



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03624/2017

THE IMMIGRATION ACTS

Heard at Field House
On 7 September 2018

Decision & Reasons Promulgated
On 12 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR IRFAN BAIG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Turner of Counsel

For the Respondent: Ms Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 19 December 1982. He is a citizen of Pakistan. He appealed against the respondent's decision dated 15 February 2017 to refuse him indefinite leave to remain on the basis of ten years' lawful and continuous residence here.
2. The appeal against the respondent's refusal was dismissed by Judge Coaster (the judge) in a decision promulgated on 30 January 2018. The grounds claimed the judge erred as follows:

3. Ground 1 – the judge failed to recognise that before the ILR application, the appellant had filed an amended tax return voluntarily and had also made payment of relevant tax liabilities. In those circumstances the judge erred in failing to consider whether 322(5) applied given “... that all was accurate and up-to-date at the date of the ILR application and more importantly at the date of the appeal hearing.”
4. Ground 2 – as 322(5) is a discretionary provision the judge erred in failing to consider whether the respondent had exercised discretion and the judge erred in failing to exercise the discretion in the Rules.
5. Ground 3 – the judge’s credibility findings are not sound. Whereas she says at [45] that the burden of proof falls on the appellant to provide a plausible account, at [46] the judge says that the account is not credible. Plausibility imposes a far lower threshold than credibility. See **SM and Qadir (ETS – evidence – burden of proof) [2016] UKUT 229 (IAC)**.
6. Ground 4 – the judge made no findings with regard to the letter at page 54 of the appellant’s bundle which is important to the appellant’s innocent explanation. See **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)**.
7. Ground 5 – the judge made no findings with regard to the character reference at pages 70 onwards in the appellant’s bundle.
8. Ground 6 – the judge failed to engage with the fact that the appellant’s child was born prematurely such that he was preoccupied.
9. Ground 7 – the judge erred in failing to undertake a proper proportionality assessment.
10. Judge Pooler refused permission to appeal on 5 April 2018. He said:

- “3. The judge undertook a careful evaluation of the evidence relating to an underpayment of tax by the appellant. She found that the appellant had been dishonest and that he had not been the victim of a mistake by his accountant. This finding was open to her and was adequately reasoned. It was moreover relevant to the issues of whether the appellant met the requirements of para 276B of the Immigration Rules and whether para 322(5) was engaged. Ground 3 refers to the burden on the appellant to advance a plausible explanation but under para 276B the burden of proof remained throughout on the appellant; the judge clearly found the decision to be justified under para 276B as well as para 322(5) and any alleged errors of law in relation to the latter, as advanced in grounds 1 – 4, cannot be arguably material errors of law.
4. As to grounds 5 and 6, there was no duty on the judge to mention each and every piece of evidence in her decision and reasons. The judge was entitled to reach her findings having heard the appellant under cross-examination.
5. Ground 7 is vague and unparticularised and discloses no arguable error of law.

11. The grounds were repeated. Judge Pitt on 9 July 2018 granted permission to appeal, *inter alia* as follows:

“3. The decision turned on the application of paragraph 322(5) of the Immigration Rules where the appellant amended a tax return from 2011 prior to applying for ILR in 2016. In light of the respondent’s public statements on the potential misapplication of paragraph 322(5) and in light of the grounds concerning whether the correct approach was taken to the letter from the most recent accountants and the premature birth of the appellant’s child at the time he discovered the incorrect tax return, it is arguable that legal error arises.

4. All grounds are arguable.”

12. I adjourned this case when it was first before me on 7 September 2018 with a direction as follows:

“Not less than ten working days prior to the resumed hearing, Mr Turner do file and serve respondent’s public statements on the potential misapplication of paragraph 322(5) and a skeleton argument addressing such public statements and their applicability to the appellant’s grounds that an incorrect approach was taken to the letter from the appellant’s most recent accountants and the interaction of the premature birth of the appellant’s child at the time he discovered the incorrect tax return.”

13. Mr Turner filed and served a skeleton dated 10 October 2018. My attention was drawn to a letter from the Minister of State for Immigration to Yvette Cooper MP dated 21 June 2018, a question put to the Minister of State for Immigration answered on 13 June 2018. Mr Turner also handed up a letter dated 14 August 2018 from E Smith & Company, the appellant’s previous accountants, said to acknowledge and clarify errors made by the accountants for the tax returns for 2010/2011. This letter is postdecision and I have not read it nor taken it into account.

14. Mr Turner submits that the Secretary of State recognises that there are problems with the way rectification of tax returns are dealt with in terms of refusal to grant indefinite leave to remain under paragraph 322(5). This is the comment made by Upper Tribunal Judge Pitt which I have referred to at [11] above.

15. Given Mr Turner’s reliance on such documentation, I propose to set it out in full. The answer given by the Minister of State for Immigration on 13 June 2018 was in response to a question made on 6 June 2018 asking her for what reason rectifying a tax return error constituted sufficient grounds to refuse indefinite leave to remain under paragraph 322(5). The Minister for Immigration’s response was as follows:

“It is not the Government’s policy to refuse applications due to rectification of tax return errors.

We have refused applications where there are substantial differences – often tens of thousands of pounds – between the earnings used to claim points in an immigration application and an applicant’s HMRC records, without a credible explanation from the

applicant. We take all available evidence into account before making a decision. Paragraph 322(5) is used where the evidence shows that an applicant's character and conduct is such that their application should be refused. Any such case is signed off by a manager before refusal grounds are applied.

As I advised the Home Affairs Select Committee on 8 May, we are carrying out a review of these cases to see how many showed clear evidence of deceit, and whether any were minor errors."

16. The letter from the Minister of State for Immigration to Yvette Cooper MP on 21 June 2018 was by way of updating the Home Affairs Select Committee on the review of the cases refused on character and conduct grounds under paragraph 322(5).
17. The letter inter alia reported the following:
 - *"In 249 of the initial 281 cases reviewed, applicants amended their HMRC records by more than £10,000. In many of the remaining cases, though the differences were less than £10,000, they were nevertheless substantial.*
 - *In 241 cases, the amendments were made more than three years after the initial submission to HMRC, with the majority looking to amend their records within one year of making a further application to the Home Office.*
 - *Applicants were given the choice to explain their situation. Most of those who did provided no further explanation, other than that there were errors by their accountants.*
 - *Applications were not refused on the grounds that the applicants made errors in their tax returns. They were refused on the grounds that the applicants had, most likely, exaggerated their earnings to the Home Office to claim enough points to obtain leave to remain or indefinite leave to remain in the UK or, alternatively, substantially under-reported their earnings to HMRC to evade tax. In either scenario, their character and conduct is such that their applications should not be granted."*
18. The letter goes on to say that it is important that any applicants who might have made minor errors should not be inadvertently caught up in tackling the wider pattern of abuse.
19. The appellant's circumstances can be readily distinguished from those mentioned in the respondent's public statements who might have made minor errors. The judge carried out what Judge Pooler called (see [10] above) "... .. a careful evaluation of the evidence relating to an underpayment of tax by the appellant." She set out her conclusions at [32–[46]. The judge found and Ms Kiss submitted that the appellant had amended the tax in question by £21,000. The appellant is an intelligent, educated man; he would have known a dishonest return had been submitted on his behalf.

20. The judge found that the appellant signed off the financial statement in 2011 approving the figures and acknowledging responsibility for them. The respondent's public statements confirm that the correct approach was taken with regard to the amended tax return and no error of law is established in that regard.
21. I find that none of the grounds are made out. The judge found there was no credible innocent explanation and that the appellant had been dishonest. That was a finding the judge was entitled to come to on the evidence. The appellant's preoccupation with the premature birth of his child was irrelevant to the dishonesty but in any event, there was no error of law in the judge failing to mention all evidence and submissions tendered. She carried out a careful and comprehensive analysis of all significant issues and evidence.

Decision

The grounds fail to establish any error of law. The judge did not err in her decision which shall stand.

No anonymity direction is made.

Signed

Date 2 November 2018

Deputy Upper Tribunal Judge Peart