



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10790/2018

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2019

Decision & Reasons Promulgated
On 20 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PAUMIL RAKESH SHAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms S Sharma, Counsel instructed by Aschfords Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of India born on 26 June 1985. On 31 August 2017 he applied for indefinite leave to remain in the UK on the basis of ten years' residence under paragraph 276B of the Immigration Rules. His application was refused under paragraphs 276B(ii)(c) and 276B(iii) (with reference to Paragraph 322(5)) because in an application for leave to remain made in February 2011 he claimed to have

earnings of £22,722.21 between 30 April 2010 and 31 January 2011, whereas his income in the tax year 2010/11 was declared to HMRC as being only £9,111.

3. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Smith. In a decision promulgated on 29 November 2018 the appeal was allowed. The Secretary of State is appealing against that decision.

Decision of the First-tier Tribunal

4. The judge found that the appellant had given accurate information to the Home Office in his 2011 application but had intentionally and dishonestly given incorrect information to HMRC for the purposes of determining how much tax he was required to pay in the 2010/11 tax year. The judge rejected the appellant's explanation that there had been an accidental underpayment and that the fault lay solely with his accountant.
5. Despite finding that the appellant had been dishonest, the judge reached the conclusion that the appellant did not fall foul of paragraph 322(5) and on that basis allowed the appeal under Article 8 ECHR.
6. The judge gave several reasons for finding that the appellant's application should not be refused under paragraph 322(5). These include:
 - (a) Paragraph 322(5) is primarily intended to apply to conduct that is more serious than that carried out by the appellant. The judge reached this view in light of Home Office Guidance dated 11 January 2018 on General Grounds for Refusal.
 - (b) The dishonesty did not have the effect of conferring an immigration advantage.
 - (c) No money was outstanding to HMRC.
 - (d) The appellant did not engage in repeat conduct.
 - (e) There have been no enforcement proceedings by HMRC.
 - (f) Character references show that the appellant has a good positive character and is a popular teacher at his school.
7. The judge considered the Upper Tribunal decision *Khan v Secretary of State (Dishonesty, tax return, paragraph 322(5))* [2018] UKUT 384 (IAC), and at paragraph 42 distinguished it from the appeal before him. He stated:

"The Presenting Officer relied on *Khan* (and the authorities cited therein) for the contrary proposition. In that case, Spencer J held that the Secretary of State had acted rationally when applying paragraph 322(5) in relation to an over-declaration of claimed income. It was not a case analogous with the present matter, whereby the appellant's claimed income was at the correct level, but the declaration to HMRC was below that level. Even if it were directly on point with these proceedings, it would be of limited precedential value. As the judge noted, in judicial review proceedings, the court is not conducting a merits-based review. It is addressing whether the Secretary of State's decision was within the range of

reasonable decisions he could properly have taken. It was not mandating the role that a fact-finding Tribunal should take in a full, merits-based appeal”.

8. The judge also considered the Secretary of State’s Operational Instruction relating to earnings discrepancies and applications by Tier 1 (General) Migrants dated 22 November 2018. The judge noted that this Operational Instruction postdates the hearing and only took effect from 22 November 2018.
9. The judge concluded that because the appellant did not fall foul of paragraph 322(5) his appeal should be allowed under Article 8 ECHR.

Grounds of appeal and submissions

10. The Secretary of State appealed on the basis that the judge failed to follow *Khan* and failed to appreciate that dishonesty in tax affairs meets the standard for refusal under paragraph 322(5).
11. Ms Isherwood highlighted the extent and nature of the adverse findings by the judge in respect of the appellant’s dishonesty. She argued that it was inconsistent with *Khan* to find that paragraph 322(5) was not applicable, given that dishonesty in tax affairs had been established.
12. Ms Sharma’s response was that the judge had properly considered *Khan* and had explained why it was distinguished from the present appeal. She drew attention to the judge’s finding that no tax was outstanding.
13. I raised with Ms Isherwood that the grounds of appeal did not raise the issue of whether the judge had failed to consider paragraph 276B(ii)(c) which is a distinct basis for refusing indefinite leave under paragraph 276B. Ms Isherwood acknowledged that this was the case and accepted it was too late to now raise this issue (as it was not in the grounds).

Analysis

14. Paragraph 322(5) is one of several grounds in the Immigration Rules where it is stipulated that leave to remain should normally be refused. It refers to:

“the undesirability of permitting the person concerned to remain in the UK 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.”
15. *Khan* is a recent judicial review case in the Upper Tribunal which considered the applicability of paragraph 322(5) where an applicant for leave to remain is alleged to have been dishonest because of a discrepancy between income disclosed in an immigration application and income declared to HMRC. At paragraph 32 Spencer J stated:

“The starting point seems to me to be that, where the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC (as here), she is entitled to

draw an inference that the application has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules." (emphasis added)

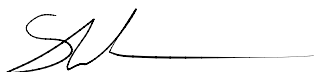
16. Although in the above cited paragraph Spencer J indicates that the Secretary of State should refuse indefinite leave to remain under paragraph 322(5) where there is a finding of dishonesty in tax affairs, the issue in *Kahn* was not whether dishonesty to the HMRC should lead to refusal under 322(5) but rather the Secretary of State's approach to determining whether an applicant has been dishonest or merely careless. This distinction is not relevant to the present appeal as the judge found that the appellant had been dishonest (and not merely careless).
17. Where, as in this appeal, there has been dishonesty to the HMRC it is clearly open to a judge to refuse indefinite leave to remain under paragraph 322(5) as a consequence. However, that does not mean that in all cases where there has been dishonesty to the HMRC a judge must find that indefinite leave to remain should be refused. Where there has been dishonesty in tax affairs a judge must consider the applicability of paragraph 322(5) but there may be cases where, because of other considerations, it is found to not apply notwithstanding the dishonesty.
18. In my view, the judge has not erred in the approach he has taken. He correctly recognised that, in the light of his finding of dishonesty in tax affairs, it might be appropriate to refuse indefinite leave to remain under paragraph 322(5). He carefully considered the applicability of paragraph 322(5) to the appellant, having regard to the Secretary of State's guidance, as well as the recent case of *Khan* (as discussed above). The judge recognised that the appellant's dishonesty was a serious matter but also had regard to other factors, such as that there had been only a single act of deception, no money was outstanding to HMRC and evidence of good character.
19. I am satisfied that it was not inconsistent with *Khan* for the judge to find that even though the appellant had been dishonest in his tax affairs paragraph 322(5) was not applicable in the particular circumstances. Even though many other judges might have come to a different view the judge has reached a decision that was, in my view, open to him. The appeal is therefore dismissed.

Notice of Decision

The appeal is dismissed and the decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 19 February 2019