



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06992/2016  
HU/06998/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 June 2018

Decision & Reasons Promulgated  
On 18 June 2016

Before

DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL

Between

MR NOUMAN KHURSHID QURESHI  
MR FARHAN KHURSHID QURESHI  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr L Youssefim, Counsel, instructed by Richmond Chambers  
Immigration  
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. The appellants, citizens of Pakistan, who are twins, have permission to challenge the decision of Judge Walker of the First-tier Tribunal (FtT) sent on 19 July 2017 dismissing

their appeals against the decisions of the respondent made on 22 February 2016 to refuse their applications for ILR on the basis of long residence. The appellants have very similar immigration histories. Both arrived in the UK as students on 30 January 2006. Both received extensions in the same capacity until 31 May 2010. After making in time applications both were granted further leave under the Tier 1 (General) scheme valid until 29 April and 20 May 2016 respectively. On 7 January 2016 they made their applications for ILR the refusals of which were the subject of their appeal to the FtT.

2. The refusal decisions of the respondent stated that the respondent considered paragraph 322(5) of the Immigration Rules (which concerns grounds on which leave to remain and variation of leave to enter or remain in the UK should normally be refused) applied to them because there were considerable discrepancies in the amount of earnings they had declared/paid tax on to HMRC for tax years 2011/2012 and 2012/2013 and the earnings they declared to UKVI relating to the same periods. The refusal letters in respect of each appellant stated:

“Therefore, on this basis, your application for indefinite leave to remain has been refused under paragraphs 276D and paragraph 322 with reference to paragraph 276B(iii) and paragraph 322(5) ... as your character and conduct in misleading another government department would lead to the undesirability of permitting you to remain in the UK.”

3. The grounds of appeal are discursive (and were supplemented by a lengthy and no less discursive skeleton argument), but in essence contended that the judge was wrong to apply paragraph 322(5) against the appellants because properly analysed the differences between the earnings declared to the HMRC and UKVI were small and the surrounding circumstances did not indicate that their earnings were not genuine or that they had intended to inflate/deflate their earnings to the UKVI for immigration advantage. The judge was also said to have ignored that paragraph 322(5) is a discretionary provision.
4. I have no hesitation in finding that the judge’s treatment of the paragraph 322(5) issue was legally flawed. As the respondent noted in her refusal decision, paragraph 322(5) is a discretionary provision. What the judge was required to do was decide whether the respondent was right to exercise her discretion under this provision adversely to the appellants. Secondly, when considering the character and conduct provision set out in paragraph 322(5) the decision-maker (on appeal the judge) is required to conduct a balancing exercise looking at the positive and negative aspects: see **Ngouh, R (On the application of) v SSHD** [2010] EWHC 2218 (Admin). All the judge did, however, was to state at paragraph 37 that “the respondent has satisfied the burden and standard of proof to show initially that different earnings have been submitted to UKVI and HMRC and so paragraph 322(5) has been properly invoked” . Leaving aside (i) that by referring to the burden of proof having been discharged by the respondent “initially” the judge appears here to be only dealing with whether the respondent had discharged the initial evidential burden, without stating why the appellants were found not to be able to discharge the evidential burden that then shifted to them; and

(ii) the mere fact that different earnings had been submitted was not in itself sufficient to engage character and conduct considerations, the judge's reasoning at this juncture appears to assume that all that he was required to do was review whether the respondent could lawfully or reasonably invoke paragraph 322(5) rather than examine whether its exercise was justified on the merits.

5. Clearly this error had a material effect on the outcome of the appeal since if paragraph 322(5) did not apply the appellants stood to succeed under paragraph 276B on the grounds of long residence. (Mr Walker accepted that if the paragraph 322(5) ground fell away - and with it paragraph 276B(iii) which excludes those who "fall for refusal under the general grounds of refusal" - the appellants met the requirements of paragraph 276B in full, on the strength of their long residence. He did not seek to argue that there were any other public interest factors to be taken against the appellants). Accordingly I set aside the decision of the judge for material error of law.
6. Mr Youssefim sought to argue that if I set aside the decision of the judge I was in a position to re-make it without further ado by allowing the appeals under paragraph 276B. The difficulty with that submission is that I have only found the judge's treatment of paragraph 322(5) to be legally flawed. It still remains to be considered, when the decision is re-made, whether paragraph 322(5) properly applies. In this regard there is no agreement on the facts concerning the appellants' declared earnings for the tax years 2011/2012 and 2012/2013. Effectively the judge's mishandling of the burden of proof and his failure to make a lawful decision as regards paragraph 322(5) means there are no finding of fact that can be preserved. In such circumstances I consider the case should be remitted to the FtT to be heard afresh. Given Mr Walker's concessions, the only issue to be decided is paragraph 322(5). If the next judge decides that this provision should not be applied then the appellants are entitled to succeed in their appeals under paragraph 276B. Conversely, if the next judge decides paragraph 322(5) should be applied, then the appellants' appeals must fail, as they cannot succeed under paragraph 276B and as Mr Youssefim acknowledged, on this scenario they had no realistic prospect of success under either paragraph 276ADE or Article 8 outside the Rules.

### **Directions**

7. The existing grounds of appeal and skeleton argument are difficult to untangle. In order to spare the next judge from having to clarify basic particulars,
  - (1) The appellants' representatives are to produce to the FtT with a copy to the respondent within 28 days from the date this decision being sent a diagram having two columns in respect of each appellant, the first column being headed "Earnings declared to HMRC"; the second headed "Earnings declared to UKVI". The entries in these columns should cover the 2011/2012 and the 2012/2013 tax years respectively.

- (2) Upon receipt of this diagram the respondent is to confirm to the FtT with a copy to the appellants' representatives within a further 14 days whether she agrees these figures and if not why not.

I do not suggest that the above direction will remove the disagreement between the parties as regards paragraph 322(5) since that is largely concerned with whether the appellants' explanations for the discrepancies are satisfactory (and on whether looking at facts in favour of the appellants' character and conduct and those against, the exercise of the discretion incorporated into paragraph 322(5) was justified). One point of remaining importance is whether the appellants have given a satisfactory explanation for not declaring their earnings to the HMRC for 2012/2013 until January 2016. But compliance with the above directions it will at least enable the judge not to wrestle with reference to different figures even within the appellants' own grounds.

8. For the above reasons:

The decision of the FtT Judge is set aside for material error of law;


The case is remitted to the FtT (not before Judge Walker);

The parties have been given a direction which must be complied with within the specified time limits (28 days for the appellants; and a further 14 days for the respondent).

No anonymity direction is made.

Signed:

Date: 15 June 2018



Dr H H Storey  
Judge of the Upper Tribunal