



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/14422/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 December 2019**

**Decision & Reasons Promulgated  
On 19 December 2019**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MR MOHAMMAD NURUN NABI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellant: Mr M Biggs, Counsel, instructed by Commonwealth Solicitors

For the respondent: Mr S Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge M Khan (the 'FtT'), promulgated on 8 March 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 24 May 2016 of his human rights claim. That decision had in turn refused the appellant's application for leave to remain based on 10 years' lawful residence under paragraph 276B of the Immigration Rules.

2. The core point taken against the appellant by the respondent related to a belief that the appellant had participated in deception when making an earlier application as a Tier 1 (Entrepreneur) in November 2012; in concert with others, he had set up a sham company, and had funds transferred into relevant business accounts, which were then returned a short period after his application. His application for indefinite leave to remain was therefore refused under paragraph 322(2) of the Immigration Rules, specifically that he had made false representations in his Tier 1 application.

### **The FtT's decision**

3. The FtT made an analysis of the evidence, running from [31] to [41]. The FtT was not impressed by various aspects of the appellant's evidence, finding that there was clearly dishonesty involved in the appellant's 'intentions and actions'. While others who had been prosecuted in relation to the deception had been acquitted at a criminal trial, the burden of proof in relation to criminal proceedings was higher.
4. Having considered the evidence as a whole, the FtT found that the respondent had been entitled to refuse the appellant's application for indefinite leave to remain as a result of his dishonesty. The FtT concluded that refusal of leave to remain was proportionate, noting sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002, particularly where the appellant's immigration status had been precarious.

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

5. The appellant lodged grounds of appeal on 22 March 2019 which are as follows:
  - 5.1. Ground (1): the FtT had applied the wrong standard and burden of proof, referring at [41] to where the respondent had raised evidence of quality 'to raise suspicions', the burden then passes to the appellant to provide an innocent explanation. That was not consistent with the authority of R (Giri) v SSHD [2016] 1 WLR 4418 All ER;
  - 5.2. Ground (2): the FtT had failed to consider whether the appellant had genuinely failed to misunderstand the rules, which had been the basis on which others had been acquitted at their criminal trial and on which the Upper Tribunal in a different case had upheld a First-tier Tribunal determination allowing an appellant's appeal;
  - 5.3. Ground (3): the FtT had failed to properly scrutinise the evidence about whether the appellant had paid monies to a claimed investor following his application, when in fact no evidence to support that central allegation had been provided by the respondent;
  - 5.4. Ground (4): the FtT had failed to proof-read the decision which included typographical errors and had produced a draft;

- 5.5. Ground (5): it was possible that the respondent's decision attracted a right of appeal broader than human rights, as the decision 'may be affected' by regulation 9(1)(b) of the Immigration Act 2014 (Commencement No.3, Transitional and Saving Provisions) Order 2014/2771, although this issue was not said to have been raised by the appellant in his appeal to the FtT.
6. Upper Tribunal Judge Martin, sitting in the First-tier Tribunal, initially refused permissions but renewed permission was granted by Upper Tribunal Judge Allen on 30 October 2019. He regarded the grounds as identifying arguable points of challenge and did not limit the grant of permission in its scope.

### **The hearing before me**

7. Mr Biggs withdrew grounds (4) and (5). On behalf of the respondent, Mr Walker expressly conceded that the FtT had erred in law, in relation to the legal and evidential burden which had been applied (ground (1)), which then infected his findings in relation to ground (2). The FtT had referred at [9] of his decision:

*"The appropriate standard of proof is whether there are 'substantial grounds for believing the evidence'. The burden of proof of dishonesty is on the respondent. The civil standard of proof applies but evidence of weight is required to discharge this burden. If the respondent establishes that there are reasonable grounds for suspicion of dishonesty or prima facie evidence of it, the burden shifts to the appellant to show there is a plausible innocent explanation for the conduct complained of."*

8. The FtT's conclusions, based on that legal test, were at [41]:

*"The fact that Mr Pervez has been acquitted in his criminal trials where different standard of proof is required. The important aspect here is whether the appellant used dishonesty, if so has the respondent raised evidence of quality to raise suspicions, and has the appellant provided an innocent explanation, I find he has not."*

9. I accept Mr Biggs' submission, as conceded by Mr Walker, that the legal test outlined by the FtT fell into error in two respects: first, was to conclude that the raising of suspicions was sufficient to put the evidential burden on the appellant. Second, and in my view of more importance, was the fact that the FtT conflated a legal and evidential burden of proof, so that what the FtT had erred in concluding was that where there were suspicions, the legal burden, as opposed to the evidential one, shifted onto the appellant. That was clearly incorrect and material to the FtT's decision.
10. I do not reach any conclusions in relation to ground (3), ie. the extent to which the FtT had failed to assess the evidence (or lack of evidence) that

the appellant had ever transferred money to a co-accused investor, as the errors in grounds (1) and (2) go to the heart of the FtT's findings, sufficient to make the FtT's decision unsafe in its entirety. I therefore set aside the FtT's decision, which will need to be remade.

11. In terms of a remaking, the representatives agreed that as the FtT's assessment of the appellant's credibility was flawed, this went to the core of the decision, so that the decision needs to be remade in its entirety. As substantial evidence will need to be considered, it is appropriate to remit the remaking to the First-tier Tribunal.

## **Decision**

### **Notice of Decision**

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

**I remit this appeal to the First-tier Tribunal for a complete rehearing.**

### **Directions to the First-tier Tribunal**

**This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.**

**The remitted appeal shall not be heard by First-tier Tribunal Judge M A Khan or Upper Tribunal Judge Martin.**

**No anonymity direction is made.**

Signed **J. Keith**

Date: 16 December 2019

Upper Tribunal Judge Keith