



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

Appeal Number: HU/04355/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 4 March 2019**

**Decision & Reasons Promulgated
On 20 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MUHAMMAD [S]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Secretary of State : Mr N Bramble, Senior Home Office Presenting Officer

For Mr [S]: P Turner, Counsel, instructed by Milestone Chambers

DECISION AND REASONS

Background

1. This is a challenge by the Secretary of State against the decision of First-tier Tribunal Judge Zahed (the judge), promulgated on 30 November 2018, by which he allowed the appeal of Mr [S] (the Claimant) against the Secretary of State's decision of 24 January 2018. This decision had in turn refused the Claimant's application for indefinite leave to remain in the

United Kingdom on the basis of ten years' continuous lawful residence in this country.

2. The core point taken against the Claimant by the Secretary of State related to the now familiar issue connecting paragraph 322(5) of the Immigration Rules (the Rules) to the matters of tax returns submitted to HMRC and/or figures stated in application forms for limited leave to remain submitted over the course of time.

The judge's decision

3. In this case it was said by the Secretary of State that dishonesty was practised by the Claimant in two applications for limited leave: the first in April 2011 and the second in May of 2013.
4. Having considered the evidence as a whole, the judge found that the Claimant had not been dishonest in respect of information set out in his application forms submitted to the Secretary of State, but had been dishonest in respect of an under declaration of income to HMRC.
5. The judge correctly noted that paragraph 322(5) of the Rules was discretionary in nature. Having this in mind, the judge went on to consider a number of other factors in respect of that discretionary element. These factors included: the steps taken by the Claimant to remedy the under declaration; the absence of any penalty imposed by HMRC; the Claimant's payment of outstanding tax liabilities; and also the Claimant's familial circumstances in this country, which included his relationship with a dual Polish/British national partner and their two children (with the birth of a third child imminent at the date of the hearing).
6. All-told, the judge concluded in effect that the discretionary element of paragraph 322(5) should be exercised in the Claimant's favour. Therefore, this general ground of refusal did not apply and given the undisputed fact of the ten years' lawful residence and in the absence of any other adverse matters, the judge concluded that the Claimant had indeed satisfied the requirements of the relevant Rule upon which the latest application had been based, that being paragraph 276B. On this basis the appeal was allowed.

The grounds of appeal and grant of permission

7. The Secretary of State lodged grounds of appeal which are essentially twofold. The first on the face of it has a perversity element to it, suggesting that the finding of dishonesty in respect of the Claimant's dealings with HMRC was "enough" for paragraph 322(5) of the Rules to have applied. An additional point under ground 1 is that the judge allegedly placed "significant emphasis" on the fact that HMRC had not

imposed a penalty or sought to prosecute the Claimant in respect of the incorrect tax returns. The second ground is an out-and-out perversity challenge.

8. Permission to appeal was granted by First-tier Tribunal Judge Davies on 12 December 2018.

The hearing before me

9. Mr Bramble relied on the grounds of appeal. He submitted that the judge had been wrong to have taken any material account of the failure of HMRC to impose a penalty on the Claimant. The judge had also been wrong to have taken the Claimant's family circumstances into account when considering the discretionary element of paragraph 322(5). The family's circumstances, it was said, should have been considered separately and in respect of Article 8 only.
10. Mr Turner relied on his skeleton argument and submitted that because this was a human rights appeal, all factors were relevant. These would have included the Claimant's familial circumstances in this country, amongst others. It was noted that the Secretary of State had not challenged a number of the judge's findings contained in [41] and [42] of the decision. Whether the issue of the absence of an HMRC penalty was neutral or favourable to the Claimant, this was only one factor amongst others.
11. Mr Bramble made no reply.

Decision on error of law

12. I conclude that there are no material errors of law in the judge's decision.
13. The judge correctly directed himself to the uncontroversial fact that paragraph 322(5) is discretionary in nature.
14. To the extent that the grounds of appeal suggest that a finding of dishonesty on the part of the Claimant was, in and of itself, sufficient for this general ground of refusal to have applied, there are misconceived. Clearly a finding of dishonesty is a serious matter and counts against an individual. The judge in my view correctly recognised this starting point in [38], stating that in light of his primary finding of fact there was a presumption that the Claimant would be subject to the application of this general ground. However, the judge was also correct to have then gone on and taken what he considered to be all relevant circumstances into account.
15. There may be a question mark as to whether the failure of HMRC to impose a penalty or to have taken criminal proceedings against an

individual is relevant. As far as I am aware, there is nothing authoritative to say that this is not the case. However, in my view this was only one factor amongst a number of others, and there is no indication that he placed particularly “significant weight” upon it. If it were to be excised from the judge’s reasoning the rest of what he said is adequate and, is certainly in my view not perverse.

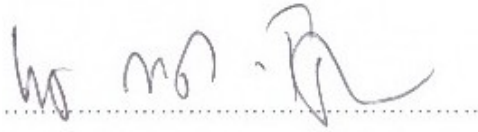
16. The judge was entitled to take account of the Claimant’s actions in remedying the under declaration and paying off his tax liabilities. More importantly, the judge was entitled, indeed was bound, to have taken account of the Claimant’s familial circumstances in this country. To have placed these into an entirely separate category of considerations under Article 8 would have been artificial. Mr Turner was right to point out that this was a human rights appeal and all relevant circumstances had to be factored in. The (or at least an) appropriate stage for this to have been done was when considering paragraph 322(5) and the discretionary element thereof.
17. It is of note that the Secretary of State has not challenged the findings set out in [41] and [42]. There was nothing else weighing against the Claimant other than the paragraph 322(5) issue. Once the judge had concluded that this general ground of refusal did not apply it follows that he was then entitled to conclude that all of the relevant elements of paragraph 276B were met (although I accept that this particular provision is not stated in terms that was clearly the relevant Rule, and had been relied upon throughout the Claimant’s application). In turn, the satisfaction of the Rule inevitably (at least in this case) led to the judge’s conclusion that decision under appeal was disproportionate and unlawful.
18. It is well-established that challenges involving allegations of perversity must reach what has been described as an “elevated threshold”. On the facts of this case and in light of what some may describe as fairly generous findings by the judge, this threshold has simply not been met.
19. Therefore the Secretary of State’s challenge fails and the decision of the First-tier Tribunal shall stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

A handwritten signature in blue ink, appearing to read 'Ms Norton-Taylor', is written over a horizontal dotted line.

Signed

Date: 18 March 2019

Deputy Upper Tribunal Judge Norton-Taylor