



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

Appeal Number: HU/05269/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19 December 2018**

**Decision & Reasons Promulgated
On 01 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GULZAMAN KHAN RIND BALOCH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Mr M C Afzal, Legal Representative, Lords Solicitors LLP

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Pakistan born on 23 August 1985. He entered the UK lawfully on 12 September 2007 and had valid leave to remain until the expiry of his visa on 6 January 2018 by which time he had achieved a period of ten years' continuous lawful residence.
2. On 4 September 2017, the Claimant made a human rights claim on the basis of his long residence. This was refused in a decision dated 11 February 2018 on the basis that his tax returns to HMRC for the years 2010 to 2011 and 2013 to 2014 were incorrect and he had been required to repay tax altogether in the sum of £6,894.68.

3. The Secretary of State refused the application with reference to paragraph 322(5) of the Immigration Rules, viz. it was *"undesirable to permit the Appellant to remain in the United Kingdom in light of his conduct, character or associations."* The Claimant appealed against this decision and his appeal came before First-tier Tribunal Judge I Ross for hearing on 12 October 2018. In a Decision and Reasons promulgated on 26 October 2018 the judge allowed the appeal, finding that in the absence of any criminal conduct, proven dishonesty or deception the application should not have been refused pursuant to paragraph 322(5), which is discretionary. The judge then allowed the appeal on human rights grounds.
4. The Secretary of State made an application for permission to appeal in time on the basis of two grounds: firstly, that the judge had materially misdirected himself in law in relying on two unreported decisions of the Upper Tribunal that have no binding effect, those decisions being the case of Kadian (6 April 2018) and MMS (2 November 2017). It was further submitted, pursuant to the same ground of appeal, that in any event the approach taken by the judge to paragraph 322(5) was wrong in law in light of reported judicial review decisions, in particular Khan JR/3097/2017 and Chowdhury JR/7/2018, which found that the Secretary of State is entitled to invoke paragraph 322(5) in cases where the applicant has employed dishonesty in dealings with HMRC or UKVI. Thus, the judge had materially erred in finding that paragraph 322(5) has no application in this case.
5. Secondly, it was asserted that the judge had failed to make findings that resolved the view of the Secretary of State that the claimant had employed dishonesty in his dealings with HMRC or UKVI when declaring his self-employed income and that the judge's findings failed to adequately resolve this issue and the judge had made no findings that resolved the key conflict in the evidence, i.e. whether or not the claimant has acted dishonestly.
6. Permission to appeal was granted by First-tier Tribunal Judge Baker in a decision dated 13 November 2018 for the reasons set out in the grounds of appeal.

Hearing

7. At the hearing before the Upper Tribunal, I indicated at the outset that I took the preliminary view that the grounds of appeal had merit and that in addition to the grounds specifically raised, it was clear, given the nature of the issue to be determined, that the decision lacked proper or adequate reasoning, given that it amounted to only three paragraphs which are as follows:
 8. *The Appellant gave oral evidence and explained how the discrepancies arose when he switched to new accountants. He apologised and has repaid the whole amount of the tax due. The Appellant is not in any relationship and has no children. He has two brothers who are British citizens and a British citizen nephew.*
 9. *In the case of Kadian the Upper Tribunal referred to the Respondent's guidance on the discretionary refusal in relation to a person's conduct, character and associations." At paragraph 17 of the judgment the following is stated:*

“17. Nevertheless, not declaring all relevant income, whilst highly regrettable, cannot properly be described as conduct such as that set out in the policy guidance. The Appellant has not been involved in any criminality. It cannot properly be said that his failure to disclose calls into question his character, conduct and associations. There is no suggestion that he has been or is a threat to national security or subject to a travel ban or has been involved in a sham marriage.

10. *It is accepted that the Appellant meets the requirements for a grant of indefinite leave to remain. In my judgment, in the absence of any criminal conduct, proven dishonesty or deception the application ought not to have been refused under paragraph 322(5), which is discretionary.*

11. *For all the above reasons I find that this appeal should be allowed under human rights grounds.”*

8. Mr Afzal took me through the judge’s findings. He placed weight on the fact that at [7] of the decision the judge recorded that Ms Sulieman (the Presenting Officer) was content for the appeal to be dealt with by submissions only. I pointed out that this conflicted with the fact that at [8] the judge recorded that the Claimant gave oral evidence. I asked Mr Mills to check the case minute drafted by the Presenting Officer, which he did. This confirmed that the Claimant gave evidence in English.
9. Mr Afzal sought to argue that the judge had taken into account the evidence that was before him, including the letter from the accountant and that essentially, he found the Claimant’s explanation to be plausible and that was a question of fact. He endeavoured to argue that the Home Office were stopped from going behind the concession recorded at [7] that the Presenting Officer was content for the appeal to be dealt with on the basis of submissions only.
10. In his submissions, Mr Mills asserted that the reported decision in the case of Khan, [2018] UKUT 00384 (IAC), before the Honourable Mr Justice Martin Spencer, makes clear that even where there has been repayment of tax and an accountant’s letter, there is still the need to consider whether there has been dishonesty and whether the Claimant has discharged the burden of showing that he has not acted dishonestly. The judge’s approach was clearly wrong in relying on an unreported decision and thus, following that decision, to substantiate his finding that the case did not engage paragraph 322(5) when clearly this aspect, which was the issue in the case, required a further consideration. He submitted that at [7] the Presenting Officer was not conceding that the Claimant’s explanation had been accepted but simply that the matter could be dealt with in respect of submissions, albeit the Claimant gave evidence.

Findings and Reasons

11. I find material errors of law in the decision of First-tier Tribunal Judge Ross for the reasons set out in the grounds of appeal. I find that the Judge erred in taking account of two unreported Upper Tribunal decisions without attempting to verify whether there were any reported decisions on the point. It is clear that there are, in fact,

reported decisions which would have assisted him more, i.e. the case of Khan [2018] UKUT 00384 (IAC), and also the case of R on the application of Sheik JR/8324/2017 before Judge Canavan.

12. The entirety of the appeal essentially comes down to whether or not the Secretary of State was correct to invoke paragraph 322(5) of the Rules. Thus, it is necessary to engage with the key issue of whether or not the Claimant has acted honestly in light of the Supreme Court judgment in *Ivey v Genting Casino Limited* [2017] UKSC 67 at [74] where it was said:

"When dishonesty is in question the fact-finding Tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the acts. ... when once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people."

13. This the judge failed to do. As a result of his reliance on the unreported cases he was under the misapprehension that paragraph 322(5) of the Rules simply did not apply. I set the decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First-tier Tribunal at Taylor House.

Notice of Decision

The appeal by the Secretary of State is allowed, with the effect that the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before any Judge of the First tier Tribunal other than Judge I Ross.

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 15 January 2019

Deputy Upper Tribunal Judge Chapman