Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15151/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype for business	**Decision & Reasons Promulgated**
On 26 February 2021	**On 9 March 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HASNAIN AKRAM AWAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Miah, Counsel on behalf of the appellant.
For the Respondent: Mr Diwncyz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Clarke (hereinafter referred to as the "FtTJ") promulgated on the 5 February 2020, in which the appellant's appeal against the decision to refuse his human rights application dated 3 October 2017 was dismissed.

2. The FtTJ did not make an anonymity order and no application was made for such an order before the Upper Tribunal.

3. The hearing took place on 26 February 2021, by means of *Skype for Business*. which has been consented to and not object1d to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant who was able to see and hear the proceedings being conducted. There were no issues regarding sound, and no technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. I am grateful to Mr Miah and Mr Diwnycz for their clear oral submissions.

Background:

5. The appellant is a national of Pakistan. The decision of the FtTJ did not set out his immigration history but is relevant to the facts of this appeal.

6. He entered the United Kingdom on 27 September 2007 with entry clearance as a Tier 4 student valid until 28 February 2009. The decision letter and the FtTJ's decision refer to the date of arrival as 27 August 2007 but Mr Miah has confirmed that the correct date is the 27 September 2007.

7. On 3 March 2019, he made an application for leave to remain as a student which was granted on 12 June 2009 until 31 January 2010.

8. On 29 June 2009, he made an application for leave remain as a Tier 1 Highly Skilled Post Study Migrant which was granted on 20 August 2009 until 20 August 2011.

9. On 10 March 2011 he made an in- time application for leave to remain as a Tier 1 General Migrant which was granted on 29 March 2011 until 29 March 2013.

10. On 12 April 2016 he made an in-time application for indefinite leave to remain as a Tier 1 General Migrant which was refused on 22 September 2017.

11. On 3 October 2017 he made an application for indefinite leave to remain on the basis of 10 years long residence.

12. On 27 August 2019, the respondent refused his application for ILR on the basis of completing 10 years continuous long residence.

13. The decision letter set out the appellant's immigration history. It stated, "consideration is being given to your application and it is noted that whilst you had 10 years of continuous residence in the United Kingdom you fall under the

general grounds for refusal". Reference was then made to a previous application for indefinite leave to remain as a Tier 1 General migrant which had been made on 12 April 2016 but was refused on 22 September 2017.

14. The decision letter recited an extract from that previous decision (dated 22 September 2017) relating to Paragraph 322(5). It was stated that within the application dated 25 March 2013 for leave to remain as a Tier 1 (General) Migrant the Home Office records concerning his previous earnings from employment and self-employment were inconsistent with the cheques made by HM revenue and Customs (full details were set out in the decision letter).

15. The respondent acknowledged that Paragraph 322 (5) of the Immigration Rules was not a mandatory refusal, but the evidence submitted by the appellant did not demonstrate that the failure to declare to the HMRC at the time the self-employed earnings and the dividends declared in the previous application for leave to remain in the United Kingdom was a genuine error. In essence, the Secretary of State considered that the evidence demonstrated that he had been deceitful or dishonest in his dealings with the HMRC and/or UKVI.

16. As a result, his application for leave to remain in the United Kingdom on the basis of 10 years lawful and continuous residence was refused under paragraph 276D of the immigration rules as the appellant did not meet the requirements of paragraph 276B (ii) with reference to paragraph 322 (5) of the Immigration Rules.

17. The decision letter stated that it had been considered whether it was appropriate for discretion to be exercised with regard to the reason why the application fell for refusal however it was considered that given the reasons why the application had been refused, it was not appropriate that any discretion should be exercised.

18. The decision letter and then went on to consider the application under the private life rules under Paragraph 276ADE noting that his application fell for refusal on grounds of suitability in section S-LTR 1.6 (character and conduct) that his presence was not conducive to the public good because he was dishonest in his application leave to remain on 25 March 2013. Furthermore paragraph S-LTR 4.2 applied (false representation of failure to disclose material facts) relating to the previous income earned.

19. Further consideration was given to his length of residence, and whether there were any significant obstacles to his integration into Pakistan but concluded that he could not satisfy the rules under paragraph 276ADE.

20. The respondent also considered whether there were any "exceptional circumstances" which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the appellant but having

considered the evidence, that the respondent did not consider there were any such circumstances for a grant of leave to be made.

21. Thus the application was refused.

The appeal before the First-tier Tribunal:

22. The appellant's appeal against the respondent's decision to refuse leave came before the First-tier Tribunal (Judge Clarke) on the 15 January 2020.

23. In a determination promulgated on the 5 February 2020, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rule in question and on Article 8 grounds.

24. The FtTJ considered the evidence relating to the issue under Paragraph 322 (5) at paragraphs [7]-[22] and carried out an analysis of that evidence in the context of the evidence and the explanations provided by the appellant. At [20] the judge concluded that having carefully considered the evidence and the facts of the case that the appellant had made "an innocent error". The judge went on to state that he accepted that the appellant acted under the instructions of his accountants and that two-irregular set of accounts were prepared by unqualified staff but that the corporation tax had been properly paid. Whilst the appellant's own income tax had not been properly paid at the time, an explanation had been provided as to what drew his attention to the irregularity. The judge took into account the appellant had written to HMRC drawing their attention to the irregularity and only some months later made the first application in time for indefinite leave to remain.

25. At [22] the judge finally concluded "that the respondent has not discharged the burden of proof on a balance of probabilities that the appellant has been deceitful and dishonest in his tax affairs."

26. As to whether the appellant could satisfy paragraph 276B based on his long residence the judge stated at [6] "there is at least one gap in the immigration history" and that the appellant could not show 10 years continuous residence because there were "gaps of leave of one day between the previous grants of leave expiring on application for further leave to remain ." At [23] the judge confirmed that the appellant could not meet the requirements for indefinite leave to remain and that whilst the appellant may have resided in the UK since he arrived on 27 August 2007 (which is in fact the wrong date) that not all of the applications for leave to remain were made in time. "They were all granted but for 12 April 2016 application."

27. At [23] the judge considered whether the appellant could meet the private life rules under paragraph 276ADE, and noted the concession made that it was

accepted that there were no very significant obstacles to his return to Pakistan. The judge also found that there were no "exceptional circumstances" in his case and that while the appellant had lawful leave in the UK his stay was always precarious; he had formed a company and had contributed to the UK society and worked and not relied on public funds but that he could return to Pakistan and form another company there. When considering the section 117B public interest considerations, and the need immigration control, the judge found that "the appellant does not fall within the immigration rules and there is no reason why leave should be granted to enable him to remain in the UK, I dismiss the appeal."

28. The FtTJ therefore dismissed the appeal.

29. Permission to appeal was issued and on 16 April 2020, permission to appeal was granted by FtTJ Osbourne stating:-

"The grounds assert that the judge erred in law for the following reasons: failed to provide adequate reasons for the decision: found at [20] at the appellant had made an innocent error and at [21] that the respondent did not establish that the appellant had been dishonest but at [22] found that the appellant had used deceit and had been dishonest: failed to adequately consider the Home Office policy on continuous residence.

In an otherwise careful decision, it is at least arguable that the judge materially erred when having found that the appellant was innocent of dishonesty went on to find that the appellant had been dishonest and used deceit.
This arguably material error of law having been identified, all the grounds are arguable."

The hearing before the Upper Tribunal:

30. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 15 June 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face- to- face hearing. Following the appellant submitting his written submissions on 29 June 2020 but with no compliance on behalf of the respondent further directions were given by UTJ Finch. On 17 November 2020 UTJ Rintoul issued directions for a remote hearing to take place and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties with the assistance of their advocates.

31. Mr Miah on behalf of the appellant relied upon the written grounds of appeal and the written submissions dated 29 June 2020.

32. There has been no written response filed on behalf of the respondent.

33. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions. After hearing the submissions made by Mr Miah, Mr Diwncyz confirmed that the FtTJ had found the appellant not to have used any deception or deceit and therefore paragraph 322(5) did not apply and that there was no cross-appeal mounted on behalf of the respondent. He further confirmed that he accepted the submissions made by Mr Miah and that the application made in 2017 fell within the period of 14 days and thus the decision made by the judge was erroneous. It was therefore accepted that the decision reached by the judge involved the making of an error on a point of law and should be set aside and when considering the issue of long residence and that in the circumstances the appeal should be remade and allowed under Article 8.

Discussion:

34. As set out above, the advocates are in agreement that the decision of the FtTJ involved the making of an error on a point of law, and further agree that if that error had not been made, the only outcome would have been to allow the appeal under Article 8 of the ECHR. Consequently both parties invite me to remake the decision by allowing the appeal.

35. In the light of the agreement reached, it is only necessary for me to set out in brief terms why I agree with that approach.

36. The appellant's application for ILR (made on 3 October 2017) was made under para 276B on the basis of ten years' lawful continuous residence. So far as relevant, para 276B provides as follows:

> "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
>
> (b) strength of connections in the United Kingdom; and
>
> (c) personal history, including character, conduct, associations, and employment record; and
>
> (d) domestic circumstances; and
>
> (e) compassionate circumstances; and
>
> (f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

.... ."

37. As regards the general grounds of refusal, the relevant provision is para 322(5) which provides:

"322(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C)), character or associations ....;"

38. That general ground of refusal is a ground on which leave "should normally be refused", consequently it is a discretionary rather than mandatory ground of refusal.

39. The application made on 3 October 2017 for indefinite leave to remain on the basis of 10 years continuous long residence was refused under paragraph 276B (ii) and paragraph 276B(iii) with reference to paragraph 322(5) of the Immigration Rules. The decision letter clearly sets out that whilst it was noted that he had 10 years continuous residence in the United Kingdom he fell under the general grounds for refusal based on the reasons given in a previous decision dated 22 September 2017 that he had used deception or had been dishonest in his declarations made as to his tax affairs. As Mr Miah pointed out, the decision letter did not dispute that he had had 10 years continuous residence or seek to identify any breaks in the continuity of lawful residence but refused the application on the basis of his undesirability to be granted leave under paragraph 276B (ii) and that the applicant fell for refusal under the general grounds of refusal (paragraph 276B (iii) based on paragraph 322(5)). Thus the reasons for refusing his application on long residence grounds were based on the allegation made of his dishonesty.

40. There is no dispute between the parties that the FtTJ gave adequate and sustainable reasons for reaching the conclusion at [22] that the respondent had not discharged the burden of proof that the appellant had been deceitful or dishonest in his tax affairs. I observe that the reasons given for the grant of permission at paragraph 2 appear to be in error. The judge appeared to state that the judge had made inconsistent findings on whether the appellant had been dishonest. Both parties agree that if that was what the judge was referring to paragraph 2 of the grant of permission, that was plainly in error.

41. As Mr Diwncyz confirmed, the respondent had not sought to challenge the findings of fact made by the FtTJ on the issue of dishonesty in his tax affairs. Therefore the FtTJ found that paragraph 322(5) did not apply. It must also follow that based on those unchallenged factual findings, the respondent's reliance on paragraph 276B (ii) and (iii) also did not apply.

42. Mr Miah submitted that having found there was no deception or dishonesty on the part of the appellant, the FtTJ erred in law by failing to consider how that

finding should have been taken into account when considering the appellant's application for indefinite leave to remain in the context of Article 8 (this being a human rights appeal). In the alternative, it was submitted that the FtTJ erred in law by failing to give reasons as to why the appellant did not meet the requirements for long residence and that the references at paragraph 6 of the decision failed to identify any such gaps in his immigration history.

43. The appellant's immigration history is relevant to the outcome of this appeal. I observe that the FtTJ did not set out the appellant's immigration history and the only references made to his periods of leave in the United Kingdom were made at paragraph [6] and in summary at [23]. At paragraph [6], the FtTJ set out that there was "at least one gap in immigration history". The judge therefore concluded that he would be unable to show 10 years continuous residence because there were gaps of at least one day between previous grants of leave expiring and applications of further leave to remain. It was on that basis that the judge found that he could not meet the requirements for indefinite leave to remain under the Immigration Rules.

44. Mr Miah submitted that whilst the FtTJ referred to "gaps of at least one day" none had been identified in the decision. He submitted that there were no such gaps and in relation to the application made on 3 October 2017, the application was made within 14 days of the refusal decision dated 22 September 2017, as set out in the respondent's policy.

45. Mr Diwncyz submitted that the only possible gap could have been in 2009 when his leave as a student ended on 28 February 2009 and the application was only made on 3 March 2009 although he submitted that he accepted Mr Miah's submission that there was no gap in the leave thereafter by reference to the application made on 3 October 2017.

46. The Court of Appeal has recently considered the legal position regarding lawfulness of stay where there is an application for leave to remain made out of time in the case of Hoque and others v Secretary of State for the Home Department [2020] EWCA Civ 1357 (" Hoque"). In those cases, the Court of Appeal drew a distinction between "open ended" or "current" overstaying on the one hand and "book-ended" or "previous" overstaying on the other when looking at the periods which fall to be disregarded when assessing the period of lawful residence. In the case of "book-ended" overstaying where there is a gap in lawful residence, but leave is subsequently granted, that gap is to be regarded as part of the lawful residence for assessing whether the requirement for a continuous period of ten years is met whereas in the case of "open ended" overstaying, the period is not taken into account.

47. When applied to the appellant's immigration history, there was no gap in his leave in 2009 therefore if this were the gap the FtTJ was referring to, that would be in error.

48. It is also important to take into account the nature of the application made by the appellant on 12 April 2016. Prior to that date the appellant had continuous lawful leave from 27 September 2007 and from 2009 as a Tier 1 Migrant. On 12 April 2016, the appellant submitted an application for indefinite leave to remain upon completion of 5 years as a Tier 1 (General) Migrant. The respondent refused that application in a decision taken on 22 September 2017. The reasons given for refusing his application for indefinite leave to remain was that he had used dishonesty/deception when representing his income based on the tax discrepancies and therefore his application was refused under Paragraph 322(5). It was not asserted on behalf of the respondent that he could not meet the five- year continuous lawful residence period and the refusal was based on the tax discrepancies. His application made on 3 October 2017, this time under the 10 years continuous lawful residence requirements, was again refused solely on the basis of the previous decision made relating to his alleged dishonesty.

49. In the light of the factual findings made by the FtTJ that the appellant had not used any deception or had been dishonest in his tax affairs, the reasons for refusing both applications fall away. In particular, by reason of the factual findings the application made on 12 April 2016 but not decided until 22 September 2017, would have led to the appellant being successful in his application for indefinite leave to remain as no other issues were identified on behalf of the respondent. The FtTJ did not consider the effect of his findings of fact upon the decisions reached by the respondent and therefore the judge erred in law when reaching his overall decision on Article 8.

50. The recent decision of *Patel (historic injustice: NIAA Part 5A)* [2020] UKUT 351 is of relevance in this context. The headnote reads as follows:

> "…(2) Cases that may be described as involving "historical injustice" are… where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (e.g. Ahsan v SSHD [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case….".

51. The panel at [46], quoted paragraphs [120] – [121] of the Court of Appeal decision in Ahsan , and at [47], said:

> "Although not immediately apparent, one way in which this kind of erroneous treatment of an individual can have a bearing on Article 8 proportionality is in an ensuing human rights appeal, as was envisaged by Underhill LJ. In such an appeal, the individual would be able to argue that, if the respondent did not form the mistaken view of their conduct, he or she would have been given leave to remain, and that this should be given weight in the balancing exercise, comparably with how the Court of Appeal, in *AA (Afghanistan)* et cetera, spoke of the respondent taking account of past mistakes in deciding whether to exercise discretion in the individual's favour."

52. The only reason the appellant was found to not meet the requirements for indefinite leave to remain in his application made on 12 April 2016 was that he had been dishonest in his tax affairs. Had the respondent not formed the mistaken view of his conduct, the appellant would have been likely had been given leave to remain no other issues having been identified. In my judgement that was a weighty factor in the proportionality assessment under Article 8. Similarly the same factual basis was given for refusing the application made on 3 October 2017. As Mr Miah submitted, the decision letter did not seek to challenge his period of over 10 years continuous lawful residence but sought to refuse it on the basis of his undesirability and conduct in the context of his tax affairs under Paragraph 276B therefore fell for refusal under Paragraph 276D of the Immigration Rules on the basis that he did not meet the conditions of Paragraphs 276B(ii) and 276B(iii) with reference to Paragraph 322(5). Therefore, the FtTJ was required to take that into account in his assessment of proportionality.

53. On the unchallenged findings of the FtTJ, the appellant was not dishonest in his tax affairs. The allegation of dishonesty was the reason given by the respondent for refusing the applications made in 2016 and in 2017.

54. He therefore would have met the requirements under the Immigration Rules that would entitle him to a grant of indefinite leave to remain on the basis of his completion of 5 years as a Tier 1 (General) Migrant in 2016 had the allegation of dishonesty not been made. Therefore, even if there had been a gap in his residence based on the 10 years continuous long residence requirements (although Mr Diwnycz agreed with Mr Miah that there was no such gap), the immigration history demonstrates that he would have been successful in the application made prior to this and decided on 22 September 2017.

55. However, this is not an appeal against the refusal to grant the appellant indefinite leave to remain. It is a human rights appeal, made under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, on the ground that the decision to refuse the appellant's application for indefinite leave to remain on the basis of long residence was unlawful under Section 6 of the Human Rights Act 1998 as it was contrary to Article 8 ECHR.

56. It is agreed between the parties that the appellant succeeds in his human rights appeal because in light of the length of time he has resided in the UK, he plainly has a private life in the UK that engages Article 8(1) ECHR; and that his removal from the UK would be disproportionate under Article 8(2) because, as he satisfies the conditions to be entitled to a grant of indefinite leave to remain under the Immigration Rules, there is no public interest in his removal.

57. In this context I have had regard to OA and Others (human rights; new matter) [2019] UKUT 65 at 27 and 28:

> "27. The significance of an appellant proving to a First-tier Tribunal judge that he or she meets the requirements of a particular immigration rule, so as to be entitled to be given leave to remain, lies in the fact that - provided Article 8 of the ECHR is engaged - the respondent will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the respondent in the proportionality balance, so far as that factor relates to the particular immigration rule that the Tribunal has found to be satisfied.
>
> 28. Whether or not such a finding in favour of an appellant is likely to be determinative of the human rights appeal will depend upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the appellant's interest in remaining in this country. To take one simple example, an appellant who persuades the First-tier Tribunal that he meets the requirements of the Immigration Rules relating to entrepreneur migrants will not thereby succeed in his human rights appeal if the appellant has been found by the respondent (and the Tribunal agrees) that the appellant falls foul of one or more of the general grounds of refusal contained in Part 9 of the Rules; for example, because he made false representations in connection with a previous application for leave (paragraph 322(2))."

58. Also as set out in *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 at [34] ("...where a person satisfies the Rules, whether or not by reference to an Article 8 informed requirement, then this will be positively determinative of that person's Article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed").

59. No other reasons adverse to the appellant have been raised on behalf of the respondent and therefore for the reasons given above, I am satisfied as the parties have submitted that the decision of the FtTJ did involve the making of an error on a point of law and the decision should be set aside. The appeal is remade as follows; the appeal is allowed on Article 8 grounds.

Notice of Decision.

60. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside. It is remade as follows: the appeal is allowed on Article 8 grounds.

Signed *Upper Tribunal Judge Reeds*

Dated 1 March 2021

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.