Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/34832/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 12 December 2018

Decision & Reasons Promulgated
On 20 December 2018

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
and

MR SOHAIL AMIR
(NO ANONYMITY DIRECTION)
Respondents

Representation:

For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Mr D Coleman, Counsel (instructed by MA Consultants)

DETERMINATION AND REASONS

Introduction

1. The Appellant (The Secretary of State for the Home Department) appealed with permission granted by First-tier

© CROWN COPYRIGHT 2018

Tribunal Judge I D Boyes on 1 November 2018 against the determination of First-tier Tribunal Judge A A Wilson who had allowed the Respondent's appeal on Article 8 ECHR grounds. The decision and reasons was promulgated on 12 October 2018.

2. The Respondent is national of Pakistan, born on 8 March 1983. He had entered the United Kingdom lawfully on 8 December 2004 and became eligible for settlement under paragraph 276B of the Immigration Rules once he had acquired 10 years continuous lawful residence. While the Secretary of State for the Home Department accepted that the Respondent had indeed completed 10 years continuous lawful residence, settlement was refused on 24 November 2015 under paragraph 322(1C)(iv) of the Immigration Rules, on the ground that the Respondent had within 24 months prior to the date on which his application was decided been convicted of or had admitted an offence for which he received a non custodial sentence or other out of court disposal that is recorded on his criminal record. The Secretary of State for the Home Department was satisfied that the Respondent had been convicted of an offence on 24 November 2013, meaning that the mandatory rule applied.

3. The Respondent's appeal to the First-tier Tribunal was dismissed but the determination was set aside by the Upper Tribunal for material error of law. Upper Tribunal Judge Finch held that the certificate of conviction from the Crown Court was the determinative evidence. That certificate showed that the Respondent was convicted on 26 September 2013 (i.e., not 24 November 2013), with the result that the Home Office decision was clearly more than 24 months after that date. That had been misunderstood by the First-tier Tribunal.

4. Upper Tribunal Judge Finch had noted that paragraph 322(5) of the Immigration Rules was potentially applicable: leave should normally be refused due to "*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, associations or the fact that he represents a threat to national security.*" That had, however, to be read in conjunction with Home Office policy guidance (General grounds for refusal Section 1 – version 29.0 11 January 2018) which states at page 75 that "*It is unlikely that a*

person will be refused under the character, conduct or association grounds for a single conviction that results in a non-custodial sentence outside the relevant time frame." The appeal was remitted to the First-tier Tribunal to enable both issues to be considered before another judge after hearing further evidence.

5. Judge Wilson found that the Respondent had been in the United Kingdom with leave to remain at all times, including leave extended by virtue of section 3C of the Immigration Act 1971. The Home Office decision was erroneous because of the error of fact identified by Upper Tribunal Finch, so the general grounds of refusal were inapplicable. As to the discretionary grounds, the judge accepted the Respondent's evidence that the conviction on 26 September 2013 was a single, isolated event and that there had been no further arrests or offences. Applying the Home Office guidance identified by Upper Tribunal Judge Finch, none of the grounds under paragraph 322(5) of the Immigration Rules was applicable. The judge applied <u>SF and others (Guidance post 2014 Act) Albania</u> [2017] UKUT 120 (IAC). Thus he allowed the human rights appeal.

6. Permission to appeal was granted (with reservations) because it was considered arguable that the judge had not engaged sufficiently with the circumstances of the Respondent's conduct.

Submissions

7. Mr Lindsay for the Appellant accepted that the grounds submitted on the Secretary of State for the Home Department's behalf were lacking in clarity. The main problem with the determination was that the Home Office policy was only guidance. Here the Respondent's conduct went to the heart of the immigration system and its procedures, which the Respondent had sought to undermine. Refusal was important as a deterrence: see <u>Hesham Ali</u> [2016] UKSC 60, especially Lord Wilson at [69]. The decision should be set aside, the appeal remade and dismissed.

8. Mr Coleman for the Respondents relied on the rule 24 notice served on the Respondent's behalf. The Home Office Presenting Officer at the First-tier Tribunal re-

hearing had asked only one question of the Respondent, had he been convicted of any other offences, to which the answer was no. Thus this was a single offence case. Far from misdirecting himself, the very experienced judge had been guided by the Upper Tribunal Judge's comprehensive decision and had applied the relevant law in SF (above). He submitted that the judge had been entitled to allow the appeal and had given adequate reasons for doing so.

No material error of law finding

9. The tribunal accepts the submissions of Mr Coleman and finds that there was no error of law. The very experienced judge's determination must be read alongside the determination of Upper Tribunal Judge Finch, as was plainly intended. The Upper Tribunal had identified the key issues, and it was tolerably clear that they could only be decided in the Respondent's favour if the evidence at the remitted showed that he was a "single conviction" case. That was Judge Wilson's finding on the evidence. The absence of any record of submissions to the contrary from the Home Office Presenting Officer corresponds to Mr Coleman's rule 24 notice. In effect, once that evidence had been accepted, the appeal was conceded by the Home Office. That might well be thought to have left little scope for a permission to appeal application.

10. Mr Lindsay's submissions for the Appellant put the case in a different and possibly creative way, suggesting that there is or should be a special category of offence which precludes further leave or settlement, namely offences which undermine the immigration system. He submitted that that would be a proper exercise of discretion under paragraph 322(5). There can be no doubt that the Respondent's offence, assisting unlawful immigration into an EU member state, was in that very category, although this appears to have been in relation to a single individual, which would explain the lenient sentence.

11. There are, however, a number of difficulties with Mr Lindsay's logical and well argued submission. The first is that the Respondent was given what by any standards was a light, non-custodial sentence, which the tribunal cannot go behind. The second is that it was found to be a single offence, with a conviction more than two years before the Home Office's decision. Another and possibly the greatest

problem is that the relevant Home Office guidance draws no distinction between categories of offence, making no special exceptions for offences undermining the immigration system. Perhaps the Home Office guidance should do so, but any debate over that is not for the judges at either level of the Immigration and Asylum Chamber. The Home Office guidance is both recent and highly specific. There is no scope for any gloss. Lord Wilson's observations in Hesham Ali (above) were addressed towards serious and/or persistent offences which lead to deportation orders.

12. Judge Boyes's hesitation in granting permission to appeal was right, in the tribunal's view. There was no error of law. Judge Wilson's decision stands unchanged.

DECISION

The appeal to the Upper Tribunal is dismissed.

The original decision of the First-tier Tribunal stands unchanged.

Signed **Dated** 12 December 2018

Deputy Upper Tribunal Judge Manuell