**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/34313/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 25 April 2017** | **On 16 May 2017** |

**Before**

**UPPER TRIBUNAL JUDGE MCGEACHY**

**Between**

**JAHANZEB DAR**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Z Malik, of Counsel instructed by Messrs Whitefield Solicitors Ltd
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant, a citizen of Pakistan born on 21 December 1983 appeals with permission against a decision of Judge of the First-tier Tribunal Mathews who in a determination promulgated on 4 August 2016 dismissed the appellant's appeal against a decision of the Secretary of State to refuse to grant him indefinite leave to remain. The application was refused under Rule 322(1A) on the basis that the appellant had failed to disclose material facts about his application. The relevant part of the reasons for decision reads as follows:-

> "• 18/10/14 - Current application submitted for indefinite leave to remain on the basis of long residency.

- 23.3.15 - IS151A served. Reporting arrangements set up commencing on 8 April 2015 following the service of letter ISI51A. Documents sent to last known address – [ ]

- 17.04.2015 - Failed to attend reporting event at Manchester Reporting Centre.

As set out above it is noted that you failed to attend for reporting at Manchester Reporting Centre. In addition you were required to attend an interview in relation to the English Language qualification submitted with your current application. You are not residing at the address provided to us. We wrote to your legal representatives, Whitefield Solicitors Ltd, on 24 August 2015 to ascertain your current address. We did not receive a response. As we have been unable to contact you with regard to your application it is considered that you have failed to demonstrate that your application was not obtained fraudulently and your application is therefore refused under paragraph 322(1A).

For the above reasons, I am satisfied that you have failed to disclose material facts about your application and it is refused under 322(1A), of the Immigration Rules as below:

> '322(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.'

Your application has also been considered under the Immigration Rules on the basis of long residence.

Paragraph 276B states that:

> '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

...

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.'

You entered the United Kingdom on 22 April 2004 and your lawful leave was curtailed on 18 January 2014. You cannot therefore demonstrate 10 years' continuous, lawful residence in the United Kingdom ...".

2. The background to this case is that the appellant entered Britain on 22 April 2004 and had leave to remain as a student up to 18 January 2014. He made an application on that day for leave to remain as a student which was refused on 17 July 2014 without right of appeal. On 18 October 2014 he made the application for indefinite leave to remain on the basis of his long residency.

3. Of relevance is the application form which he completed. In Section 1 of the form he gave as his contact address in Britain the address of his solicitors and at section B14 gave his own address. It is accepted that the address he gave was the address at which he was living when the application was made. The applicant also put in his hotmail address and referred to the application which he had made on 18 January 2014 which he believed was still pending.

4. In a witness statement the appellant stated that the refusal of 17 July 2014 regarding the application for the student extension had not been received until March 2015 by his solicitors. He argued that therefore his lawful leave had been extended by virtue of Section 3C of the Immigration Act 1971. He stated that on 1 November 2014 he had moved from the address which he had put on the application form to another address on 26 October 2015. He stated that the person with whom he had been living had not wanted him to pass that particular address to the Home Office. He stated however that his legal representatives had written to the respondent in May 2015 asking for further information regarding the initial application.

5. Judge Mathews heard the evidence of the appellant and in paragraph 16 of the decision made a clear finding that by 22 April 2014 the appellant had accumulated a ten year period of continuous residence.

6. Although the Secretary of State had indicated concerns regarding the appellant's English language certificate, no allegation was made that the appellant's English language certificate had been fraudulently obtained and that was not part of the refusal. The refusal was that the appellant had failed to disclose material facts about his application and those "material facts" it was agreed were that the applicant had not informed the Secretary of State of his change of address.

7. In paragraph 19 the judge stated:-

> "A general ground of refusal under Section 322(2) is asserted in failing to provide his current address ...".

I would comment that although at the end of the decision (page 4 of 9) there is a reference to paragraph 322(2), that ground of refusal is not particularised, whereas that where the refusal under paragraph 322(1A) is in the decision. In any event, however, the judge went on to say that he found the appellant did not notify the respondent of his address after he had moved home and therefore paragraph 322(1A) was made out:-

> "... since the appellant's current address was clearly a material fact in the present application. An accurate address is a pre-requisite for timely notices and requests to be able to be passed to an appellant, it would avoid precisely the difficulties with notification that the appellant complains of in this case, and which I find to be due to his own conduct in moving properties without notifying the respondent".

8. The judge comments in paragraph 21 that he had noted the assertion relating to fraud by the appellant in obtaining a language certificate. He stated that:-

> "I do not find that the respondent has put before me adequate or sufficient evidence to prove the dishonesty alleged against this appellant. I simply have a notice sent to the appellant and containing generic evidence that is not specific to this man. I do not find that paragraph 322(1A) is made out in relation to false test results."

9. He then commented on the copy of the letter sent to the appellant's solicitors regarding the request that the appellant report on 6 May and noted that the solicitors had stamped the correspondence as being received by them on 6 May 2015. He stated that however the letter had been dated 29 April 2015 and therefore was sent in timely fashion.

10. The judge concluded that:-

> "I find that he failed to attend as directed having been given proper notice of the date and time at which he was required to report. Again I find that fact engages paragraph 322 as a ground upon which refusal of leave should normally follow."

11. However, he went on to state that the response had not been put before him nor adequate evidence to show any further appointment request to the appellant's connection with his language test results and he was unable to make findings that the appellant failed to attend any such interview in the absence of such evidence from the respondent. However, in paragraph 24 the judge stated:-

> "I have found the appellant has failed to notify the respondent of his address, and failed to report as directed, I find that the respondent was correct in engaging provisions of paragraph 322 in those respects, and I do not find that the appellant has addressed those failures in evidence such that it is unfair to find that general grounds for refusal are made out. Those matters are fatal to his 10 year application notwithstanding the accumulation of the required period."

12. The judge went on to dismiss the appellant's appeal under Article 8 of the ECHR.

13. It is clear from paragraph 24 of the determination that the judge not only found that the appellant had met the ten year requirement of the Rules, but that he also discounted an allegation that the appellant had failed to attend for interview regarding the allegation that his English language test results might have been improperly obtained.

14. In brief the judge found that the fact that the appellant had not informed the Secretary of State of his change of address meant that the Secretary of State was entitled to refuse his application under the provisions of both paragraphs 322(1A) and 322(2) of the Rules.

15. The grounds of appeal argued that the judge had misdirected himself in law in his consideration of the application of paragraph 322(1A) and 322(2). Having set out the provisions of paragraph 322(1A), to which I have referred when I quoted from the notice of refusal, the grounds quoted paragraph 322(2) which states as follows:-

> "the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave".

16. It was argued in the grounds that there was nothing in the provisions that required an applicant to inform the Secretary of State as to the change of his residential address. It was impossible to see how changing a residential address without notifying the respondent could amount to the making of a false representation or non-disclosure of a material fact. It was pointed out that this was different in a situation where an applicant had given a false address in his application form.

17. The grounds also argued that the judge had erred in failing to consider and determine whether the appellant had been dishonest so as to fall within the

provisions of paragraphs 322(1A) and 322(2), pointing to case law which made it clear that dishonesty or deception was needed to render a "false representation" ground for mandatory refusal under paragraph 322(1A) of the Immigration Rules. Failing to disclose a material fact could be classed as deception, but that required dishonesty on behalf of the applicant. The judge had erred by not considering whether or not the appellant had acted dishonestly.

18. It was also argued that the judge had failed to appreciate the burden was on the Secretary of State to establish contested facts and that that included the issue of whether or not the appellant had failed to attend a reporting requirement and that that would fall within paragraph 322 of the Immigration Rules.

19. Permission was granted on those grounds of appeal by Designated Judge Shaerf on 9 March 2017.

20. On 16 March 2017 the respondent served a Rule 24 response opposing the appeal. It was stated that the grounds of appeal were wrong in that the judge had found the appellant had "knowingly provided an incorrect address to the respondent". Moreover, it was stated that the judge had clearly found that the appellant had acted dishonestly and it was stated that the appellant had conceded that he had given the respondent the wrong address. The appellant had failed to report as required. It was argued that the respondent had made out her case and therefore this was not a question that the respondent's discretion should have been exercised differently.

21. At the hearing of the appeal before me Mr Malik amplified the grounds of appeal pointing out that the appellant had put the correct address in the application form and that there was nothing requiring him to inform the respondent of his change of address. Moreover, he has given the address of his solicitors as his contact address. Moreover, he pointed out that there was no appeal from the Secretary of State against the decision of the judge that the appellant had completed ten years' lawful residence in Britain. He stated that if the Secretary of State wanted to make an allegation of dishonesty that should clearly be set out.

22. Mr Avery has stated that the actions of the appellant had "frustrated" the appellant's enquiries. There was no case law on which he could rely to show that Rules 322(1A) and 322(2) were engaged. However, he did point to the fact that the application form stated that the appellant declared that "If there is a material change in my circumstances or any new information relevant to this application becomes available before it is decided, I will inform the Home Office". He stated the appellant had not informed the Home Office of his change of address.

**Discussion**

23. The reality is that the issue before the judge was a simple one – whether or not the provisions of Rule 322(1A) and 322(2) were engaged. To be found to have fallen foul of those Rules leads to draconian consequences for an appellant. I have considered the facts of this case, noting that the sole issue is whether or not the appellant made

false representations or did not disclose a material fact for the purpose of obtaining leave to enter.

24. It is accepted that when he made the application the appellant put his correct address in the application form. He clearly did not make any false representations at that time. Moreover, he gave his solicitors' address and details as the contact details. Those again were correct. He also gave an e-mail address and indeed repeated that when requested to do so.

25. It is correct that the appellant did change his address, but I cannot consider that that is a material fact given that the contact address and the e-mail address remained the same. Indeed, in any event, the reality is that the appellant's solicitors state that they did not receive the letter requesting him to attend for interview in time. They marked the received letter with a date which was the same as the interview. Given the short period between the letter being sent out and the date of interview, I do not consider that that is not credible.

26. Mr Avery has argued that the fact that the appellant did not give his change of address was a material fact. The reality is that nowhere on the application form does it state that the respondent must be informed of a change of address and, of course, the contact address did not change in any event. Mr Avery relied on the fact that the appellant has moved as being a change of circumstances of which the appellant should have informed the respondent. Given that the appellant had given correct contact addresses – the address of his solicitor and had also given his e-mail address, I cannot see how his change of address can be a material change in his circumstances relevant to the application. A material change in circumstances could have been, for example, that the appellant's marital status had changed, that he had left the country and did not intend to return, or indeed had committed a crime. That was not the case here.

27. The argument that somehow the appellant was trying to frustrate a consideration of his application is simply not made out.

28. Nor, of course, has the Secretary of State shown that there was any factor which would mean that the appellant was not entitled to indefinite leave to remain.

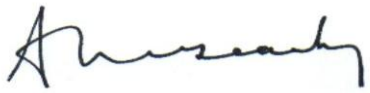
29. Taking all these factors into account I find that the judge made a material error of law in the decision in that he erred in his conclusion that the appellant had used false representations or in any other way was guilty of behaviour which would mean that Rules 322(1A) and 322(2) were engaged. I therefore set aside his decision dismissing this appeal.

30. For the same reasons I find that, given the unchallenged finding that the appellant had had ten years' lawful residence in Britain and moreover that Rules 322(1A) and 322(2) were not engaged this appeal should be allowed.

**Notice of Decision**

31. This appeal is allowed.

32. No anonymity direction is made.



Signed Date 15 May 2017

Upper Tribunal Judge McGeachy