



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/07666/2018

THE IMMIGRATION ACTS

Heard at Field House  
On 31 January 2019

Decision & Reasons Promulgated  
On 21<sup>st</sup> February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M T I

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms B Jones, HOPO

For the Respondent: Mr J Gajjar, Counsel

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge D P Herbert OBE in which he allowed the appeal of the respondent against the Secretary of State's decision to refuse his application for leave to remain in the UK on the basis of his ten years' long residence. The respondent made the application on 21 August 2017. The Secretary of State's letter refusing the application is dated 16 March 2018.

2. The respondent will from now on be referred to as the applicant for ease of reference.
3. The applicant is a citizen of Pakistan born on 15 January 1978. He entered the UK on 12 September 2007 with entry clearance as a student. He was granted leave to enter as a student until 28 February 2009 and further leave to remain valid until 31 January 2010.
4. On 11 January 2010 the applicant made an in time application for leave to remain as a Tier 1 (Post-Study) Migrant. He was granted leave to remain until 4 February 2012. He was granted further leave to remain in this capacity until 24 May 2013 and again until 5 June 2016. On 21 May 2016 he applied in time for indefinite leave to remain as a Tier 1 (General) Migrant. On 21 August 2017 he varied his Tier 1 (General) Migrant indefinite leave to remain application into an application for indefinite leave to remain on the basis of ten years' long residence in the United Kingdom.
5. In the Reasons for Refusal Letter the Secretary of State listed the number of documents submitted by the applicant with his various applications. Next the Secretary of State considered the most recent application under paragraph 276B of the Immigration Rules. The Secretary of State noted that whilst the applicant had accrued ten years of continuous residence in the United Kingdom, he fell under the general grounds for refusal. The respondent considered paragraph 322 of the Immigration Rules which outlines the general grounds for refusal of leave to remain, in particular sub-paragraph 5 - *the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or association or the fact that he represents a threat to national security.*
6. The applicant had submitted various documents for HMRC with his application and these clearly showed that he had made significant underpayment and under declaration of tax for the years 2010 to 2013. The respondent noted that there was a letter from the applicant's previous accountant stating that the tax returns for the year 2010/2011 and 2012/2013 were submitted incorrectly. The error had been noticed in September 2015 when he went to a mortgage advisor to check his eligibility for a mortgage. His accountant then discovered a shortfall in the tax paid for the year ending 2011 and the year ending 2013. He then asked his accountant to carry out a full review of his tax return for the years ending 2011, 2012, 2013 and 2014. The Secretary of State claimed that there was a significant difference which the applicant must have been aware of himself. HMRC confirmed his amended tax return. The Secretary of State relied on the fact that these documents were submitted to HMRC six months prior to the applicant submitting his application for indefinite leave to remain as a Tier 1 (General) Migrant.
7. The respondent was therefore not satisfied that the applicant had not been previously deceitful or dishonest with his dealings with HMRC and the UK Visas and Immigration. The Secretary of State took the view that in the light of this

evidence the applicant did not meet the criteria on account of his conduct and therefore refused the applicant's application.

8. The judge said the applicant's claim was that if the HMRC did not conclude that his behaviour was dishonest or deceptive, it would be wholly inequitable for the Secretary of State to do so simply based on that fact.
9. At paragraph 35 the judge set out the Secretary of State's policy guidance on paragraph 322(5) which said the threshold was a high one. The policy guidance to caseworkers states
 

*"The main type of guidance you need to consider to refuse under paragraph 322(5) for those involved in serious criminality, a threat to national security, a war crime terrorist activity. A person does not need to be convicted for this to apply when deciding whether to refuse under this category. The key to consider is if there is reliable evidence to support the decision is that the person's character and conduct is unacceptable and that it is undesirable to allow them to enter the United Kingdom. ..."*
10. The judge at paragraph 36 said the guidance goes on to state that behaviour resulting in a single conviction and sentence is generally unlikely to meet the paragraph 322(5) threshold.
11. The judge went on to find as follows:
  38. On any view, it is accepted that the appellant did not engage in criminality. Neither the HMRC nor the respondent sort to impose any separate penalty, financial or otherwise for the appellant's conduct. The appellant was not investigated for the criminal conduct by the HMRC or by any other agency. He has a good immigration history over the last 11 years together with his family. He has clearly contributed to the UK economy where applicable by pursuing his life as established a significant family and private life throughout that 10 years period. And he had been in the UK continuously for 10 year period perfectly lawfully to establish himself here.
  39. Even if the appellant had been convicted on one occasion of an under declaration of tax, that itself would be unlikely to meet the high threshold of paragraph 322 (5).
  40. This case and any disparity in the appellant's conduct was brought to life by himself well before he made any application for leave to remain under the human rights of the basis of his 10 years residency.
  41. I therefore find that any criticism of the appellant conduct falls short of that envisaged under paragraph 322 (5).
  42. On the basis of the facts taking into account, his age, conduct associations and the other criteria set out the appellant clearly satisfies the immigration rules."
12. First-tier Tribunal Judge Birrell granted the Secretary of State permission to appeal. He said the grounds assert that the judge erred in that he failed to make a finding on a central issue in this case as to whether the applicant had used deception; the judge

failed to take into account the guidance in **R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384.**

13. Judge Birrell held that the judge's findings are arguably underpinned by the view that his conduct does not meet the threshold of paragraph 322(5) when **Khan** makes very clear that such conduct, where it has been found to be dishonest, entitles the Secretary of State to refuse leave under paragraph 322(5). Therefore, it is arguable that failing to make a finding as to whether the applicant was dishonest was an error of law.
14. I find that the judge placed significant emphasis in his reasoning on the fact that the applicant has not been penalised or prosecuted by HMRC for submitting incorrect tax returns. I agree with Ms Jones's submission that the judge's failure to resolve the issue of dishonesty means that the judge made an error and the error was material and consequently the judge's decision cannot stand.
15. The applicant's appeal is remitted to Hatton Cross for rehearing by a First-tier Judge other than First-tier Tribunal Judge Herbert.
16. No anonymity direction is made.

Signed

Date: 18 February 2019

Deputy Upper Tribunal Judge Eshun