



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17319/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC
On December 14, 2018

Decision & Reasons Promulgated
On January 9, 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR MUHAMMAD KAMRAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salam, Solicitor

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

DECISION AND REASONS

1. No anonymity order is made.
2. The appellant is a national of Pakistan. The appellant entered the United Kingdom as a student on April 2, 2007 and his leave to remain as a student was subsequently extended. The appellant then lodged an application, in time, to remain as a Tier 1 (Post-Study) Migrant and this was granted and extended until May 17, 2016.

3. The appellant lodged an application for indefinite leave to remain as a Tier 1 (General) Migrant on May 10, 2016 which he subsequently varied to an application under paragraph 276B HC 395 of March 6, 2017. This was refused by the respondent on November 24, 2017.
4. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 6, 2017. The grounds argued the respondent had erred in considering his application on long residency grounds.
5. His appeal came before Judge of the First-tier Tribunal Obhi (hereinafter called "the Judge") on February 23, 2018 and in a decision promulgated on March 16, 2018 the Judge dismissed his appeal under article 8 ECHR.
6. The appellant appealed this decision on March 29, 2018 on the grounds that the Judge had erred by failing to treat the application for long residence as a human rights claim, by failing to correctly consider the law relating to a parent who has a parental relationship with a child who has lived in this country for at least seven years and wrongly applying section 117B of the 2002 Act.
7. Permission to appeal was granted on April 23, 2018 and when the matter came before me on October 1, 2018 Mr Tan, a Senior Home Office Presenting Officer, accepted the Judge had failed to make a clear finding as to whether it was undesirable to let the appellant stay because of his character, behaviour or associations under para 322(5) HC 395.
8. Having considered the Judge's decision accepted there was an error in law for the reason provided by Mr Tan. The Judge did not address the issue of whether it was undesirable to let the appellant stay because of his character, behaviour or associations. Whilst the Judge considered the children in paragraph 23 of the decision I am satisfied that the Judge further erred by failing to take into account section 117B(6) of the 2002 Act.
9. The appellant served a further statement that was received by the Tribunal on November 5, 2018. The respondent had already written to the Tribunal on October 31, 2018 advising that paragraph 322(5) HC 395 remained a live issue.
10. I have also taken into account the newly issued guidance on Tier 1 applications where there had been a refusal under paragraph 322(5) HC 395 and the decision of R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC).
11. Mr Salim wished to introduce the unreported decision of Deputy Upper Tribunal Judge Taylor in the case of Mr S Kadian because it dealt with paragraph 322(5) HC 395 in the context of long residence applications whereas the Khan decision only dealt with paragraph 322(5) HC 395 in the context of indefinite leave applications. I rejected this request because the Khan decision addressed when paragraph 322(5) HC 395 should be applied.

RELEVANT EVIDENCE

12. The appellant, wife and children are Pakistani national and holders of Pakistani passports.
13. The appellant came here in 2007 and his wife came as his dependant in December 2009. Both children were born in the United Kingdom on August 11, 2010 and December 24, 2015 respectively.
14. The eldest child did not satisfy paragraph 276ADE HC 395 because she had not been in this country for seven years at the date of application (May 10, 2016). However, section 117B(6) of the 2002 Act would apply in any article 8 assessment of the eldest child's article 8 claim.
15. The appellant adopted his two recent statements and explained that for the tax year 2010/2011 he did not use the services of a professional accountant and had failed to disclose his tax returns in respect of his self-employment. It was in 2016, when he was using a professional accountant to draw up his accounts, that he realised he had failed to disclose his self-employment income and he, with the assistance of his accountants, filed an amended tax return for 2010/2011 tax year and agreed to a payment plan to repay the outstanding tax in September 2016. He denied acting dishonestly or trying to evade the payment of tax and accepts that the error was his alone, but he had corrected the error once it was pointed out to him. He accepted that he had used an accountant for a certificate of income in 2011 but he had not discussed his actual circumstances with those accountants. In support of this he adduced at the hearing a copy of the tax return for 2010/2011 and that confirmed no tax advisers name was given at Q15.
16. In cross-examination the appellant accepted that he had obtained a master's in business administration and he had previously obtained a degree in business whilst studying in Pakistan. He accepted that he had studied the ins and outs of business to a high degree. Although he accepted, he had used a reputable firm of accountants in 2010/2011 tax year he was not aware that he had to pay tax on the self-employed earnings. The appellant accepted that when his business developed, he employed an accountant to look after his tax affairs and at that time he became aware that he had to pay tax on self-employed income, but it was only in 2016 that his accountants pointed out his error.
17. He confirmed that both his and his wife's parents lived in Rawalpindi and that they continued to maintain contact with them by telephone. Their respective parents owned their own properties in Rawalpindi that neither of their parents spoke English to any great extent.
18. Their children were born in this country and had never been to Pakistan. The appellant maintained that his children only spoke English and that was a language they spoke at home and that was also the language used by the children when speaking to their grandparents. The appellant stated that any conversation between the children and their grandparents was limited due to the language issue. He

denied the children spoke Urdu stating that their friends were English and that was their language of choice. Both the appellant and his wife were practising Muslims who attended mosque on a regular basis. The eldest child had recently been to mosque to learn Arabic, but she had not continued her studies at there.

19. The appellant submitted that he, his wife, children treated the United Kingdom as their home and any decision to remove them would affect them emotionally, financially, morally and psychologically. He submitted that it would be unreasonable to require their eldest child to leave the United Kingdom as she had spent more than seven years in this country and had become integrated into British society. An independent social worker's report supported what he was saying and that it was in the child's best interests to remain in this country.

SUBMISSIONS

20. Mr Bates relied on the decision letter and the decision of Khan when considering paragraph 322(5) HC 395. He submitted there is a significant difference in what was declared by the appellant in his two tax returns.
21. Instead of declaring an income of £39,000 the appellant had only disclosed an income of £16,000. He claimed he only used an accountant in 2010 for his immigration application and the accountant did not complete his tax return.
22. However, Mr Bates invited the Tribunal to look at the appellant's qualifications. In 2010 he obtained a master's degree in business and he submitted it lacked credibility the would not have known he had to pay tax on his self-employed income. The accountants sent him a letter which advised that self-employed income was taxable income. He was therefore aware his income was taxable and taxes were likely to be due.
23. In 2014 the appellant engaged a tax professional and so he must have been aware at that time he should have paid tax on that income. His claim he did not realise lacked credibility.
24. In March 2016 the appellant engaged his new accountant to assist him with his immigration application in May 2016 and it was only then he decided to put his house in order. The appellant accepts the error is his and he does not blame the accountant.
25. Mr Bates referred to sub-heading (v) in Khan and submitted the correction to his tax return only came about because he had to submit an application to remain.
26. The fact he has now paid the tax does not alter the fact he was dishonest and had not declared the tax until he needed to.
27. Mr Bates submitted that if a finding under paragraph 322(5) HC 395 was made then this prevented him from succeeding under paragraph 276B HC 395.

28. In dealing with any article 8 ECHR claim he relied on the decisions of KO (Nigeria), MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) and Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC) and submitted there was a clear public interest in both the appellant and his wife being given leave to remain and whilst the eldest child would have formed a private life it would not "in the real world" be unreasonable to expect the children to accompany their parents back to Pakistan. The children were Pakistani nationals and they have grandparents in Pakistan who own their own property and both their parents are well educated and are from Pakistan.
29. In considering section 117B of the 2002 Act he accepted there would be a severance of the children's existing private life, but he submitted it was not unreasonable for her to establish a new private life in Pakistan. Mr Bates cast doubt on the appellant's claim the children spoke no Urdu especially as that was the common language of their parents and grandparents. The social worker's report says the eldest child suffered with moderate speech and language difficulties, but the school report suggests she has no such difficulties (pages 88-93). It was not unreasonable to require a child to go to a country they have never been to.
30. Mr Salam submitted that the Home Office had to establish dishonesty and he stated the respondent had failed to do this. The refusal letter suggested it was the appellant's responsibility and rejected his account (see page 17 of main bundle). The appellant said he was busy and he had made a mistake and Mr Salam submitted his account was plausible. No penalties, other than interest, were imposed by HMRC.
31. Turning to article 8 ECHR the Supreme Court in Khan made clear that a parent's immigration history does not affect the children, but the Court contradicted itself when it later said that children can accompany parents. The social worker spoke to the eldest child and considered the school documents but concluded she has speech difficulties and recorded the children's main language as English.
32. It was unreasonable to expect her to go and live in a country where her first-choice language not spoken there and had special needs.

FINDINGS

33. I am concerned with two issues. The first issue is whether I make a finding on whether the appellant is caught by paragraph 322(5) HC 395 and the second issue is to consider the appeal under article 8 ECHR.
34. Paragraph 322(5) HC 395 makes it clear that leave to remain should normally be refused where "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security."
35. This appellant was refused under this provision because when lodging his tax return for the year 2010/2011 he only disclosed an income of £16,000 when in fact his total

income for PAYE and self-employment was £39,000. According to the paperwork that has been placed before me the appellant did use an accountant to confirm his income but did not use that firm to prepare his tax return although it seems from the documents produced that self-employed income was flagged up as something that tax had to be paid on. The appellant did not think about his unpaid tax until March 2016 when he was submitted an application for further leave to remain. He had employed an accountant in 2014 but the non-payment of tax had not come to light at that time.

36. Paragraph 322(5) HC 395 only applies if it is undesirable to permit the appellant to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), his character, associations or the fact that he represents a threat to national security. The issue that I have to consider is whether his conduct in failing to disclose taxable income makes it undesirable to permit him to remain in this country.
37. Whilst the respondent has a discretion to refuse under paragraph 322(5) HC 395 the Immigration Rules are clear when they say such applications should “normally be refused.”
38. The starting point is that the difference in declared income was over £22,000 with a loss to HMRC of around £5,900. I acknowledge that the appellant has since repaid this tax with interest and that no penalty was imposed on him for the non-declaration. However, I find the undeclared income was only brought to the attention of HMRC in the months leading up to the application for leave to remain.
39. His accountants were assisting him both with his accounts and his immigration application. I am satisfied that they would have pointed out to him what he had to demonstrate and the fact that there was a chunk of undeclared income which needed to be addressed.
40. The appellant accepts that it is no one else’s fault but his own and made clear both in his written and oral evidence that he had not brought the shortfall to anybody else’s attention until March 2016.
41. The appellant is an educated man as he has a degree and master’s in business. His claim he did not appreciate tax had to be paid on self-employed income is incredulous. He clearly knew he had to pay tax on income as he declared his PAYE income on his tax form so his claim that he did not realise he had to pay tax on his self-employed income has no merit.
42. Even if he was unsure about paying/declaring that income in that year it does not explain why it took him a further 4/5 years to make the declaration. The fact no penalties were imposed on him, apart from interest, by HMRC is ultimately a matter for HMRC and is not an acknowledgement that there was no “offence”.
43. There has recently been several challenges to decisions under this provision and as a direct consequence of this the Government reviewed the data and issued the

guidance referred to above on November 22, 2018. The Court in Khan issued guidance on how refusals under this provision should be looked at. I have looked at the appellant's case against this background.

44. The Court in Khan stated-

“(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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.

(ii) However, 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 is presented with a fact-finding task: she 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):

- (a) Whether the explanation for the error by the accountant is plausible;
- (b) 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;
- (c) 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;
- (d) 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. Turning to the facts of this case I find that there is a significant difference between the income declared in a previous application for leave to remain and the income declared to HMRC. I have considered his explanation that it was an

oversight/mistake but the appellant knew how much he had earned and by only declaring £16,000 for the relevant tax year as against £39,000 the appellant would have been aware that the amount of tax he was paying on that total income was less and it should be. The appellant did not take any steps to remedy the situation within a reasonable period of time. The fact the respondent chose not to impose a penalty is ultimately a matter for the HMRC. As he had ultimately disclosed the shortfall and reached an agreement to repay that shortfall HMRC may well have taken the view that no penalty needed to be imposed. No letter has been adduced by the appellant to explain the respondent's actual decision.

46. I find the appellant did act deceitfully or dishonestly as against being merely careless.
47. Having decided this issue, I now move on to the question of whether there are compelling circumstances to allow this appeal under article 8 ECHR. If I had found in favour of the appellant on the previous provision then he would have been entitled to status akin to long residence. As I did not I have to consider the best interests of two children including a child who has been living in this country since birth and is now eight years old.
48. The appellant has provided a report from an independent social worker dated October 31, 2018. The report incorrectly refers to the fact that this is an appeal by the child when in fact the appeal is brought by her father.
49. As I stated earlier neither the appellant nor his wife had any status entitling them to remain in this country. I accept that the appellant has been in this country for over twelve years whilst his wife has been in this country for around nine years as at the date of hearing. They do have some family living in this country, but they also have ties to Pakistan as both their parents continue to live in their own properties in Rawalpindi.
50. Both the appellant and his wife speak Urdu and whilst the appellant stated that his eldest daughter, in particular, cannot speak Urdu I do not find that claim credible. The child lives in a household where her earliest years would have been spent in the presence of her own family who speak Urdu. The appellant confirmed that he and his wife did speak Urdu and the prominent language spoken by their respective parents is also Urdu. The speech therapist's report is in my view very carefully worded when discussing the eldest child's language abilities. At paragraph 36 of the report the author refers to the fact that the eldest child has no reading and writing foundation skills in either Urdu or Pakistan studies because she uses English as a medium for instruction in school. At paragraph 40 of the report the author refers to the eldest child as speaking English as her first language.
51. Whilst I take on board the appellant's own evidence, I find that whilst the eldest child may well speak English as her first language she retains an ability to speak Urdu. The report referred to the child having an individual educational plan in place due to "developmental delay in expressive language". Mr Bates submitted that this

may possibly have been caused by her having difficulties in switching from Urdu to English once in mainstream schooling. I find this is speculation.

52. I accept that the child is doing well at school and settled and as she has been born in this country and has only ever lived in this country the starting point must be that it would be in her best interests to remain in the United Kingdom. However, the fact it is in her best interests to remain here does not mean she automatically is entitled to be allowed to remain. I have to have regard to section 117B of the 2002 Act and in the case of the eldest child I must have regard to section 117B(6) of the 2002 Act which makes it clear that where the child has been in this country from more than seven years it would not be reasonable to expect the child to leave the country.
53. The Supreme Court in KO (Nigeria) recently considered section 117B(6) of the 2002 Act. Both Mr Bates and Mr Salim addressed me on this section.
54. The Supreme Court explicitly endorsed the need to address the question of why the child would be expected to leave the UK before assessing reasonableness. It described this as “inevitably relevant”, albeit indirectly.
55. Seven years of residence in the UK can be literally a lifetime. In this appeal the eldest child’s experience of life is only in the UK. The child did not make a decision about where she had so far lived and she is therefore left with having to cope with the consequences of her parent’s choices.
56. The Supreme Court, in KO (Nigeria) considered the question of reasonableness and the factors that a court is entitled to take into account when applying the reasonableness test. The list of relevant factors in the Home Office’s guidance was described by the court as “wholly appropriate and sound in law”. The “reasonableness” assessment in both paragraph 276ADE(1)(iv) HC 395 and 117B(6) of the 2002 Act is “directed solely to the position of the child”. In other words, the conduct of her parents is irrelevant to that assessment of the impact on her.
57. However, the immigration history of her parents is “indirectly material”. I have to ask myself, ‘Why would the child be expected to leave the UK?’
58. If the answer is that the child’s parents have no right to remain in the UK then the Supreme Court in KO (Nigeria) says that this is “inevitably relevant” to the reasonableness assessment.
59. The “ultimate question” is therefore, ‘Would it be reasonable to expect the child to follow parents, with no right to remain, to Pakistan?’
60. In Agyarko and Ikuga v SSHD [2017] UKSC 11 (recently re-iterated by Lord Wilson in Rhuppiah v SSHD [2018] UKSC 58) Lord Reed stated that “exceptional does not mean ‘unusual’ or ‘unique’” and concluded that, even in a case which would not succeed by reference to the Rules, “leave to remain can nevertheless be granted outside the Rules in ‘exceptional circumstances’, in accordance with the Instructions, that is to say, in “circumstances in which refusal would result in unjustifiably harsh

consequences for the individual such that refusal of the application would not be proportionate, then leave will be granted outside the rules on the basis that there are 'exceptional circumstances'. In the case of MT and ET the Tribunal reiterated that powerful reasons are needed to remove a child after seven years.

61. I have to consider the extent of the eldest child's life in and ties to the UK, the extent of her family's integration, the impact of removal on the child, and the difficulties faced by the child if they had to start their life over in another country.
62. The various documents contained in the appellant's bundle regarding the eldest child's educational progress together with that of her sibling demonstrates that the eldest child has integrated into UK society. I accept she would not have any friends in Pakistan at this time but that is simply because she has never lived there. I asked myself how different is that situation to one where the child has been living in Pakistan and accompanies her parents to the United Kingdom because they have been granted a visa to come and live here. In that scenario the child would have no friends in the United Kingdom. Friendships can be created quite easily and whilst not wholly transferable they can of course now be maintained through various social media platforms.
63. The independent social worker's report concentrates on the family being split up. Any removal would not lead to this family being split up because the child's best interests would be to remain with her parents. The report approaches the case on the basis the appellant would be the only person leaving the United Kingdom and I find the report to be of little assistance in considering the eldest child circumstances save that I accept child would prefer to remain in this country as this is the only country she has known.
64. I accept this is a case which should be considered under article 8 ECHR due to the length of time the eldest child has been living here. I have followed the approach set out by the House of Lords in Razgar [2004] UKHL 00027 albeit I do not set out five questions posed by the court. Ultimately, this is an appeal that would be dealt with on proportionality grounds. Section 117B of the 2002 Act applies and I accept the appellant and his family speak English and had been able to financially support themselves. In light of my finding under paragraph 322(5) HC 395 I find the public interest requires the maintenance of immigration control as set out in section 117B(1) of the 2002 Act but ultimately the key question is that posed in section 117B(6) of the 2002 Act and whether it would be reasonable to require the eldest child to leave the United Kingdom.
65. This is a finely balanced argument but ultimately, I take into account, as directed by the Supreme Court, the fact neither parent has established a right to remain in this country. The appellant would have done save for the paragraph 322(5) point but his wife only ever entered this country as a dependent and she has spent the majority of her life in Pakistan where she was born and where her parents continue to live. The parents do speak Urdu I am satisfied that the eldest child speaks Urdu albeit I accept it is no longer her first language. They have family living both in this country and

Pakistan. The eldest child has not spent the formative years for educational purposes in this country.

66. Taking all these factors into account I find it would be reasonable to require the eldest child (and youngest) to leave the United Kingdom as it is in their best interests to remain with the parents who have no right to remain in this country.
67. I therefore find that it would not be unduly harsh to require the appellant and his family to leave the United Kingdom and to return to Pakistan.

DECISION

68. There was an error of law I previously set aside the First-tier Tribunal's decision.
69. I have remade this decision and dismissed the appeal under article 8 ECHR. In doing so I have upheld the respondent's conclusion that paragraph 322(5) HC 395 applies.

Signed

Date 19/12/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award as I have dismissed the appeal.

Signed

Date 19/12/2018



Deputy Upper Tribunal Judge Alis