when considering whether an applicant is dishonest or merely careless the decision-maker has to consider a number of matters, including (iii) "why the applicant did not realise then an error had been made …." In the claimant's case the evidence was that she was under extreme stress. During the relevant period she had lost a child through stillbirth and her father had been diagnosed with serious complaints (he later died). There were clearly matters which the judge weighed in the claimant's favour when assessing the issue of alleged dishonesty. The judge's finding on this issue were within the range of reasonable responses.

15. The SSHD also contended that the judge gave undue weight to the fact that the claimant was not prosecuted. However at paragraph 30 the judge only treats the lack of prosecution as one relevant consideration and even under the SSHD's own guidance, consideration of criminality or its lack is a relevant factor.

16. For the above reasons I conclude that the judge did not err in law and accordingly his decision to allow the appeal must stand.

No anonymity direction is made.

Signed Date: 15 January 2019

Dr H H Storey
Judge of the Upper Tribunal