



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06161/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 23 January 2019

Decision & Reasons Promulgated  
On 14 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TARIQ ISMAIL  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr P Turner, Counsel, instructed by Imperium Chambers

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more the Respondent and Mr Ismail is the Appellant.
2. This is a challenge by the Respondent to the decision of First-tier Tribunal Judge Loke (the judge), promulgated on 1 November 2018, in which she allowed the Appellant's appeal against the Respondent's decision of 12 February 2018, which in turn had refused an application for indefinite leave to remain in the United Kingdom (this constituting the refusal of a human rights claim).

3. The Appellant had originally come to the United Kingdom in 2006 as a student. Thereafter he applied for, and was granted, extensions of leave as a Tier 1 (General) Migrant. On 14 June 2016 he made his application for indefinite leave to remain in this country on the basis of having accrued ten years' continuous lawful residence. In refusing the application the Respondent asserted that when making his Tier 1 application on 20 May 2013 the Appellant had deliberately provided false information about his income, either to the Respondent or to HMRC. In light of this, paragraph 322(5) of the Immigration Rules applied, which in turn meant that the Appellant was unable to satisfy all the requirements of paragraph 276B of the Rules, with particular reference to subparagraphs (ii) and (iii).

### **The judge's decision**

4. At [17] the judge concludes that the Respondent had discharged the evidential burden in respect of the deception issue. At [18] and [19] the judge goes on to find that the Appellant had provided a sufficiently plausible explanation by way of rebuttal to the Respondent's allegations so as to shift the burden back to the Respondent. With reference to the legal burden, the judge then goes on to consider the core factual issues in the case.
5. Following the 2013 application, the Appellant had subsequently amended the relevant tax return on two occasions: first in 2014 (the first amendment); and a second in March 2016 (the second amendment).
6. In respect of the first amendment, the judge makes reference to a letter from the Appellant's accountant which accepted that they had made an error. On this basis, and on this basis alone, the judge finds that the Appellant was not dishonest in respect of that first amendment to the relevant tax return.
7. As regards the second amendment, the judge found that it related to tax relief for a vehicle. In [22]-[24] the judge sets out a number of concerns about the Appellant's evidence relating to the second amendment. At [25] the judge states:
 

"Thus I do find, albeit narrowly, that the Respondent has discharged the legal burden with respect of the second amendment, to the limited extent that there was a dishonest irregularity in the Appellant's tax relief claimed. Once he realised his car was being used for personal use there was no reason why his tax return was not amended sooner. However, I accept that this was rectified in 2016, probably in anticipation of this application under appeal".
8. At [26] the judge sets out relevant passages from the Respondent's guidance on the application of paragraph 322(5) of the Rules. At [27]-[29] she has regard to matters which she regarded as mitigating (my word, not hers) the Appellant's misconduct in respect of the second amendment. I shall return to these in more detail, below.
9. Paragraph 30 reads as follows:
 

"My findings being limited in this way, I am not satisfied that the Appellant has engaged in conduct of the kind envisaged in the guidance. The guidance

provides examples of the type of conduct envisaged, and the list is not exhaustive, however, they give a flavour of the kind of conduct that is required before paragraph 322(5) will be relevant. In my view the conduct alleged in the Appellant's case falls well short of that contemplated by the guidance".

10. In the next paragraph the judge concludes that all of the requirements of paragraph 276B of the Rules had in fact been met and that the Appellant was entitled to indefinite leave to remain in the United Kingdom.
11. She then goes on to consider Article 8 in its wider context, noting that the satisfaction of the relevant Rule (that being paragraph 276B) was a "significant factor" in the assessment of proportionality. The appeal was duly allowed.

### **The grounds of appeal and grant of permission**

12. There are two grounds of appeal put forward by the Respondent. In the first, it is said that the judge failed to have proper regard to relevant factors relevant to the conduct of the Appellant and his overall character, particularly in view of the fact that the judge had found him to be dishonest in respect of the second amendment. The second ground asserts that the judge's reliance on the accountant's acceptance of blame was wrong. It is said that responsibility for accurate tax returns ultimately lay with the Appellant and the judge had failed to take this into account.
13. Permission to appeal was granted by First-tier Tribunal Judge P J M Hollingworth on 5 December 2018.

### **The hearing before me**

14. Prior to the hearing Mr Turner had submitted a detailed Rule 24 response, contained in a skeleton argument.
15. Mr Wilding relied on the grounds of appeal. He accepted that paragraph 322(5) of the Rules is discretionary in nature and therefore the judge was entitled to substitute her own discretion for that of the Respondent. However, in doing so Mr Wilding submitted that she had fallen into error. She had failed to recognise that dishonesty was dishonesty, as it were, and that this was an important starting point. Mr Wilding emphasised the use of the word "normally" in the preamble to paragraph 322(5). He submitted that the factors stated by the judge in [27]-[29] were misconceived and, in any event, she failed to have regard to matters weighing on the Respondent's side of the scales.
16. It was submitted that reliance on the guidance was erroneous in part because it was guidance only and did not represent the type of "only one outcome" as might be the case in respect other guidance, for example that relating to whether British children should be expected to leave the United Kingdom. The judge had committed an error because in [30] she appears to be concluding that conduct such as that undertaken by the Appellant was not capable of falling within the scope of 322(5): that was wrong.

17. Turning to ground 2, Mr Wilding submitted that the single reason for concluding that the Appellant was not dishonest in respect of the first amendment was flawed. She had ignored the issue of the Appellant's own responsibility and had not provided any reasons as to why, if this had been considered, she was accepting that there was no fault on his part. Mr Wilding referred me to subparagraph (iv) of the head note of R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC). The judge had in effect treated the accountant's letter as being the complete answer.
18. Mr Turner relied on his Rule 24 response and emphasised the discretionary nature of paragraph 322(5). He submitted that the Respondent was attempting to mount what was in effect a rationality challenge to the judge's decision. He emphasised the judge's comment that her finding on dishonesty was only made by a narrow margin. The judge had taken the relevant factors into account, and these pointed in the Appellant's favour. On the Respondent's side of the scales the finding of dishonesty was the sole factor. There was no other adverse immigration history and no dishonesty in respect of the first amendment.
19. In respect of ground 2. Mr Turner submitted that the decision in Khan did not say that an accountant's letter would never be sufficient. I was asked to read [20] in the context of what is said in [18].
20. In reply, Mr Wilding confirmed that he was not seeking to make a perversity challenge in this case. The fact of dishonesty was highly relevant to any exercise of discretion within the overall assessment of proportionality and the judge had failed to approach this issue correctly.

### **My decision on error of law**

21. After careful reflection in this case I conclude that the judge has materially erred in law, but in respect of
22. I deal first with ground 1 of the Respondent's challenge, as it was developed by Mr Wilding in oral submissions. The first thing to say is that the judge was fully entitled to reach the finding that the Appellant had been dishonest in respect of the second amendment. The reasons set out in [22]-[24] are entirely adequate.
23. This finding of dishonesty was clearly extremely important. I agree with Mr Wilding that dishonesty is dishonesty. Paragraph 322(5) is of course a discretionary ground for refusal and it was open to the judge in principle to revisit that exercise of discretion when considering the Appellant's case. However, in my view the judge has fallen into error when carrying out this task. I say this for the following reasons.
24. First, the finding of dishonesty meant that the application under the Rules would "normally" fall to be refused. Dishonesty effectively created a presumption against the Appellant. With respect, I cannot see that the judge has had that in mind when going on to consider other factors.

25. Second, in respect of [27] it is true that the figure of £11,944 was that presented both to the HMRC and to the Respondent in the 2013 Tier 1 application. Thus, this was not a case in which discrepant levels of income had been stated to the two different authorities. However, this appears to ignore the fact that the Appellant has been dishonest in respect of his dealings with the HMRC, at least in respect of the second amendment. Dishonesty towards the HMRC is, in principle, just as serious a matter as dishonesty towards the Respondent, something made clear in paragraphs 25 and 25 of the decision of the Outer House Court of Session in Collins and Ishoma [2018] CSOH 127.
26. Third, in respect of [28] it is true that the judge had at that point found there to be no dishonesty in respect of the first amendment. Once again, this appears to ignore the finding that the Appellant had been dishonest towards HMRC as regards the second amendment. It is difficult to see why the absence of dishonesty to the one authority would significantly ameliorate the impact of dishonesty towards the other.
27. Fourth, it was indeed the case that HMRC had not imposed any penalties or instigated criminal proceedings against the Appellant in respect of the second amendment. As far as I can see, there is nothing in the case law as it stands to suggest that this is entirely irrelevant, but in my view it simply cannot attract very much weight at all. Nothing before the judge appears to have provided any relevant information about processes undertaken by HMRC in respect of amendments to returns and when penalties should be imposed or resources put into pursuing an individual further.
28. Fifth, the judge clearly placed a good deal of reliance upon the Respondent's guidance (see [30], with reference back to [26]). There are, with respect, difficulties with the judge's approach to this particular issue. Guidance is clearly just that: it is the Rules which are of primary relevance when considering the overall Article 8 considerations. It is right that guidance can be highly significant to the outcome of a statutory appeal, but this is only really where it provides clear indication of only one outcome, that being in favour of an Appellant (the example cited in argument before me was that of the Appendix FM guidance relating to British children leaving the United Kingdom and how that was dealt with by the Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120(IAC). To that extent, I agree with what Mr Wilding has said.
29. The guidance in relation to paragraph 322(5) is very different in nature. It is broad and non-exhaustive. When considering the very same guidance, the Court of Session made it very clear that it did not restrict the scope of the provision (see paragraph 26). The Court also made it clear that dishonesty in respect of information provided to HMRC or the Respondent as regards income was capable of falling within the ambit of paragraph 322(5) (see paragraph 25).
30. I have read and re-read [30] of the judge's decision. It remains unclear to me whether she was concluding that dishonesty of the type practised by the Appellant in this case was not capable of falling within the scope of paragraph 322(5) at all (and not

simply with reference to the guidance), or whether she was saying that whilst such conduct could in principle come within its ambit, the particular facts of this case meant that it did not. Whilst the latter view may (depending on the approach to the other factors being correct) would be permissible, the former view would not.

31. Sixth, Mr Turner has submitted that there were other features of the Appellant's overall circumstances which might have counted in his favour when the discretion was being considered. He pointed out the otherwise unblemished immigration history and character references contained in the appeal bundle. However, none of this has been cited by the judge in support of her purported exercise of discretion. I cannot read such consideration into her decision.
32. Seventh, I agree with Mr Wilding that there has not been a sufficiently balanced approach to the consideration of relevant factors under 322(5). The only points raised by the judge in [27]-[29] refer to the "mitigation" of the dishonesty. There is nothing about the timing of the amendment (which was only a couple of months before the indefinite leave to remain application was made), the significance of the dishonesty itself, or indeed an answer to the question of whether the dishonesty towards HMRC was potentially of itself enough to make his presence in the United Kingdom undesirable.
33. I turn to ground 2. The sole reason provided by the judge for concluding that the Appellant was not dishonest in respect of the first amendment is the accountant's letter (this can be found at page 5 of the Appellant's bundle).
34. With reference to the decision in Khan (which had been published many months before the hearing before the judge and provides guidance which I regard as being relevant in statutory appeals, notwithstanding it being delivered in the context of judicial review), it is problematic for a judge simply to rely on the accepted error on the part of an accountant *without more*. I appreciate that Khan does not expressly rule out the sufficiency of such evidence, but paragraph (iv) of the head note does make the valid point that whilst professionals may act for an individual, it is the responsibility of the individual taxpayer to check that figures set out in a tax return are accurate.
35. It is very difficult for me to discern whether this particular issue was addressed at the hearing before the judge, but [20] of her decision does not engage with the subsidiary question, namely the Appellant's responsibility. I note that this issue was raised by the Respondent in the penultimate paragraph of page 4 of the reasons for refusal letter. Although my conclusion on ground 2 is by a narrower margin than in respect of ground 1, the judge has nonetheless erred by failing to deal with a material point.
36. A further point raised by Khan in relation to errors by accountants is the question of whether the claimed mistake is in fact plausible. In the present case, the judge has not provided any reasons as to why she found the accountant's explanation to be at least capable of belief.
37. In light of the above I set the judge's decision aside.

**Disposal**

38. Given my conclusions, this appeal must be remitted to the First-tier Tribunal.
39. In taking this course of action I am acutely aware of the potential difficulties in preserving findings of fact made by the previous judge.
40. However, in this appeal I am satisfied that the judge’s finding of dishonesty by the Appellant in respect of the second tax return amendment can and should be preserved. It is not vitiated by any error and its presence in the remitted case will not in my view produce artificiality or a ‘straight jacket’ for the First-tier Tribunal. After all, the judge felt able to reach differing findings on dishonesty as regards the two amendments and there is no particular reason why the Tribunal could not ultimately conclude that the Appellant was not dishonest in respect of the first amendment notwithstanding the preserved finding against him on the second.
41. I will issue directions to the First-tier Tribunal, below.

**Notice of Decision**

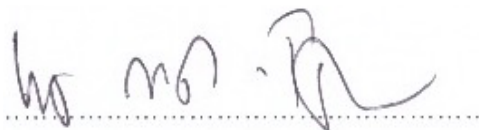
**The First-tier Tribunal’s decision contains material errors of law and I set it aside.**

**I remit this appeal to the First-tier Tribunal.**

**No anonymity direction is made.**

**Directions to the First-tier Tribunal**

- 1) This appeal is remitted to the First-tier Tribunal;**
- 2) The remitted appeal shall not be heard by First-tier Tribunal Judge Loke;**
- 3) Judge Loke’s finding that the Appellant was dishonest in respect of the second tax amendment is preserved;**
- 4) An important factual issue to be determined on remittal is whether the Appellant was also dishonest in respect of the first tax amendment;**
- 5) The discretionary element of paragraph 322(5) of the Rules will be a relevant aspect of the overall Article 8 assessment.**



Signed

Date: 8 February 2019

Deputy Upper Tribunal Judge Norton-Taylor