



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/03941/2018

THE IMMIGRATION ACTS

**Heard at Field House
On May 28, 2019**

**Decision & Reasons Promulgated
On June 06, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MR QADEER AHMAD
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Richardson, Counsel instructed by Morgan Mark Solicitors

For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Pakistani national who is now 32 years of age. He originally entered the United Kingdom as a student on September 8, 2007 with leave to remain until December 31, 2010. He was subsequently granted leave to remain as a Tier 1 (Highly Skilled) Migrant until April 21, 2016.
2. On April 19, 2016 the appellant lodged an application for indefinite leave to remain under the Tier 1 route, but this was refused by the respondent on April 19, 2016. There were a number of administrative reviews sought by the appellant, but these were all refused and on August 31, 2016 he

lodged a further application for indefinite leave to remain under the Tier 1 route which he subsequently varied on August 11, 2017 to an application under paragraph 276B HC 395.

3. The respondent refused this application on January 19, 2018 and the appellant appealed it under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Seifert (hereinafter referred to as “the Judge”) who in a decision promulgated on March 26, 2019 dismissed his appeal. I note that the Judge actually heard the appeal on August 31, 2018.
4. The appellant appealed this decision and Judge of the First-tier Tribunal Grant-Hutchison granted permission to appeal on May 7, 2019 finding it arguable that the Judge had failed to make a clear finding as to whether it was accepted the respondent had met the initial burden of proof and that could have infected the remainder of the decision.
5. A Rule 24 response dated May 14, 2019 opposed the application. The respondent argued that the Judge had properly addressed the issues in paragraph 322(5) HC 395. He also argued that the Judge had set out the correct burden of proof at paragraph 6 of the decision, had gone on to find there had been an element of dishonesty in the appellant’s behaviour and found he had not adequately explained the discrepancies in the information provided to the Respondent and the information provided to HMRC.
6. No anonymity direction is made.

SUBMISSIONS

7. Mr Richardson adopted the grounds of appeal and submitted there had been an error in law. He highlighted the delay between hearing the appeal that had taken place in August 2018 and the promulgation of the decision that took place almost seven months later. He referred to the Court of Appeal decision of SS (Sri Lanka) [2018] EWCA Civ 1391 and submitted that whilst on its own a delay would not necessarily undermine the Judge’s decision, it nevertheless remains an appropriate marker which meant the findings of fact needed to be scrutinised with particular care to ensure the delay had not infected the determination. Mr Richardson accepted that the Judge’s decision did not demonstrate that he had forgotten facts due to the passage of time, but he argued that the assessment of credibility could have been undermined by the delay.
8. Dealing with the remaining grounds of appeal he submitted that whilst the Judge correctly set out the burden and standard of proof at paragraph 6 it was unclear in paragraphs 28 and 29 of the decision whether the Judge was requiring the appellant to prove his innocence. The burden of proving dishonesty lay on the respondent on the balance of probabilities. Whilst the Judge found there was an element of deception he nevertheless submitted that the Judge should have considered the evidence that had been provided to the respondent, then considered his account and

reached a conclusion by identifying any wrongdoing and assessing whether that wrongdoing justified refusal under paragraph 322(5) HC 395.

9. Mr Richardson submitted the failure to make full findings and to assess whether this provision applied amounted to an error in law as did the failure by the Judge to thereafter go on to consider whether to apply the discretion not to refuse in the appellant's favour.
10. Mr Tarlow relied on the Rule 24 response and submitted that the Judge had made numerous findings that impinged on the appellant's dishonesty and it was not necessary to use the word "dishonest", especially as the Judge had found that there had been an element of deception by the appellant and that it was not simply a genuine mistake. With regard to any delay, he submitted that on its own this was insufficient.
11. Mr Richardson responded and submitted that there was a big difference between lying to the respondent about the level of income to earn the necessary points compared to a situation where incorrect information was provided and that such actions were not dishonest.

FINDINGS ON ERROR IN LAW

12. This is an appeal brought by the appellant who argued, through his counsel, that the Judge had erred by:
 - (a) Wrongly placing the burden of proving his honesty on him
 - (b) Failing to make clear findings on the appellant's own actions.
 - (c) Taking seven months to promulgate the decision.
13. Dealing with the issue of delay I find that delay on its own would be insufficient to amount to an error in law. Mr Richardson appeared to accept this conclusion in that he relied on the Court of Appeal decision in SS which made it clear that there had to be a nexus between the delay and the safety of the decision. It is clear from the Judge's recounting of the evidence that he was clearly aware of the evidence that was given and had carefully set out the information contained in the paperwork in his decision and had then gone on to consider the oral evidence that had been provided by the appellant at the hearing. Without more, this delay, whilst regrettable, does not amount to an error in law.
14. The issue that required the Judge's consideration was whether the finding under paragraph 322(5) HC 395 should be upheld. The Judge considered the guidance of Mr Justice Spencer in the case of Khan [2018] UKUT 384 and set out that guidance at paragraph 27 of his decision. Importantly, the guidance was set out after the Judge had chronologically set out the evidence and before any findings of fact were made.
15. It was accepted by both representatives that the burden and standard of proof was correctly set out in paragraph 6, but Mr Richardson argued that in considering the evidence in paragraphs 28 and 29, the Judge failed to demonstrate that he had applied that test or that he had made findings that the appellant had acted dishonestly.

16. In his written and oral evidence, the appellant stated that whilst he had seen the documents he had relied on his accountant and that the error lay with the accountant.
17. Having considered the evidence, the Judge made findings at paragraph 28. As stated above he had regard to the guidance in Khan and found there was no satisfactory evidence from the previous accountant, there were no details of relevant correspondence between the appellant and his previous accountant at the time of the tax returns and the Judge noted that the appellant had been sent his tax returns to check, confirm and sign before they were lodged with HMRC. Mr Richardson had submitted that the Judge had not made findings, but I am satisfied the Judge has made clear findings and the Judge did have regard to the issues in this case. The Judge had to consider whether the appellant had simply made an error or had acted dishonestly, and Mr Richardson submitted that paragraph 28 does neither.
18. The decision needs to be read as a whole rather than having regard to individual paragraphs. The Judge noted that whilst the appellant was not an accountant he did have business qualifications and had studied finance in his courses and he concluded that there was no satisfactory explanation from the appellant as to why he did not realise that an error had been made in respect of the tax disclosure.
19. The Judge, in paragraph 29, went on to consider his explanations and concluded that he had not made a genuine mistake, as was alleged, but there was an element of deception. It therefore follows that he did apply the correct burden and standard of proof. The delay has no bearing on those findings.
20. Mr Richardson went on to argue that, following the decision in Balajigari [2019] EWCA Civ 673, there was a duty on not only the respondent but also the Judge to consider whether, despite such a finding under paragraph 322(5) HC 395, it would be disproportionate to require him to leave. The Judge went on to consider the Article 8 position at paragraphs 30 and 31 and has provided adequate reasons for finding it would not be disproportionate to require him to leave. Those findings were clearly open to him.
21. In the circumstances I do not find there is an error in law.

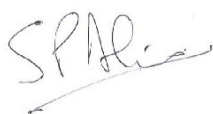
NOTICE OF DECISION

22. There is no error in law and I uphold the original decision.

Signed

Date

31 May 2019



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award made and I have dismissed the appeal.

Signed

Date

31 May 2019

A handwritten signature in black ink, appearing to read 'SPAL' with a flourish underneath.

Deputy Upper Tribunal Judge Alis