



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08846/2016

THE IMMIGRATION ACTS

Heard at Glasgow
15 August 2018

Decision & Reasons Promulgated
19 November 2018

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE MACLEMAN

Between

IGNATIUS CHUKA MONEKE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sharma of The Chamber Practice.

For the Respondent: Mr A. Govan Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria. He came to the United Kingdom in April 2006 as a student. He has been in the United Kingdom, apparently with leave, ever since. On 18 March 2016 he applied for indefinite leave to remain on the basis of ten years long residence. The decision on that application is, perhaps rather surprisingly, dated the same day, 18 March 2016. It refuses the appellant's application. The refusal does not take the point that, at the date of the refusal, the appellant had not been in the United Kingdom for (quite) ten years. The refusal is primarily on the ground that paragraph 322(5) of the Statement of Changes in Immigration Rules, HC 395 (as amended) applies to the appellant. That paragraph falls under the head of "Grounds on which leave to remain ... should normally be refused", and is as follows:

“(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 associations or the fact that he represents a threat to national security.”

2. The decision-maker went on to consider the appellant’s personal and family circumstances: he has a wife, who also has Nigerian nationality, but who has indefinite leave to remain, and a son born in the United Kingdom in 2009 who has recently been granted British citizenship. The decision-maker concluded that the appellant had no right under the Rules to a grant of leave; and that there was no good reason for considering that he had a right to a grant of leave despite not meeting the requirements of the Rules. Thus, as we have said, the application for indefinite leave to remain was refused.
3. The appellant appealed to the First-tier Tribunal. Judge Agnew dismissed his appeal. He now appeals, with permission, to this Tribunal.
4. It is always important to identify the decision which is the subject of the appeal, the right of appeal, and the grounds upon which the right of appeal can be exercised. In the present case the appeal is one to which sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014 apply. The right of appeal is that granted by s. 82(1)(b), that the Secretary of State has decided to refuse a human rights claim made by the appellant. The ground of appeal is limited to that specified by s. 84(2):

“An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.”

5. The right of appeal was correctly stated at the end of the letter of refusal. Despite the lengthy grounds submitted on the appellant’s behalf to the First-tier Tribunal and to this Tribunal, and despite Mr Sharma’s attempts to argue the point before us, there is no right of appeal on the ground that the decision was not in accordance with the immigration rules, nor on the ground that a discretion conferred by the immigration rules should have been exercised differently, nor on the general ground that the decision is not in accordance with the law. Those grounds of appeal have not been available since the coming into force of the amendments introduced by the 2014 Act. Mr Sharma’s apparent ignorance of this development in the law is reprehensible. What is particularly unfortunate is that he attempted to support his submissions in relation to the admissible grounds of appeal by reference to passing comments in a decision of this Tribunal which, as he should have known, a subsequent decision of the Tribunal has since pointed out was clearly wrong (see Charles [2018] UKUT 89 (IAC) at [45] to [46]). Compliance or non-compliance with the Immigration Rules may be of some relevance in assessing the proportionality of the Secretary of State’s decision and hence it determining whether it can be said to have been unlawful under s. 6 of the 1998 Act; but detailed grounds such as would have been available under the old appeals procedure, have no place in an appeal of this sort.

6. The basis of the complaint in relation to the primary reason for refusal was that the Secretary of State was not entitled to apply paragraph 322(5) to the appellant. Mr Sharma went on to say that even if paragraph 322(5) applied to the appellant, the Secretary of State should have exercised her discretion not to apply it in the individual case. As we have said, we do not have jurisdiction to respond to those complaints. The factors which the Secretary of State applied in determining this application, by a person who had been in the United Kingdom for ten years (or very nearly so) are, however, matters which we do take into account in assessing proportionality.
7. The position is that in considering the appellant's application in March 2016, the Secretary of State discovered that some years earlier, in March 2011 and May 2013, the appellant had made applications for further leave as a Tier 1 (General) Migrant, based on income of (in each case) about £56,000, including about £39,000 from self-employment, whereas the amounts declared to HMRC for the purposes of tax were very different: in 2010/11 the total income declared was £17,500; in 2012/13 the total income was £16,809, including a declared sum of £550 from self-employment. The decision-maker took the view that it would be against the public interest to grant the appellant indefinite leave to remain taking into account his character and conduct in representing to the Immigration authorities that his income was high enough to merit the grant of leave, whilst representing to the Tax authorities a wholly different and much lower sum, so reducing his tax liability.
8. The grounds of appeal to the First-tier Tribunal were submitted in March 2016. They assert that the appellant was not dishonest. It is, however, the case that only after receipt of the decision now under appeal did he seek to make any arrangement with HMRC and to pay the tax that he had underpaid. In a later statement, the appellant says that his "failure to file a return" was not dishonest, but, as we understand the facts, there must have been at least one false return filed, declaring the £550 of self-employed income rather than the £39,000 or thereabouts declared to the Secretary of State.
9. Mr Sharma's argument that in these circumstances the Secretary of State was not entitled to apply paragraph 322(5) to the appellant is, quite frankly, hopeless. Although the appellant is now said to have begun to repay the tax he owes, the position at the date of the decision was clearly that he had not done so; and his conduct in the period before that decision obviously justified that conclusion the Secretary of State reached. Although the appellant has claimed not to be dishonest, he offers no explanation for how he came to think that the tax he was paying was the appropriate calculation in relation to an income of the level he was declaring to the Secretary of State, nor why he thought that a self-employed income of £38,000 a year (or thereabouts) would not lead to a substantial charge to tax.
10. We are reinforced on our conclusions on that point by the decision of Spencer J in R (Khan) v SSHD (JR/3097/2017) a decision on judicial review, not on appeal:

"[37] ...

- (i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy
- (ii) However, where an applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty." (Emphasis added).

11. There is, in the present case, no evidence of any mistake. So far as concerns Mr Sharma's submission that this was not a case to which paragraph 322(5) applied, therefore, we reject his argument.
12. Even if there were available to Mr Sharma an argument that the discretion implicit in the word "normally" in the heading to paragraph 322(5) should have been exercised differently, there is no evidence in the present case that could have established that ground. In present circumstances Mr Sharma's argument simply goes nowhere. There is no proper basis for challenging the Secretary of State's decision to refuse the application for indefinite leave to remain on the grounds set out in paragraph 322(5).
13. That factor then falls to be taken into account in considering whether the refusal of indefinite leave to remain was disproportionate. In general terms, the public interest balance in private and family life cases has to be taken to be that set out in the Immigration Rules. As the decision-maker correctly concluded, this application did not fall to be granted under any of the paragraphs of the Immigration Rules relating to private or family life.
14. The question then is whether the appellant's circumstances, or the circumstances of some member of his family, or some combination of them, gives the appellant some right to the leave he sought, despite not being able to meet the requirements of the Rules. The general rehearsal of the family circumstances again gets the appellant nowhere. The point on which Mr Sharma particularly relied before us was that s. 117B(6) of the 2002 Act is as follows:

"(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

15. Mr Sharma said that the appellant's claim under that head was unassailable.
16. The position was considered by Judge Agnew. There is no evidence of the best interests of the appellant's son. Judge Agnew pointed out that he has only recently been granted citizenship, his parents both grew up in Nigeria and could live there,

and that the evidence before her did not show that it would be unreasonable for either the appellant's wife or his son to accompany the appellant to Nigeria if they chose to do so. The appellant's claim that that decision was not open to the judge is fanciful. Mr Sharma pointed to not a shred of evidence which would have justified a contrary conclusion, let alone required one. Section 117B(6) does not apply because the evidence does not establish that s 117B(6)(b) applies.

17. For the foregoing reasons we dismiss the appeal on all the grounds advanced.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 31 October 2018.