Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01714/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2018	**On 8 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

AMOR ALBERT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Z Malik, Counsel instructed by the Government Legal Department
For the Respondent: Mr. P Saini, Counsel instructed by Vision Solicitors Ltd

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department and the respondent to this appeal is Mr Amor Albert. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal ("F*t*T"). I shall in this decision, refer to Mr Albert as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Pakistan. He arrived in the United Kingdom in October 2006 as a student and in March 2009, he made an in-time application for

leave to remain as a Post study migrant. He was granted leave to remain until April 2011. In February 2011, he applied for leave to remain as a Tier 1 General Migrant and he was granted leave to remain until March 2013. He made a similar application in March 2013 and was granted further leave to remain until March 2016. On 29th February 2016 the appellant made a further in-time application for leave to remain as a Tier 1 General Migrant. That application was refused for the reasons set out in a decision dated 29th February 2016 and the decision was maintained following administrative review on 6th April 2016. Thereafter, on 25th April 2016, the appellant applied for indefinite leave to remain as a Tier 1 Migrant. That application was refused for the reasons set out in a decision dated 25th April 2016 and again, maintained following administrative review. The appellant challenged that decision by a claim for judicial review and the respondent agreed to reconsider the application. The application was reconsidered, and refused again for the reasons set out in a decision dated 2nd March 2017. The decision was again maintained following Administrative Review. The March 2017 decision was challenged by a claim for Judicial Review. Permission to claim Judicial Review was refused on the papers and following an oral renewal. The decision to refuse permission is the subject of an appeal before the Court of Appeal.

3. Nevertheless, on 19th April 2017, the appellant made an application for indefinite leave to remain on the grounds of long residence. That application was refused for the reasons set out in a letter dated 14th December 2017. The application was considered by reference to the requirements set out in paragraph 276B of the immigration rules, to be met by an applicant for indefinite leave to remain on the grounds of long residence. The respondent gave three reasons for refusing the application. First, the respondent concluded that the appellant could not meet the requirements of paragraph 276B(i)(a) of the immigration rules that he has had at least 10 years continuous lawful residence in the UK. Second, the respondent concluded that the applicant could not satisfy the requirement of paragraph 276B(iii) that he does not fall for refusal under the general grounds for refusal. Third, the respondent concluded that the application made on 19 April 2017 was made when the applicant was in the UK in breach of immigration laws and thus the applicant could not meet the requirements of paragraph 276B(v).

4. The decision of 14 December 2017 gave rise to an appeal that was heard by F*t*T Judge Smith on 14th June 2018. For the reasons set out in a decision promulgated

on 26th of June 2018, the F*t*T Judge allowed the appeal on human rights grounds. It is that decision that that is the subject of the appeal before me.

The decision of F*t*T Judge Smith

5. The background to the appeal and the appellant's immigration history is set out at paragraph [7] to [19] of the decision of the F*t*T Judge. Noting that there was a pending appeal before the Court of Appeal that was capable of having an impact upon whether the appellant might fall for refusal under the general grounds for refusal, the F*t*T Judge canvassed with the parties whether an adjournment might be appropriate. There was no application for an adjournment, and with limited information before him as to the appeal before the Court of Appeal, the F*t*T Judge went on to hear the appeal.

6. The findings and conclusions of the F*t*T Judge are set out at paragraphs [31] to [45] of his decision. It appears to have been common ground between the parties that the only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The appellant's ability to satisfy the immigration rules was therefore not the question to be determined by the Tribunal, but was capable of being a weighty, though not determinative factor, when deciding whether the refusal of the application for indefinite leave to remain is proportionate to the legitimate aim of enforcing immigration control.

7. The F*t*T Judge considered whether the appellant is able to satisfy the requirement set out at paragraphs 276B(i)(a) of the rules, at paragraphs [33] to [37] of his decision. That is the requirement that the appellant has had at least 10 years continuous lawful residence in the United Kingdom. At paragraph [33] of his decision, the F*t*T Judge records the respondent's position. The respondent contended that the appellant had accumulated nine years and five months continuous lawful residence in the United Kingdom between 12th October 2016 *(when he first arrived as a student)* and 6th April 2016 *(when this application made on 29th February 2016 was refused and that decision maintained following Administrative Review.)*.

8. The F*t*T Judge found, at [35], that the appellant did not have leave to remain between 6th April 2016 and 25th April 2016. He went on to note the appellant's claim that he had not received the decision *(of 6th April 2016)* until 12th of April 2016, and that "*..The appellant asserts that he is allowed a period of 14 days, thereafter, to submit a further application..*". The appellant claimed that his further application made on 25th April 2016 was therefore an in-time application. At paragraph [36] the F*t*T Judge states:

> "*However, paragraph 276B(v)(a) provides that any period of overstaying will be disregarded if a further application was made before 24 November 2016 and within 28 days of the expiry of leave. I am satisfied that the appellants application was made within 28 days of the expiry of his 3C leave on 6th April 2016 and he, therefore, satisfies the provisions of paragraph 276B(i)*(a) of the rules."

9. The F*t*T Judge then turned to the question of whether the applicant fell for refusal under the general grounds for refusal. That is addressed at paragraphs [37] to [42] of the decision. The Judge noted, at paragraph [38], the claim made by the respondent that the information provided by the applicant in his applications of 11th February 2011 and 2nd March 2013, contained details of income that were contrary to self-assessment tax returns filed by the appellant for the years ending April 2011 and April 2013. At paragraph [39], the Judge states:

> *"The appellant accepts that the figures presented in his tax returns was in error and as soon as he knew he moved to correct the error. He has set out his case in considerable detail in his witness statement (AB pl-9) which he adopted and which I do not intend to recite. In essence the appellant's claims that it was an innocent mistake and when set against his impeccable Immigration history, his commitment to the UK and his continual employment. Mr Saini identified to the court the HMRC penalties which can flow from the errors in understating due tax which could be between 0%-30% of the extra tax due. The HMRC has not issued any penalties against the appellant.*

10. At paragraphs [41] and [42], the F*t*T Judge concluded as follows:

> *"41. I am satisfied the fact there were factual errors in the information provided by the appellant and, therefore, the initial burden of proof moves to the appellant to establish a reasonable explanation for the discrepancies. The appellant gave evidence and adopted his statement. He was cross-examined by Mr Swaby. With the exception of establishing the various documents Mr Swaby did not challenge the credibility of the appellant. Having heard the appellant's evidence and having considered his statement setting out the reasons for the events that unfolded in 2011 and 2013 and taking into account the burden and standard of proof I cannot conclude that the appellant's answer is unreasonable. Having established a reasonable explanation, I am satisfied the appellant's explanations were not undermined by the respondent. I take note that the refusal letter I cannot assess whether the respondent has balanced the positive side of the appellant's case before*

> *reaching the decision she did. I find that without conducting such a balancing exercise of the facts it dangerous and arguably unfair to rely upon paragraph 322(5).*
>
> *42. Having considered all the evidence in the round both for and against the appellant I cannot conclude the respondent has established that the actions of the appellant in regard to his applications for 11th February 2011 and the 2nd March 2013 breaches paragraph 322(5) of The Rules."*

11. Having found that the appellant meets the requirements of the immigration rules the Judge referred to the public interest considerations set out in sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and in the end concluded, at [45], that the interference is disproportionate.

The appeal before me

12. The respondent advances five grounds of appeal. Four of the grounds, (*one, two, three and five)* concern the Judge's approach to, and decision in respect of whether the requirements of paragraph 276B of the rules are in fact met. That is, whether the appellant meets the requirements of paragraph 276B(i)(a) of the immigration rules that he has had at least 10 years continuous lawful residence in the UK, and the requirement of paragraph 276B(iii) that he does not fall for refusal under the general grounds for refusal. The remaining ground *(ground four)* concerns the Judge's conclusion that to remove the appellant and his family from the UK when he has established he satisfies the immigration rules would be disproportionate, having *"factored in the best interests of his two children as required by section 55 of the Borders, Citizenship and Immigration Act 2009."*.

13. Permission to appeal was granted by F*t*T Judge Hodgkinson on 17th October 2018. The matter comes before me to consider whether or not the decision of F*t*T Judge Smith involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

Discussion

14. The F*t*T Judge found that the appellant satisfies the requirements of paragraph 276B(i)(a) of the immigration rules. The Judge accepted, at [35], that the appellant's leave to remain in the UK ended on 6th April 2016 and that between 6th April 2016 and 25th April 2016, the appellant was in the UK without leave. The

Judge proceeds, at [35] and [36], upon the premise that the s3C leave that the appellant enjoyed, continued for the period of grace permitted by the rules so that the appellant satisfies the requirements of paragraph 276B(i)(a).

15. In my judgement, the F*t*T Judge erred in reaching the conclusion that paragraph 276B(i)(a) could be met by the appellant for the reasons given. There is no doubt that the appellant arrived in the United Kingdom as a student on 12th October 2006. He made a number of in-time applications for leave to remain that were granted. On 29th February 2016, the appellant made an in-time application that was refused on for the reasons set out in a decision made on the same day. The appellant applied, as he was entitled to, for Administrative Review. For the reasons set out in a decision dated 6th April 2016, the respondent maintained the decision to refuse the application for leave to remain as a Tier 1 (General) Migrant.

16. Section 3C Immigration 1971 Act makes provision for the continuation of any leave granted to a person, pending a decision upon an application for variation of that leave. s3C(2) provides that the leave is extended by virtue of s3C during any period when—

> (a) the application for variation is neither decided nor withdrawn,
>
> (b) an appeal under s82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought, while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
>
> c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of s104 of that Act) or
>
> d) an administrative review of the decision on the application for variation –
>
> (i) could be sought, or
>
> (ii) is pending

17. Properly understood, s3C applies so that where an application for variation of an existing leave is made before that leave expires *(and provided that there has been no decision on that application before the leave expires),* there is, by s3C(2), a statutory extension of the original leave until; (a) the application is decided or withdrawn; (b), if the application has been decided and there is a right of appeal against that decision, the time for appealing has expired; (c), if an appeal has been brought,

that appeal is decided; (d) if the application has been decided and there is a right to Administrative Review, the time for applying for Administrative Review has expired, or the Administrative Review is decided. The continuation of any leave granted to a person by operation of s3C of the 1971 Act does not extend beyond that provided for in the 1971 Act, and is not in my judgment extended by any provision in the immigration rules that permits the decision maker to disregard any period of overstaying. If parliament had intended s3C to be extended in such a way, it would have expressly provided for such an extension.

18. The requirement under paragraph 276B(i)(a) of the immigration rules is that the appellant must have had at least 10 years continuous lawful residence in the UK. Paragraph 276A(a) of the immigration rules provides that "*continuous residence*" means residence in the UK for an unbroken period. The rule sets out a number of circumstances in which a period shall not be considered to have been broken. Paragraph 276A(b) provides that "*lawful residence*" means residence which is continuous residence pursuant to, *inter alia,* existing leave to enter or remain.

19. The appellant here has continuous lawful residence between 12th October 2006 and 6th April 2016. He could not therefore in my judgment, satisfy the requirement of paragraph 276B(i)(a)the rules. In reaching his decision, the F*t*T Judge conflates the requirements of paragraph 276B(i)(a) and 276B(v) of the immigration rules. Paragraph 276B(v) of the rules provides that the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of the rules applies, any current period of overstaying will be disregarded. That is not to say that the period of overstaying is to be treated as a period of lawful residence. The rules simply makes provision for a short period of overstaying to be disregarded. An individual that has 'overstayed' in the UK cannot in my judgment be regarded as an individual that is exercising continuous lawful residence in the UK, whilst he or she remains in the UK as an 'overstayer'.

20. It is clear from the structure of paragraph 276B of the rules that there are five requirements that must be met. They are five separate and freestanding requirements, and in my judgement, an applicant who cannot otherwise satisfy the requirement that they have had at least 10 years continuous lawful residence in the UK, cannot rely upon the provision that a short period of overstaying is to

be disregarded, as counting towards the requirement for 10 years continuous lawful residence.

21. That in itself is sufficient to establish that the decision of the F*t*T Judge is infected by a material error of law because the Judge proceeds upon the premise that the appellant satisfies the requirements the immigration rules and therefore his removal would be disproportionate on Article 8 grounds. In my judgment, the appellant cannot meet the requirement set out at paragraph 276B(i)(a) of the rules.

22. However, the respondent had also said in the decision of 14th December 2017 that the appellant fell for refusal under the general grounds for refusal. The respondent referred to paragraph 322(5) of the rules. That is, the undesirability of permitting the appellant to remain in the UK in light of his conduct, character or associations or the fact that he represents a threat to national security. The respondent referred to discrepancies between the appellant's earnings declared to the respondent in support of the applications made on 11th February 2011 and 2nd March 2013 and the self-employed earnings declared by the appellant to HMRC for the tax years ending 2011 and 2013.

23. In his application dated 11th February 2011, the appellant claimed that he had previous earnings of £43,230.55, during the period 1st February 2010 and 31st January 2011. Checks by the respondent with HMRC disclosed declared earnings of £17,704.00. The income declared to HMRC would not have demonstrated sufficient earnings to qualify for the points required by the appellant.

24. In his application dated 2nd March 2013, the appellant claimed that he had previous earnings of £40,308.82 between 1st February 2012 and 31st January 2013. That included self-employed earnings of £17,018.00. Checks with HMRC revealed total earnings declared to HMRC of £25,349, significantly lower than the £40,308.82 claimed by the appellant in support of his application to the respondent. Again, the income declared to HMRC would not have demonstrated sufficient earnings to qualify for the points required by the appellant.

25. At paragraph [39] of his decision, the F*t*T Judge notes that "*The appellant accepts that the figures presented in his tax returns was in error and as soon as he knew he moved to correct the error.*". At paragraph [40], the F*t*T Judge referred to the decision of Mr

Justice Foskett in R (Ngouh) -v- SSHD [2010] EWHC *(sic)* Civ 2218 and concluded at [41] and [42] as follows:

> "4.1 I am satisfied the fact there were factual errors in the information provided by the appellant and, therefore, the initial burden of proof moves to the appellant to establish a reasonable explanation for the discrepancies. The appellant gave evidence and adopted his statement. He was cross-examined by Mr Swaby. With the exception of establishing the various documents Mr Swaby did not challenge the credibility of the appellant. Having heard the appellant's evidence and having considered his statement setting out the reasons for the events that unfolded in 2011 and 2013 and taking into account the burden and standard of proof I cannot conclude that the appellant's answer is unreasonable. Having established a reasonable explanation, I am satisfied the appellant's explanations were not undermined by the respondent. I take note that *[from]* the refusal letter I cannot assess whether the respondent balanced the positive side of the appellant's case before reaching the decision she did. I find that without conducting such a balancing exercise of the facts it dangerous and arguably unfair to rely upon paragraph 322 (5).
>
> 42. Having considered all the evidence in the round both for and against the appellant I cannot conclude the respondent has established that the actions of the appellant in regard to his applications for 11th February 2011 and the 2nd March 2013 breaches paragraph 322 (5) of The Rules."

26. In my judgement, the consideration by the F*t*T Judge of whether the appellant fell for refusal under the general grounds for refusal (*i.e. paragraph 322(5) of the rules)* was also flawed. Paragraph 322(5) of the rules is a discretionary provision *(a ground on which leave to remain and variation of leave to enter or remain should normally be refused)* and on appeal, the Judge was required to decide in this context whether the respondent was right to exercise the discretion against the appellant, and conclude that it is undesirable to permit the appellant to remain in the UK in the light of his conduct, character or associations.

27. The fact that there were discrepancies between the figures presented by the appellant in his two applications (*in 2011 and 2013)* to the respondent, and his tax returns to HMRC was accepted by the appellant. The appellant's explanation that there were genuine errors borne of the fact that he had handled his self-assessment returns himself, without professional help, and with a mistaken understanding of allowable expenses, was accepted by the Judge. It not clear what the Judge was referring to when he stated, at [41], that "*..I take note that the refusal letter I cannot assess whether the respondent has balanced the positive side of the appellant's case before reaching the decision she did."*, because the refusal letter was before the F*t*T Judge, and the matters relied upon by the respondent would have been apparent.

However, the F*t*T Judge went on to find that without conducting a balancing exercise of the facts it is dangerous and arguably unfair to rely upon paragraph 322(5). I accept, as Mr Malik submits, that the question for the Tribunal was not whether it was "dangerous" or "arguably unfair" for the respondent to rely upon paragraph 322(5). the Judge was required to decide whether the respondent was right to exercise the discretion against the appellant, and conclude that it is undesirable to permit the appellant to remain in the UK in the light of his conduct, character or associations.

28. In R (Nghou) -v- SSHD [2010] EWHC 2218, Mr Justice Foskett held that where an offence was committed during a person's Army career, it could not simply be said that the nature and existence of an unspent conviction cast very significant doubt upon the person's character and conduct, for the purposes of and application for indefinite leave to remain, without a close investigation of all the circumstances. He noted, at paragraph [120], that the decision would need to demonstrate that both the positive and negative aspects were weighed up fully and fairly, not merely the positive and negative aspects of the offence, but also other (*potentially positive)* factors that would make it 'desirable' that the applicant should be permitted to remain in the UK.

29. At paragraph [42] of his decision, the Judge concluded that having considered all the evidence in the round, both for and against the appellant, he cannot conclude the respondent has established that the actions of the appellant in regard to his applications for 11th February 2011 and 2nd March 2013 breached paragraph 322(5) of the rules. That appears to be a finding that the respondent was wrong to exercise the discretion against the appellant, but the Judge fails to identify the factors that weigh in favour of, and against the appellant. The Judge accepted that there had been an 'innocent mistake', and presumably accepted the submission made on behalf of the appellant that the appellant had an impeccable immigration history, a commitment to the UK, and had been in continual employment. However, the Judge failed to have regard to factors that weigh against the appellant. The mistakes were mistakes that go to the heart of the system of immigration control. As the respondent had noted in the decision of 14th December 2017, had the appellant declared to the respondent the same earnings, as he had declared to HMRC in 2011 and 2013, the appellant would not have

acquired the required points for a grant of leave to remain on each of those two previous occasions.

30. Although it may have been open in the end to the F*t*T Judge to conclude that the respondent was wrong to exercise his discretion under paragraph 322(5) in a way that is adverse to the appellant, in my judgement the F*t*T Judge failed to address the correct question. The question was not "whether the explanation provided by the appellant was reasonable" or "whether the explanation had been undermined by the respondent " or whether "it was "dangerous" or "arguably unfair" for the respondent to rely upon paragraph 322(5). The question was simply whether the respondent's decision to exercise his discretion under paragraph 322(5) in a way that is adverse to the appellant, was justified on its merits.

31. As I have already said, the Judge proceeds upon the premise that the appellant satisfies the requirements the immigration rules and his removal would be disproportionate on Article 8 grounds. The F*t*T Judge does not address whether Article 8 is engaged at all. He states, at [45], that he is satisfied that "*..to remove this appellant and his family from the UK when he has established he satisfies the Immigration Rules would be disproportionate.*" and that "*I have factored in the best interests of his two children as required by section 55 of the Borders, Citizenship and Immigration Act 2009*". Quite apart from the fact that the appellant cannot satisfy the requirements of the rules, particularly paragraph 276B(i)(a) for the reasons I have set out, the consideration of the Article 8 claim is cursory at best. The Judge fails to identify the factual basis upon which he considered the Article 8 claim based upon the appellant's family and private life and the best interests of the children.

32. In my judgement, it is plain that the decision of the First-tier Tribunal involved in the making of an error on a point of law. It follows that the decision of the First-tier Tribunal must be set aside.

33. I must then consider whether to remit the case to the First-tier Tribunal, or to re-make the decision myself. I consider the decision of the F*t*T Judge as to whether the requirements paragraph 276B are met, to be flawed. There needs to be a proper consideration of paragraph 322(5) of the rules, and the failure of the Judge to address the correct question and make a lawful decision as regards paragraph 322(5) means that the appropriate course is to remit the matter to a newly

constituted First-tier Tribunal for a fresh hearing with no findings preserved. In reaching my decision, I have taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

34. The appeal is allowed, and the decision of F*t*T Judge Smith is set aside.

35. The appeal is remitted to the F*t*T for a fresh hearing of the appeal with no findings preserved.

Signed Date 18th January 2019

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

No fee is paid or payable, there can be no fee award

Signed Date 18th January 2019

Deputy Upper Tribunal Judge Mandalia