



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04688/2018
HU/18090/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th July 2019

Decision & Reasons Promulgated
On 31st July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ADIL [Q] (FIRST APPELLANT)
MRS ADIL [A] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondents: Ms F Allen, Counsel

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondents are citizens of Pakistan born on 4th April 1982 and 20th May 1986 respectively. They are husband and wife. They have two children both born in the United Kingdom who are also citizens of Pakistan. However for the sake of convenience, I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. Since the appeals of the second appellant rests or falls with that of the first appellant, I shall deal with the appeal of the first appellant and refer to him as “the appellant”. The appellant appeal against the decision of the respondent dated 29th January 2018 under paragraph 322(5) of the Immigration Rules.
3. Judge P S Aujla of the First-tier Tribunal allowed both appellants’ appeals in a decision promulgated on 1st April 2019.
4. The Secretary of State appealed against the decision and First-tier Tribunal Judge Parkes granted permission to appeal on 7th June 2019 stating that it is arguable that the judge erred in failing to consider two pieces of evidence when allowing the appellant’s appeal. The first was the fact that the appellant was employed in accounts and it was highly unlikely that he would fail to identify a discrepancy of £36,000 and would have taken steps earlier to rectify the mistake. The timing of his taking steps to rectify this mistake suggested it was done for his application for indefinite leave to remain and not simply to correct the error. The judge with “some hesitation” granted permission to appeal to the Secretary of State.
5. I heard submissions from both Mr Bramble and Ms Allen as to whether there is an error of law in the decision.

My Findings as to the Error of Law

6. Upon the reading of the decision it is clear that the judge took into account all the evidence. The judge refused the application under the general grounds of refusal under paragraph 322(5) of the Rules. This was due to the discrepancies in the appellant’s declared income to HMRC for tax purposes and the UKVI. Paragraph 322(5) says the undesirability of permitting a person concerned to remain in the United Kingdom in light of his conduct (including conditions which do not fall within paragraph 322(1C), character or associations or the facts that he represents a threat to national security). Therefore the judge had to consider the appellant’s conduct in relation to the earning discrepancy.
7. The Home Office Presenting Officer before the First-tier Tribunal did not make any allegation that the appellant had used deception but at the same time said that the discrepancy was not an innocent mistake. I have considered the case of **Balajigari**, in the Court of Appeal, [2019] EWCA Civ 673 at paragraph 35 where the Court of Appeal states that

“As to the first two limbs Mr Biggs’ position was that an earnings discrepancy case could constitute sufficiently reprehensible conduct for the purposes of paragraph 322(5) if but only if the discrepancy was the result of dishonesty on the part of the applicant.”
8. The Home Office Presenting Officer at the hearing before the First-tier Tribunal made no allegation of dishonesty against the appellant. The burden of proof is on the respondent to demonstrate that the appellant was dishonest in relation to the

discrepancy in his earnings. Therefore if the respondent had made no allegation of dishonesty, he had not satisfied his burden of proof which initially was upon him. I refer to the case of **R (on the application of Khan) of the Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5) [2018] UKUT 00384 (IAC)** when assessing whether the appellant was dishonest in relations to his dealings UKVI or HMRC. Therefore an allegation of dishonesty must form the basis of any refusal under paragraph 322(5).

9. In the circumstances, the First-tier Tribunal Judge did not fall into material error as alleged by the respondent. I therefore find that the Judge of the First-tier Tribunal's decision is safe and I uphold it.

Decision

The respondent's appeal is dismissed.

No anonymity direction is made.

Signed

Date: 29th day of July 2019

Deputy Upper Tribunal Judge Chana

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award

Signed

Date: 29th day of July 2019

Deputy Upper Tribunal Judge Chana