Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/11968/2018 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34 (P) **Decision & Reasons Promulgated**

On 3 November 2020 **On 5 November 2020**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Mr Nadeem Shakir

(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Lawrence sent on 6 September 2019 dismissing the appellant's appeal against a decision dated 14 May 2018 refusing his human right's claim, which was based upon his private life in the UK. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 10 January 2020.

2. Directions for the further conduct of the appeal were sent on 27 April 2020 and, in the circumstances surrounding COVID 19, provision was made for

the question of whether there was an error of law and if so, whether the decision of the judge should be set aside, to be determined on the papers.

3. The appellant, who is unrepresented, informed the Upper Tribunal that he was content to rely on the grounds of appeal on which permission to appeal had been granted. He agreed that the appeal was suitable to be heard on the papers with no requirement for an oral hearing. The respondent did not respond to directions. On 23 June 2020 further directions were sent to the respondent giving the respondent another opportunity to respond to the grounds of appeal, to make further submissions, and indicate a view on the appropriateness of the appeal being decided on the papers. To date, no submissions have been received from the respondent. On this basis, I am satisfied that the respondent has not raised any objection to the appeal being determined without a hearing.

4. I am satisfied that the submissions made on behalf of the appellant together with the papers before me are sufficient to enable me to be able to take a decision on whether there is an error of law in the decision of the judge and if so whether the decision should be set aside, without hearing oral submissions.

Respondent's Decision of the First-tier Tribunal

5. On 14 May 2018, the respondent refused the appellant's application for indefinite leave to remain in the UK on the basis of ten year's lawful continuous residence in the UK in line with paragraph 276B (ii)(c) and (iii) of the immigration rules on the grounds of suitability because there were discrepancies between the amount of earnings he had declared to the Home Office in support of his Tier 1 applications and the amount of income he had declared to HMRC in his tax returns for the same periods. The respondent was satisfied that it would be undesirable for the appellant to stay in the UK in light of his character and conduct in accordance with paragraph 322(5) of the immigration rules because it was said that the appellant had dishonestly misrepresented his earnings to HMRC for the purpose of reducing his tax liability or for the purpose of obtaining leave to remain or both. Further, the appellant had not remained in the UK for 20 years and there were no very significant obstacles to his integration to Pakistan. His dishonesty weighed against him in the Article 8 ECHR proportionality exercise.

Decision of the First-tier Tribunal

6. The judge found that there were discrepancies between the tax returns and the figures provided to the Home Office and that the respondent had met the evidential burden. The judge was not satisfied with the appellant's innocent explanation. He found the appellant's evidence to be inconsistent and implausible and unsupported by documentary evidence. He found that the suitability grounds were made out. He did not make any findings as to whether the appellant had accrued ten year's continuous lawful residence in the UK. He then found that there were no very significant obstacles to

the appellant's return to Pakistan and that it would not be unduly harsh for him to return to Pakistan.

Grounds of appeal

Ground 1

7. The judge has misapplied the law by applying the incorrect burden of proof. Where the respondent alleges dishonesty, the legal burden is on the respondent.

Ground 2

8. The judge failed to take into account relevant evidence.

Ground 3

9. There was procedural unfairness in that the appellant was prevented from giving his evidence due to interruptions from the judge and the appellant's counsel failed to present his appeal properly.

Discussion and Analysis

10. At [5] the judge states;

> "The appellant bears the legal burden of proof from start to finish and the standard of proof is on the balance of probability".

11. Later in the same paragraph the judge states;

> "I reiterate, the legal burden of proof does not lie with the respondent at any stage. That lies with the appellant from start to finish".

12. This is a very clear statement by the judge of where he considers the legal burden of proof to lie which is manifestly an error in a situation where the respondent has alleged dishonesty on the part of an appellant.

13. The proper approach is set out in Balajigari [2019] EWCA Civ 67 at [42] where the Court of Appeal endorses the approach of Martin Spencer J in R (Shahbaz Khan) v Secretary of State for the Home Department [2018] UKUT 00384 (IAC);

> "42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty, but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide,

considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.

43. At para. 37 (iii) Martin Spencer J said:

> "In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the 'balance of probability', a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences."

We would respectfully agree with that passage. In particular, despite the valiant attempts made by Ms Anderson on behalf of the Secretary of State before us to argue the contrary, we consider (as Martin Spencer J did) that the concept of standard of proof is not inappropriate in the present context. This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences. Accordingly, we agree with Martin Spencer J that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty".

14. Even had the judge come to the conclusion that on the shifting of the evidential burden the appellant had provided an unconvincing explanation, the legal burden of proof was not on the appellant as stated by the judge. The judge's statements set out at [5] in relation to the burden of proof are manifestly an error of law which undermines the decision as a whole.

15. This error is a serious one that vitiates the whole decision because it is clear that the judge had the incorrect burden of proof in his mind at all times and this infected his approach to all of the evidence to the extent that it cannot be said the appellant had a fair hearing. On this basis the decision must be set aside in its entirety.

16. Since I am satisfied that the above ground is made out, I do not go onto consider the grounds relating to the failure to consider the evidence and the additional allegation of procedural unfairness.

17. Given the extent of the findings that are required to be made in respect of the tax returns, the oral evidence to be heard and the consideration of the appellant's innocent explanation, this appeal is to be remitted to the First-tier Tribunal in accordance with the relevant guidance with none of the findings preserved.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal for a fresh hearing before the first-tier tribunal. The appeal will be heard de novo by a judge other than First-tier Tribunal Judge Lawrence.

R J Owens
Upper Tribunal Judge Owens Date: 3 November 2020