Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/16643/2018 (V)
HU/16638/2018 (V)
HU/16634/2018 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Skype for Business On 10 September 2020	**Decision & Reasons Promulgated On 28 September 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL [O]
EMMANUELLA [O]
[D O]

Respondents

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

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellants are citizens of Nigeria. The first and second appellants are a married couple who were born respectively on 17 April 1983 and 5 September 1990. The third appellant is their child who was born in the United Kingdom on 18 July 2015.

Background

3. The first appellant arrived in the United Kingdom on 12 September 2007 with entry clearance as a Tier 4 (General) Migrant and leave valid until 31 January 2009. This leave was subsequently extended until 30 September 2009 during which time he studied for an MBA at the University of Wales, Newport.

4. On 4 August 2009, the first appellant applied for extension of his leave as a Tier 1 (Post-Study Worker) Migrant which was granted on 4 September 2009 until 4 September 2011. He was subsequently granted an extension of that leave until 28 March 2013.

5. During this time, the first appellant was employed by various companies. In February 2010, he set up his own consultancy business. In August 2010, the first appellant engaged the services of AGS Business Consultancy Limited ("AGS") to prepare his accounts in respect of his self-employment. Those accounts were duly prepared for the period 1 April 2010 to 30 November 2010. It would appear that, subsequently, those accounts were filed with HMRC in respect of the tax year 2010/2011. In 2010, the first appellant set up his own company, Nininac Consultancy Limited which was incorporated on 26 November 2012. In order to prepare the necessary accounts for both that company and in respect of his employment, the first appellant engaged the services of an accountant, TomFag LLP.

6. On 21 February 2013, the first appellant applied for an extension of his leave as a Tier 1 (General) Migrant and he was granted leave until 14 March 2016.

7. On 4 March 2016, the first appellant made an application for indefinite leave to remain as a Tier 1 (General) Migrant. The Secretary of State refused this application on 31 May 2016 on the basis that HMRC's records revealed that for the tax year 2010/2011 the first appellant had not declared his self-employed earnings which he had relied upon as part of the Tier 1 (General) Migrant application he had made on 21 February 2013.

8. Thereafter, through his accountant, TomFag LLP, the first appellant sought to rectify his declared income for the tax year 2010/2011 and filed an amended tax return on 13 June 2016. On 16 June 2016, the first appellant's accountants notified the Secretary of State of this correction. The tax and interest due on his self-employed income for the tax year 2010/2011 was paid on 26 July 2012.

9. On 19 June 2016, the first appellant lodged an administrative review in respect of the Secretary of State's decision to refuse him ILR on 31 May 2016 but, in a decision dated 26 July 2016, the Secretary of State maintained her earlier decision.

10. On 8 August 2016 the first appellant submitted a second application for ILR but, on 15 October 2016, this application was rejected as invalid due to the non-payment of fees.

11. The application was resubmitted on 26 October 2016. The Secretary of State refused the application on 20 January 2017 on the same basis as the refusal on 31 May 2016. Again, the first appellant lodged an administrative review but the Secretary of State maintained the earlier decision on 1 March 2017. A judicial review of that decision was unsuccessful when, following an oral application to renew seeking permission, permission was refused on 2 February 2018 by UTJ Kekic.

12. On 23 March 2018, the first appellant applied for leave to remain on the basis of his private and family life in the UK. On 17 July 2018, the Secretary of State refused the first appellant's application under Art 8 of the ECHR.

13. The second appellant arrived in the United Kingdom on 23 September 2018 with entry clearance as a student valid until 31 October 2011. On 26 September 2011 she was granted leave to remain as a Tier 1 (Post-Study Worker) Migrant until 24 October 2013. On 11 July 2013 she was granted further leave to remain as a Tier 4 (General) Migrant until 10 April 2015.

14. On 26 November 2014, the first and second appellants married in Cardiff.

15. On 27 November 2014, the second appellant made an application as a dependant of the first appellant as a Tier 1 (General) Migrant. She was granted leave until 14 March 2016 in line with that of the first appellant. The second appellant subsequently made applications in line with those as the first appellant as his dependant.

16. The third appellant, who is the daughter of the first and second appellant, was born in the UK on 18 July 2015. They also have a son, who is not a party to this appeal, who was born in the UK on 21 August 2016.

17. Both the second and third appellants were refused leave and their Art 8 claim rejected on 17 July 2018.

The Appeal

18. All three appellants appealed against decisions taken on 17 July 2018 to refuse them leave under Art 8.

19. The appeal was listed on a number of occasions in Taylor House in London. On 14 February 2019, the appeal was adjourned apparently on the basis that the Secretary of State wished to consider the position concerning the issue of "suitability". This arose because, in the refusal decision of 17 July 2018, no issue had been taken in respect of the first appellant's "suitability" based upon any allegation of dishonesty due to the discrepancy in his declared income to the HMRC for the tax

year 2010/2011 and his income relied upon in his application for leave in 2013. The appeal was again adjourned on 18 July 2019.

20. On 2 August 2019, the Secretary of State issued a supplementary decision in which the "suitability" point was taken against the first appellant under paras S-LTR.4.2 and S-LTR.1.6 of Appendix FM of the Immigration Rules (HC 395 as amended). The Secretary of State noted that the first appellant had failed, in his declared income to HMRC for the tax year 2010/2011, to include any of his self-employment income (namely the £17,972) that he had relied upon in his 2013 application for leave and had only included in his tax return for 2010/2011 employed income of £19,171. On the basis of the discrepancy, the Secretary of State concluded that the first appellant had "made false representations or failed to disclose material facts" in his previous application (para S-LTR.4.2) and that his presence was not conducive to the public good because his conduct makes it undesirable to grant him leave to remain (para S-LTR.1.6).

21. Following a Case Management Hearing on 22 August 2019, the appeal was transferred to the Newport Hearing Centre and was listed before Judge Page on 24 October 2019.

The Judge Decision

22. The appellants were unrepresented before Judge Page. The first appellant gave oral evidence along with the second appellant's sister. There was also evidence from the second appellant. There were several bundles of documents submitted on behalf of the appellants. Many of these documents related to the substance of the Art 8 claim and their contention that their removal would be a disproportionate interference with their private and family lives in the UK.

23. Judge Page dealt first with the respondent's contention that the "suitability" requirements were not met based upon the first appellant's dishonesty in submitting discrepant figures for his income in the tax year 2010/2011 in his HMRC tax return and to the respondent as part of his 2013 application for leave.

24. It was accepted by the first appellant that his tax return for 2010/2011 omitted the whole of his self-employed income for that tax year. He, however, contended that that was an innocent mistake on his part and the error was that of his first accountant, AGS. In his evidence, the first appellant set out his case that he had provided AGS with all the documents, including his self-employed income for 2010/2011. He understood that AGS had submitted his profit and loss accounts to the HMRC. He had only discovered that this was not the case when he received the respondent's refusal of his 2016 application for leave on 31 May 2016. The first appellant's case was that he had then instructed his current accountants, TomFag LLP who had submitted an amended tax return to HMRC on13 June 2016. HMRC had issued an amended assessment and the outstanding tax and interest had been paid on 26 July 2016. He had notified the respondent of this correction in a letter dated 16 June 2016. Those letters were contained within the appellants' main bundle of documents.

25. In addition, the first appellant said that he had sought to track down his first accountants that he had used in 2010. However, he had been unable to do so. Although he had found a company trading under a similar name, it was in fact an entirely different business. He had contacted various accounting bodies and he had been unable to find the accountant who had prepared his tax return for 2010/2011. In support of that evidence, the first appellant relied upon a series of e-mails between himself and a number of accountancy organisations and a company with a similar name to AGS which were at pages 11-22 of the appellants' supplementary bundle of documents.

26. In his determination, Judge Page was plainly troubled by the Secretary of State's decision-making process (see, e.g. para 24). In particular, the fact that the issue of suitability had not been taken in the initial decision of 17 July 2018 and was only subsequently relied upon in the letter of 2 August 2019.

27. There is, no doubt, an apparent inconsistency between those letters. Mr Howells, in his submissions, indicated that it would appear that there had been an oversight when the decision letter of 17 July 2018 had been prepared as the suitability issue had already been relied on in the earlier decision of 31 May 2016. That would seem, to me, to be the likely explanation of why the decision letter of 17 July 2018 did not rely on the "suitability" requirement and the apparent discrepancy in the first appellant's declared income which had previously been relied upon in the decision letter of 31 May 2016. That is, to say the least, most unfortunate and it has undoubtedly led to delay and some confusion in the case. However, there is nothing inconsistent in the Secretary of State indicating that both the letters of 17 July 2018 and 2 August 2019 should be read together whilst only taking the "suitability" point in the latter decision letter. As the first appellant indicated to me at the hearing, he was plainly aware at the hearing before Judge Page that the suitability issue was being relied upon by the Secretary of State.

28. Having set out his concerns about the two decision letters, Judge Page set out at para 10 that it was for the Secretary of State to establish "dishonesty" on the part of the first appellant. At para 11, Judge Page noted specifically that the burden of proof was upon the party who asserted it, namely the Secretary of State (see also para 18).

29. Then at paras 12-18, Judge Page set out his findings on the issue of "dishonesty" ultimately concluding that the respondent had not established that the first appellant was "dishonest" and that he was satisfied that the first appellant had made a genuine error. The judge said this:

> "12. The respondent's letter dated 2 August 2019 makes a rambling reference to HMRC records under the heading 'suitability'. And goes on to say that there are significant differences between HMRC records and the appellant's self-employed income. I do not propose to set out here any attempt to unravel those confusing paragraphs but as I have said above the basic rule of litigation is that he who asserts must prove. If the respondent is to make an allegation that the appellant has acted dishonestly then I expect to see the evidence to which this letter refers to make matters clearer than this.

Nowhere in the respondent's papers have I been able to find the HMRC records to which the respondent is referring or indeed the earlier applications that the appellant has made with copies of the documentation that he is said to have submitted. All I have is this rambling account given in the letter dated 2 August 2019 which cannot be reconciled with the respondent's decision dated 17 July 2018. In that letter, the respondent said specifically to the appellant: 'your application does not fall for refusal on grounds of suitability in Section S-LTR of Appendix FM under paragraph 276ADE(1)(i) of the Immigration Rules.'

13. Helpfully, the appellant in his bundle of documents prepared for the appeal for Taylor House on 7 February 2019 has, at pages 206-301, included all of his HMRC records for the years 2010-2018, together with HMRC transactions confirming one-off payments to clear outstanding tax for 2010-2011, which appears to be the tax year of the respondent's allegations of dishonesty and false representations, referred to in the respondent's letter of 2 August 2019. These assertions in the letter of 2 August 2019 are not evidence, without more, that could discharge the burden of proof upon the respondent to prove dishonesty on the part of the appellant. Allegations of dishonesty in a Home Office letter do not, without supporting evidence, amount to evidence of dishonesty. Such assertions only evidence the Home Office allegation.

14. The appellant gave evidence before me and adopted the contents of his witness statement dated 5 February 2019 and the contents of his appellants' bundle of documents at pages 1-301. It was his evidence that when his application for indefinite leave to remain as a Tier 1 (General) Migrant was refused on 31 May 2016 on the basis that HMRC's records revealed that for the tax year 2010-2011 he had not fully declared the self-employed earnings, which he had relied upon as part of his Tier 1 (General) Migrant application, this was the first he knew about this. He was adamant that this was a genuine error that had since been remedied with an amended tax return, filed with the HMRC and explaining that he had identified an error. The respondent was notified of this correction by way of a letter dated 16 June 2016 and the tax and interest due was fully paid on 26 July 2016. He asked for an administrative review of the respondent's decision, but on 26 July 2016 the respondent maintained the decision to refuse.

15. The evidence that there was an error is insufficient evidence for the respondent to discharge the burden of proving that the appellant acted falsely, given the appellant's explanation and the supporting evidence that follows.

16. At page 226 of the appellants' bundle of documents is a letter from TomFag LLP Chartered Certified Accountants to the Inspector of Tax, Self-Assessment, HMRC dated 13 June 2016. This stated they had identified errors in the self-assessment return submitted by the appellant's former accountants for the tax years 2010-2011 and the request that an amendment to the return are shown in the list in the letter to be made and for HMRC to recalculate the tax due and update its records and advise of the additional tax payable by their client (the appellant) to enable him to make the necessary payment. This shows that there was an underpayment of tax of £5,032.99 for these years. On the following pages there are HMRC letters

dated 11 August 2016, 26 January 2017 which records that the appellant's tax affairs [were] put in order by 31 July 2017 [and] there was £3,538.35 to pay. What is significant is that nowhere in the HMRC records, as far as I can see, is there any record of any penalty being imposed by the HMRC for failing to declare material earnings. It appears that the HMRC was satisfied with the explanation that an error had been made by the appellant's former accountants.

17. Further, at page 234 of the appellants' bundle, there is a letter from TomFag Chartered Accountants to the Visa Officer dated 1 August 2016 which reports on the appellant's financial affairs. This appears to be responding to a request from the respondent to provide a report on the appellant's financial and tax affairs. This report is very detailed and has annexed to it the statutory account summary of invoices for the period 1 December 2014 to 30 June 2016.

18. I will not record any more of the appellant's financial documents. As I have said above it is for the respondent who is asserting that the appellant has acted dishonestly to prove dishonesty. Nowhere in the respondent's papers is there any more than the allegation made in the letter dated 2 August 2019, which, as I have said above, contradicts what the respondent said in the letter dated 17 July 2018, a letter which is to be read in conjunction with the letter of 2 August 2019. The respondent has not begun to discharge the burden of proof to show that the appellant has acted dishonestly. I accept the appellant's evidence that there was an error by the appellant's first accountants which the appellant's second firm of accountants has rectified and the appellant did not act dishonestly and that there has been a genuine error that he became aware of and rectified as soon as he could."

30. Having reached that finding, Judge Page then went on to consider the substance of the appellants' claim under Art 8 and reached the conclusion that their removal would be a disproportionate interference with their private and family life and so he allowed the appeals of each appellant.

The Appeal to the Upper Tribunal

31. The Secretary of State sought permission to appeal to the Upper Tribunal challenging the judge's finding that the respondent had not established the "suitability" requirement applied to the first appellant, namely that that he was dishonest. In essence, the grounds contended that the judge had failed to apply the approach set out by the Upper Tribunal for discrepant income declaration cases in R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC). On 2 January 2020, the First-tier Tribunal (DJ Woodcraft) granted the Secretary of State permission to appeal. On 20 January 2020, the appellants filed a detailed rule 24 response.

32. The appeals were initially listed before the Upper Tribunal on 26 March 2020. However, in the light of the Covid-19 crisis and national lockdown, the appeals were adjourned.

33. In response, the first appellant e-mailed the Upper Tribunal on 7 April 2020 requesting that the appeal be relisted as soon as possible either for a paper hearing or remote hearing by, for example, Skype.

34. The appeals were listed for a remote hearing by Skype for Business on 10 September 2020 without objection from either party. The hearing took place with me based in the Cardiff Civil Justice Centre and the appellants and Mr Howells joining the hearing remotely by Skype for Business.

The Submissions

35. On behalf of the respondent, Mr Howells relied upon the grounds of appeal upon which permission to appeal had been granted. He accepted that the only issue before the Upper Tribunal was whether the judge's conclusion on the "suitability requirement", namely that it had not been established that the first appellant was "dishonest", was legally sustainable. Mr Howells acknowledged that the Secretary of State had not sought to challenge the substance of the judge's decision under Art 8 and that if his finding on the "suitability" requirement was upheld, then the Secretary of State's appeal should be dismissed and Judge Page's decision to allow the appeal under Art 8 should stand. However, Mr Howells submitted that if the finding in relation to the "suitability" requirement could not stand, that would affect the judge's assessment of proportionality and, at any rehearing, the substance of the Art 8 claim would be an issue.

36. Mr Howells submitted that the judge had failed to apply the steps set out in Khan in reaching his finding in respect of "dishonesty". Mr Howells made, in essence, two points.

37. First, in para 16 of his determination, the judge had been wrong to take into account, in his words, as "significant" that the HMRC had not imposed a penalty upon the first appellant when his resubmitted tax return for 2010/2011 was accepted. Mr Howells submitted that was of no relevance as it did not indicate that HMRC accepted that the error was 'innocent'. Mr Howells referred me to the case of Balajigari and Others v SSHD [2019] EWCA Civ 673 at [66]-[67] in support of that submission.

38. Secondly, Mr Howells submitted that the judge erred in reaching his finding because there was no supporting evidence from the first appellant's initial accountant supporting the first appellant's claim that the mistake was that of his accountant and that he (the first appellant) was innocent. Mr Howells relied on paras (iv) and (v) of the headnote in Khan that it was not sufficient to simply blame an accountant for an error and that it was necessary to take into account what, if any, documentation existed for example of correspondence between the individual and his accountant to support his claim that the error was that of his accountant and that he was innocent of any dishonesty himself. Mr Howells also referred me to the case of Balajigari which had approved the approach in Khan. Mr Howells submitted that whilst it was recognised that each case must depend on its facts, it was unlikely that an individual's account would be accepted without support from his accountant.

39. In relation to that latter point, Mr Howells referred me also to the cases of see Abbasi (rule 43; para 322(5): accountants' evidence) Pakistan [2020] UKUT 27 (IAC) and Ashfaq (*Balajigari*: appeals) [2020] UKUT 226 (IAC). Mr Howells submitted that in Abbasi the UT found that it was unlikely to place any particular weight on an accountant's letter unless the accountant gave evidence and signed a statement of truth. Further, in Ashfaq the UT had emphasised the importance of evidence from an accountant as the individual's case of an error by the accountant went to that accountant's professional standing.

40. Finally, Mr Howells submitted that the judge had failed to take into account, in accordance with the case law, that the accountant's obligation was to have the first appellant sign his tax return for which he was personally responsible.

41. The first appellant sought to sustain Judge Page's factual finding. He submitted that he was not a UK qualified accountant and he had instructed an expert, upon whom he had relied, to file his tax return for 2010/2011. He submitted that his accountant had submitted his tax return and he had only become aware of the error when the decision of 31 May 2016 was taken by the respondent. The first appellant relied upon the e-mail exchanges and submitted that he had tried his best to contact the first accountant to obtain evidence from him but had been unable to do so. He was no longer practicing. The first appellant submitted that he had corrected, through his current accountant, the error in his tax return as soon as he had become aware of it and it was relevant that this was his first tax return and he had made no errors thereafter. He relied on the fact that HMRC had not imposed a penalty upon him. He invited me to uphold the judge's finding, which accepted his explanation, that it was an innocent mistake and that he had not been "dishonest".

Discussion

42. The issue of whether the first appellant was "dishonest" in his dealings with the HMRC and/or the respondent in relation to his earnings for the tax year 2010/2011 arose in his Art 8 claim by virtue of para 276ADE(1)(i) which requires that the first appellant should not fall within the refusal grounds in the "suitability" provisions in Section S-LTR in Appendix FM. It is not disputed, in these appeals, that the issue arose, in particular, under para S-LTR.4.2. It is accepted by the respondent that it must be established that the first appellant was "dishonest" and the burden of doing so is upon the respondent.

43. Judge Page correctly directed himself on those latter matters at paras 10-12 of his determination.

44. Mr Howells relied upon the headnote in Khan (in particular paras (iv) and (v)), summarising the views of the Martin Spencer J:

> "(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 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) 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."

45. In Balajigari, the Court of Appeal largely approved the approach of Martin Spencer J in Khan (at [40]-[44]) with one caveat. At [42], Underhill LJ (with whom Hickinbottom and Singh LJJ agreed), pointed out a "danger" in the "starting-point" in paras (i) and (ii) of the headnote as follows:

> "42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a *suspicion* that it is the result of dishonesty but it does not by itself justify a conclusion to

> that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."

46. At [43], the Court approved Martin Spencer J's view at [30(iii)] in Khan that the standard of proof was a "balance of probabilities" but that a finding of dishonesty was a serious finding with serious consequences. Underhill LJ said this:

> " …despite the valiant attempts made by Ms Anderson on behalf of the Secretary of State before us to argue the contrary, we consider (as Martin Spencer J did) that the concept of standard of proof is not inappropriate in the present context. This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences. Accordingly, we agree with Martin Spencer J that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty."

47. Balajigari and Khan were concerned with decision-making by the Secretary of State, rather than with decisions made on appeal by Judges of the First-tier Tribunal. Nevertheless, the views expressed concerning the approach of a decision maker are equally applicable to an appeal when a judge determines whether the respondent has established that an appellant was dishonest.

48. The decision in Khan (as approved in Balajigari) did not, in my judgment, set out a straightjacket as to the approach that should be followed by a decision maker in reaching a decision on whether an individual has acted dishonestly. The decision provides a helpful guide, and no more than that, as to how a decision maker should approach that task. The Court of Appeal in Balajigari noted (at [40]) the points made in Khan were "by way of general guidance". The Court clearly took the view that each case must turn upon an individual factual assessment. Of course, in an appeal a judge is likely to have the advantage of hearing an appellant give evidence and be cross-examined. In a case where there is no appeal, but there is a challenge by way of judicial review to the Secretary of State's decision, there will, at best, have been an interview which the individual will have been given an opportunity to deal with any allegation of dishonesty. Indeed, as a requirement of fairness that was one of the issues decided by the Court of Appeal in Balajigari. That is likely to be a less informative exercise than if the individual gives evidence and is cross-examined by a representative of the Secretary of State and a judge is then required to make an assessment of that individual's credibility.

49. Nevertheless, the case law beginning in Khan and concluding in Abbasi and Ashfaq, does emphasise that an individual's claim that any error was that of their accountant, and not dishonestly made by them, is *likely* to need to be supported by evidence from

that accountant (see Khan at [37(vii)]). So, in Abbasi the UT stated, as set out in the judicial headnote, that:

> "… where an individual relies upon an accountant's letter admitting fault in the submission of incorrect tax returns to Her Majesty's Revenue and Customs, the First-tier or Upper Tribunal is unlikely to place any material weight on that letter if the accountant does not attend the hearing to give evidence, by reference to a Statement of Truth, that explains in detail the circumstances in which the error came to be made; the basis and nature of any compensations; and whether the firm's insurers and/or any relevant regulatory body has been informed. This is particularly so where the letter is clearly perfunctory in nature."

50. Likewise, in Ashfaq, as set out in the judicial headnote, the UT stated that:

> "The explanation by any accountant said to have made or contributed to an error is essential because the allegation of error goes to the accountant's professional standing. Without evidence from the accountant, the Tribunal may consider that the facts laid by the Secretary of State establish the appellant's dishonesty."

51. The forensic importance of evidence from the accountant who submitted the tax return, and indeed oral evidence or evidence supported by a statement of truth from him, is emphasised in these decisions. However, the decisions are necessarily made in the context of the "general guidance" given in Khan and approved in substance in Balajigari. In Khan, Martin Spencer J acknowledged that it was relevant to take into account "a plausible explanation" why supporting evidence from an accountant was missing (see [37(vi)ii)]). I do not understand the UT in any of the subsequent decisions to have laid down as a legal requirement that in order to succeed an appellant *must* produce supporting evidence from the relevant accountant.

52. Production of such evidence may be expected but it cannot, in my judgment, be a mandatory requirement without which the appellant would not be able to shift the evidential burden by establishing an innocent explanation so that the respondent will have discharged the legal burden of establishing dishonesty on the part of the individual. When I put this point to Mr Howells, he submitted that such evidence was mandatory, and an individual would necessarily fail in establishing the innocent explanation without such evidence. I do not accept that submission for the reasons I have given. There may be cases where it is simply impossible, or not reasonably practicable, to obtain evidence from the initial accountant. The accountant may be untraceable (as appears to have been the case in this appeal) or no longer be practising or willing to assist the appellant in presenting their case. An individual's case may not be as strong without the supporting evidence from an accountant, but, applying a fact-sensitive approach, an individual's case cannot always be impossible of proof without such evidence.

53. Each case will depend upon an assessment of the evidence available, including the underlying creditworthiness (or not) of the individual and what, if any, other documentary evidence exists to support the individual's case.

54. In this appeal, the first appellant put before Judge Page a series of e-mails from him to, for example, accountancy bodies and others seeking to trace his initial accountant. He drew a blank. Whilst Judge Page made no specific reference to these e-mails, he clearly had in mind the extensive documentary evidence which was relied on before him. This evidence was supportive of the first appellant's claim that the mistake was that of his first accountant and that he had tried to contact him in order to provide evidence of his dealings with the accountant and the submission of his 2010/2011 accounts to HMRC. The absence of direct evidence from the accountant, in these circumstances, was not necessarily fatal to the appellants' claim being accepted by Judge Page.

55. Turning to the other points relied upon by Mr Howells, I agree that the judge (at para 16 of his determination) overstated the relevance of HMRC not imposing any penalty upon the first appellant when his revised tax return for 2010/2011 was accepted. As the Court of Appeal in Balajigari noted at [66] and [67], an error of this sort simply means that a penalty could be imposed. The Court rejected the contention made in Balajigari that the HMRC had a duty to impose a penalty in every case. It cannot, therefore, be presumed that when a penalty is not imposed that is because the HMRC has taken any particular view as to the culpability of the individual; in particular has determined that the individual was not dishonest. It is a neutral factor. I do not, however, read Judge Page's reference to this in para 16 as anything more than a recognition – despite his use of the word "significant" – that HMRC had not imposed a penalty followed by an observation that it "appears" HMRC might have accepted the first appellant's claim that it was an error by his accountant. In any event, even if the judge did take it into account, the bulk of his decision on the issue of dishonesty is concerned with his assessment of the first appellant having heard him give evidence and having been cross-examined.

56. The final point relied upon by Mr Howells is that, taking into account what was said in Khan at para (iv) of the headnote, Judge Page failed to take into account that the first appellant would have been asked to confirm that his tax return was accurate and sign it and he was responsible for its contents.

57. Of course, simply to have signed a document is not necessarily to have read, or to be aware of, its contents. Likewise, formal responsibility for the contents of a tax return does not necessarily mean the individual is aware of its contents or that the contents are an inaccurate reflection of his tax affairs. Further, the later lower tax liability – particularly if substantial – is likely to call for explanation. Also, an acceptable explanation can be forthcoming even if a court of tribunal is entitled to be sceptical of mere assertions put forward by an individual. In Khan, Martin Spencer J rejected as "too broad or extreme" (at [34]):

> "a proposition to suggest that it cannot be a defence for a person who has been refused ILR…on the basis of a discrepancy between his tax return and a previous application for leave to stay that his account or agent was responsible for the discrepancy on the basis that each person is personally responsible for his own tax matters and dealings with HMRC. Otherwise, whenever she discovers such a discrepancy, the Secretary of State would be entitled to refuse ILR without

> further consideration of the reason for the discrepancy and whether it in fact betrays a lack of honesty on the part of the Applicant. Thus, it seems to me that an error by an accountant may afford a reason for an Applicant to show that he has not been dishonest but, at most, careless (or perhaps even not that). Thus, whilst it would normally be the case that an Applicant would soon become aware of the error because of his unexpected lack of a liability to pay tax, if the Applicant could show that he was so distracted by other matters - here the serious illness of a child undergoing life saving brain surgery with subsequent treatment, rehabilitation and chemotherapy - then the Secretary of State would have to consider very carefully whether that did in fact afford a good reason for the Applicant's failure to appreciate that his tax liability was less than expected and therefore notify the authorities sooner than he had done so."

58. The "explanations" given in Khan are only examples. Other explanations might be given which, if credible and accepted, would support an individual's claim not to have been dishonest.

59. Judge Page was, no doubt, well aware of this point which will be familiar to any taxpayer who completes a tax return to HMRC. The first appellant's evidence was that he had not been aware of the failure to include his self-employed income, the relevant documents for which he had provided to his accountant. Judge Page also had the first appellant's evidence about his background, which did not include that he was a person likely to have an understanding of the detail of HMRC procedure and tax matters, and also the first appellant's account, supported by the documentary evidence, that this was his first tax return involving self-employed income and that his subsequent tax returns had been complete and accurate. It was, therefore, a one-off error. He had corrected the error, through his new accountants, immediately the discrepancy was identified in the decision of 31 May 2016.

60. It is important to bear in mind that the burden of proof was upon the respondent and, although I accept the discrepancy raised, as the Court of Appeal put it in Balajigari at [42], a "suspicion" of dishonesty, the first appellant offered an explanation with some (but not all) supporting documentation. The Secretary of State had the burden of proof which was to be satisfied on a balance of probabilities but, again as the Court of Appeal pointed out in Balajigari at [43], "bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty." The crucial issue was one of fact. The finding of facts is essentially a matter for a trial judge in a court or tribunal. An appellate court or tribunal should be cautious in interfering with a factual finding based upon all the evidence and should only do so if the judge has misdirected himself in law *or* the findings reached are inadequately or irrationally reasoned *or* the decision reached is itself an irrational one. The caution is particularly important where the factual finding involves an assessment of the credibility of an individual who gave oral evidence before the judge. Here, the Secretary of State was represented and, no doubt, her representative cross-examined the first appellant on the relevant matters in seeking to establish that he was dishonest. The judge formed a view of the first appellant's credibility. That was highly relevant in assessing whether his account

that he did not realise, and therefore it was not due to dishonesty on his part, that his tax return for 2010/2011 had not included his self-employed income.

61. In my judgment, Judge Page was entitled to accept the first appellant's evidence of how the discrepancy in his income declared to HMRC, on the one hand, and to the Secretary of State, on the other hand, arose. He was not required by the "general guidance" in Khan and subsequent cases to inevitably reach a different conclusion. That conclusion was reasonably open to him, even if not all judges would necessarily have reached the conclusion Judge Page did. His reasons are adequate and sufficient to sustain, particularly given his acceptance of the first appellant's oral evidence, his finding that the respondent had not discharged the burden of proof on a balance of probabilities that the first appellant was dishonest.

62. Consequently, I reject the Secretary of State's grounds of appeal. The judge did not err in law in reaching his finding that the "suitability" requirement – which entailed proof of dishonesty by the first appellant – was not established by the respondent.

63. As I have already indicated, Mr Howells accepted that, if the judge's finding in relation to the issue of dishonesty was upheld, the Secretary of State's appeal to the UT should be dismissed as the Secretary of State had not challenged the substance of the judge's decision to allow the appeal under Art 8.

Decision

64. For the above reasons, the decision of the First-tier Tribunal to allow the appellants' appeals under Art 8 of the ECHR did not involve the making of an error of law. That decision, therefore, stands.

65. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
24, September 2020