Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02372/2019

THE IMMIGRATION ACTS

Heard at Field House
On 28 January 2020

Decision & Reasons Promulgated
On 10 March 2020

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR NAMDAR SUBHANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, instructed by Whitefield Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Devlin promulgated on 19 June 2019, dismissing his human rights appeal. For the reasons set out in the attached decision, I set the decision of the First-tier Tribunal aside.

© CROWN COPYRIGHT 2020

The Appellant's Case

2. The appellant arrived in the United Kingdom with entry clearance as a student on 16 September 2007. He held leave in that capacity subsequently varied to leave as a Tier 1 (General) Migrant, then as a Tier 1 Post-Study Work Migrant, further grants being made until 23 August 2016.

3. On 23 August 2016 the appellant applied for indefinite leave to remain as a Tier 1 (General) Migrant an application which, on 19 April 2018 varied to that one of application for indefinite leave to remain on grounds of long residence.

4. On 26 November 2018 the respondent wrote to the appellant including a questionnaire to be completed which asked him for details about his tax records. Of this questionnaire is usual in cases where indefinite leave to remain is sought on the basis of a Tier 1 Migrant application. Although the questionnaire required the documents to be submitted within ten days, the appellant's solicitors wrote requesting additional time, in this case fifteen working days, that being submitted on 3 December 2018. A further request to that effect was made on 28 December 2018 but on 20 January 2019 the respondent refused the application pursuant to paragraph 322(9) on the basis that he had not produced within a reasonable time information required by the Secretary of State to establish his claim under the Rules.

The Respondent's case

5. The respondent refused the application under the Immigration Rules on the basis that as paragraph 322(9) applied, the applicant could not meet the suitability requirements of the Immigration Rules.

The appeal to the First-tier Tribunal

6. The appellant appealed on the basis that the Secretary of State had erred with respect to paragraph 322(9) (although it is clear that the questionnaire was not returned until 15 May 2019). The judge directed herself at [55] to begin by considering the general ground for refusal in 322(9) not with a view to determining whether the decision was in accordance with the Rules or otherwise but as informing the assessment of proportionality of the decision. She set out the factual context having at [36] to [54] their view of the law as to fairness. In doing so she noted that there were differences in this case which is not under the points-based system and at [54] the Secretary of State has not applied to enter into a dialogue with the applicant. She concluded that as the appellant was being asked to produce records he was bound to maintain [66] and had failed to explain why the delay was needed, that no indication as to why a delay was needed was made in the second letter [73] and that in this factual context the appellant had been given a reasonable time to provide the requested documentation and the respondent's delay between the application to vary of 19 April 2018 and letter of 26 November 2018 did not lead to a different conclusion [80] and that although this was a discretionary ground, was not satisfied that the Secretary of State had erred in deciding how to exercise her discretion. Concluding

[86] the Secretary of State had been entitled to exercise discretion as she had done and find that the general ground of refusal applied.

7. The judge then went on to consider the issue of fairness concluding that the Secretary of State had not acted unfairly, was not obliged to enter into a dialogue with the appellant and when looking at that in the context found there is no breach of the public law duty of fairness in the application the relevant falls to the case [99].

8. The judge then considered Article 8 "outside the Rules" concluding [102] that as there was no proposal for a removal date the appellant could have made a further application for indefinite leave to remain on the ground of long residence, this did not constitute an interference with his right to respect for a private life as such as would engage Article 8. The judge then went on to consider the issue in the alternative taking into account Section 117B of the 2002 Act. When concluding that the public interest outweighed the proposed interference with the appellant's right to respect for his private life.

9. The judge did, however conclude as follows at paragraph [115]:-

> "I should say, by both postscript, that although the appellant has now produced the requested documentation, I do not consider myself to be in a position to determine whether or not any of the general grounds of refusal apply in his case. That is because, I not only have no means of verifying the information contained in the documentation of the HMRC, but more importantly, I do not know what figures for income the appellant claimed in his applications for leave to remain as a Tier 1 (General) Migrant. It follows, that this is not a case in which the Tribunal is well placed to rely on its own judgment and expertise, in the general evaluation of whether the requirements of the Immigration Rules have been met, for the purposes of assessing proportionality."

10. Having found an error of law, I adjourned the hearing until 28 January when I heard submissions from both representatives.

11. Mr Biggs submitted first that on a proper interpretation of paragraph 322(9) it could not be applied by the Secretary of State on the facts of this case as this had not been invoked "within a reasonable time" nor did it relate to documents which could be "required" to establish the facts of the application, following Balajigari v SSHD [2019] EWCA Civil 673. He submitted that following that decision, it was not reasonable on the facts of this case for the Secretary of State to require documents from the appellant, there being nothing to stop them from making inquiries with HMRC and then to put any questions that might arise to the appellant.

12. Mr Biggs submitted that, if the appellant were wrong on this interpretation, he had a reasonable excuse for the delays as set out in the material before me and, at the date of decision, the Secretary of State had not afforded a reasonable time in all the circumstances.

13. Mr Biggs submitted that it was in any event for the Tribunal to decide for itself whether the appellant satisfied the Immigration Rules at the date of consideration of

the appeal and that where the Rules are satisfied there would be no public interest in removal, relying on TZ (Pakistan) v SSHD [2018] EWCA Civil 1109 at [34].

14. Relying on MM (Lebanon) v the SSHD [2017] UKSC 10, Mr Biggs submitted that whilst considerable weight should be attached to the judgments by the Secretary of State in her exercise of constitutional responsibility for immigration policy, that did not extend so far as all the matters set out in the Rules, there being different public interest considerations and different formulations, in the case of 322(9) this being of less weight, it being merely for administrative convenience. He further submitted that it is not affected by the subsequent enactment of Section 117A to D of the 2002 Act. He submitted in the circumstances that even were 322(9) to apply, little weight could be attached to it in the analysis here given that paragraph 322(9) could not be applied to any subsequent application and that there was nothing to prevent the appellant from now making (or in future) making an application in which that would not apply and there would be no other apparent basis for him being refused leave to remain pursuant to paragraph 276B.

15. Mr Tufan submitted the Secretary of State had been entitled to raise paragraph 322(9) and on the facts of this case sufficient time had been given for the appellant to respond to requests for documents. He submitted the Secretary of State would be entitled to require that certain documents should be provided for within a reasonable time, drawing my attention to the significant period of time that had elapsed. He submitted it took time for the HMRC to answer queries raised by the Home Office.

16. Mr Tufan submitted that MM (Lebanon) is not relevant on the facts of this case, now, the rationale being to ensure that the Secretary of State had all the relevant documents available to reach a decision and that although evidence had been provided postdecision, this did not alter the situation.

17. In response, Mr Biggs submitted the Secretary of State had failed properly to explain why 322(9) was engaged on the facts of this case; that MM (Lebanon) did apply; and, that a proper application of Section 117B(1) of the 2002 Act would not assist the Secretary of State given that immigration control encompasses the system of appeals in which the appellant could make good his case.

The Law

18. Paragraph 276B of the Immigration Rules provides:

> '276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a) age; and
>
> (b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

…'

19. Paragraph 322(9) of the Immigration Rules provides:

> '322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave, except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.
>
> …
>
> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused**
>
> (9) failure by an applicant to produce within a reasonable time information, documents or other evidence required by the Secretary of State to establish his claim to remain under these Rules'

20. The sole basis for refusal under paragraph 276B was that paragraph 322(9), one of the general grounds for refusal, was engaged.

21. As both parties accepted, and I have found nothing to indicate to the contrary, paragraph 322(9) has not been judicially considered in any depth. That is perhaps unsurprising. When the grounds for appealing permitted a challenge on the basis that the decision was not in accordance with the Immigration Rules, the first consideration would be whether the Rules other than the general refusal grounds had been made out as at the date of the decision of the appeal. The Tribunal would then have had to consider whether, exercising its own discretion, whether nonetheless the appeal should be dismissed on the grounds that paragraph 322(9) was met.

22. It was accepted in Kaur v SSHD [2019] EWCA Civil 1101 at [16] that there are limits on the extent to which it can be invoked, it not being open to the Secretary of State to refuse leave to remain on the basis of a failure to provide necessary documents if that failure was itself the result of an act or omission on the part of the Secretary of State. That of course is not the position here.

23. The Secretary of State's right to require information is not unfettered; the information must be required to establish the claim to remain under the Rules and it is for the Secretary of State to prove that that was so. It also follows it is for the Secretary of State to prove that the time in question was "reasonable".

24. It is evident from the letter of 26 November 2018 that the Secretary of State considered that she should be satisfied with the evidence that the appellant had provided in support of previous applications and that he has complied with the conditions of leave. He was then required to provide and return a questionnaire and to provide SA302 forms and tax returns for the period in which he was registered as self-employed or had been a director of a limited company.

25. I am satisfied that in all the circumstances of this case the Secretary of State was entitled to require these documents. It is not evident that the relevant material could have been obtained from HMRC and that is certainly not the case in the case as regards the questionnaire to be completed. The refusal letter records as follows:-

> "Your legal representatives in their correspondence of 3 December 2018, and 28 December 2018 requested an extension of fifteen days in order for you to obtain the relevant information from your accountant. It is noted however that to date you have not complied with our request to submit the relevant information required. Therefore under paragraph 322(9) your application has been refused. It also recorded that the application is refused pursuant to paragraph 276D. The letter of 3 December requests another fifteen working days as it is said that the appellant needs time to collect all the required evidence from HMRC and his professional accountant. The letter of 28 December again requests a further fifteen working days and again states that the appellant will struggle to collect all the original documents within the time limit."

26. The First-tier Tribunal's assessment of this issue as at the date of the respondent's decision was, however, preserved - see the error of law decision at [15].

27. There was no submission made to me that the Immigration Rules were not met other than through the failure to comply with the request to supply information, a request which has now been met. No submission is made that there is anything in that material which casts doubt on whether the appellant meets the requirements of the Immigration Rules. The situation now is that, since the documents have been provided, it has been open to the Secretary of State to have considered the material provided. Since the error of law decision the Secretary of State has been given time in order to raise that and whilst Mr Tufan submitted that there had not been sufficient time to do so, equally there has been no request by the Secretary of State to extend the deadline or to seek an adjournment. Further, in any event it has always been open to the Secretary of State to withdraw her decision in the light of the material and there is of course nothing to prevent her from relying on the material provided in future.

28. I have had regard to <u>OA and Others</u> (human rights; new matter) [2019] UKUT 65 at 27 and 28:

> "27. The significance of an appellant proving to a First-tier Tribunal judge that he or she meets the requirements of a particular immigration rule, so as to be entitled to be given leave to remain, lies in the fact that - provided Article 8 of the ECHR is engaged - the respondent will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the respondent in the proportionality balance, so far as that factor relates to the particular immigration rule that the Tribunal has found to be satisfied.

> 28. Whether or not such a finding in favour of an appellant is likely to be determinative of the human rights appeal will depend upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the appellant's interest in remaining in this country. To take one simple example, an appellant who persuades the First-tier Tribunal that he meets the requirements of the Immigration Rules relating to entrepreneur migrants will not thereby succeed in his human rights appeal if the appellant has been found by the respondent (and the Tribunal agrees) that the appellant falls foul of one or more of the general grounds of refusal contained in Part 9 of the Rules; for example, because he made false representations in connection with a previous application for leave (paragraph 322(2))."

29. In effect the sole reason that the appellant does not meet the requirements of paragraph 276B is the failure to supply documents within time. That is a defect which has been cured; and, as Mr Biggs submitted, were the appellant now to make an application this provision could not be relied upon.

30. It is also to observed that in the case of paragraph 276B, an applicant must not fall to be refused on public interest grounds, as is provided for at paragraph 276B (ii). It is not submitted that that is so in this case.

31. Looking at the evidence at the date of hearing, I note that the appellant has now complied with the request for information. I accept also from the material provided that there were good reasons for the delay in obtaining the material sought, albeit not ones known to the respondent.

32. I therefore consider that in all the circumstances of this case and given the explanations which now exist for the failure to supply material at the relevant time, that it would not now be reasonable to penalise the appellant for having failed to comply with the requirement to supply the documents as at the relevant date. It follows that I am not satisfied that the requirements of paragraph 322 (9) are met, and so the appellant also meets the requirements of paragraph 276B of the Immigration Rules.

33. In the circumstances and given the extent to which the appellant meets the requirements of the Immigration Rules, I am not satisfied that this is a matter in which Section 117B (1) is engaged. Accordingly, and having had due regard to all the other provisions of Section 117B, I consider that on the facts of this case requiring the appellant to leave the United Kingdom would be disproportionate given that he now meets the Immigration Rules.

34. Accordingly, I allow the appeal on human rights grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing the appeal on human rights grounds.

3. No anonymity direction is made.

Signed Date 18 February 2020

Upper Tribunal Judge Rintoul

ANNEXE – ERROR OF LAW DECISION

IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02372/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre **Decision & Reasons Promulgated**
On 29 October 2019

…………………………………

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR NAMDAR SUBHANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hussain, instructed by Whitefield Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Devlin promulgated on 19 June 2019, dismissing his human rights appeal.

© CROWN COPYRIGHT 2019

The Appellant's Case

2. The appellant arrived in the United Kingdom with entry clearance as a student on 16 September 2007. He held leave in that capacity subsequently varied to leave as a Tier 1 (General) Migrant, then as a Tier 1 Post-Study Work Migrant, further grants being made until 23 August 2016.

3. On 23 August 2016 the appellant applied for indefinite leave to remain as a Tier 1 (General) Migrant an application which, on 19 April 2018 varied to that one of application for indefinite leave to remain on grounds of long residence.

4. On 26 November 2018 the respondent wrote to the appellant including a questionnaire to be completed which asked him for details about his tax records. Of this questionnaire is usual in cases where indefinite leave to remain is sought on the basis of a Tier 1 Migrant application. Although the questionnaire required the documents to be submitted within ten days, the appellant's solicitors wrote requesting additional time, in this case fifteen working days, that being submitted on 3 December 2018. A further request to that effect was made on 28 December 2018 but on 20 January 2019 the respondent refused the application pursuant to paragraph 322(9) on the basis that he had not produced within a reasonable time information required by the Secretary of State to establish his claim under the Rules.

5. The respondent refused the application under the Immigration Rules on the basis that as paragraph 322(9) applied, the applicant could not meet the suitability requirements of the Immigration Rules.

6. The appellant appealed on the basis that the Secretary of State had erred with respect to paragraph 322(9) (although it is clear that the questionnaire was not returned until 15 May 2019). The judge directed herself at [55] to begin by considering the general ground for refusal in 322(9) not with a view to determining whether the decision was in accordance with the Rules or otherwise but as informing the assessment of proportionality of the decision. She set out the factual context having at [36] to [54] their view of the law as to fairness. In doing so she noted that there were differences in this case which is not under the points-based system and at [54] the Secretary of State has not applied to enter into a dialogue with the applicant. She concluded that as the appellant was being asked to produce records he was bound to maintain [66] and had failed to explain why the delay was needed, that no indication as to why a delay was needed was made in the second letter [73] and that in this factual context the appellant had been given a reasonable time to provide the requested documentation and the respondent's delay between the application to vary of 19 April 2018 and letter of 26 November 2018 did not lead to a different conclusion [80] and that although this was a discretionary ground, was not satisfied that the Secretary of State had erred in deciding how to exercise her discretion. Concluding [86] the Secretary of State had been entitled to exercise discretion as she had done and find that the general ground of refusal applied.

7. The judge then went on to consider the issue of fairness concluding that the Secretary of State had not acted unfairly, was not obliged to enter into a dialogue with the

appellant and when looking at that in the context found there is no breach of the public law duty of fairness in the application the relevant falls to the case [99].

8. The judge then considered Article 8 "outside the Rules" concluding [102] that as there was no proposal for a removal date the appellant could have made a further application for indefinite leave to remain on the ground of long residence, this did not constitute an interference with his right to respect for a private life as such as would engage Article 8. The judge then went on to consider the issue in the alternative taking into account Section 117B of the 2002 Act. When concluding that the public interest outweighed the proposed interference with the appellant's right to respect for his private life.

9. The judge did, however conclude as follows at paragraph [115]:-

> "I should say, by both postscript, that although the appellant has now produced the requested documentation, I do not consider myself to be in a position to determine whether or not any of the general grounds of refusal apply in his case. That is because, I not only have no means of verifying the information contained in the documentation of the HMRC, but more importantly, I do not know what figures for income the appellant claimed in his applications for leave to remain as a Tier 1 (General) Migrant. It follows, that this is not a case in which the Tribunal is well placed to rely on its own judgment and expertise, in the general evaluation of whether the requirements of the Immigration Rules have been met, for the purposes of assessing proportionality."

10. The appellant then sought permission to appeal on extensive grounds running to some sixteen pages.

11. It is averred that the judge erred:

    (i) in not assessing whether the appellant met the Immigration Rules for grant of ILR at the date of the appeal, but instead reached a conclusion as to the appellant's entitlement to ILR under the Immigration Rules by reference to the facts known before the respondent as at 20 January 2019;

    (ii) in giving inappropriate weight as in treating the point as dispositive as to whether 322(9) just via the refusal as at 20 January 2019, the correct approach. being to consider whether the appellant met the requirements for ILR at the date of determination and to consider what weight to be given to the respondent's ability to rely on paragraph 322(9), it being submitted that this should be given little weight;

    (iii) in her interpretation of paragraph 322(9) in particular failing to consider whether the appellant had provided

        (1) the required information and documents within a reasonable time, the question of reasonableness to be undertaken by the First-tier Tribunal itself not by way of a review into the reasonableness of the respondent's decision to invoke paragraph 322(9) and should have assessed whether it was proportionate, lawful and appropriate to use paragraph 322(9) as a matter of discretion at the date of determination of the appeal;

(iv) in failing to make findings of fact when considering Article 8 and paragraph 322(9) in particular for them to consider the reasons set out in the appellant's accountant's letter, overlooking that the requested period for an extension had not expired by the date of decision, 20 January 2019, in failing to consider whether the appellant satisfied the Immigration Rules at the date of decision and failing to consider whether it was proportionate for paragraph 322 at the date of determination if the appellant met the other requirements of the Immigration Rules.

The Law

12. The background to this appeal is an application for indefinite leave to remain, leave having been accrued in part as a Tier 1 migrant. As was noted in Balajigari [2019] EWCA Civ 673 at [2] to [5], the respondent has become aware of discrepancies between income declared to SSHD and to HMRC. At [26], the Court of Appeal noted that:

> "… sub-paragraphs (2)-(13) set[s] out grounds on which leave to remain and variation of leave to enter or remain "should normally be refused". It is common ground that this is not a mandatory ground for refusal but that it does create a presumption of refusal."

13. It is evident from many cases, including Agyarko [2017] UKSC 11 as well as TZ (Pakistan v SSHD [2018] EWCA Civ 1109 and other cases that the Immigration Rules fall to be treated as an expression of the Secretary of State's policy; that is, that they set out who is and who is not to be permitted to enter or remain in the United Kingdom.

14. What is in issue is whether the immigration rules can be met at the date of decision. In some cases, such as those where the requirement is, for example, to have acquired a certificate or degree *prior* to the application, that cannot be met by subsequent acquisition of such a document.

15. Here, what the judge did was to focus on whether the respondent had been correct to refuse the application as at the date of that decision, not at the date of hearing. While that was carefully analysed and sustainable findings were made that the appellant had been given an opportunity to provide the relevant documents, that was not the correct approach. The judge should have assessed the situation at the date of hearing, and considered whether a failure to comply with paragraph 322 (9) of the Immigration Rules, was still in issue as part of the overall consideration of proportionality. That in turn required an analysis of the whether the long residence rules were met.

16. The judge erred in declining to make findings with respect to the document provided. The judge appears to have considered that the task was an assessment of whether there had been different declarations of income to the respondent and to HMRC – the scenario in Balajigari – when there was no allegation to that effect put

by the respondent. That was an error compounded by declining to make relevant findings

17. For these reasons, the decision that removal was proportionate was infected by an error of law, and the decision of the First-tier Tribunal is set aside.

18. I consider that the decision will need to be remade in the Upper Tribunal. The issues and fact-finding to be undertaken are relatively narrow; there is no dispute as to when relevant documents were submitted.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The decision will be remade in the Upper Tribunal.

Directions

1. If the appellant wishes to adduce any further evidence he must make an application pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least 10 days before the hearing, such application to be accompanied by the evidence upon which it is sought to rely.

2. Should the respondent wish to raise any issue with respect to the documents now supplied in response to the questionnaire or to the answers now provided in the questionnaire; or, to raise any new reasons for refusal, this must be done in writing at least 10 working days prior to the relisted hearing.

Signed Date 11 November 2019

Upper Tribunal Judge Rintoul