Home Office

REVIEW OF APPLICATIONS BY TIER 1 (GENERAL) MIGRANTS REFUSED UNDER PARAGRAPH 322(5) OF THE IMMIGRATION RULES

Published on 22 November 2018

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Executive Summary

Tier 1 (General), introduced in 2008 to replace the Highly Skilled Migrant Programme, was intended to provide a route for migrants looking to find high skilled employment in the UK. Unfortunately, many applicants claimed points for earnings which were not genuine. Partly as a result of widespread abuse, the route was closed to new applicants in 2011, with extension applications closing in 2015 and Indefinite Leave to Remain (ILR) applications closing in 2018. The Home Office has also worked with HM Revenue and Customs (HMRC) to identify and tackle this abuse.

Recent concerns, however, have been raised in Parliament that applicants were being wrongly refused when their only failing was that they had made minor tax errors. In response, on 8 May 2018, the Minister for Immigration committed to carrying out a review of all Tier 1 (General) cases. To inform Parliament of the early findings, a first phase of the review, looking at 281 postal applications, was to be completed by the end of May. The Minister for Immigration provided a written update on this first phase on 21 June. The remainder of the review is now complete, and this report contains the final findings.

Since January 2015, a total of 1,697 ILR applications from Tier 1 (General) migrants have been refused under a long-standing provision within the Immigration Rules, contained at paragraph 322(5). It has been reported that applicants have been labelled as threats to national security, but this is not the case. Paragraph 322(5) states that applications to extend individuals' stay in the UK should normally be refused if their character and conduct means that it is undesirable for them to remain in the UK. These include applications for settlement in the Tier 1 (General) category itself, and under the 10-year Long Residence provisions. We have now analysed all 1,697 of the decisions.

In analysing these cases, we have considered the key factors involved in reaching a decision on the genuineness of declarations made to the Home Office regarding self-employed earnings. These include the size of difference between the earnings declared to HMRC and UK Visas and Immigration (UKVI); the timing of any amendment, proximity of an amendment to a subsequent immigration application, whether the applicant was given an opportunity right of reply to our concerns; and the applicants' responses. All of these factors have been captured and recorded as part of the review, and the analysis has identified specific cohorts based on these factors.

The key findings are as follows:

- Applicants have typically used self-employed income to "top up" their PAYE earnings in order to meet the minimum income threshold requirements to score enough points for Tier 1 (General).
- There were large differences between the self-employed earnings shown by applicants' initial HMRC records and those claimed in the Tier 1 applications for the same periods.
- In 88% of cases (1,490 applications), these differences amounted to more than £10,000. Of these, 73% of the applicants (1,084 cases) made amendments to their tax returns within the 6 months before a subsequent ILR application, or did not make any amendments (meaning the differences between their records remain).

- In the majority of cases (83% where recorded), amendments were made more than three years after the date of the original tax return.
- The pattern of behaviour in amending tax records was sufficiently unusual for HMRC to draw it to the Home Office's attention.
- Applicants were given the opportunity to respond to our concerns. The primary response given by applicants, in 39% of cases (640 instances), was that the differences were the fault of their accountant.

In the majority of cases, having taken all the evidence and applicants' explanations into account, we were not satisfied that these were minor tax errors as claimed, but attempts to misrepresent self-employed earnings for the purposes of obtaining leave or settlement in the UK.

We identified 177 (10% of the total) complex cases where the evidence was less clear-cut. Following further checks, we identified 56 cases which require further action.

In 37 of these, or 2% of all cases, we found the decision to refuse to be more finely balanced. 25 of these applicants have since been granted leave outside of this review, following further applications being submitted to the Home Office, further representations or legal challenges. For the remaining 12 cases, following the review, and given the subjective nature of these decisions, we have conducted a formal reconsideration of the cases. In these, we have given the applicants the benefit of any remaining doubt and intend to overturn the refusals by the end of December.

We are also reconsidering a further 19 (1%) cases, in which we require further information from either the applicant or HMRC before a final decision can be made. In the remaining 121 cases (7%) there were additional attributes, which demonstrated non-compliance and indicated that the decisions to refuse were correct.

The review also looked at cases where the applicant had sought to challenge a decision to refuse their application through an appeal (in the case of those whose latest application was submitted under the 10-year long residency provisions) or through an application for a Judicial Review. The review found that 65% of those appeals which have been heard so far in the First Tier Tribunal have been allowed, sometimes because of wider Human Rights considerations but also where a judge accepted appellants' explanations (for example around the role of their accountant) that the Home Office had previously rejected. In other appeals with similar facts, the tribunals have rejected these explanations. In Judicial Reviews, the majority of applications for permission have been refused. Applicants have had their claims upheld in fewer than a third of the cases which have proceeded to a substantive Judicial Review hearing.

It is expected that the Court of Appeal will provide more clarity on many of these issues early next year and we will consider the matter again in the light of these further rulings.

Until then, given the findings of the review, there are no plans to change the approach taken to deciding the majority of these cases. The review has, however, identified some areas for improvement. These are set out in the conclusion at Chapter 6.

Chapter 1: Policy background

1.1 Paragraph 322(5)

Paragraph 322(5) forms part of the General Grounds for Refusal (GGfR), contained within Part 9 of the published Immigration Rules[1].

The GGfR set out the specific grounds when a person's background, behaviour, character, conduct or associations can lead to a refusal, and any circumstances when the grounds are either discretionary or would not apply. They apply across most immigration categories, not just Tier 1 (General). The long-standing provision relating to character and conduct has formed part of the Immigration Rules since 1972.

The Home Office publishes guidance for its case-working staff on applying the GGfR. As with other operational guidance, this is publicly available on GOV.UK[2] to ensure transparency of the decision-making process.

With regard to paragraph 322(5), the guidance states that it will mainly be used for cases involving criminality or threats to national security. However, the guidance is also clear that a criminal offence does not need to have been committed for the paragraph to apply.

1.2 Tier 1 (General)

The Tier 1 (General) category aimed to identify highly skilled individuals through points criteria, who would be likely to find highly skilled employment and would be given the freedom to seek work without being tied to a sponsoring employer. Points were awarded at each application stage (initial, extension, settlement) for the applicant's earnings during the previous 12 months. Further points were available for an applicant's qualifications, age and UK experience.

The category did not, however, deliver as intended. The lack of a sponsoring employer or any other form of third-party oversight of migrants' activities meant that the category was heavily abused. It was closed to initial applications on 6 April 2011 but remained open for extension and settlement applications for those already in the category. These closed in April 2015 and April 2018 respectively.

1.3 Long Residence

The Long Residence provisions, like the GGfR, are not specific to Tier 1 (General), but apply across the majority of categories contained within the Immigration Rules. The current provision enables those who have had at least 10 years' continuous lawful residence in the UK (in any category or combination of categories) to apply for settlement.

[1] https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-9-grounds-for-refusal
[2] https://www.gov.uk/government/collections/general-grounds-for-refusal-modernised-guidance

Chapter 2: Methodology

2.1 Scope of the review

This review investigated concerns as to whether there were systemic issues leading to settlement applications by Tier 1 (General) migrants being refused incorrectly.

It was not a formal reconsideration of each individual case decision. This would be disproportionate action to take. If the review were to find that original case decisions had been made correctly, then re-making those decisions with the same outcome could cause unnecessary confusion for applicants and fresh avenues for inappropriate legal challenges on cases where applicants have already exhausted all their legal options. It would also divert casework resources away from considering fresh applications in other immigration categories, impacting on service standards.

Where, however, the review identified cases which had been decided incorrectly, we intend to make fresh decisions on those individual cases. We have identified 56 such cases, of which 25 have already been granted Indefinite Leave to Remain (ILR), leaving fresh decisions to be made in 31 cases. The decision will be overturned in 12 of these, with 19 requiring further information from the applicants before a decision can be made.

2.2 Refusal of settlement applications

The majority of settlement applications, across all immigration categories, are granted. Migration statistics published by the Home Office[3] show that, on average, 5% of settlement applications are refused.

Refusal trends were analysed to identify when the refusal rates of settlement applications by Tier 1 (General) migrants – either as applications under the Tier 1 (General) or Long Residence provisions – increased, and therefore what period the review needed to analyse. Internal management information shows that the refusal rates for these cases were broadly consistent with those of settlement applications across all categories, up until mid-2015. After that, there was a trend of increasing refusal rates, rising to 52% for this cohort in the year ending March 2018 (1,095 of 2,125 applications).

Information from the policy and process part of the review (see Chapter 3) shows that earnings differences between Tier 1 (General) applications and HM Revenue and Customs (HMRC) records were being considered as early as January 2015. The review is therefore focussing on applications considered from the start of 2015 onwards.

2.3 Policy and process review

This information has been gathered through discussions with policy officials and operational managers, and trawls through guidance and e-mail records.

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/709295/settlement-mar-2018-tables.ods

2.4 Data gathering and analysis

Information from the Home Office immigration casework system was manually collated to identify whether paragraph 322(5) had been used in a refusal decision relating to earnings differences, to identify the total cohort. A manual trawl of casework notes and refusal letters was then carried out, and the data analysed to identify patterns of applicants' behaviour and the appropriateness of how decisions were handled.

2.5 Assurance and independent oversight

The review has been led by Senior Operational Managers who had no prior involvement in the work related to 322(5) refusals in Tier 1 or 10-year Long Residency, to ensure objectivity and remove the risk of bias.

To further assure the integrity of the approach, we also commissioned UK Visas and Immigration (UKVI)'s Operational Assurance and Security Unit (OASU) to conduct an independent review of our methodology and findings. OASU concluded:

> *"There is a lack of formal documentation in regard to the review. This will need to be developed retrospectively for the report. However, following discussions with the staff involved, and having had sight of the documents underpinning this, OASU are satisfied in respect of the methodology used and adherence to this in terms of the depth and breadth of the review. It is evident that the Migration Policy Unit and Legal Advisors have been closely consulted throughout the review process. Policy explained that they will be contributing to report. The review management team (review lead, data analyst, team leader) are relatively new in their current roles, and came across as objective in respect of the review's outcome. OASU are confident that the approach used will provide evidence based conclusions."*

OASU noted that the lack of formal documentation was due to the methodology being put together quickly and evolved as the review progressed. Further, OASU recommended that the unintended impacts of reviews such as this current one, such as delays for applicants, should be considered at the outset in any future reviews, with risks assessed and mitigations agreed and documented.

In addition to the assurance by OASU, section 3.1 of this report (working with HMRC) has been agreed with HMRC officials.

The data in this report are taken from operational databases and represent a snapshot in time that may not match published statistics. We have conducted a sample data assurance exercise in relation to the findings of 200 cases. This showed that information collated in the review was recorded accurately.

Chapter 3: Findings – policy and process

3.1 Working with HMRC

HMRC and the Home Office share information that helps to protect the integrity of both the UK tax system and UK immigration controls. The UK Borders Act 2007 Section 40[4] provides a legal gateway for the Home Office to request HMRC verify tax and income data it holds on individuals, who are subject to UK immigration control.

In early 2015, data sharing was extended to Tier 1 (General) applications, due to concerns that many applicants had claimed self-employed earnings which were not genuine. It had often not been possible to check these claims against HMRC records at the time of previous applications, because deadlines for submitting returns to HMRC for the relevant periods had not yet expired.

In May / June 2016, HMRC identified a new pattern of customer complaints which were linked to chasing amendments to Self-Assessment Returns. The individuals in question had:

- previously submitted tax returns showing income levels which broadly aligned with the NIC/Tax lower limits (meaning little or no tax was paid);
- recently submitted amendments to their returns showing much higher income levels from a 'new' source which took their income over £25k and asked for earlier years to be amended as well;
- followed up their amended returns with requests for the amendments to be dealt with urgently - mentioning the Home Office in their calls; and
- in some (but by no means all) cases, the customer later submitted a further amendment using another set of low figures, thereby avoiding paying tax due on the higher income.

In response to this pattern, HMRC and the Home Office launched a joint project to identify cases in which an amended tax return was linked to an ILR application in progress.

The amendment of tax records to match earnings figures stated in Tier 1 applications was a new trend in 2016, possibly because it had become widely known that UKVI were making checks against HMRC records. No other explanation for this change in pattern of applicants' behaviour has been identified. Similarly, no reasons have been identified for the higher volume of requests for amendments related to the 2010/11 and 2012/13 tax years, other than the higher volumes of Tier 1 (General) applications in those years.

HMRC will take action against an individual or business, if suspected tax non-compliance, abuse of the Benefits & Credits system or breaches of National Minimum Wage legislation are identified. However, where false earnings may have been claimed in order to extend an applicant's stay in the UK – i.e. – it was UKVI who was deceived about the level of earnings rather than HMRC – there would be no reason for HMRC to take action.

[4] https://www.legislation.gov.uk/ukpga/2007/30/section/40

3.2 Use of paragraph 322(5) in these cases

Three paragraphs in the GGfR may be relevant to such cases:

- 322(1A) – false representations relating to the current application (including obtaining documents from a third party in support of the application)
- 322(2) – false representations relating to a *previous* application (including obtaining documents from a third party in support of the application)
- 322(5) – the applicant's conduct, character or associations (see Chapter 1)

Paragraph 322(1A) is a mandatory refusal ground; paragraphs 322(2) and 322(5) are discretionary grounds. The Immigration Rules are clear, however, that applications "should normally be refused" where they apply.

The technical question of which GGfR paragraph to apply was considered at some length, and the answer was informed by emerging caselaw. Early decisions were made on the basis of paragraph 322(2), but it was decided, to also capture the possibility that the applicant had misled HMRC rather than UKVI about their true level of earnings, that paragraph 322(5) was more appropriate. The e-mail below explains the reasoning.

> *"When we began tackling Tier 1 abuse a few years ago we were refusing under 322(2) in cases where they hadn't declared the same earnings to HMRC which they had previously claimed points for, but we lost an appeal on one where the judge felt that while the explanation of 'accountant's error' was not credible it was just as likely that the applicant had deceived HMRC as UKVI.*
>
> *As a result of this we changed our approach and began refusing under 322(5) as we felt that the applicants had been deceitful or dishonest with another government agency (either HMRC or UKVI)."*
>
> - E-mail from Premium Service Delivery Team to Migration Policy, 10 May 2016

Guidance and letter templates were continuously revised and improved to tackle evolving trends and to improve quality in decision-making. The e-mail below sets out some of the complexity of the issues being considered in each application:

> *"Whether it is appropriate to refuse on deception or not will depend on the evidence in a particular case. Caseworkers should make their decision based on the list of factors in the genuineness rules in Appendix A:*
>
> *(i) the evidence the applicant has submitted;*
> *(ii) whether the money appears to have been earned through genuine employment, rather than being borrowed, gifted, or otherwise shown in the applicant's financial transactions or records without being earned;*
> *(iii) whether the business from which the earnings are claimed can be shown to exist and be lawfully and genuinely trading;*
> *(iv) verification of previous earnings claims with declarations made in respect of the*

applicant to other Government Departments, including declarations made in respect of earnings claimed by the applicant in previous applications;
(v) the applicant's previous educational and business experience (or lack thereof) in relation to the claimed business activity;
(vi) the applicant's immigration history and previous activity in the UK;
(vii) where the nature of the applicant's employment or business requires him to have mandatory accreditation, registration or insurance, whether that accreditation, registration or insurance has been obtained;
(viii) any payments made by the applicant to other parties; and
(ix) any other relevant information.

Evidence from the documents provided and from interviewing may be of more use here than HMRC data, where applicants can claim an error has been made."

- E-mail from Migration Policy to Tier 1 operational manager, 20 September 2016

This e-mail indicates that caseworkers were encouraged to consider a wider range of factors and evidence, rather than solely basing decisions on the data from HMRC. These included documents submitted with the applications, questionnaires sent to applicants, and evidence from interviews. All of these helped to set the HMRC data and the claims made in Tier 1 applications in context.

Caseworkers also considered whether there were any other explanations which could lie behind differences between Tier 1 applications and HMRC records. These include checking earnings which fell across two HMRC reporting periods (in which caseworkers often found that when all the earnings from both reporting periods were added together, they were still below what applicants had claimed for a single year in their Tier 1 (General) applications), or where earnings may have taken the form of dividends from the applicant's business, rather than a salary.

3.3 Guidance issued to caseworkers

To ensure consistency of decisions, a guidance instruction was issued to caseworkers, advising them how to handle cases where there were differences between applicants' HMRC records and the earnings they had claimed in previous applications. The instruction was drafted by senior caseworkers managing Premium Service Centre applications, where the majority of such applications were being received. It was shared with caseworkers in other operational teams.

The first version of this guidance was issued on 9 February 2015. It was expanded over time as greater use was made of interviews and postal questionnaires sent to applicants. The postal questionnaire, for example, was drafted in October to November 2016. Changes such as this were introduced mainly to handle the large volume of cases demonstrating similar symptoms in relation to earnings differences. A separate piece of guidance was issued to Long Residence caseworkers in April 2017. This consolidated guidance on all cases where applicants had previously had leave in a Tier 1 category, not just Tier 1 (General).

Chapter 4: Findings – review of case decisions

4.1 Scale and timescales of earnings differences

The chart below demonstrates the scale of earnings differences – the difference between what the applicant had claimed as self-employed earnings to UKVI and the corresponding earnings declarations made to HMRC. It also sets out the times at which applicants subsequently amended their self-employment earnings with HMRC following their immigration application.

Difference and timescale	No amendment made		After ILR application		Less than 3 months		Less than 6 months		Less than 1 year		More than 1 year		No timescale recorded		Total	
Greater than £10k	473	28.5%	185	11.1%	259	15.6%	166	10.0%	99	6.0%	100	6.0%	208	12.5%	1,490	90%
£3k – £10k	51	3.1%	19	1.1%	24	1.4%	14	0.8%	11	0.7%	7	0.4%	28	1.6%	152	9%
Less than £3k	8	0.5%	2	0.1%	1	0.1%	1	0.1%	-	0.0%	-	0.0%	6	0.4%	18	1%
Total	532	32.0%	206	12.4%	284	17.1%	181	10.9%	110	6.6%	107	6.4%	240	14.5%	1,660	100%

From this table, it is evident that in 90% of cases where a difference was recorded (1,490 applications, 88% of the total cohort), the differences were in excess of £10,000. Of these cases the highest recorded difference was £154,159 and the average across all cases was £27,600. We considered these to be major and significant differences rather than minor errors by applicants.

Of those which exceeded £10,000, 1,083 or 73% either made no amendment to the income declared to HMRC at all (meaning that the differences between the earnings they claimed in their Tier 1 applications and the earnings shown in their HMRC records remain); made an amendment after their ILR application was submitted to UKVI; or made an amendment within the 6 months prior to the submission of their ILR application. This suggests the amendments may have been made to support the ILR applications. A case study is included here.

Case study

The dividends declared to UKVI by the applicant at the time of their initial Tier 1 (General) leave to remain application for the tax year 2010/11 was £48,989. The original amount declared to HMRC for the same period was £0.

The dividends declared to UKVI by the applicant at the time of their extension Tier 1 (General) leave to remain application for the tax year 2012/13 and 2013/14 was £52,555. The original amount declared to HMRC for the same period was £0.

Late filing corrections were made to both previous HMRC declarations in February 2016 and in March 2016. These amendments were made at the fifth and sixth months prior to

the applicant applying to settle permanently in the UK - which they made on 4 August 2016.

The applicant was given the opportunity to respond via questionnaire. In response, the applicant's representatives replied that she "*was never issued any notice by HMRC to submit personal tax returns"* and "*was also not advised by her previous accountants to personally register for tax assessments."* It was claimed that she only became aware of the requirement to register for tax when she changed her accountant in August 2014.

In 2% of all cases reviewed (37 applications), no differences between self-employed income declared to HMRC and statements made to UKVI were identified. Some of these cases were refused because applicants' earnings claimed to be from companies which either proved to be fake or had been dissolved at the time the applicants claimed to have been working for them.

In 14% (240) cases, the timescale of any amendment made to HMRC was unclear. Of these, 10 applications fall within the more complex cases covered in section 4.3 below. The remaining 230 cases showed clear evidence of abuse, including differences above £10,000, with explanations that were not considered coherent or credible.

As part of the review, we also examined the time gaps between the initial declarations of self-employed income to UKVI and any subsequent amendments to HMRC. In 888 cases, an amendment was made and a timescale for that amendment identified. The table below demonstrates that in 83.4% of cases (741 applications) the time difference was in excess of 36 months.

Time between earnings declaration to UKVI and tax record amendments		
Less than 12 months	1	0.1%
12 – 24 months	14	1.6%
24 – 36 months	132	14.9%
Over 36 months	741	83.4%
Total	888	100%

4.2 Explanations given by applicants

Applicants have been given an opportunity to respond and to explain the reasons for any differences. The following reasons were stated:

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Reason for discrepancy	Accountant error		Applicant error		Medical issue		No reason provided		Other		Total
Greater than £10k	585	35.2%	210	12.7%	24	1.4%	642	38.7%	29	1.7%	1,490
£3k – £10k	50	3.0%	28	1.7%	1	0.1%	69	4.2%	4	0.2%	152
Less than £3k	5	0.3%	1	0.1%	-	0.0%	12	0.7%	-	0.0%	18
Total	640	38.6%	239	14.4%	25	1.5%	723	43.6%	33	2.0%	1,660

In cases marked as "No Reason Provided", the applicants did not provide a response in either a face to face interview or a paper questionnaire. In almost 40% of the cases reviewed, the applicant has cited errors by their accountant as the reason. In many cases, the applicant claimed their accountant completed the returns on their behalf. Another common reason given was that the original declaration error was not identified until a new accountant was used, usually for the ILR application.

In many of the instances which are recorded as "Applicant Error", the applicant stated that they did not fully understand the UK tax system. Other examples include blaming family or friends and, in some cases, claiming it was their own mistake. Medical issues recorded include pregnancy, illness and family bereavement.

The "Other" reasons include:

"Other" reasons for differences examined			
2 tax years	5	Business downturn	1
Company dissolved	4	Employer error cited	1
Late expenses	3	Debt recovery	1
HMRC error cited	3	Wage dispute	1
Exempt from personal tax	2	Op Cudgegong[5]	1
Claims never self-employed	2	Income used as dividend and salary, no tax required	1
Rent issues	1	Profit invested in other business	1
Client refund	1	Late receipt of stock and customer payments	1
Client debt	1	Difference due to payments to staff	1
Business partner	1	Bank account closed, submitted provisional tax return	1

Nine of these "Other" cases did not show clear evidence of abuse and have been included in the complex cases for further review below. These are as follows:

[5] Operation Cudgegong is identified as being an investigation into an organised crime group, consisting of an immigration advisor, accountant and company directors assisting Indian nationals to abuse Tier 1 (General) / Highly Skilled Migrant Programme by providing them with false invoices and bank payments.

- 5 cases where the applicant claim their earnings crossed over 2 tax years
- Income used as dividend and salary, no additional tax required
- Profit invested in other business
- Late receipt of stock and customer payments
- Difference due to payments to staff

4.3 Complex cases

Approximately 10% of cases (177 applications) were identified as having one or more attribute which appeared to be contrary to the above patterns of behaviour that indicates the more concerning cohort. Further investigations were conducted on each of these cases.

These investigations identified 56 cases where a formal reconsideration was required. These included 19 cases where we need further information from either the applicant or HMRC before we can make a conclusive decision, and 37 cases where we concluded, given the subjective nature of these decisions, that it is appropriate to give the applicant the benefit of any remaining doubt and grant ILR.

Those decisions which we will grant had one or more of the following attributes:

- A plausible explanation was given for the difference and time taken to rectify
- The timescale between amendment and Immigration application was reasonable and did not evidence abuse
- There was ambiguity that the difference led to a material benefit for the applicant
- Insufficient evidence of abuse

Of these 37 cases:

- 25 have gone on to acquire ILR through subsequent applications, representations or legal challenges.
- 12 applicants have no further leave to remain.

We will be contacting these 12 individuals to inform them of our findings, along with the 19 applicants from who we need further information with a view to resolving cases where possible, by the end of December. Following receipt of further information, we will consider their applications carefully and notify them once a decision has been made to either grant or continue to refuse leave.

Of the remaining 121 complex cases, we have concluded that the refusals were correct despite the applications having attributes that differentiated them from the more concerning cohort. The primary reason for this, is that other determining attributes outweighed the factors in the applicants' favour. For example:

- Cases where tax amendments had been made some time before an Immigration application, still did not match those earnings declared to the Home Office.
- Earnings were identified as non-genuine.
- The size of the difference was deemed small, but nevertheless made a material difference to qualifying for leave to remain.

Chapter 5: Findings – litigation

5.1 Introduction

Legal challenges fall into two main categories:

- Applications under the 10-year Long Residence provisions carry a **statutory right of appeal**, as these are predominantly human rights-based applications. These appeals are initially brought before the First-tier Tribunal (Immigration and Asylum Chamber (IAC)), with escalation to the Upper Tribunal (IAC) if either party wishes to appeal the decision of the First-tier Tribunal.

- ILR applications under Tier 1 (General), like other Points-Based System applications, do not have a statutory right of appeal. These decisions are generally challenged by **Judicial Review**. These are brought before the Upper Tribunal (IAC).

Information on both types of challenge is set out below. This information is taken from Home Office operational databases and may vary from other published statistics. In particular, this data is not directly comparable or reconcilable to Immigration and Asylum Tribunal appeal data recorded separately by Her Majesty's Courts and Tribunals Service and published quarterly by the Ministry of Justice.

There are no data markers which allow us easily to identify these cases from other types of litigation. We have carried out a considerable amount of manual assurance to seek to identify all relevant cases. The numbers in this report are potentially subject to change.

5.2 Statutory appeals statistics

- 625 cases relating to decisions made between January 2015 and May 2018 have an appeal lodged against them.
- Of these cases[6], the First-tier Tribunal has substantively considered (allowed or dismissed) only 220 appeals, of which it has allowed 143 (65%) and dismissed 77 (35%).
- There are 372 appeals outstanding at the First-tier Tribunal.

The total of 625 appeals indicates that the majority of Long Residence applicants in this cohort who have been refused go on to appeal the decisions. However, they represent a very small proportion of all immigration appeals (There were 45,317[7] appeals received by the First-tier Tribunal in 2017/18 across all categories).

10 cases have been substantively considered by the Upper Tribunal. There have been two appeals remitted to the First-tier Tribunal for re-hearing, two allowed, one dismissed and

[6] The figures which follow are correct as of 13 August 2018, when this part of the review was carried out.
[7] https://www.gov.uk/government/statistics/tribunals-and-gender-recognitions-certificates-statistics-quarterly-january-to-march-2018

one abandoned. In four cases, the cases have been heard but the decisions are still outstanding.

It is obviously of some concern that 65% of appeals have been allowed, and we have looked closely at the reasons for this.

Some appeals have been allowed on Article 8 grounds that are unrelated to the subject of this review. Our analysis shows, however, that many were allowed because, for example, the First-tier Tribunal concluded that the differences were the fault of the appellant's accountant and therefore were not a demonstration of the appellant's poor conduct or dishonesty. In some cases, the tribunal concluded that the lack of action taken by HMRC or the fact that the appellant had amended their tax return, gave the appellant a plausible defence.

These are decisions based on individual facts and we note that in many of the appeals which have been dismissed, the same rationale was not accepted by the Tribunal as providing a plausible explanation. We are challenging certain cases where we believe the law was not applied correctly or the Court had no evidence or not enough evidence to support its view, but the picture is likely to remain variable until there is some authoritative caselaw on the approach that should be taken. A number of test cases are due to be heard by the Court of Appeal next year.

5.3 Judicial Review statistics

The Judicial Review process involves two stages:

- A **permission stage**, at which an applicant must show that they have an arguable case.
- If the applicant succeeds at the permission stage, a **substantive hearing**, which will consider the lawfulness of the Home Office's decision.

There are procedures for the unsuccessful party to renew/appeal at both stages.

The statistics below are a snapshot in time[8] of cases at various stages and will change as more cases are heard.

Stage / outcome of Judicial Review	Received 2016	Received 2017	Received 2018	Total
Allowed at substantive hearing (applicant successful)	4	3	0	**7 (2%)**
Dismissed at substantive hearing (Home Office successful)	6	0	1	**7 (2%)**
Permission to proceed granted (applicant successful at permission hearing; awaiting substantive hearing)	8	5	4	**17 (4%)**
Permission to proceed refused (Home Office successful at permission hearing)	52	30	26	**108 (28%)**

[8] as of 19 September 2018, when this part of the review was carried out.

Review of applications by Tier 1 (General) migrants refused under Paragraph 322(5) of the Immigration Rules

Stage / outcome of Judicial Review	Received 2016	Received 2017	Received 2018	Total
Conceded by Home Office (at either stage)	42	21	14	**77 (20%)**
Withdrawn / closed	5	2	1	**8 (2%)**
No outcome (awaiting hearing or permission outcome)	19	14	131	**164 (42%)**
Total	136	75	177	388 (100%)

The above figures suggest that applicants have been successful in 101 cases, and unsuccessful in 123 cases (with no outcome on a further 164 cases).

This equates to a 45% success rate for applicants for those cases with an outcome, but this is likely to be an overestimate for the following reasons:

- At the time of writing, the Home Office has successfully defended 23 of 30 Judicial Reviews at substantive hearing. However, the applicants in 16 of these cases have appealed the Upper Tribunal's decision to the Court of Appeal. These cases are still live and are therefore included in the figures as 'No outcome (awaiting hearing)'. The remaining 7 are listed as "Dismissed at substantive hearing".

- Success at permission stage does not necessarily indicate an applicant will be successful at a substantive hearing, as they only need to show their case is "arguable".

- Similarly, if an applicant is successful at substantive hearing or the Home Office concedes the case, this does not necessarily mean the applicant will be granted ILR. Often if permission is granted it will be more cost effective for the Home Office to reconsider the case and make a fresh decision (even if a further refusal) than incur the costs of a full hearing. Success at substantive hearing may mean that the Home Office will need to consider one or more aspects of the case more thoroughly. Leave is only granted where appropriate.

At the time of writing, 51 of the 77 cases conceded had been granted, with the refusal maintained in 14 cases, 1 case withdrawn and 11 cases still outstanding. Our analysis shows that in 37 of the cases conceded, the applicant had provided additional evidence during the litigation process which prompted the concession.

5.4 Key findings from substantive Judicial Review hearings

The Home Office position has been upheld in a majority of substantive Judicial Review hearings, with judges supporting the use of paragraph 322(5) in appropriate cases. It is important to note that, even when the position was not upheld, the court has still indicated that the use of paragraph 322(5) can be appropriate.

"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. I would expect the Secretary of State to draw that inference where there is no plausible explanation for the discrepancy.

However, 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 is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty."

- Upper Tribunal decision in Khan v SSHD, JR/3097/2017, 14 February 2018

"Both the Immigration Rule and the guidance in relation to it are sufficiently broad to encompass a situation in which a person has been found to be deceitful and/ or dishonest in their tax returns to HMRC for the purposes of obtaining a tax advantage and who has sought to amend those declarations in close proximity to the time of making an application for indefinite leave to remain to the Respondent, at which point inconsistencies in such declarations to HMRC and the Respondent in applications for leave to remain would be checked and otherwise become apparent. This is a serious matter and is clearly behaviour which calls into question a person's character and/ or conduct to the extent this is undesirable to allow them to enter or remain in the UK."

- Upper Tribunal decision in Chowdhury v SSHD, JR/7/2018, 9 August 2018

Other cases have considered whether there was any procedural unfairness and whether applicants should have had more opportunity to respond:

"I do not accept that there was any procedural unfairness in a decision-making process which did not involve prior consultation with the applicant. The applicant is under a duty to provide truthful and correct information to all government departments."

- Upper Tribunal decision in Varghese v SSHD, JR/5167/2016, 13 March 2017

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The Home Office has had greater success than in appeal cases in defending Judicial Reviews where an applicant's accountant has accepted responsibility:

"The letter from the accountants accepting responsibility takes matters no further: the responsibility for accounting properly for income is always that of the taxpayer and the difference here is so huge that the respondent was unarguably entitled to consider that the applicant could not have overlooked it innocently. Nor is it the case that the applicant derived no advantage from the errors."

- Upper Tribunal decision in Kamal v SSHD, JR/11417/2016, 31 August 2017

The Upper Tribunal has also agreed that it is a separate matter for HMRC as to whether they apply their own discretion and take further action. The Home Office has increasingly made use of Witness Statements setting out evidence from HMRC to defend against legal challenges. This approach appears to have improved the success rate in defending against claims on this basis.

> *"**[REDACTED]** placed much emphasis on the fact that no additional tax was due following the amended tax return, given the claim made in the detailed grounds of defence that less tax had been paid owing to the applicant's under-reporting of his income to HMRC. This argument does not address the obvious advantage to the applicant of over-reporting his income to UKVI."*
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> - Upper Tribunal decision in Kawos v SSHD, JR/4700/2016, 4 May 2017

> *"That HMRC has not yet seen fit to issue a penalty notice is neither here nor there… The applicant knew he was self-employed and had for at least three tax years made a nil declaration for self-employed earnings which supported an application to UKVI; it was not the case that earnings were just a discrepancy. It is unarguable that dishonesty could be inferred."*
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> - Upper Tribunal decision in Abbasi v SSHD, JR/13807/2016, 9 January 2018

The most common issue that has resulted in the Home Office being unsuccessful in these cases has been the failure to distinguish between a late submission of tax and an amended tax return. This can result in inaccurate findings with regards to differences between amounts provided to UKVI and HMRC, such as in the case of Williams. Here Judge Canavan stated:

> *"Each case must be assessed on the individual facts, but at the heart of many of the recent cases involving similar issues is an allegation of dishonesty arising from discrepancies between the income declared to the Home Office to meet the earnings requirements of the immigration rules and the income declared to HMRC for tax purposes. For example, in a case where an applicant declares self-employed income of £50,000 to the Home Office to obtain points under Tier 1, but in the same tax year only declares £10,000 of self-employed income to HMRC the respondent is entitled to infer that the applicant either (i) dishonestly over inflated his level of income to meet the requirements of the immigration rules; or (ii) dishonestly failed to declare his full income to avoid tax liabilities. If there is sufficiently clear evidence of dishonesty then the Secretary of State is entitled to exercise discretion to refuse an application under the general grounds for refusal, usually paragraph 322(5)… Although it might still have been open to the respondent to reject the applicant's credibility in light of the evidence taken as a whole, in this case, the respondent's decision was based on a misapprehension of the facts. The decision letter does not deal with the potential credibility issue, which is the applicant's failure to file any self-assessment tax returns until 8 September 2015. The applicant was asked about this in interview, he provided an explanation, his accountants provided an explanation and he was assessed to be generally credible."*
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> - Upper Tribunal decision in Williams v SSHD, JR/10532/2017, 23 August 2018

Chapter 6: Conclusions and lessons learned

1. On balance, following consideration of all available evidence presented to decision makers, we believe that it was reasonable for decision makers to take the approach that they did with these cases.

2. The use of paragraph 322(5) in such cases continues to be appropriate, where an applicant's character and conduct has been called into question as a result of potentially false information they have provided to UKVI or HMRC.

3. These have not generally been cases of "minor tax errors", as has been presented. The differences between the earnings declared to the Home Office and those shown by their tax records were over £10,000 in 88% of cases looked at.

4. The review has looked at litigation outcomes in both Statutory Appeals and Judicial Reviews. The picture here is mixed. Some courts and tribunals have accepted applicants' explanations for discrepancies that the Home Office had previously rejected. Others, faced with broadly similar arguments, often around the role of applicants' accountants, have supported the Home Office's position. We look forward to the Court of Appeal providing clarity on some of these issues in upcoming hearings early next year and will consider these matters again in the light of these rulings.

5. There are some lessons for the Home Office around ensuring that, where there are a large number of refusal of cases with similar facts, litigation strategies are in place early on to ensure a consistent approach and better preparation for defending legal challenges.

6. Aside from cases which have been allowed by the courts and tribunals, the review has identified 12 decisions which we intend to overturn, and a further 19 cases where we will seek more information from applicants before reconsidering their cases. The review has given us the opportunity to look at all cases and identify a scale of issues. Whilst we believe the majority of these have demonstrated patterns of behaviour that bring into question the character and conduct of applicants, these cases have also given a fresh perspective on the minority of more finely balanced cases, the findings of which we will feed into our future decision-making process.

7. Guidance should be updated to ensure that appropriate weight is given in decision letters to HMRC evidence and to wider concerns about applicants' self-employed earnings.

8. In any future reviews of this nature, the cohort of applicants potentially affected should be more closely identified, before putting all applications on hold. This would help to mitigate the impacts of holding a larger volume of applications.