



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12384/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2018 and 15 February 2019

Decision & Reasons Promulgated
On 05 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR ZAHEER UD DIN BABAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shah, Legal Representative, 786 Law Associates (15.02.19)

For the Respondent: Mr David Clarke (21.12.18) and Ms A. Everett (15.02.19),
Senior Home Office Presenting Officers

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Veloso) dismissing his appeal against the decision of the respondent ("the Department") made on 2 October 2017 to refuse to grant him indefinite leave to remain under the Rules as a person who has accrued at least 10 years' continuous lawful residence. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of Pakistan, whose date of birth is 30 August 1974. He first entered the UK on 12 July 2006 with valid entry clearance as a student. The appellant extended his stay in the UK in various capacities thereafter. On 13 March 2009 he was granted leave to remain as a Tier 1 (Post-study work) migrant until 13 March 2011. His wife joined him in the UK as his dependant on 5 April 2010, and on 4 October 2010 the appellant and his wife returned from Pakistan with their three children, and all of them entered the UK with valid leave.
3. On 12 March 2011 the appellant applied for leave to remain as a Tier 1 (General) migrant claiming that he had accrued total earnings of £66,564 in the year from 1 March 2010 to 28 February 2011. His wife and their three children applied in line as his dependants. On 16 June 2011 the respondent granted the appellant and his dependants leave to remain until 16 June 2013.
4. The appellant applied for further leave to remain as a Tier 1 (General) migrant on 15 June 2013, claiming total earnings of £66,148 in the year from 1 June 2012 to 31 May 2013. On 10 September 2013 the respondent granted the appellant leave to remain as a Tier 1 (General) migrant until 10 September 2016, and his dependants were granted leave to remain in line with him.
5. On 30 August 2016 the appellant applied for indefinite leave to remain on the grounds of continuous lawful residence of at least 10 years. His wife and three children applied for indefinite leave to remain as his dependants.
6. On 2 October 2017 the Department gave their reasons for refusing the appellant's application. The Department invoked paragraph 322(5) of the Rules, which provides that leave to remain should normally be refused where it is undesirable to permit the person concerned to remain in the UK in light of his conduct, character or associations, or the fact that he represents a threat to national security.
7. The evidential foundation for the invocation of Rule 322(5) was a comparison between the information which the appellant had given in his applications of 12 March 2011 and 15 June 2013, with the information that the Department had obtained from HMRC. The Department said that it had verified the appellant's earnings "*during this period*" with HMRC who confirmed the following details: (a) for the tax year 6 April 2010 to 5 April 2011, the appellant had declared earnings (total income) of £23,356, the source of this income being from PAYE employment and self-employment; (b) for the tax year 6 April 2011 to 5 April 2012, there was no trace of any self-employment income being declared; (c) for the tax year 6 April 2012 to 5 April 2013, the appellant had declared earnings (total income) of £27,372, the source of this income being from PAYE employment and self-employment; and (d) for the tax year 6 April 2013 to 5 April 2014, the appellant had declared earnings (total income) of £20,900, the source of this income being from PAYE employment and self-employment.

8. The Department said that it was evident that HMRC records of the appellant's income differed significantly to the income which he had declared to UK Visas & Immigration in his two applications. If he had declared his (true) level of income to UKVI as part of his Tier 1 applications, he would not have been awarded the required points to be given leave to remain. Accordingly, the Department considered that it would be undesirable for him to remain in the UK in the light of his character and conduct. The Department was satisfied that he had misrepresented his earnings at various times for the purposes of reducing his tax liability or for the purpose of obtaining leave to remain or both.
9. The Department acknowledged that Rule 322(5) of the Rules was not a mandatory refusal. However, the evidence submitted did not satisfactorily demonstrate that the failure to declare to HMRC at the time the PAYE and self-employed earnings claimed in his Tier 1 applications were "*genuine errors.*"
10. The grounds of appeal were settled by legal representatives who the appellant had instructed. In the notice of appeal, the appellant elected for an oral hearing which was going to be attended by himself, his legal representative, and witnesses. In Part 3 of the notice of appeal, he was asked to explain why the decision to refuse his human rights claim was unlawful under section 6 of the Human Rights Act 1998. His representatives pleaded that the appellant had minor children who had been living in the UK for 7 years, and the appellant was going to rely on EX.1. The appellant had never deceived UK Visas & Immigration, and had never been a burden on the UK taxpayers. The discretion in the Immigration Rules should have been exercised differently.
11. The appellant then changed his mind about having an oral hearing. On 1 November 2017 the Tribunal was notified that the appellant wished for his appeal to be disposed of without a hearing.

The Decision of the First-tier Tribunal

12. In his decision promulgated on 13 December 2017, Judge Veloso set out the documentary evidence that was before him at paragraph [3].
13. It is apparent from his summary that the appellant had not filed any evidence in support of his appeal, including any evidence to support his bare denial in the grounds of appeal that he had deceived UKVI when applying for leave to remain in 2011 and 2013. Equally, it is apparent that the respondent had failed to comply with a direction from the Tribunal to serve on the Tribunal and on the appellant any unpublished documents on which the Department wished to rely. Accordingly, there was no letter or witness statement from HMRC confirming what had been said in the refusal decision about the contents of the appellant's applications and tax returns.
14. The Judge set out his findings on Rule 322(5) at paragraphs [19]-[25]. The burden of proof was on the respondent to show dishonesty. The Home Office bundle did not include a copy of the appellant's applications for leave to remain showing the total

earnings claimed during the relevant periods, or any correspondence from HMRC confirming the amounts that were at odds with those in the application forms. So, he found on balance that the respondent failed to show that the appellant came within Rule 322(5). He observed that the respondent did not take issue with the appellant having totalled at least 10 years' lawful leave in the UK as at the date of application. He also observed that having found against him on Rule 322(5), the respondent had refused the appellant under Rule 276B(ii)(c) and (iii). He had regard to the fact that "not in accordance with the law" was not an available ground of appeal in this case. He observed that the appellant's appeal bundle did not contain a witness statement from the appellant, and that the skeleton argument did not contain any detail about his circumstances "*such that a finding can be made that paragraph 276B was bound to succeed.*" The skeleton argument in the bundle did not argue paragraph 276B, but instead focused solely on Appendix FM and the length of time that the appellant's children had been in the UK.

15. The Judge went on to address a private life claim under Rule 276ADE(1)(vi) at paragraphs [27]-[30]. He found that there would not be very significant obstacles to the appellant's reintegration into life and society in Pakistan.
16. At paragraphs [31]-[44], the Judge gave his reasons for finding that the appellant did not succeed in an Article 8 claim outside the Rules. In particular, with regard to section 117B(6), he found that on balance the appellant had not shown that it would not be reasonable to expect his children to leave the UK.

The Reasons for the Initial Refusal of Permission to Appeal to the Upper Tribunal

17. The appellant's legal representatives settled an application for permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by First-tier Tribunal Judge Lambert who held that the pleaded grounds took issue with the findings made by the Judge on the evidence, but in effect amounted to no more than disagreement with those findings and an attempt to re-argue the appellant's case.

The Reasons for the Eventual Grant of Permission to Appeal to the Upper Tribunal

18. In a renewed application for permission to the Upper Tribunal, the appellant's representatives re-cast their grounds.
19. Ground 1 was that the Judge had erred in law in his consideration of Rule 276B, given that he had found that the respondent had failed to show that the appellant came within Rule 322(5).
20. Ground 2 was that the Judge had erred in his assessment of proportionality, given his finding at paragraph [41] that a key factor in assessing proportionality was the appellant's personal credibility, which the Judge had found to be in his favour, and his finding that the respondent had not shown that he came within paragraph 322(5) or failed under the suitability requirement.
21. Ground 3 was that the Judge had erred in his application of the 7-year Rule.

22. Ground 4 was that the Judge had erred in finding that there were no significant obstacles to the appellant's integrating into Pakistan, despite the fact that the appellant's children had spent their formative years in the UK and had fully integrated within the UK society, retaining minimal ties to their country of origin.

The Reasons for the Eventual Grant of Permission to Appeal

23. On 14 September 2018, Upper Tribunal Judge Perkins granted permission to appeal for the following reasons: "*I give permission on each ground but I am particularly concerned the First-tier Tribunal Judge may not have had lawful regard to the rights of the appellant's three children, each of whom have been in the United Kingdom for more than 7 years (see ... MT & ET (Child's best interests; extempore pilot) Nigeria [2018] UKUT 88 (IAC).*"

Reasons for Finding an Error of Law on Ground 1 only

24. Ground 4 has no merit. It is no more than an expression of disagreement with a finding that was reasonably open to the Judge on the evidence that was before him.
25. Ground 2 effectively buttresses Ground 3, which is the ground of appeal specifically identified by Judge Perkins as having particular *prima facie* merit.
26. On the law as it was understood when the Tribunal promulgated MT & ET, it is strongly arguable that the Judge may not have had sufficient regard to the strength of the private life claims of the appellant's three children - in particular the two oldest children, who had by the time of the hearing accrued over seven years' residence in the UK from the age of four. However, the reasonableness question must now be considered through the lens of a real world assessment, following the decision of the Supreme Court in KO (Nigeria) & Others -v- Secretary of State for the Home Department [2018] UKSC 53. Having found that neither parent had an independent right to remain in the UK, I consider that it was open to the Judge to find that it would be reasonable to expect all the children to accompany their parents back to Pakistan.
27. I am much more troubled by Ground 1. Although this ground has not been satisfactorily pleaded, there is an obvious difficulty in the Judge finding that the respondent had not discharged the burden of proof with regard to the invocation of Rule 322(5) and the corresponding provision in Rule 276B(ii), but at the same time holding that the appellant had not shown that he met all the relevant requirements for the grant of ILR under Rule 276B.
28. I consider that it was open to the Judge to find that the appellant had not discharged the burden of proving that he qualified for ILR under Rule 276B, but not for the reason which the Judge gave.
29. It would have been open to the Judge to find that the respondent had discharged the burden of proving that the appellant did not meet the requirements of Rule 276B(ii), in the particular circumstances which were as follows:

- (a) the refusal letter contained very detailed information about the declarations made by the appellant in his applications, and also the declarations which he had made to HMRC, and so there was hearsay evidence inherent in the refusal letter which was *prima facie* worthy of belief;
- (b) the appellant had completed a detailed questionnaire about his earnings from self-employment and about his declarations to HMRC for the purposes of his ILR application, and this document was included in the Home Office bundle and so the appellant's "admissions" as to what he had declared to HMRC could be compared with the evidence cited in the refusal decision;
- (c) the information given in the refusal decision all related to the contents of documents which had been generated by the appellant (with the assistance of his accountants), and so all the information was within his knowledge;
- (d) the appellant had not disputed the underlying facts (in particular, the quoted figures) in his grounds of appeal or in any evidence tendered in support of the appeal;
- (e) the appellant had only disputed the asserted consequence of different figures being given to HMRC as against UKVI, which was alleged deception of UKVI;
- (f) the appellant had not disputed in his grounds of appeal the (alternative) asserted consequence of alleged deception of HMRC.

30. This is not a case where the Department was relying on a document verification report to assert that a document provided by the appellant was false. Clearly, in such circumstances, the Department has to provide a document verification report in order to support the allegation of forgery. The Department was relying solely on discrepancies between information given by the appellant to the UKVI as against information given by the appellant to HMRC. The Department was not trying to prove that the information given in either case was false. The Department was simply relying on the fact that different information was given to UKVI than was given to HMRC.
31. As the Judge later noted in his decision, the respondent's bundle contained a questionnaire which the appellant had been asked to complete for the purposes of the consideration of his application for ILR. The Questionnaire begins at B2 of the Home Office bundle, and it is expressly stated to relate to the appellant's previous Tier 1 (General) leave. The appellant was asked a series of detailed questions about financial years for which he was registered as self-employed, or was a director of a limited company. The appellant provided a schedule at B8 showing that his net profit in the tax year ending 2011 was £3,658 and his gross profit was £9,562; that he did not trade at all in the tax year ending April 2012; and that in the tax year ending 2013, his gross profit was £38,813 whereas his net profit was £8,600.

32. Having regard to the evidence which he did have, it would have been open to the Judge to find that the respondent had raised a *prima facie* case of deception/misrepresentation as asserted in the refusal decision, and that the evidential burden had shifted to the appellant to provide an innocent explanation, which had not been forthcoming.
33. The Judge clearly recognised that the absence of evidence from the appellant directed to Rule 322(5) and Rule 276B was problematic, and hence he declined to find in the appellant's favour under Rule 276B. But I do not consider that the reason which he gives for so doing is sustainable. The only issue raised by the Department under Rule 276B was the issue of the appellant providing seriously discrepant information to UKVI as against what had been declared to HMRC. This was the only basis on which it was asserted that the appellant's continued presence in the UK was undesirable. So, having found in his favour on this issue, logically no additional evidence was required from the appellant to show that he qualified for ILR under Rule 276B.
34. Mr Clarke submits that the decision is defensible on the ground that the appellant failed to show that the discretion inherent in Rule 276B(ii) was exercised unlawfully or should have been exercised differently. But it is not open to me to dismiss the error of law challenge on the ground that the Judge got the right result, but for a different and opposing reason than the one he gave.
35. The upshot is that the Judge did not give adequate reasons for finding that the appellant did not qualify for ILR under 276B in circumstances where he simultaneously held that the respondent had not shown that discretion should be exercised against the appellant under Rule 322(5); and hence, by necessary implication, under Rule 276B(ii).
36. The consequence of this is that the decision of the First-tier Tribunal is vitiated by a material error of law such that it must be set aside and remade.

The Resumed Hearing on 15 January 2019

37. At the outset of the resumed hearing to remake the decision, I established that neither party had served any evidence pursuant to my directions. I discussed the implications of this with the representatives. I indicated to Mr Shah that it was open to him to apply for an adjournment. Mr Shah declined to do so. He informed me that the appellant was content to proceed on the documentary evidence as it stood.
38. Mr Shah called the appellant as a witness to explain the apparent discrepancies in the figures given in the refusal letter, which the appellant accepted were accurate. In his evidence in chief, he said that the apparent discrepancies arose from "*accounting differences*".
39. The appellant was cross-examined by Ms Everett, and he answered questions for clarification purposes from me. He explained that during the relevant period, he had had PAYE employment as a Meter Reader; and that he had had two sources of self-

employment. One was as a Personal Trainer, and the other was as an Online Forex Trader.

40. He had paid the correct tax to HMRC. The differences in the figures declared to UKVI as against declared those to HMRC arose from a combination of factors: the different accounting periods; and the fact that he had sustained huge losses as a Forex Trader in the tax year ending April 2012. It was that reason that no self-employed income had been declared to HMRC in that year. He said that he had explained the differences when completing the Questionnaire. There was no re-examination.
41. In her closing submissions on behalf of the Department, Ms Everett reiterated the case that she had put to the appellant, which was that he had not given a credible explanation for the discrepancies in the figures, and accordingly the case under Rule 322(5) was made out. In reply, Mr Shah submitted that in the answers he had given to the Questionnaire the appellant had provided a satisfactory explanation for the apparent discrepancies in the figures, and he invited me to find that the appellant had presented as a truthful witness who had not tried to hide anything.

Discussion and Findings on Remaking

42. The appellant accepts that for the purposes of his Tier 1 application of 12 March 2011, he claimed to have an income of £66,564 from all sources between 1 March 2010 and 28 February 2011. This figure for income comprised £20,780 from PAYE employment and £45,784 from self-employment. On that basis, he was awarded 40 points under the previous earnings category.
43. As noted earlier in this decision, in answer to the Questionnaire at section B of the Home Office bundle, the appellant provided a Schedule at B8 showing that his net profit in the tax year ending 2011 was £3,658 and his gross profit was £9,562.
44. The appellant's net profit represented his taxable income from self-employment; and accordingly, the information given in the Questionnaire is broadly in line with the appellant's tax return for the year ending 5 April 2011, where he declared a total income of £23,356, the source of his income being a combination of PAYE employment and self-employment.
45. The accounting period for the Tier 1 application is almost the same as the accounting period for the tax return for the year to 5 April 2011. The fact that the accounting period for the Tier 1 application ended on 28 February 2011, not 5 April 2011, does not reasonably account for the massive discrepancy between the figures for net profit and gross profit declared to HMRC and the income from self-employment of £45,784 which is claimed in the Tier 1 application. Even if the figure of £45,784 represents gross profit, rather than net taxable profit, it is not credible that the appellant generated a gross profit of some £9,000 in the 11 months between 5 April 2011 and 28 February 2011, whereas he generated a gross profit of some £36,000 in the period 1 March 2011 to 5 April 2011.

46. I am not directly concerned with the next tax year, but it is noteworthy that the appellant has given conflicting accounts as to the reason why no self-employment income was declared to HMRC for the tax year ending 5 April 2012. His explanation in his oral evidence was that this was because he had made massive losses in that year. But in his Questionnaire, his explanation was that he was not trading.
47. The appellant accepts that for his leave to remain application of 15 June 2013, he claimed to have a total income of £56,148 from all sources of employment between 1 June 2012 to 31 May 2013, comprising just over £19,000 from PAYE employment and £47,056 from self-employment. This figure presents as hugely inflated when compared to the declarations made by the appellant to HMRC for the tax years ending April 2013 and April 2014. The combined total income for the two years taken together that was declared to HMRC, including income from PAYE employment, was just over £47,000.
48. The figure also presents as hugely inflated when compared to the figures for net profit given in the Schedule at B8. The appellant said that his net profit from self-employment in the year to April 2013 was £8,600, and in the tax year to April 2014 was £876.
49. I accept that the gross profit for the tax year to April 2013 was said to be £38,813, and that for the tax year to April 2014 the gross profit was said to be £15,000. However, as the appellant indicated in the course of his oral evidence, these gross profit figures are in reality figures for turnover. This is reflected in the fact that the reason for the massive difference between the gross profit figures and the net profit figures is the allocation of expenses: the costs incurred by the appellant in generating turnover. The net profit figures reflect the income which the appellant will have taken out of his business. For the purposes of the Tier 1 application, it was his personal income from self-employment, not his turnover, which was determinative of his true level of previous earnings, as he would have known full well.
50. The case advanced in the refusal decision is that the appellant knowingly misrepresented his earnings at various times, either for the purpose of reducing his tax liability or for the purpose of obtaining leave to remain, or both. I accept the appellant's evidence that he declared his full earnings to HMRC, and that he did not misrepresent his earnings to HMRC for the purposes of reducing his tax liability. But the corollary of this is that the Department has established on the balance of probabilities that the appellant knowingly inflated his earnings from self-employment in his Tier 1 applications in order to obtain the points he required to qualify for leave to remain in the UK as a Tier 1 (General) migrant.
51. Accordingly, the general ground of refusal is made out, and the appellant does not qualify for the grant of indefinite leave to remain under Rule 276B as he does not meet the requirements of Rule 276B (iii).
52. With regard to an alternative claim on Article 8 grounds outside the Rules, there is no reason to depart from the sustainable findings of the First-tier Tribunal Judge that

the threatened interference consequential upon the refusal decision is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal on human rights grounds is dismissed under the Rules and on Article 8 ECHR grounds outside the Rules.

Signed
Deputy Upper Tribunal Judge Monson

Date 1 March 2019