UTIJR6

JR/3362/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Prabhu Sekaran

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Frances

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Mr S Karim, of Counsel, instructed by Deccan Prime Solicitors, on behalf of the Applicant and, Mr B Bedford of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 4 February 2019.

JUDGMENT

1. The applicant challenges the respondent's decision of 12 January 2018 refusing his application for indefinite leave to remain as a Tier 1 (General) migrant and the administrative review decision of 14 February 2018 maintaining the decision. His wife is his dependant.

2. The applicant is a citizen of India born on 1 February 1982. He came to the UK as a student in April 2009. He was granted leave to remain as a Tier 1 (Post-Study Work) migrant until 10 August 2012. On 31 March 2011, he applied for further leave to

remain as a Tier 1 (General) migrant which was granted and leave extended until 23 July 2016.

3. On 23 July 2016 the applicant applied for indefinite leave to remain. He responded to the 'paper genuineness test' questionnaire [the questionnaire] on 10 May 2017. The respondent refused the application under paragraphs 322(5) and 245CD(b) on 12 January 2018 because the applicant had claimed earnings from self-employment of £37,150 in the period 1 September 2010 to 26 March 2011 in his application for leave to remain made in March 2011 and declared £4270 to HMRC in his self-assessment tax return for the year 2010/2011. The respondent stated that it was not credible that an accountant would make such a mistake and rejected the applicant's explanation given in the questionnaire, that he was not able to verify his tax return, on the basis that the applicant would have provided information to his accountant at the time and would have been aware of the discrepancies.

4. In his application for administrative review, the applicant submitted that paragraph 322(5) did not apply because he had not intended to deceive or to submit an inaccurate tax return. There had been an omission which had now been rectified. There were no false representations or deception. The respondent had failed to follow guidance in AA Nigeria [2009] EWCA Civ 773.

5. The decision to refuse leave was maintained on administrative review on the ground that the Applicant was responsible for ensuring his tax return was correct and he had either failed to declare earnings to HMRC or over-inflated his income in his application for leave to remain. The decision maker stated: "You raise AA Nigeria [2009] EWCA and TR (CCOL cases) Pakistan [2011] UKUT to support your application, arguing there was no intention to deceive the Secretary of State. On review the case laws are relating to deception being used to obtain leave of some form in the UK. However, this case law is not deemed relevant to your application as your application has not been refused on deception, but on character and conduct."

6. The applicant challenged the decisions on the following grounds:

a. The respondent had reached irrational conclusions;

b. The respondent failed to engage with material matters; and

c. The respondent had acted unlawfully in his application of paragraph 322(5) and had failed to properly exercise his discretion.

7. It was submitted that the respondent failed to engage with the explanation given for the amendment to the tax return and the conclusion that a professional accountant would not make such an error was irrational. The applicant had voluntarily amended his tax return and paid the tax due. His actions demonstrated that his presence in the UK was not undesirable. The respondent applied to high a standard of proof in considering the explanation and had failed to exercise discretion under paragraph 322(5) such that the refusal of indefinite leave to remain was unlawful. Further, the respondent ought to have invited further comment prior to refusing the application. The respondent had failed to explicitly allege dishonesty or deception and in any event the applicant had provided a plausible explanation.

8. Permission was granted on the ground that, if the respondent was not asserting dishonesty, it was difficult to see what, other than negligence or significant carelessness, could have resulted in the discrepancies. It is arguable that significant carelessness, if that is what the respondent was actually asserting, does not fall within the scope of paragraph 322(5) of the immigration rules and the respondent acted unlawfully in relying on that provision.

Applicant's explanation for the discrepancies

9. In his questionnaire the applicant names his accountants as Oasis Accountants and gives their full address and postcode. He stated that they prepared his self-assessment tax returns on five occasions from 2010 to 2015 and his company tax returns for five years from 2012 to 2017. He set out his turnover, expenses and net profit for each year. The following questions and answers are relevant to this application.

10. Question 12: Did you review, check and sign each tax return before it was submitted and if not please list and give reason why?

> "I was undergoing lot of problems in family and was not able to concentrate on this. Also my marriage was fixed on 26/02/2012 and was really behind making the necessary arrangement. Moreover I was rushing to complete my official commitments before leaving to India for marriage. Hence given authorisation to accountant for filing the tax return. This was the reason why I was not able to verify the figures submitted by accountant. As soon as I realised the mismatch in figures, made amendments to 2010-2011 tax returns and started paying revised tax."

11. Question 13: Are you satisfied that the tax returns submitted accurately reflected your income and if not state what further action you have taken to address it?

> "The variation in incomes was in 2010-2011 which was brought to my notice by early 2016 while checking previous tax history. I was undergoing lot of problems in family and was under real stress. Also my marriage was fixed on 26/02/2012 and was really behind making the necessary arrangement. Moreover I was rushing to complete my official commitments before leaving to India for marriage. Hence given authorisation to accountant for filing the tax return. This was the reason why I was not able to verify the figures submitted by accountant. As soon as I realised the mismatch in figures, made amendments to 2010-2011 tax returns and started paying revised tax."

12. Question 14(a) Please provide details and why the tax return was incorrectly submitted?

> "I was undergoing lot of problems in family and was under real stress. Also my marriage was fixed on 26/02/2012 and was really behind making the necessary arrangement. Moreover I was rushing to complete my official commitments before leaving to India for marriage. Hence given authorisation to accountant for filing the tax return. This was the reason why

I was not able to verify the figures submitted by accountant. As soon as I realised the mismatch in figures, made amendments to 2010-2011 tax returns and started paying revised tax."

13. Question 14(c) What was the cause of the error?

"As I explained earlier, I was not able to verify the tax return at the time of filing. I was going through a lot of family problems and also my marriage was fixed in feb (sic) 2012. I was rushing to complete the necessary arrangements and was not able to concentrate on this."

14. In his unsigned and undated statement at H1 of the trial bundle, the applicant stated:

"Tax difference issue had come into light as my new accountant was going through all my tax returns, and the reason for 2010-2011 tax return discrepancy was due to because in during Jan 2012 I was in the process of getting married and I was fully busy in doing marriage arrangements. As my parents are very old, I have to do all the arrangement from here and my marriage was held in India. We have invited over 1000 people therefore I was totally busy arranging marriage hall and food and invitation therefore I was not able to check and sign the accounts prepared by my accountant.

One of my staffs in Financial partners has made this error and he submitted on my behalf as he prepared my accounts for my Tier 1 general visa and I was in the impression since he is submitting the same figures. He would do it accurately. However, the staff has made a mistake.

I have been trying to get hold of the staffs in Financial partners when my new accountant identified. However, the financial partners was closed and I found in companies house they dissolved the company in October 2014. So I am unable to get hold of any staffs. I am still in the process of trying to get hold of the staff or owner or get a letter of this error.

So due to my marriage circumstances I lost track of responsibilities. And I

did sign the accounts in my tax returns which was submitted by my old accountant.

Hence, when my new accountant spotted the mistake I gave the permission to rectify it and was ready to pay the difference to HMRC And I have paid all the taxes in full."

Respondent's decisions

15. In the refusal letter of 12 January 2018, the Respondent set out the answer to question 14(c) and stated:

> "Consideration has been given to the explanation provided. However, it is not credible that a competent professional accountant would make such a fundamental mistake in declaring taxes to HMRC. Your accountant would have prepared your accounts based on the evidence and information provided to them at the time. Once they had produced the accounts, you would have been provided with a copy which you could check for any inaccuracies. It is therefore not accepted that you could have been unaware of the discrepancies between the earnings declared to UKVI and HMRC.
>
> Therefore, the Secretary of State is satisfied that the self-employed earnings you had declared in your initial Tier 1 (General) application is not consistent with your declaration made to HMRC in the relevant tax period. Had you declared earnings which were consistent with your declaration to HMRC, you would not have scored sufficient points under the Immigration Rules for leave to remain to be granted.
>
> The Secretary of State has considered whether the particular circumstances of your case merit the exercise of discretion. Having considered those circumstances the Secretary of State is satisfied that the refusal remains appropriate and is not prepared to exercise discretion in your favour."

16. On administrative review, dated 14 February 2018, the Respondent stated:

> "You claim that you did not intentionally sought to deceive the Home Office

or intentionally not provide accurate information to HMRC…

The ultimate responsibility for the requirements lies with you, as you are responsible for ensuring that when the tax returns are submitted to HMRC the details within are correct. It is additionally noted there would have been a clear benefit to yourself either by under-reporting your self-employed earnings to HMRC and thereby reducing your tax liability, or by over-inflating your self-employed earnings in order to meet the threshold for points required as a Tier 1 (General) Migrant. On review we are satisfied the original caseworker has assessed your application correctly and we have maintained the original decision.

You raise AA Nigeria [2009] EWCA Civ and TR (CCOL cases) Pakistan [2011] UKUT to support your application, arguing that you had no intention to deceive the Secretary of State. On review the case laws are relating to deception being used to obtain leave of some form in the UK. However, this case law is not deemed relevant to your application as your application has not been refused on deception but on character and conduct."

Applicable Law

17. The relevant Immigration Rule in this case is paragraph 322(5) which states:

'Grounds on which leave to remain…should normally be refused

(5) The undesirability of permitting the person concerned to remain in the United Kingdom [considering his conduct] (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security'.

18. In the reported decision of R (Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384, Martin Spencer J gave the following guidance:

(i) *Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been*

deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.

(ii) *Where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.*

(iii) *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.*

(iv) *For an Applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore, the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty.*

(v) *When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):*

i. Whether the explanation for the error by the accountant is plausible;

ii. Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;

iii. Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;

iv. Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.

Written Submissions

19. In his skeleton argument, Mr Karim refined the grounds and submitted:

(i) The respondent's actions/decisions were in breach of the *Tameside* duty;

(ii) The respondent's decisions were unlawful/irrational; and

(iii) The respondent's decisions amount to a disproportionate breach of the applicant's Article 8 ECHR rights.

20. It was submitted that the questionnaire was wholly inadequate and the respondent should have interviewed the applicant and contacted HMRC. The threshold for the engagement of paragraph 322(5) was high. The respondent must have reliable and cogent evidence and give clear precise reasons in support of the conclusion that the applicant's presence in the UK was undesirable. The respondent' allegation of deception was vague and in any event the applicant had been careless and not dishonest. The exercise of discretion was flawed because the respondent had failed to have regard to all factors and an inadequate balancing assessment had been carried out. Lastly, the applicant had now made a human rights claim and he should be given the opportunity to give evidence at an appeal hearing in line with Khan v SSHD [2018] EWCA Civ 1684.

21. In the detailed grounds of defence, the respondent submitted that the application was not refused under paragraph 322(2) and therefore the deception tests set out in AA Nigeria v SSHD [2009] EWCA Civ 773 did not apply. Under paragraph 322(5) the respondent did not need to show who was deceived just that deception/dishonesty had occurred. There was reliable evidence of sufficiently reprehensible conduct to justify the refusal under paragraph 322(5). The respondent properly applied the guidance in R (Khan). An allegation of dishonesty was implicit in a refusal under paragraph 322(5).

Application to amend the grounds

22. Mr Karim submitted that the application to amend was not made at the eleventh hour. The applicant relied on Articles 6 and 8 at section 4 of the judicial review claim form and in the skeleton argument submitted two weeks before the hearing. The pragmatic approach was that agreed in the ETS case of Khan v SSHD [2018] EWCA Civ 1684 whereby on appeal the applicant could advance evidence in response to the respondent's allegation of dishonesty.

23. Mr Bedford submitted that section 4 of the claim form did not give rise to a human rights claim. There were no particulars in the grounds and permission was not granted on this point. The respondent had no opportunity to deal with it and it was an attempt to circumvent the rules of public law.

24. Mr Karim relied on paragraph 14 of Ahsan v SSHD [2017] EWCA Civ 2009 in which the respondent conceded that there was no statutory provision requiring an applicant to make a paid application. The human rights claim had been raised in the claim form and the respondent had ample opportunity to deal with it.

25. I refused the application to amend the grounds made on 21 January 2019 for the following reasons. The applicant had not made an application for leave to remain on human rights grounds and stating that Article 8 was relied on in section 4 of the claim form, without giving particulars in the grounds, was not sufficient. The grounds did not rely on Article 8 and permission was not granted on that basis. The statement relied on in the application to amend was not before the respondent at the time he made his decision to refuse indefinite leave to remain or on administrative review. In the interests of the overriding objective, I have regard to the comments by Singh LJ in R (Talpada) v SSHD [2018] EWCA 841 at paragraphs 67 to 69.

Applicant's submissions

26. Mr Karim relied on grounds 1 and 2 and proceeded to make oral submissions as follows: The ambit of paragraph 322(5) was wide and even if dishonesty was found,

the rule still required an assessment of whether the applicant's conduct was undesirable. The respondent's own guidance indicated a high level of reprehensible behaviour such that it would be undesirable to allow a person to remain in the UK and the consequences of a refusal under paragraph 322(5) were serious. The rules required the respondent to conduct two balancing exercises. Firstly, weighing desirable factors against undesirable ones and secondly, exercising discretion as to whether the rule should be invoked at all. There must be reliable evidence and the threshold of engagement was high.

Ground 1

27. Mr Karim submitted that the applicant was not interviewed and the questionnaire was not sufficient to put the applicant on notice of an allegation of dishonesty or deception. There was no reference to the respondent's concerns in the questionnaire or in any correspondence. Following R (Anjum) v ECO [2017] UKUT 00406 (IAC), the respondent had adopted an inflexible approach and denied the applicant an opportunity to clarify the answers given in the questionnaire. In the absence of an interview the respondent should at least issue a 'minded to refuse' letter. The allegation was a serious one and should have been put to the applicant (R v SSHD ex parte Fayed [1998] 1 WLR 763 at 777B, Lord Woolfe MR).

28. Mr Karim submitted that the applicant did not know the respondent was alleging deception because amending his tax return was not sufficient to lead to a conclusion of dishonesty. The questionnaire was inadequate. The allegation was not put in this case and the applicant was not aware of the draconian consequences. He was not able to put forward reasons for why his conduct was not undesirable because there was no proper process in place. The respondent was not seized of all facts and information prior to making the decision. It was apparent from the respondent's guidance that HMRC would take action if they suspected non-compliance. They had not done so and therefore they had not been deceived. As part of his *Tameside* duty the respondent should have made enquiries.

29. In the decision to refuse indefinite leave to remain the decision maker referred to

errors but did not state that the applicant intended to deceive. In the administrative review decision, the decision maker specifically stated that the application had not been refused on deception but on character and conduct. The decision makers had wrongly assumed that amending a tax return was sufficient for the application of paragraph 322(5) without the need for dishonesty. This was a significant error and the decisions should be quashed.

30. The applicant had amended his tax return and paid all tax due. He had received no financial benefit. HMRC had taken no action and were not deceived. The respondent accepted the applicant's evidence of income in granting leave to remain in 2011. There was no suggestion the applicant had submitted false documents. The respondent's reasoning was fundamentally flawed.

31. The applicant raised the issue of deception in his administrative review and denied it. The respondent in the acknowledgement of service stated that he was not implying dishonesty and has now changed his position after the grant of permission. The two decisions under challenge were contradictory and vitiated by public law errors. The decision maker did not consider dishonesty or deception.

Ground 2

32. The decisions demonstrated that the error in the tax return was an innocent mistake not an act of deception. The applicant had given substantial answers in his questionnaire and the respondent had applied the wrong burden of proof in rejecting this explanation which only had to be plausible not convincing. The decisions failed to engage with the explanation in considering whether the applicant's conduct was undesirable. There was a clear contradiction between the decision to refuse leave and the summary grounds of defence.

Respondent's submissions

33. Mr Bedford submitted that the guidance in R (Khan) was binding, even though it could be distinguished on its facts. In the present case, there was no letter from the applicant's previous or current accountant. Mr Bedford accepted that carelessness

was not enough to engage paragraph 322(5). However, the discrepancy was large and the amendment of the tax return was not made until four years later. The respondent had properly considered the applicant's explanation for the error in his tax return and concluded that it was not credible. This case was on all fours with R (Sultana) v SSHD (JR/10580/2017).

34. The respondent did not accept that the applicant was unaware of the discrepancies in self-employed income declared to UKVI and HMRC. It was not relevant that HMRC had not taken any action. The decision to prosecute was different with a higher burden of proof. There was no further information necessary for the respondent to reach a balanced conclusion. The respondent did not accept the applicant had been careless. The applicant's behaviour came within paragraph 322(5) and it was not necessary for the respondent to prove which of the two government departments had been deceived. The respondent considered undesirability in the exercise of his discretion.

35. Mr Bedford accepted that the paragraph in the administrative review decision referring to AA Nigeria was ambiguous but, when read in context, the decision maker was stating that this case was not relevant because paragraph 322(1A) did not apply. The administrative review decision did not invalidate the initial refusal of indefinite leave to remain. The decision maker did appreciate that dishonesty was required and it was clear that the applicant's innocent explanation was disbelieved.

36. The applicant's statement at H1 of the trial bundle was not before the initial decision maker. This statement was inconsistent with the answers given in the questionnaire. There was no statement from the either of the accountancy firms. Mr Bedford submitted that even if there was an error in the decisions under challenge it made no difference to the outcome and relief should be refused. There was no additional evidence which could lead to a different conclusion.

37. The applicant was not taken by surprise by the allegation of dishonesty and was clearly aware of the need to explain why he had amended his tax return. There was

no requirement to put the application on notice that his explanation had not been accepted. There was no policy to offer an interview and it was not merited in this case because the applicant had completed a questionnaire and his explanation had not changed on administrative review.

Applicant's response

38. Mr Karim submitted that R (Khan) was not binding but he accepted it was persuasive. The absence of a letter from the applicant's accountant was not an issue. The applicant was not blaming his accountant. He was stating that he was in a rush and unable to verify his tax return. He had not provided his accountant with the correct information. The respondent had failed to properly engage with the applicant's explanation and had applied too high a threshold. The applicant's subsequent tax returns, submitted by the same accountant, were accurate. His explanation could be plausible. The respondent failed to assess desirability.

39. The administrative review decision was flawed and should be set aside. The respondent's concession that the decision was ambiguous was sufficient for the applicant's claim to succeed. The respondent failed to conduct a true and fair balancing exercise (R (Ngouh) v SSHD [2010] EWHC 2218 (Admin)). There was a clear allegation in Sultana that false information had been submitted. That was not clear from the language used in this case. The applicant was not aware of the allegation of dishonesty and the respondent stated that he did not rely on it in the administrative review decision. This further undermined the decision making process. Section 31 of the Senior Courts Act 1981 did not apply. A discrepancy in a tax return was not necessarily dishonest and the respondent failed to conduct balancing exercise. Had he done so he may well have come to a different conclusion.

Discussion and conclusions

40. It is not in dispute that the applicant failed to declare £32,880 to HMRC in his self-assessment tax return for 2010/2011. This is a significant discrepancy capable of

giving rise to an inference of dishonesty. There is an implicit allegation of dishonesty in the application of paragraph 322(5). This is accepted at paragraph 33 of the applicant's grounds.

41. It is apparent from the decision of 12 January 2018 that the respondent is alleging dishonesty because he does not accept that the applicant's accountant could have made such a mistake and the applicant was unaware of the discrepancies between earnings declared to UKVI and HMRC. There was no evidence before the respondent from the accountant or correspondence from the applicant at the time of the tax return. Applying R (Khan) the respondent was entitled to reject the applicant's explanation.

42. It is also apparent in the administrative review decision that the respondent is alleging the applicant either under reported his self-employed income to HMRC to reduce his tax liability or over inflated his self-employed income to meet the threshold for points required as a Tier 1 (General) migrant. A clear allegation of dishonesty on the facts. The statement that the application was not refused on deception but on character and conduct was with reference to AA Nigeria: mandatory refusals under paragraphs 322(1A) as opposed to the refusal under paragraph 322(5) in this case.

43. Paragraph 11(e) of the acknowledgment of service states: "The Respondent is not implying dishonesty or deception, but that the Applicant has been refused on character and conduct." However, the detailed grounds of defence make it clear this was not the respondent's position. The refusal letter and administrative review make a clear allegation that the applicant has failed to declare income to HMRC or inflated his income in his application for leave to remain. The submission advanced in the acknowledgment of service does not change this.

44. The standard of proof for paragraph 322(5) is the balance of probabilities and the burden is on the respondent. The applicant failed to declare income of £32,880 to HMRC for the year 2010/2011. This was a significant discrepancy. The applicant relied on income of £37,150 in his application for leave to remain made in March

2011. There was reliable evidence of dishonesty.

45. On the facts, the discrepancy would have been apparent to the applicant. His explanation that he was under too much stress and was too busy to check his tax return was rejected by the respondent as not credible. This conclusion was one which was reasonably open to the respondent on the material before him and the reasons given were adequate. The respondent was entitled to reject the applicant's explanation for the discrepancy in relation to self-employed income and draw an inference that the applicant was deceitful or dishonest such that indefinite leave to remain should be refused under paragraph 322(5).

46. The applicant was aware of the reason for the discrepancy in his tax returns before he made his application for indefinite leave to remain. He amended his tax return in early 2016 and applied for indefinite leave to remain in July 2016. There was no obligation on the respondent to put the applicant on notice of something which was within the applicant's own knowledge. This was not a case where an applicant would be in real difficulty in doing himself justice unless the area of concern was identified by notice.

47. I am not persuaded that the refusal of indefinite leave to remain was procedurally unfair because the respondent failed to interview the applicant and failed to act consistently with HMRC. The applicant was aware of the discrepancies in his tax returns and the reason for those discrepancies at the time he made his application. He was given an opportunity to elaborate and explain in the questionnaire.

48. The applicant's explanation is that his accountants submitted his tax return and he did not verify it. The respondent did not accept that the accountants would make such a mistake. There was no plausible explanation for why there was no evidence from Oasis Accountants given that the applicant claimed they filed his company tax returns for the year 2016/2017. The applicant was aware of the error in his tax return in early 2016, he made his application for indefinite leave to remain in July 2016 and the questionnaire was submitted in May 2017.

49. If the applicant was claiming that he inadvertently gave his accountants incorrect information, as submitted by Mr Karim, there was no plausible explanation before the respondent for how he was able to claim income of £37,150 in March 2011 in his application for leave to remain given that he now claims that his accountants assisted him with this application. The explanation put forward does not explain why there was such a significant difference. The applicant's statement at H1 was not before the respondent and was inconsistent with the applicant's questionnaire. He named different accountants and stated that they closed in 2014.

50. The applicant has paid a late penalty to HMRC. The respondent's decision to apply paragraph 322(5) was not inconsistent or dependant on the action taken by HMRC. The respondent considered whether to exercise discretion and considered the evidence as a whole in concluding that the applicant's presence in the UK was not desirable. There was no misapplication of paragraph 322(5).

51. The respondent's decision to refuse indefinite leave to remain, applying paragraph 322(5), was open to him on the material before him at the time of the decision. The respondent gave adequate reasons for why the explanation was not credible.

52. Accordingly, I refuse this application. The decisions of 12 January 2018 and 14 February 2018 were not unlawful or irrational. The application is dismissed.

53. Mr Karim applied for permission to appeal to the Court of Appeal. I refuse his application for the following reasons. There was no obligation on the respondent to put the allegation of dishonesty to the applicant prior to the decision to refuse indefinite leave to remain. The summary grounds of defence were not part of the decision making process. The applicant had ample opportunity to put forward a plausible explanation and failed to do so. This case was not comparable with Fayed (see paragraph 46 above). The applicant accepted he had under-declared income to HMRC. Their view was not material to the respondent's decision. The decision that the applicant's conduct was undesirable was open to the respondent on the evidence before him. The applicant's answers in his questionnaire were largely the same and the respondent engaged with his explanation. The applicant did not make

a human rights claim in his application for indefinite leave to remain.

54. I refuse permission to appeal to the Court of Appeal. There is no arguable case that I have erred in law or there is some other reason that requires consideration by the Court of Appeal.

55. The Applicant to pay the Respondent's costs of £8,434. The summary grounds of defence, at paragraph 11(e), were an inaccurate statement of the respondent's position and were not relied on in the detailed grounds of defence.

56. The circumstances do not justify a departure from Bahta v SSHD [2011] EWCA 895 and M v Croydon BC [2012] EWCA Civ 595 that the unsuccessful party will pay the costs of the successful party. The Respondent is entitled to his reasonable costs.

J Frances

Signed: _____

Upper Tribunal Judge Frances

Dated: **15 February 2019**