Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13865/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 February 2019	**On 19 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

MD MAHAMUDUL ALAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik, Counsel
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal G A Black, promulgated on 3 September 2018, in which she dismissed the appellant's appeal against a decision of the respondent, dated 25 October 2017, to refuse his application for indefinite leave to remain.

2. The appellant had made his application on the basis he satisfied the rules for indefinite leave to remain on the grounds of long residence. His application was refused by reference to paragraph 322(2) of the Immigration Rules which provides

that leave should normally be refused where an applicant has made false representations or failed to disclose a material fact the purpose of obtaining a previous variation of leave. The reasons were as follows.

3. In his previous application for leave as a Tier 1 (Entrepreneur), the appellant provided a management report and accounts created by ABC Bookkeeping and Accountancy Ltd ("ABC") along with Santander bank statements behalf of M and F (UK) Ltd ("Mand F"). ABC had been the subject of an intelligence led operation called 'Operation Qwerty'. The bank statements showed a transfer of £32,000 from M N Nabi Ltd and £90,000 from Pulakh (UK), taking the funds over the required £50,000 threshold. The operation established that the funds were then transferred from M and F to Rehaf Ltd and Amana Venture Ltd, who then used the funds in the same manner. Operation Qwerty provided a flow chart to show the movement of funds starting with the manager of ABC, Mr Ashraf Pervez. The respondent was not satisfied that the funds were actually invested in the company. The respondent considered it would be undesirable for the appellant to remain in the UK based on the fact he had been deceitful or dishonest in his previous Tier 1 (Entrepreneur) application. The appellant appealed but his grounds of appeal were purely generic.

4. The appeal was heard by the First-tier Tribunal on 23 August 2018 at Taylor House. The respondent provided a bundle of evidence in support of his case. This included a statement by Mr Andrew Lintern, an immigration officer employed as a financial investigator regarding his investigation into the dealings of ABC. In relation to this appellant, the investigation showed that he submitted bank statements showing a transfer of over £50,000 into his company M and F that, after the application was submitted, the funds were transferred to two other accounts. The suggestion was that the £50,000 was not a genuine investment but was simply loaned for the purposes of creating the appearance of an investment by the appellant with his application. The judge reasoned that this evidence was sufficient to raise a reasonable suspicion so as to require the appellant to provide an innocent explanation.

5. Considering the evidence provided by the appellant, she found this to be "vague in the extreme". She found his evidence did not amount to an innocent explanation. She concluded the respondent had established that the appellant had been dishonest and she found that he was aware when he submitted his application on 12 December 2012 that he did not have the requisite amount of funds available to him. She dismissed the appeal on article 8 grounds, concluding there was little evidence of the appellant's private life, although she noted he had resided in the UK for more than ten years. He did not meet any of the requirements of paragraph 276ADE(1) of the rules and his use of deception rendered the decision proportionate.

6. The grounds submitted in support of the application for permission to appeal to the First-tier Tribunal challenged the decision on the basis that the judge had failed to consider material matters. In particular, she failed to take into account that nine defendants who were prosecuted as a result of Operation Qwerty were all acquitted. Permission to appeal was refused by a Judge of the First Tribunal because it was clear from paragraph 10 of the decision that the judge hearing the appeal had

considered that the evidence relied on by the appellant in this respect was not relevant.

7. The appellant renewed his application and submitted different grounds in support of it. The first ground alleged that the decision was vitiated by procedural impropriety caused by the respondent's apparent breach of the duty of candour. Although the respondent had relied on evidence adduced in the criminal proceedings he had failed to inform the First-tier Tribunal of the outcome of those proceedings. Secondly, the grounds argued that the judge failed to have regard to a material matter, namely the outcome of the criminal proceedings. Thirdly, it was argued the judge had erred in her application of the relevant burden of proof. Specifically, in order to show an innocent explanation, the appellant's account only had to satisfy the minimum level of plausibility. Fourthly, the judge had erred by failing to appreciate that paragraph 322(2) was not a mandatory ground for refusal. She had treated it as if it were mandatory.

8. Permission to appeal was granted by Upper Tribunal Judge Kebede. She found arguable merit in the assertion that there was procedural unfairness and a failure to consider the outcome of the criminal proceedings. The appellant's bundle contained a statement by Mr Justin Rivett, who acted as counsel for Mr Pervez at his criminal trials, which the judge had arguably failed to consider. The verdict was not binding on the judge but should arguably have been taken into account.

9. The respondent has not filed a rule 24 response.

10. I heard oral submissions from the representatives concerning whether the judge made a material error of law such that her decision should be set aside. These are fully recorded in my record of proceedings and I only set out key points here.

11. Mr Malik elaborated on his written grounds. On the first ground, he confirmed that Mr Lintern's statement had been prepared for the criminal proceedings. The first trial judge found there was no case to answer, although that decision was overturned by the Court of Appeal. The defendants were all acquitted by the jury at the second trial. The respondent should have "placed all his cards on the table" and informed the judge that the criminal proceedings had not resulted in any convictions.

12. Mr Kotas argued the decision of Judge Black does not contain any material error. He pointed out that the appellant's bundle contained a short statement by Mr Rivett confirming the outcome of the criminal proceedings. On the second ground, he argued that any error on the part of the judge in failing to have regard to the acquittals was immaterial because she was considering the evidence on a balance of probabilities and not to the criminal standard. He pointed out that the appellant's grounds had not challenged the reasons given by the judge for rejecting the appellant's evidence.

13. Mr Malik replied. He relied on *MM (unfairness; E & R) Sudan* [2014] UKUT 00105 (IAC) for the proposition that, "a successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be

found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49)."

14. I do not consider that Judge Black's decision is erroneous in any of the respects put forward by Mr Malik and I dismiss the appellant's appeal.

15. The appellant has now provided a detailed statement by Mr Rivett prepared for these proceedings in which he sheds light on why he believes the jury acquitted his client, Mr Pervez, and by inference the other defendants in the trial. He comments on the respondent's reasons for refusal and suggests the issues have not been accurately represented by the respondent. On that point, I should note that the respondent's bundle containing the statement of Mr Lintern and the findings of Operation Qwerty are no longer in the file so I cannot comment on them. Neither representative was able to give me a copy.

16. Mr Rivett goes on to argue that there had been a misunderstanding as to whether the £50,000 funds were "available for investment". The application had been assessed on the basis that the funds had been deposited in the company's account whereas, in fact, the investment had been made by virtue of a purchase of 50,000 x £1 shares in the business. The money had, in fact, been a loan in order to purchase the shares and this was the investment in the business which the appellant had made. The Immigration Rules permitted investment by means of the purchase of shares. The fact the loan had been repaid and recorded as a debtor balance against the directors meant the company could still be said to be worth £50,000. The first trial judge, who found there was no case to answer, had commented that there appeared to be a lacuna in the rules. In any event, there could not have been any dishonesty.

17. None of this was explained to Judge Black. As it was, she found the appellant's knowledge of the scheme to be "vague in the extreme". Her findings have not been challenged in this respect. He could not name the director of M N Nabi Ltd from whom he borrowed such a large sum of money. He said there was no formal agreement or security for the loan as it was transacted informally within the community. There was no paperwork. He did not know what Nabi's business did. He could not name the director of the other company from which he borrowed money. He could not even remember the name of either of the companies he paid the money out to. She found as fact that the appellant knew when he made his Tier 1 application that the funds paid into his account were not a genuine loan or investment by a third party which he would be able to access while running his proposed business.

18. These were findings the judge was undoubtedly entitled to make on the evidence.

19. I accept the judge relied on the statement of Mr Lintern and the flowchart prepared as part of Operation Qwerty but only to the extent it provided sufficient grounds for discharging the initial burden on the respondent to raise a reasonable suspicion. It appears counsel who represented the appellant at Taylor House submitted the

evidence should not be considered but not because of the fact the prosecutions failed. It appears the argument ran that it should not be relied on because it was not evidence prepared specifically for the appeal. That submission was rightly rejected by the judge.

20. I accept the parties have a duty of candour and the respondent should, as a matter of fairness, have ensured the judge was informed that the defendants had all been acquitted. However, the argument that there was procedural impropriety in this case does not get off the ground for the simple reason that it is plain that the fact the defendants were acquitted was known to the judge. The earlier statement by Mr Rivett was towards the back of a lengthy bundle and, unless specifically referred to, might not have come to the notice of the judge. However, the judge did refer to the appellant's witness statement and this devotes almost a whole page to the criminal trials. The decision must therefore be read on the understanding the judge was fully aware of the acquittals.

21. That disposes of grounds 1 and 2.

22. I note in passing that paragraph 16 of the appellant's witness statement contains an assertion that the appellant has "access to £50,000 in our Santander bank account" which is difficult to reconcile with the evidence submitted showing that the money was dispersed prior to the application being considered and, according to Mr Rivett's second statement, was always intended as a loan to buy share capital.

23. Moving to ground 3, Mr Malik has cited *SM and Qadir (ETS – Evidence – Burden of Proof)* [2016] UKUT 229 (IAC) and *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 615 as authority for the proper approach to applying the burden of proof in cases in which deception is alleged by the respondent. In those cases it was explained that, once the respondent had discharged the initial evidential burden, the appellant had only to discharge an evidential burden "of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility" (*SM and Qadir*).

24. Mr Malik argued there was plain error in Judge Black's self-direction by failing to recognise that the appellant was not required to "show" an innocent explanation and that, in order to be an innocent explanation, it did not have to reach the standard of being "credible" or "reasonable".

25. I refer to the description set out above of the judge's findings with regard to the appellant's evidence. I do not understand Mr Malik's objection to the judge's use of the word "show" in paragraph 3 of her decision. The appellant's explanation could only be considered if it were mentioned, offered or explained. That is all that the judge meant by "show".

26. I also see no error in her application of this self-direction. She went on to examine the appellant's explanation and disbelieved it, as she was entitled to do. She expressed herself in terms that, "I found that the appellant's evidence did not amount to an innocent explanation" and she gave full reasons based on the evidence for that

conclusion. It was not an "innocent explanation" because it was not true. I do not consider Judge Black imposed too heavy a burden on the appellant. Overall, she was entitled to find the legal burden had been discharged by the respondent in this case.

27. The final ground concerns the fact the rule in question is discretionary, not mandatory. I accept the judge does not refer to this expressly after concluding the appellant had been dishonest in his application. However, what the judge does is correctly to recognise that the appeal is a human rights appeal and to go on to determine the proportionality of the decision. She found, on the one hand, there was little evidence of the appellant's private life and, on the other, that his actions were designed to undermine the scheme of immigration control. The decision was proportionate.

28. If there was an error on the part of the judge in failing to visit the issue of discretion before referring to the fact the rules were not met, it could not conceivably have affected the outcome of the appeal. Mr Malik argued that it could not be ruled out with certainty that the judge would not have allowed the appeal given the appellant's length of residence. However, I disagree. The judge took account of the relevant factors and, having balanced them, reached a rational conclusion. Given the deception there was obviously significant public interest in the decision being maintained and the weight to be given to the appellant's private life ties established during the period since he obtained leave by deception must be reduced. It is inconceivable the judge would have come to any other conclusion.

29. I therefore dismiss the appeal. The decision of the First-tier Tribunal to dismiss the appellant's appeal shall stand.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeal shall stand.

No anonymity direction made.

Signed Date 12 February 2019

Deputy Upper Tribunal Judge Froom