HOUSE OF COMMONS LIBRARY

DEBATE PACK

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Section 322(5) of the Immigration Rules

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Westminster Hall, Wednesday 13 June 2018, 4.30pm

A Westminster Hall debate on Section 322(5) of the Immigration Rules is scheduled for Wednesday 13 June 2018 at 4.30pm. The Member leading the debate is Alison Thewliss MP.

Contents

1. Background

1.1 What is Immigration Rule 322(5)?

Paragraph 322(5) of the Immigration Rules is one of the "general grounds for refusal" of leave to remain, variation of leave or curtailment of leave. It states:

> **Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused**
>
> (…)
>
> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;

As indicated above, refusal under paragraph 322(5) is not mandatory – UK Visas and Immigration (UKVI) has leeway to exercise discretion and not apply the Rule to any particular application.

The Home Office's policy guidance to UKVI decision-makers on the general grounds for refusal (January 2018) includes some commentary on how rule 322(5) should be applied (see pages 34-46), including the following:

> The main types of cases you need to consider for refusal under paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.
>
> A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, the key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control. If you are not sure the evidence to support your decision is reliable, then speak to your line manager or senior caseworker.

UKVI caseworkers are instructed to refer potential refusal decisions under 322(5) to a senior caseworker. The guidance does not specifically highlight tax discrepancies as potentially relevant to rule

322(5), although some parts of the guidance have been redacted from the public version.

1.2 Recent associated controversy

UKVI's use of paragraph 322(5) to refuse immigration applications has received greater public attention over the past few months. There have been many reports of applications falling for refusal because the income declared by the applicant to UKVI has been found to differ from information provided to HMRC. In some cases, this appears to be due to applicants (or their representatives) having committed minor errors on their tax returns, which were subsequently corrected without incurring any penalty from HMRC. Other examples have included cases when there have been logical explanations for the differences, such as the incomes relating to different earning periods.

Although all immigration categories are subject to the rule, this issue appears to be particularly affecting people who entered the UK under the Tier 1 (General) visa category (which catered for "highly skilled" migrants).

Refusal of the application can ultimately lead to the person no longer having a valid immigration status in the UK, thereby becoming subject to the broader consequences of the "hostile environment" policies (losing rights to employment and access to public services, the "right to rent", open a bank account, etc.) and ultimately, being required to leave the UK. Some refused applicants have a right of appeal against the refusal decision, but others will only have redress via the more limited 'administrative review' procedure (i.e. internal review by UKVI officials).

Background: Government policy on highly-skilled migrant workers

The Tier 1 (General) visa enabled highly-skilled migrants to come to work in the UK without having a job offer lined up in advance. Factors such as the applicant's age, qualifications and previous salary determined whether they amassed the number of 'points' required to be eligible for the visa. After five years' residence in the UK they could become eligible to apply for Indefinite Leave to Remain, again, subject to a points assessment.

The Coalition Government closed the visa category to new applicants in December 2010. It considered that the visa was poorly designed and open to abuse (since it did not restrict visa holders to taking up highly-skilled work in the UK). Since April 2015 Tier 1 (General) visa holders have not been able to apply for an extension of the visa, and since April 2018 they have not been able to apply for Indefinite Leave to Remain from the Tier 1 (General) category. Some of them may have 'switched' into other immigration categories. Those who have accumulated ten years' continuous lawful residence in the UK could be eligible to apply for Indefinite Leave to Remain on that basis.

Various other categories of Tier 1 visa remain, catering for more specific categories of high-skilled/'high-value' migrants.

Is UKVI being too heavy-handed?

The various criticisms of UKVI's use of paragraph 322(5) in "tax discrepancy" cases include:

- That it is inappropriate to put these cases in the same refusal category as cases due to be refused for reasons related to criminality, national security, and war crimes, etc.

- That it is unfair for applications to be refused on the basis of minor tax discrepancies which have not previously been queried or penalised, particularly in light of the serious consequences of a refusal decision for the applicant.

- That UKVI is not taking into account applicants' particular circumstances and explanations, and is failing to exercise sufficient discretion when considering whether to apply this rule in individual cases.

- That UKVI is increasingly refusing applications under paragraph 322(5) instead of certain other provisions in the Immigration Rules, such as those related to dishonesty, because of the broad wording and lower burden of proof required.

The Government has said that it is not policy to refuse applications solely due to minor tax errors, and that applicants are given an opportunity to explain any discrepancy. A senior official gave examples of the types of 'tax discrepancy' case which have been refused under 322(5) in an evidence session with the Home Affairs Committee on 15 May:

> In a lot of the cases that have come up—not all of them, but some of them—there was a pattern whereby an amount of money is claimed from an employer and that is supplemented by an amount of money that is from self-employment. Usually that self-employment figure is very large compared with the employment figure because the employment figure has tended to be small, £9,000, £10,000, £12,000 a year, supplemented by self-employment earnings of £25,000, £35,000, £40,000 a year. In the corresponding tax return that is being made, those figures have been significantly different. Hence when it has come to us, we have cast doubts on whether the figures that were given to us for employment, particularly the self-employment element of that, were the correct figures.

1.3 Parliamentary scrutiny, and Government response

The Home Affairs Committee has recently questioned the Minister for Immigration and Home Secretary about the use of paragraph 322(5).

A letter to the Home Affairs Select Committee of 25 May from the Home Secretary gave an update on action being taken by the Government in response to recent criticisms.

Firstly, the Minister for Immigration has been reviewing the use of paragraph 322(5) to refuse Tier 1(General) applications on tax discrepancy grounds. The review of the initial cohort of cases was due to be completed by the end of May and the Home Affairs Committee is due to receive a further update in light of that. Consideration of all applications involving people who were previously in the Tier 1 (General) category and which potentially fall for refusal on paragraph 322(5) grounds has been put on hold pending the review's findings.

The Home Secretary's letter also gave some information about the number of related refusals, removals and departures from the UK that the analysis of UKVI records has identified thus far:

> As part of the review of these cases we are checking individual case records to identify any applicants who were removed having been refused Indefinite Leave to Remain under paragraph 322(5). We have identified 19 individuals who were refused Indefinite Leave to Remain and subsequently made voluntary departures from the UK. One has since been issued with a visa to return to the UK having applied under a different provision of the Immigration Rules. We are also analysing further data regarding other individuals who were refused Indefinite Leave to Remain having applied under the 10-year Long Residency provision and who were previously in the Tier 1 (General) route to determine how many might have been refused under paragraph 322(5) and were subsequently removed or made voluntary departures from the UK.

The Home Office is also analysing appeals data:

> You have also asked how many individuals in this cohort are challenging their decisions. Between 1 January 2015 and 31 December 2017, 238 applicants sought to challenge the refusal of an application for Indefinite Leave to Remain in the Tier 1 (General) route through a Judicial Review, of which 189 were against a refusal on paragraph 322(5) grounds. We are also reviewing appeals data for those in the 10 year long residency route who were previously in the Tier 1 (General) route and we will set out our full findings as part of the review that we expect to complete by the end of May.

2. News and blogs

Quartz

UK suspends anti-terror rule used to deport migrants who made tax errors

Aamna Mohdin 30 May 2018

Electronic Immigration Network

Home Secretary says paragraph 322(5) refusals of highly skilled migrants have been put on hold pending review findings

29 May 2018

Quartz

Britain is using simple tax errors as a reason to deport migrants

Aamna Mohdin and Joon Ian Wong 17 May 2018

The Conversation

Paragraph 322(5): what the Home Office uses to refuse highly skilled migrants leave to remain in Britain

Jo Wilding 16 May 2018

2.1 Press

Financial Times

Javid halts removal of immigrants who altered tax returns

29 May 2018

Guardian

Government U-turn over anti-terror provision used to expel migrants

29 May 2018

Financial Times

Skilled migrants targeted by UK Home Office over minor tax issues

24 May 2018

Guardian

Why is the Home Office treating skilled migrants like terrorists?

Lord Dick Taverne 20 May 2018

Guardian

Home Office faces pressure over deportation of highly skilled migrants

20 May 2018

Guardian

A life 'completely destroyed' by one paragraph of immigration law

20 May 2018

Economist

Britain creates a more hostile environment for immigrants

14 May 2018

3. Parliamentary Business

Migrant Workers: Deportation

Asked by: Yvette Cooper

To ask the Secretary of State for the Home Department, how many people who had held tier 1 (general) visas have been removed from the UK in the last 12 months as a result of a decision based on s322(5) of the Immigration Rules.

Answered by: Caroline Nokes | Home Office

Data is not held centrally in a way that allows us to give an up to date answer to this question without manually checking individual case records which could only be undertaken at disproportionate cost.

24 May 2018 | Written question | 146114

Immigration

Asked by: Lord Taylor of Warwick

To ask Her Majesty's Government whether they have any plans to reassess the use of paragraph 322(5) of the Immigration Rules by the Home Office on indefinite leave to remain cases denied due to tax errors.

Answered by: Baroness Williams of Trafford | Home Office

It is not the Government's policy to refuse applications solely due to minor tax errors. Where these are identified, applicants are given a right to explain any discrepancy. Any such case is signed off by a manager before refusal grounds are applied.

We have refused applications where there are substantial differences – often tens of thousands of pounds – between the earnings used to claim points in an immigration application and an applicant's HMRC records, without a credible explanation from the applicant. We take all available evidence into account before making a decision. Paragraph 322(5) is used where the evidence shows that an applicant's character and conduct is such that their application should be refused.

As the Immigration Minister advised the Home Affairs Select Committee on 8 May, we will carry out a review of these cases to see how many showed clear evidence of deceit, and how many were minor errors.

23 May 2018 | Written question | HL 7726

Topical Questions

Asked by: Alison Thewliss

Several of my constituents who are highly skilled migrants made entirely legitimate and timely changes to their tax returns and are now facing removal by the Home Office under immigration rule 322(5). Will a Treasury Minister confirm that people should make entirely legitimate changes to their tax returns? Will they also have a conversation with their Home Office colleagues to prevent these highly skilled contributors from being removed from the UK?

Answered by: Mel Stride | HM Treasury

The answer to the hon. Lady's question is that people should clearly continue to make appropriate changes to their tax returns. I reassure her and the House that Treasury Ministers and HMRC officials are working closely across Government—particularly with the Home Office—on the issues that she raised in order to ensure that we get these matters right.

HC Deb 22 May 2018 c709-10

Deportation: Migrant Workers

Asked by: Steve Reed

To ask the Secretary of State for the Home Department, whether his ministerial team were made aware of concerns over wrongful deportation of highly skilled migrants under section 322(5) of the Immigration Act on appointment.

Answered by: Caroline Nokes | Home Office

Paragraph 322(5) of the Immigration Rules is a long-standing provision which provides that applications for leave to remain or indefinite leave to remain should normally be refused where it would be undesirable for a person to remain in the UK in light of their conduct, character or associations, or where they represent a threat to national security. Refusal of an application for leave or indefinite leave to remain does not automatically lead to removal or deportation.

It is important that the Government retains the ability to refuse an application where we have identified that migrants have given deliberately false information in order to extend their stay or obtain settlement in the UK. It is not the Government's policy to refuse applications by highly skilled migrants solely due to minor tax errors. Where any discrepancies are identified, applicants are given a right to explain the discrepancy. All such cases are signed off by a manager before refusal grounds are applied.

The Tier 1 (General) category was intended for highly skilled workers applying to work in the UK without requiring a sponsoring employer. The route was closed in April 2011, partly due to evidence of abuse by

migrants using the route. Applications for indefinite leave to remain remained open until April 2018, for those who were in the category at the time it closed.

We have refused Tier 1(General) applications under paragraph 322(5) where an applicant's character and conduct call into question their desirability of remaining in the UK. In these cases, refusals have been given where there have been substantial differences – often tens of thousands of pounds – between the earnings used to claim points in an immigration application and an applicant's HMRC records, without a credible explanation from the applicant. We take all available evidence into account before making a decision and each application is considered on its own merits.

As I confirmed to the Home Affairs Select Committee on 8 May, we will carry out a review of these cases to see how many showed clear evidence of deceit, and whether any were refused due to minor errors. So far there is insufficient evidence to suggest there is any systemic problem which may lead to wrongful removals for this group, but this is one area our review will check.

21 May 2018 | Written question | 144297

4. Further reading

Home Office, Immigration Rules part 9: grounds for refusal

Home Office, General grounds for refusal: section 4 of 5 considering leave to remain, 11 January 2018

Home Affairs Committee, Windrush: publication of correspondence with Home Secretary, 29 May 2018

Includes Chair's comments on Home Secretary's letter, below

Home Affairs Committee, Response from the Home Secretary to the Chair, dated 25 May 2018, regarding Windrush and Tier 1 refusals under paragraph 322(5)

Martina Flanagan and Diana Todrico, The growing trend to thwart ILR, ILPA [Immigration Law Practitioners' Association] Monthly, May 2018

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