



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08206/2018  
HU/10648/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 25 February 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

MR ZAKI UR REHMAN  
MRS NAZISH REHMAN  
(ANONYMITY DIRECTION NOT MADE)

Respondents

**Representation:**

For the Secretary of State: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondents: Mr E Waheed, Counsel, instructed by NR Legal Solicitors

**DECISION AND REASONS**

1. The Secretary of State challenges the decision of Designated First-tier Tribunal Judge McCarthy (the judge), promulgated on 16 November 2018, allowing the Respondents' appeals against the refusals of their human rights claims.
2. Mr Rehman (hereafter, "the first Claimant") had, on 3 September 2017 applied for an extension of his leave to remain in the United Kingdom under the Tier 1 route within

the Immigration Rules (“the Rules”). This application was varied on 9 September 2016 to seek indefinite leave to remain on the basis of ten years’ continuous lawful residence in this country. Mrs Rehman (hereafter, “the second Claimant”) is and always has been a dependant of her husband.

3. In refusing the applications, the Secretary of State relied on paragraph 322(5) of the Rules. It was alleged that the first Claimant had been dishonest in respect of earnings related to tax returns made for the years 2010/2011 and 2012/2013. The figures connected to these claims had been used by the first Claimant in Tier 1 applications made on 5 April 2011 and 5 July 2013.
4. The specific basis for the allegation was as follows. In respect of the tax year 2010/2011, the Secretary of State asserted that figures for self-employment submitted to HMRC were much lower than those submitted to the Secretary of State in a Tier 1 application. The discrepancy was said to amount to a figure approaching £34,000.
5. In respect of the tax return for the year 2012/2013, the Secretary of State again relied on an apparent discrepancy in figures, the difference this time amounting to some £35,000.
6. These seemingly very large discrepancies, together with the timing of amendments made to the tax returns, led the Secretary of State to conclude that the first Claimant had been dishonest in respect of his dealings with HMRC or the Secretary of State.
7. It was accepted that the first Claimant had accrued ten years’ continuous lawful residence in the United Kingdom.

### **The judge’s decision**

8. It is quite apparent from his decision that the judge expended a great deal of time and effort in analysing the evidence before him. Before coming to that evidence, it is right to point out that the judge’s recitation of the Secretary of State’s case against the first Claimant, as contained in the reasons for refusal letter, is accurately set out at [11] to [18]. It is also the case that the judge directed himself correctly as to the location of the burden and standard of proof, and the fact that paragraph 322(5) is a discretionary ground of refusal.
9. Turning to the evidence itself, at [26]-[43] the judge considers with great care information obtained from HMRC about the two tax years in question. Upon analysis, the judge concludes that the HMRC evidence was not in keeping with the particular way in which the Secretary of State had set out his case against the first Claimant in the reasons for refusal letter (see in particular [29]-[32]). The judge concluded that the author of that letter had misread the information provided by HMRC.

10. The judge goes on to conclude that it was inappropriate for him to amend or reformulate the Secretary of State's allegations against the first Claimant in light of the HMRC evidence, concluding that such a course of action would not have been in the interests of justice, as he put it. Thus, he was only prepared to consider the Secretary of State's case on the basis on which it was set out in the reasons for refusal letter (see [33]). In light of this, the judge concluded that there were significant problems with the Secretary of State's allegations.
11. However, the case had not been entirely undermined and therefore the judge went on to consider evidence sourced from the Secretary of State's files. Taking the evidence as a whole the judge was prepared to accept that the Secretary of State had discharged the evidential burden resting upon him (see [43]-[46]).
12. The judge moves on to consider the first Claimant's evidence and whether that, in effect, amounted to an innocent explanation of the Secretary of State's initial case against him. It is right to say that the judge had some concerns about aspects of the first Claimant's own evidence. These included the claim that his accountants had outsourced work to a subsidiary company and in respect of the chronology of events. In light of these concerns the judge concluded that he was reaching "mixed findings".
13. At this point, the judge found that the first Claimant had not been shown to be dishonest.
14. Other aspects of the evidence were then considered. Ultimately, the judge concludes that whilst there were concerns with the first Claimant's evidence, he had not been dishonest in respect of his conduct towards HMRC or the Secretary of State. At [65] he concludes that the evidence relied upon by the Secretary of State was not sufficiently robust to discharge the legal burden of proof. With an implicit reference back to his analysis of the HMRC evidence at [32]-[35], the judge states that the Secretary of State's allegations were not properly drawn from that evidence. It was noted that the actual figures stated in the amended tax return to the two tax years in question had not been disputed.
15. At [67] the judge concludes that the Secretary of State had not shown that the first Claimant had been dishonest. Therefore paragraph 322(5) did not apply and the judge was satisfied that all criteria under paragraph 276B of the Rules had indeed been met. This being the case the first Claimant was entitled to succeed in his appeal.
16. In respect of the second Claimant, the judge concluded that she too should succeed in her case and given the conclusions on her husband's appeal.

### **The grounds of appeal and grant of permission**

17. The grounds of appeal cite three judicial review decisions of the Upper Tribunal in support of the contention that the judge had erred in his approach to the paragraph

322(5) issue. It is said in particular that the judge failed to have regard to the guidance set out in R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC), had erred in relation to the evidence about the first Claimant's accountants, and should not have taken account of the fact that HMRC had not imposed a penalty on the first Claimant in respect of the amended tax returns.

18. Permission to appeal was granted by Designated First-tier Tribunal Judge Woodcraft on 21 September 2018.

### **The hearing before me**

19. Mr Duffy relied on the grounds of appeal but quite properly in my view accepted that the judge's analysis of the HMRC evidence at [26] to [32] was accurate in that the author of the reasons for refusal letter had appeared to misunderstand what the figures actually showed. He acknowledged that the judge had relied on this analysis when considering whether or not the Secretary of State had discharged the legal burden of proof (see [65]).
20. For his part Mr Waheed relied on his detailed skeleton argument. He submitted that there were no material errors of law. The judge had correctly directed himself in law and had had regard to all the relevant evidence.

### **Decision on error of law**

21. As I announced to the parties at the hearing, I conclude that there are no material errors of law in the judge's decision.
22. As I mentioned before, it is quite clear that he put in a good deal of thought into this decision. Whilst the amendments made to the two tax returns in question were, as the judge put it, "peculiar" (see [30]), the judge was fully entitled (indeed he was probably bound to) conclude that the HMRC evidence simply did not match with the way in which the Secretary of State had put his case against the first Claimant.
23. Mr Duffy has not sought to argue that the judge was obliged to reformulate the Secretary of State's case in any way. In my view, the judge was quite right to have viewed the allegations on a restrictive basis. The Secretary of State had relevant evidence before him when making the decision, and that decision had not been amended in any way leading up to the hearing or indeed at it. The judge was fully entitled to proceed as he did with reference to the comments made in [33] and [34]. The significant concerns about the nature of the Secretary of State's allegations against the first Claimant were an important factor in the judge's ultimate evaluation of the case. Somewhat unfortunately in my view, the author of the grounds has overlooked this issue.

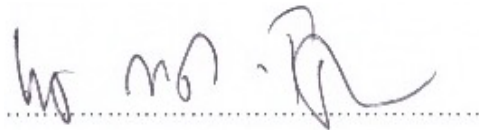
24. It is right that the judge in effect found that the Secretary of State had discharged the evidential burden notwithstanding the weakness in the allegations. On one view, he may have been somewhat generous to have done this, but that is what he did.
25. He then quite correctly turned to the first Claimant's rebuttal. He clearly had some concerns with aspects of the Appellant's case, but he was nonetheless entitled to find that the Appellant had not, at least on his evidence, being dishonest in respect of dealings with HMRC or the Secretary of State. The judge, whilst refusing to admit the judicial review decisions which were put to him by the first Claimant's Counsel and the Presenting Officer, nonetheless dealt with the general points raised therein at [61]. He was right to state that the judicial review jurisdiction is materially different from that of a statutory appeal.
26. The judge was entitled to find that the first Claimant's reliance upon the accountant's letter was not simply a bold assertion unsupported by any evidence. There was evidence from accountants who had acted for the first Claimant, albeit not from the original firm or the subsidiary. The acceptance of errors and the fact that the first Claimant was suing in respect of these errors was a relevant factor which the judge was entitled to take into account.
27. It is right that the judge placed some reliance on the fact that HMRC had not imposed any penalties on the first Claimant. It may be that this constituted an error in that it is difficult to see what evidence there was as to HMRC's approach to such matters. However, in my view this potential error could be stripped away from the decision as a whole and what remains is fully sustainable.
28. The judge was entitled to conclude that the first Claimant had provided an innocent explanation to the Secretary of State's allegations, bearing in mind that the threshold is not particularly high.
29. When moving on to the ultimate question of whether the Secretary of State had discharged the legal burden of proof, Mr Duffy quite fairly recognised that the judge was then entitled to look back at what he had said about the HMRC evidence at [26]-[35] and rely on this as a factor that undermined the Secretary of State's case, with the consequence that the evidence against the first Claimant was not "sufficiently robust".
30. Following from this sustainable conclusion, the judge was fully entitled to find that the first Claimant had indeed met all of the criteria under paragraph 276B of the Rules.
31. There is no suggestion that, absent the issue of the first Claimant's appeal, the judge erred in respect of the second Appellant. It is clear that her case stood or fell with that of her husband.
32. In all the circumstances, the decision of the First-tier Tribunal stands.

**Notice of Decision**

**The decision of the First-tier Tribunal does not contain material errors of law and it shall stand.**

**The Secretary of State's appeal to the Upper Tribunal is therefore dismissed.**

**No anonymity direction is made.**

A handwritten signature in black ink, appearing to read 'Norton-Taylor', is written over a horizontal dotted line. The signature is cursive and somewhat stylized.

Signed

Date: 12 March 2019

Deputy Upper Tribunal Judge Norton-Taylor