



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03314/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 28<sup>th</sup> November 2019

Decision & Reasons Promulgated  
On 15<sup>th</sup> January 2020

Before

**HHJ BIRD  
UPPER TRIBUNAL JUDGE JACKSON**

Between

**RIZWAN KAYANI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

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

Respondent

**Representation:**

For the Appellant: Mr J Gajjar of Counsel instructed by Legal Chambers Solicitors  
For the Respondent: Ms J Isherwood, Senior Home Officer Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Lever promulgated on 5 June 2019, in which the Appellant's appeal against the decision to refuse his application for leave to remain based on long residence under paragraph 322(5) of the Immigration Rules dated 4 February 2019 was dismissed.
2. The Appellant is a national of Pakistan, born on 20 May 1982, who first arrived in the United Kingdom in 2006 with valid entry clearance as a student. The Appellant was

granted leave to remain as a student, to 28 February 2010, and subsequently granted leave to remain as a Tier 1 Post-Study Migrant to 12 March 2012 and as a Tier 1 General Migrant to 24 May 2013 and then to 11 June 2016; prior to which he applied for indefinite leave to remain in the same category. Prior to the determination of that application, the Appellant varied his application on 8 December 2016, as one for indefinite leave to remain on the basis of long residence in the United Kingdom.

3. The Respondent refused the application the basis that the Appellant failed to meet the suitability criteria and the application was primarily refused under paragraph 322(5) of the Immigration Rules on the basis that it would be undesirable for the Appellant to remain in the United Kingdom in light of his character and conduct. This was on the basis that the Appellant had misrepresented his earnings and had changed what he represented in respect of his earnings to HM Revenue and Customs and/or UK Visas and Immigration for the purpose of reducing his tax liability or the purpose of obtaining leave to remain or both. In his application for leave to remain dated to April 2011, the Appellant claimed to have an income of £39,712.94 between 1 April 2010 and 31 March 2011, including dividends to the value of £36,880 from self-employment. However, the initial tax return filed by the Appellant with HMRC for the same period, did not include any earnings from dividends. An amended tax return was filed in 2016 to declare dividend earnings of £36,666 for this period. In response to a tax questionnaire sent to the Appellant by the Respondent, he confirmed that an amendment to his tax records was required as incorrect submissions were made by his accountants initially and this was not noticed by the Appellant although he checked the tax return prior to its submission.
4. Judge Lever dismissed the appeal in a decision promulgated on 5 June 2019 on all grounds. In summary, the First-tier Tribunal found that the Respondent had discharged the first task of raising a proper suspicion in support of the Respondent's assertion of dishonesty by the Appellant and went on to look at the explanation provided by the Appellant in respect of this. It was found that the Appellant had obtained a Master of Business Administration degree, which may not have contained a detailed study of tax or accounting, but that the Appellant has set up was running a business as a self-employed businessmen and was solely responsible for generating and passing data to an accountant and it was considered implausible that had the accountant been provided with all of the relevant information by the Appellant, that they would fail to record the totality of the dividends paid to the Appellant as his primary source of income. Although the Appellant's accountants had written a letter, that contained no explanation of the human error claimed and little weight was attached to this document. It was noted that the Appellant did not seek to correct the error until some years later prior to the application for indefinite leave to remain and further that little weight was attached to the fact no further tax liability arose following the amendments to the tax returns. This was because the Appellant's account was that he was ignorant of tax matters and therefore would not have known at the time of filing whether or not there would be a greater tax liability and in any event, the intention to deceive and to act dishonestly was considered to be the relevant consideration and not the potential loss of tax revenue.

5. The First-tier Tribunal was satisfied that the Appellant was deliberately dishonest in providing a false and wholly inflated figure to the Home Office in his application for leave to remain in 2011 and concluded that on the totality of the evidence, there was no innocent explanation against the suspicion of this raised by the Respondent. Finally, the First-tier Tribunal considered all of the factors for a refusal under paragraph 322(5) of the Immigration Rules but did not find any reason to depart from the general view and that there were no countervailing features to prevent refusal on unsuitability grounds.
6. Finally, the First-tier Tribunal considered whether the Appellant could meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules, but found that there would be no very significant obstacles to his reintegration to Pakistan. Overall and taking into account the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, the Appellant's removal was not found to be a disproportionate interference with the Appellant's right to respect for private life and no family life had been established in the United Kingdom.

### **The appeal**

7. The Appellant appeals on numerous grounds which are not clearly numbered or identified individually but unhelpfully form extended text in relation to the decision under appeal. The main focus of the grounds of appeal are in relation to what is described in the grounds as the material point in the determination, the Appellant's dishonesty in failing to declare his dividend in his personal tax return. On this issue, the grounds of appeal are that the First-tier Tribunal materially erred in law in failing to consider that the Appellant did not have to pay any additional tax because his company had paid tax on the income, such that dividends were in effect taxed at source, which was a key part of the Appellant's innocent explanation. Further, that the First-tier Tribunal erred in fact in stating that the Appellant's dividend income was his only source of income, where the evidence showed that the Respondent accepted that he also had PAYE income.
8. In addition, the Appellant claims that the First-tier Tribunal conflated dishonesty with a breach of duty in relation to tax returns; reached an irrational conclusion that the Appellant's academic qualifications would have enabled him to appreciate detailed tax matters; attached insufficient weight to the letter from the accountant and failed to take into account that there was only a single discrepancy in the Appellants declarations.
9. In the final sentence of the grounds of appeal, the Appellant claims that the First-tier Tribunal materially erred law in failing to consider that his application of 2 April 2011 for leave to remain would only have been successful if the Respondent was satisfied that the specified evidence had been provided to show that he and the income requirements.
10. At the oral hearing, we queried with Mr Gajjar the relevance of the grounds of appeal focusing on the Appellant's omission in declaring dividend income to HMRC initially for the period in 2011 given the express finding by the First-tier Tribunal in

paragraphs 25 and 26 of the decision that the dishonesty in this case was aimed at the Respondent in the Appellant's application for leave to remain in April 2011 and no express finding of dishonesty to HMRC was made. Mr Gajjar accepted in these circumstances that the main points in the written grounds of appeal could not ultimately be material to the outcome of the appeal in light of this finding of dishonesty against the Respondent, which alone engages conduct relevant to paragraph 322(5) of the Immigration Rules. The focus of the oral submissions on behalf of the Appellant were then on the final sentence of the grounds of appeal, which was submitted to be broad enough, when read in conjunction with the original grounds of appeal to the First-tier Tribunal, to challenge the finding of dishonesty against the Respondent, including that there were inadequate reasons for this finding in the First-tier Tribunal's decision.

11. Mr Gajjar submitted that although it was potentially permissible for the First-tier Tribunal to conclude that the Appellant had been dishonest in his application to the Respondent in 2011, the bare finding in paragraph 25 was a material error of law because there was a failure to consider all relevant factors, specifically that the application in 2011, made with specified evidence supporting the claimed income, was accepted by the Respondent on the balance of probabilities. It was accepted that a previous grant of leave to remain is not binding on any future application, but that in the present case there was nothing further to undermine that decision. In particular, the incorrect tax declaration made in 2011 does not lead to a conclusion that the income declared to the Respondent for the same period was wrongly declared.
12. On behalf of the Respondent, Ms Isherwood reiterated the factual circumstances in this appeal, with the basis of the Respondent's refusal under paragraph 322(5) of the Immigration Rules being that the Appellant had misrepresented his earnings to the Respondent for the purposes of obtaining leave to remain in 2011, or had misrepresented his earnings to HMRC for the purpose of reducing tax liability, or both; with a discrepancy between the declarations of over £36,000. The Appellant's declaration of earnings to HMRC was only amended in 2016, shortly before his application for indefinite leave to remain. Prior to the Respondent's decision, the Appellant was sent a tax questionnaire stating that there was an oversight and miscalculation by his accountants and also stating that the Appellant checked his tax return prior to its submission. The Appellant's explanation for the discrepancy in declarations to different government departments was essentially that there was a genuine error in his initial declaration to HMRC, with no dishonesty or intention to reduce his tax liability and the position was later corrected. The implication follows that the Appellant maintained that his declaration of earnings to the Respondent's application for leave to remain in 2011 was entirely true and accurate.
13. The First-tier Tribunal considered the Appellant's explanation and rejected it for the reasons given in paragraphs 17 to 24 of the decision. In particular, it was noted that the Appellant had himself checked his tax return before its submission and the explanation of an error by the accountant was rejected given the lack of detail in the letter from them.

14. Overall, it was submitted on behalf of the Respondent that there was no error of law in the finding in paragraph 25 of the decision that the Appellant was dishonest in his application to the Respondent for leave to remain in 2011. It is not enough for the Appellant to simply rely on the fact that that the earlier application was successful when new evidence came to light subsequently about the discrepancy in his declaration of earnings and the amendment of his tax returns.

### **Findings and reasons**

15. The issues in this appeal essentially come down to a single point about whether the findings in paragraphs 25 and 26 of the decision contain a material error of law. As accepted by the parties, this issue is determinative of the appeal. If there is no error in these findings, paragraph 322(5) of the Immigration Rules is engaged and there is no further challenge to the second stage assessment of the application of discretion under this paragraph, nor is there any challenge to the conclusions in relation to Article 8 of the European Convention on Human Rights. Any errors by the First-tier Tribunal about declarations to HMRC, in particular as to tax liability, the accountant's explanation and breach of duty would not be material. If on the other hand there is an error of law in the findings in paragraphs 25 and 26 of the decision, that is sufficient of itself for the decision of the First-tier Tribunal to be set aside as those errors would infect the remaining findings under the Immigration Rules and Article 8.
16. The Appellant's two main issues with the findings in paragraphs 25 and 26 are that first, there was no consideration of the fact that the Appellant's application in 2011, on the basis of specified evidence of income, was successful; and secondly, that there were inadequate reasons for the findings. The second point does not feature at all in the grounds of appeal to the Upper tribunal and will not be considered further as a result.
17. Although it is not set out in the clearest way, when read as a whole the decision of the First-tier Tribunal does follow a structured approach to the assessment of dishonesty/deception as alleged by the Respondent in the reasons for refusal letter. It is accepted that there was sufficient evidence from the Respondent to raise a clear suspicion of dishonesty based on the discrepant declarations of earnings to 2 different government departments for the same period. The Respondent's decision was on the basis of dishonesty against the Respondent, or HMRC, or both.
18. In response, the explanation provided by the Appellant only addresses in substance, the allegation that he had misrepresented his earnings to HMRC for the purpose of reducing his tax liability. In support of this he claimed that there was an error by his accountant, not spotted by himself when checking the form, in failing to declare his dividends to HMRC which was corrected when identified and there was no tax advantage in failing to declare the dividend income. The amended tax returns confirmed that no further tax was payable, corporation tax having already been paid on the company's profits and the Appellant benefiting from a tax credit on the dividends as a result. Although not set out expressly by the Appellant, it can be

inferred that his position was that the declaration of earnings to the Respondent, consistent with his amended tax returns, were correct.

19. The First-tier Tribunal considered in detail the elements of the Appellant's explanation about why his initial tax return was said to be wrong and rejected these for the reasons set out in paragraph 17 to 24 of the decision. The Appellant's reliance on there being no further tax liability from the amendment was set out in paragraph 23 (albeit without any reference to corporation tax paid or the detailed reasons for there being no further liability) but rejected in paragraph 24 for two main reasons. First, it was the Appellant's case that he was ignorant of tax matters when the tax return was filed and he could not therefore have known or predicted that the failure to declare dividends at that time would have a benefit or no impact on at all on his tax liability. Secondly, it is the intention to deceive and act dishonestly rather than whether there was in fact any loss of tax revenue which is relevant for the purposes of conduct in paragraph 322(5) of the Immigration Rules. We find no error of law in these conclusions reached by the First-tier Tribunal which were open to them on the evidence available.
20. In any event, there was no finding that there was dishonesty to HMRC in the initial tax return, to the contrary, reading the decision as a whole and in particular the finding that the dishonesty was in the declaration of earnings to the Respondent, by implication and by the rejection of the claim that there was no genuine error at the time, the First-tier Tribunal appears to accept that it was the initial tax return to HMRC that was correct.
21. There was no further or express explanation by the Appellant as to his earnings declared to the Respondent in 2011, merely the implicit reliance on this declaration being correct. There was therefore nothing of substance on this claimed deception against the Respondent for the First-tier Tribunal to consider in any detail. We find no error of law in the findings in paragraphs 25 and 26 of the decision, in these circumstances and following the rejection of the Appellant's explanation of a mistake in the initial tax returns to HMRC, even in the absence of any express reference to or consideration in this part of the decision to the application for leave to remain in 2011 having been successful. This was clearly known as part of the Appellant's immigration history and could not, in any event, be material let alone determinative against the finding of dishonesty, given what has come to light since the application was made and the other findings of the First-tier Tribunal. In all cases such as this one, there will inevitably be a previous successful application for leave to remain.
22. We find no material error of law in any of the remaining points made in the written grounds of appeal. In particular the factual error about whether the Appellant's income was solely from dividends or whether he had small PAYE income as well is wholly immaterial to the findings in the decision, similarly the fact that there was only a discrepancy in a single year is not a material consideration which would have affected the outcome of the appeal in light of the other findings made and in light the fact that the discrepancy was over £36,000, which on any view is a significant sum. Finally, the First-tier Tribunal did not conflate dishonesty with a breach of duty, as

above, there was no finding of dishonesty in the initial earnings declaration to HMRC.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

13<sup>th</sup> January 2020

Upper Tribunal Judge Jackson