



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/11723/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 6th April 2018

**Decision &
Promulgated
On 01st May 2018**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

**SANDEEP KADIAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss K Jones of Counsel, instructed by Gurney Harden Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Asjad made following a hearing at Birmingham on 12th June 2017.

Background

2. The appellant is a citizen of India born on 10th January 1984. He entered the UK on 28th January 2006 on a student visa and was subsequently granted further leave to remain until 20th February 2016.

3. On 20th January 2016 he made an application for indefinite leave to remain in the UK on the basis of ten years' lawful and continuous residence. He was refused on 15th April 2016 under paragraph 322(5) of the Immigration Rules, a discretionary general ground of refusal.
4. The Secretary of State said, on a review of his application, it would appear that he had failed to disclose his earnings in full to HM Revenue & Customs for the tax years 2010 to 2011. Accordingly, she considered that it would be undesirable for him to remain in the UK based on the fact that he had been deceitful or dishonest in his dealings with HM Revenue & Customs.
5. In her determination, the judge rejected the appellant's explanation for his failure to disclose all of his income. She said that there was no evidence about any family life that the appellant had in the UK, and although he had spent ten years here, he had still spent the majority of his life in India. There were no very significant obstacles to his returning there.
6. She concluded:

“Immigration control is in the public interest as is the economic wellbeing of the country in terms of ensuring that tax is paid. In carrying out the balancing exercise I find that the factors weighing against the appellant outweigh those that are in his favour and the interference with his private life is proportionate in this case.”

The Grounds of Application

7. The appellant sought permission to appeal on the grounds that the judge had materially erred in failing to properly consider the core issue in the appeal, namely whether the Secretary of State's decision was in accordance with the Immigration Rules or policy guidance in relation to refusals of this kind. Even on the judge's findings, that the appellant had failed to disclose relevant self-employed earnings to HMRC and/or had failed to give a full picture of his earnings in his application to the respondent, it was entirely unclear how the applicant's conduct would meet the threshold of behaviour as set out in the guidance.
8. Permission to appeal was granted by Judge Froom for the reasons set out in the grounds on 19th December 2017.
9. At the hearing Mr Tarlow accepted that the judge had materially erred in law.
10. The judge did not refer to paragraph 322(5) in the determination at all. Nor did she consider whether the relevant policy guidance, which sets out the circumstances in which the respondent could refuse an application for leave to remain under paragraph 322(5), was applicable in the appellant's case. This was a relevant question for her to address when considering the proportionality of the decision.
11. By failing to take into account all relevant factors the Immigration Judge erred in law. Her decision is set aside.

Remaking the Decision

12. Mr Tarlow nevertheless submitted that the appeal ought to be dismissed and said that the conduct of the appellant, in failing to disclose his entire income, and in seeking to blame his accountant for the error was sufficient to bring paragraph 322(5) into play.
13. Miss Jones submitted that the policy guidance made it clear that a high threshold was required to justify a refusal under paragraph 322(5) and the appellant's conduct plainly came nowhere near that threshold.

Findings and Conclusions

14. Paragraph 322(5) of the Immigration Rules states that the respondent may refuse an application for leave to remain on discretionary grounds where

“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. The respondent has produced policy guidance in relation to the type of conduct which is likely to meet this threshold. Miss Jones helpfully provided the current policy guidance, which states as follows:

“The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.

A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control.”

16. The appellant explained to the judge that the lack of a declaration for 2010 to 2011 for his employment with Maztech was as a consequence of having been let down by his accountants. The judge rejected his explanation. She clearly considered the appellant to be culpable in failing to declare that income to HMRC.
17. Nevertheless, not declaring all relevant income, whilst highly regrettable, cannot properly be described as conduct such as that set out in the policy guidance. The appellant has not been involved in criminality. It cannot properly be said that his failure to disclose calls into question his character conduct and associations. There is no suggestion that he has been or is a

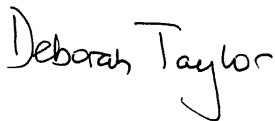
threat to national security or subject to a travel ban or has been involved in a sham marriage.

18. No other reason has been relied upon by the respondent in relation to refusing the appellant indefinite leave to remain on the basis of ten years' lawful and continuous residence.
19. This is a human rights appeal. The conclusion that the respondent's decision to invoke paragraph 322(5) is inconsistent with her own policy guidance reduces considerably the weight to be attached to the public interest in this refusal. Indeed, it is hard to discern what the public interest could be if the appellant does in fact meet the requirements of the Immigration Rules.
20. This appellant has established that he has been in the UK for ten years lawfully and continuously. Accordingly the present refusal is disproportionate.
21. The original judge's decision is set aside and is remade as follows. The appellant's appeal is allowed.

Notice of Decision

The appeal is allowed

No anonymity direction is made.



Signed
2018

Date 30 April

Deputy Upper Tribunal Judge Taylor