



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08309/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25th January 2019

Decision & Reasons Promulgated
On 01st March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

MR ABIDEEN ALAM SHAIKH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini, Counsel instructed by Clyde Solicitors

For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a Pakistani national whose date of birth is recorded as 28th June 1982. He first arrived in the United Kingdom on 16th November 2006 as a student. He then applied in time for extensions of leave until on 23rd June 2016 he applied for indefinite leave to remain as a Tier 1 (General) Migrant. On 26th October 2016 that application was varied to an application for indefinite leave to remain on the grounds of ten years' continuous lawful residence. The application was refused.

2. The Secretary of State relied principally on paragraph 322(5) contending that the Appellant's conduct was such that he ought not to be granted the relief he sought. There were question marks so far as the Secretary of State was concerned over the tax returns of the Appellant in years 2010/2011 and in the following year. The history with respect to that is set out at paragraph 7 of the decision of Judge Monaghan and I do not propose to set it out again.
3. The Appellant appealed. His appeal was heard on 24th October 2018 by Judge Monaghan sitting at Bradford. She came to the view that the Appellant ought not to succeed and she dismissed the appeal.
4. Not content with that decision by Notice dated 28th November 2018 the Appellant sought permission to appeal to the Upper Tribunal. The grounds are lengthy running to 51 paragraphs. Judge of the First-tier Tribunal Nightingale however was able to wade her way through them and on 6th December 2018 granted permission. There were a number of grounds, but it is of note that Judge Nightingale principally granted permission because of concern over whether the judge had correctly applied the burden of proof such being on the Secretary of State when dishonesty is in issue.
5. I propose to deal very briefly with the other grounds. The first submits that the judge erred in allowing the appeal when the Secretary of State had not followed his own policy in coming to the decision. That is because a decision of this kind needed to be put before a senior caseworker and was not. The decision therefore was not in accordance with the law. That is a term of art however and that Ground of Appeal as a statutory ground was not available to this Appellant under the current regime. The five-stage test in **Razgar** has, as the second question after considering whether the proposed removal would engage Article 8, consideration of whether any interference would have consequences of such gravity as potentially to engage the operation of it, and the third test is if so, is such interference in accordance with the law? It is clear that that interference being in accordance with the law relates to the interference, not the decision, and that was a point made clear by the Court of Appeal in the case of **Singh v Secretary of State for the Home Department [2017] EWCA Civ 362**. The second ground relates to the burden of proof and I shall return to that.
6. Ground 3 submits that the judge had failed to appreciate that there was a discretionary nature to the basis upon which the application had been refused, in other words, paragraph 322(5) is not a mandatory Ground of Refusal. There is some substance in the submission that the judge having approached the case as she did, did not recognise that there was a discretionary basis here but it is of note at paragraph 44 that the judge says in terms that paragraph 322(5) of the Immigration Rules states that the Respondent *may* refuse an application for leave to remain on discretionary grounds. The point however that Mr Saini makes is that having self-directed in that way it appears to have been the single determining factor. Again, I shall return to that because it goes to the way in which this case should properly be resolved.

7. At Ground 4 Mr Saini submits that the lack of penalty by HMRC deserved consideration by the judge of the level of misconduct on the part of the Appellant. The fact that there was no penalty awarded should have weighed heavily it is suggested in any proportionality assessment. Taken in the round there may be some merit in that point but there is no sufficient evidence before me to suggest that the Inland Revenue would understand the significance of a person overstating their income in the context of immigration in order to obtain the relief that was being sought. Indeed, I take the view that Grounds 4, 5 and 6 taken together are of the sort that were in the mind of McCombe LJ in the case of **VW (Sri Lanka) [2013] EWCA Civ 522** when he said at paragraph 12:

“Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully”.

8. I return then to the main point which is the burden and standard of proof. In the case of **Shen (Paper appeals, proving dishonesty) [2014] UKUT 236** it was said that:

*“(1) In terms of the approach that a Tribunal should adopt towards decisions of the Secretary of State in which dishonesty or deception is alleged against an applicant for leave to remain, the starting point should be, as the Court of Appeal in **Adedoyin [2010] EWCA Civ 773** have made clear, that pursuant to paragraph 322 of the Immigration Rules, the reference to ‘false’ means ‘dishonestly’ false.*

(2) Where an application form etc. is false in a material way, this may be relied on by the Secretary of State as prima facie evidence establishing dishonesty. The inference of deliberate deception can be strengthened by other facts: e.g. if a criminal conviction (not disclosed in an application) occurred shortly before completion of the application form. Here, the conviction must have been high in the applicant's mind and any explanation based on oversight would carry little weight. But it is always open to an Appellant to proffer an innocent explanation and if that explanation meets a basic level of plausibility, the burden switches back to the Secretary of State to answer that evidence. At the end of the day the Secretary of State bears the burden of proving dishonesty”.

That is where the difficulty for the Secretary of State in my judgment lies in this case. The legal burden was upon the Secretary of State and stayed upon the Secretary of State throughout. The Secretary of State did raise a prima facie case. There were serious question marks over the accounts which had been submitted by the Appellant which had overstated the income which would provide him with a benefit. There was also a clear error of exactly £1,000 in respect of one item which called for explanation. The Appellant provided one. His explanation was that he went to accountants, indeed it would appear that he went to a number of accountants although it is not entirely clear given that the Secretary of State bears the burden as to

quite how many accountants he went to, but having raised an innocent explanation, namely that he went to accountants and relied upon them, and that he did not fully understand what was being provided to him on the basis that he had asked professional people to prepare them so that he simply signed on the dotted line which he did relying on their professionalism, it was for the Secretary of State to disprove it.

9. At paragraph 65 of her judgment Judge Monaghan says, “Therefore the Respondent has established that he was entitled to refuse the application under paragraph 322(5)”.

That may be the case; it may be that the decision was justified by the Secretary of State but that does not answer *the appeal*. The Respondent Secretary of State would have been entitled to maintain that position absent any innocent explanation.

10. At paragraph 59 having considered the evidence the judge says:

“I therefore find, in the light of my concerns as to credibility that *the Appellant has not persuaded me* that there was an innocent explanation for the difference for the income claimed in his previous application for leave to remain and the income declared to HMRC”.

11. In a case which turns on dishonesty I would suggest that it would be better for a judge to pin her colours to the mast rather than simply raise concerns but more particularly, the decision as a whole reads as if the judge required the Appellant to prove the innocent explanation. It was not for the Appellant to do that, it was for the Secretary of State to disprove it. A number of accountants had been mentioned. It is not suggested by the Secretary of State that he was not aware of the Appellant’s case in advance of the hearing; it was open to the Secretary of State to call those accountants and obtain witness statements from them if so advised.
12. Ms Kenny realistically, faced with the way in which the judge has expressed herself, accepts that it did not appear that the Secretary of State had brought any sufficient evidence before the Tribunal. Of course, the Secretary of State can in certain circumstances rely on the evidence of the Appellant and say that the evidence is so lacking in credibility that the Respondent relies on that as proof but that is not how this case was presented, nor how it reads.
13. In my judgment there was a material error of law which means that the decision of the First-tier Tribunal is to be set aside. I then have to decide whether to remit the case or to re-make it. The only basis upon which the judge appears to have dismissed the application was based upon her concerns as to the credibility of the Appellant in relation to the tax affairs. The burden being on the Secretary of State and not having been proved it seems that the only proper course now is to re-make the case on the basis that absent that point being proved, the Appellant is entitled to succeed.

Notice of Decision

The decision of the First-tier Tribunal is set aside and re-made such that the appeal in the First-tier Tribunal is allowed.

No anonymity direction is made.

Signed

Date: 27 February 2019



Deputy Upper Tribunal Judge Zucker

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 given that there was a prima facie case which called for an explanation.

Signed

Date: 27 February 2019



Deputy Upper Tribunal Judge Zucker