



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 92

P843/18

OPINION OF LORD ARTHURSON

In the petition of

ARINZE NWOKOLO (AP)

Petitioner

for Judicial Review

of a decision by the Upper Tribunal (Immigration and Asylum Chamber) to refuse to grant permission to appeal

Petitioner: Caskie; Drummond Miller LLP
Respondent: Pugh; Office of the Advocate General

19 November 2019

Introduction

[1] The petitioner is a national of Nigeria. He arrived in the United Kingdom in 2006 as a student and was subsequently granted periods of leave to remain. He operated a business under what is known as the “points based system”. In order to obtain points under this system, the petitioner required to demonstrate his income. As a result of obtaining the necessary points, and obtaining continuing leave to remain as a result, the petitioner reached a point in time at which he could apply for indefinite leave to remain on the basis of his length of residency in the United Kingdom, namely 10 years. The respondent refused the petitioner’s application for indefinite leave to remain by letter of 27 June 2017 in terms of

Immigration Rule 322(5). The petitioner appealed against that decision to the First-tier Tribunal (“the FtT”). By decision dated 25 January 2018 that appeal was dismissed.

Permission to appeal was refused in due course by another judge of the FtT. The petitioner’s application to the Upper Tribunal for permission to appeal to itself was refused by the Upper Tribunal by decision dated 15 May 2018.

[2] The petitioner’s case falls within a category of cases known as “tax discrepancy cases”, which term refers to the points based system referred to above. The respondent refused the petitioner’s application due to discrepancies in the petitioner’s declarations of income to the respondent and to HMRC in the tax years 2012/13 and 2013/14. It was not in issue between the parties at the substantive hearing which proceeded on the petition that in the event that, if the income declared by the petitioner to the respondent was accurate, he would have obtained sufficient points under the system to allow him in due course to make a valid application for indefinite leave to remain based on his period of residency. The discrepancy between the figures declared to the respondent in respect of the petitioner’s applications for leave to remain, and in his subsequent tax returns declared to HMRC, over the said two year period amounted to some £10,913.

Submissions for the petitioner

[3] The primary challenge advanced on behalf of the petitioner had been foreshadowed in ground one of the grounds of appeal to the Upper Tribunal and amounted to this: whereas in the generality the tax year runs from 6 April in one year to 5 April the following year, the accountancy period for the petitioner’s business ran from 1 July in one year to 30 June the following year. Accordingly, if any income or loss was incurred in the period from 6 April in the first year to 30 June that year, figures related to that income or loss would

in all likelihood emerge in a tax return but not necessarily in the petitioner's business accounts. The chronological variation between the tax year and the business year meant that there would always be a discrepancy in the figures disclosed to the Secretary of State on the one hand and to HMRC on the other hand. A forensic accountancy report prepared by Chadwick-Thompson Accountancy Limited in respect of the two tax years in question had been prepared following upon the decision of the FtT and accordingly was not before that tribunal when it made its decision. The report was, however, before the Upper Tribunal when the Upper Tribunal refused permission to appeal. Counsel submitted, on an analysis of that report, that an income stream had started in respect of the petitioner's business in around November 2012 and had run through to 30 June 2013. After that date, the profitability of the business had collapsed, and this in turn had impacted on the tax to be paid by the petitioner in respect of his business.

[4] Counsel developed this submission by observing that, while the Chadwick-Thompson forensic accountancy report was not before the FtT, business bank statements and accounts from Santander were before it. The FtT, in its decision letter dated 25 January 2018, at paragraph 22 thereof, had indicated that in its view the appellant had failed to provide a reasonable or proper explanation for the discrepancy at his interview, in his statement or at the hearing. The FtT made reference to a number of documents presented by the petitioner in respect of his appeal, which included bank statements, emails and invoices. The FtT had then stated at paragraph 22:

“However without further explanation these documents are of limited assistance to me. Significantly I had little or no clear evidence from the appellant or his accountant to support the claim that his income ‘criss-crossed’ two tax years.”

Counsel submitted that it would be a relatively straightforward task for a specialist tribunal such as the FtT to embark on and complete an exercise of going through the bank statements

which were before it in order to assess the periods November 2012 to 5 April 2013 and 6 April 2013 to 30 June 2013. Chadwick-Thompson had embarked upon this exercise, and there was in its report a reconciliation of the relevant figures. A proper engagement with the material before it ought to have led the FtT to conclude that: (i) there was no actual discrepancy; (ii) there was therefore no deception; and (iii) that the petitioner in these circumstances was bound to succeed. Standing that this was a tax discrepancy case, the FtT should, as a given, have understood the distinction which required to be drawn between an accountancy period and a tax year. In addressing this issue the Upper Tribunal, in its decision refusing permission to appeal dated 15 May 2018, appeared in turn not to have engaged at all with the material which was before the FtT, and, even more significantly, with the forensic accountancy report which was before it at the time that it made its determination.

[5] Counsel advanced supplementary submissions in respect of grounds three and four of the grounds advanced to the Upper Tribunal. Ground three dealt with matters of onus. The FtT had erroneously approached this question, determining in terms that the petitioner had failed to discharge an onus of proof, whereas the correct position in law was that the onus to prove conduct such as deception, as alleged here, was a matter for the respondent to discharge. Counsel submitted that the authorities indicated that there was a single standard of proof on this matter, namely the balance of probabilities, but that this required to be flexible in its application: *JC* [2007] UKAIT 00027 at paragraphs 10, 11 and 13; *MZ (Pakistan) v Secretary of State for the Home Department* [2009] EWCA Civ 919, per Pill LJ at paragraph 10; and the dicta of Underhill LJ in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at paragraphs 43 and 44. I pause at this point to observe that the Upper Tribunal in the present case had concluded that the onus point set out in ground three had

“no arguable merit”. Notwithstanding that position, counsel for the respondent in his own submissions indicated very properly that he was driven to accept that the Upper Tribunal had fallen into error in respect of its approach to ground three, but contended in turn that this error was, nevertheless, not a material one. Counsel for the petitioner, anticipating this point, noted, under reference to Underhill LJ in *Balajigari, supra*, at paragraph 135, that “the Court should observe great caution in refusing relief on the basis of immateriality”. In any event, counsel observed, it was unknown what difference the admittedly erroneous approach to onus taken by the FtT and, in due course on permission to appeal, by the Upper Tribunal, would have made to the disposal of the petitioner’s case. It could not be said that the outcome would inevitably have been the same, counsel submitted.

[6] Finally, on ground four, dealing with the undesirability or otherwise of the petitioner remaining in the United Kingdom, and in particular the alleged failure by the FtT to consider matters of character and conduct, counsel submitted that while the FtT had considered an article 8 case in respect of the petitioner, it had omitted an essential step in process, namely providing the petitioner with an opportunity to advance reasons why his presence in the UK was not undesirable, standing his otherwise unblemished history of residence. In support of this submission, counsel referred to *Balajigari, supra*, at paragraphs 38, 39, 130 and 131, submitting that the decision of the FtT did not demonstrate any consideration of such an exercise of discretion.

[7] I should add for completeness that counsel for the petitioner made a submission in respect of ground two of the grounds placed before the Upper Tribunal which dealt with what was said to be the failure of the FtT to have regard to the business bank account, noting that the Upper Tribunal in giving its reasons for refusal of permission had recorded in summary the terms of ground two but made no ruling on it. I did not consider this to be a

matter of significance, taking the view that consideration of ground two had been subsumed into the Upper Tribunal's consideration of ground one.

Submissions for the respondent

[8] Inviting the court to dismiss the petition and to refuse the remedy of reduction sought, counsel for the respondent submitted that the appropriate fact finding body in the petitioner's case was the FtT, and that the court ultimately required to consider that tribunal's fact finding decision, albeit through the lens of the challenged decision of the Upper Tribunal refusing permission to appeal. The petitioner had been provided with an opportunity to explain his position to the FtT. His explanation was deemed by that tribunal to be insufficient, and the FtT was accordingly entitled to make a finding of dishonesty. The Upper Tribunal was correct in holding that no error should be imputed to the determination of the FtT.

[9] While counsel accepted that the forensic accountancy report from Chadwick-Thompson on the face of it provided an explanation for certain discrepancies, he reminded the court that this document was not of course before the FtT, and submitted that that tribunal could not be faulted therefore for not taking it into account.

[10] In the normal run of earnings discrepancy cases, under reference to *Oji v Secretary of State for the Home Department* 2019 SLT 233, at paragraphs 25 and 27, per Lord Tyre, counsel submitted that the first matter to be addressed was the objective one of whether a discrepancy existed, and that thereafter the second matter duly arose, namely whether that discrepancy was dishonest. On the issue of honesty, the lack of an explanation by an applicant would be something which any decision maker would wish reasonably to take account of. Counsel noted that the decision in *Balajigari, supra*, dealt with decisions which

were subject to a rationality challenge. Counsel accepted that, nevertheless, even if his analysis, in terms of which the relevant dicta on earnings discrepancy matters in *Balajigari* were obiter, the dicta of the court on this point should be regarded on any view as persuasive. Counsel submitted that the proper approach was to consider whether there was a discrepancy and thereafter whether that discrepancy, if any, was dishonest, accepting that exceptional cases could arise justifying a departure from that approach and involving an article 8 analysis: *Balajigari* at paragraphs 39, 92 and 104 to 106. In the event that a discrepancy was found to exist, and only in that event, counsel submitted that there were six elements in the guidance applicable arising from *Balajigari*, namely: (i) the FtT requires to consider dishonesty for itself; (ii) in doing so, and without reversing the burden of proof, the lack of explanation for dishonesty from an applicant will be significant; (iii) the FtT required to act with procedural fairness, which will involve giving an applicant the opportunity to call witnesses; (iv) it would be unlikely, where a discrepancy exists, that the mere assertion of a mistake would suffice; and, (v) where dishonesty is found, that will in general justify refusal of an application, although (vi) there may be exceptional reasons why this may not be the case.

[11] Counsel proceeded to address the primary point raised concerning the distinction between the tax year and the accounting year for the petitioner's business, noting that on any view a discrepancy appeared on the face of the figures. He accepted that this could be explicable, perfectly innocently, but that there nevertheless was a discrepancy and that accordingly it was not surprising that the respondent had sought an explanation before reaching any conclusion on the matter. The FtT had noted a questionnaire and the terms of an interview with the petitioner, who had indicated therein that he wished to make no changes to the figures for the tax years in question. On the facts, an explanation was called

for, counsel submitted, and, the relevant question having been asked, it had been answered by the petitioner and nothing had been raised by way of explanation. In exercising its fact finding function, the FtT had proceeded then to consider whether the discrepancy was dishonest. While the forensic accountancy report relied on by the petitioner provided more information on what was happening with the petitioner's business, it would be wrong to view matters through the prism of that report in attempting to assess what the FtT should have made of the material before it. Insofar as this accountancy input was an exercise of forensic accountancy, it was a step too far to hold that the FtT had erred in law by not engaging in an exercise of forensic accountancy itself. It was surprising, surely, counsel submitted that the catastrophic collapse of the petitioner's business after June 2013 had not been mentioned by him at interview, for example. The FtT had been correct to state at paragraph 22 of its decision letter of 25 January 2018 that little or no clear evidence on behalf of the petitioner had been placed before it to support the claim that the petitioner's income had "criss-crossed" the two tax years in question. The finding at paragraph 24 that the petitioner had misled the respondent in order to inflate his earnings as part of the requirement to score points arose at the conclusion of an exercise undertaken by the FtT in terms of which it had found a discrepancy, sought an explanation from the petitioner at each stage of the process, and then duly found in fact that no satisfactory explanation had been given.

[12] Counsel submitted that in the course of this exercise no reversal of onus was in terms engaged in by the FtT. Absent an explanation, the inference of deception had reasonably been drawn on the whole facts before the FtT and no error of law had been made out on its part, bearing in mind that the forensic accountancy report was not before the FtT. On the question of onus, counsel accepted, as set out above, that the Upper Tribunal had fallen into

error, but contended nevertheless that this error had not materially affected its disposal of the petitioner's case. Reading the decision letter of the FtT as a whole, it was plain that the determination was not made on the basis that the onus was on the petitioner.

[13] Referring again to *Balajigari, supra*, per Underhill LJ at paragraph 92, counsel submitted that in the petitioner's case, article 8 being engaged, where the exercise described in paragraph 92 of *Balajigari* required to be subject to an article 8 assessment, it was of note that the FtT in the petitioner's case had indeed undertaken such an assessment, as was evident on the face of paragraphs 25 and 26 of its decision letter.

[14] In conclusion, counsel for the respondent submitted that the FtT decision could not be impugned and that no material arguable error had arisen for consideration by the Upper Tribunal. Reduction should therefore be refused and the petition dismissed. In passing, counsel finally noted that the forensic accountancy report was in effect new evidence, and that this document accordingly could potentially be the subject of a fresh claim in terms of Immigration Rule 353, which would allow matters to proceed properly with due consideration being given to that report, albeit from the last solid footing in this case established in the decision of the FtT.

Discussion and determination

[15] The forensic accountancy report from Chadwick-Thompson did not exist at the time that the FtT made its determination on 25 January 2018. It was instructed after that determination and prepared in March 2018. The FtT cannot be faulted for not considering matters arising in that report. The Upper Tribunal, in its consideration of the petitioner's application for permission to appeal, however, did have the Chadwick-Thompson report before it in the process leading to its own determination to refuse permission on 15 May

2018. On my reading of the reasons provided by the Upper Tribunal in support of that refusal, there appears to be no engagement on the part of the Upper Tribunal whatsoever with the terms and import of that forensic report insofar as it appeared to reconcile the figures referred to in the business accountancy period and relevant tax years. I have reached the view that this can reasonably be characterised as an arguably material omission on the part of the Upper Tribunal in its consideration of the petitioner's case. It further appears to me on the face of the material which has been summarised as being available to the FtT, that the nuts and bolts of the financial position of the petitioner's business were in terms available to the FtT.

[16] I have considerable sympathy with the view expressed at paragraph 22 of the FtT decision letter to the effect that the available documents were of limited assistance to it without further explanation. Nevertheless, in holding there to be a discrepancy in looking at the figures brought out by comparison of the business year period and the relevant tax year periods and in thereafter drawing an inference of dishonesty, the FtT can be said arguably to have erred. On the raw financial material before the FtT, there was, we now know due to the terms of the forensic accountancy report, no material discrepancy at all, and of course only in the event of a valid finding of discrepancy can one proceed to find, by way of inference, any dishonesty established. Perhaps more fundamentally, the FtT as a specialist tribunal ought to have been able to grasp the relatively straightforward distinction between the period of a business accountancy year and the tax year, and in turn to appreciate the potential import thereof in this case. That does not appear, on the face of the material considered before this court, to have been done by the FtT, and, a fortiori, standing the availability to it of the said forensic accountancy report it certainly has not been a matter apparently even engaged in, let alone grappled with, by the Upper Tribunal.

[17] Counsel for the respondent very properly accepted that the FtT and the Upper Tribunal had erred in law on the matter of onus, but contended that the outcome of the petitioner's application would inevitably have been the same. Standing the view which I have expressed above concerning the erroneous approaches of the FtT and the Upper Tribunal in respect of the establishment of a discrepancy in and of itself, perhaps the issue of onus is now an otiose one. Nevertheless, while it is correct that the question of onus may have been neither here nor there in the mind of the decision maker at the FtT, the error of law embarked upon was on any view a blatant error; that said, perhaps the more important point is that this matter is an unknown factor in the determination exercise, and, for my part, I prefer to conclude that it cannot be said with confidence that the disposal would inevitably have been the same had a proper approach to onus been observed in this case.

[18] I accordingly in these circumstances hold that grounds one and three, as advanced before the Upper Tribunal in respect of the petitioner's application for permission to appeal, must be considered to be at least arguable grounds in respect of error of law. Having reached that view, the remedy of reduction consequently follows and I propose to grant that relief to the petitioner in the interlocutor accompanying this decision. I must add, however, that I cannot so view the position on ground four, which was maintained by counsel for the petitioner at the substantive hearing. Documents referred to by counsel for the petitioner within the papers made clear that it was contended on behalf of the petitioner in a letter from his solicitors dated 7 November 2016 to the respondent that refusal of his application would be in breach of his article 8 rights. The FtT at paragraphs 25 and 26 of its decision letter has reached reasonable conclusions in respect of that article 8 claim, in the whole circumstances. Having said that, standing the view which I have taken of the other grounds, whereby I have concluded that the respondent has arguably wrongly refused the

petitioner's claim, I am of the view on reflection that this must have an effect on the article 8 case, in the light of the dicta of the Court of Appeal in *TZ (Pakistan) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 at paragraph 34. In these circumstances, therefore, standing the decisions which I have made in respect of the other grounds, the fourth ground also ought to remain at least at large as an arguable ground before the Upper Tribunal.

[19] Finally, while I appreciated the candour of counsel for the respondent in submitting that an alternative route for the petitioner in this case was to make a fresh claim in terms of Immigration Rule 353, in view of the agreed fact that the Chadwick-Thompson forensic accountancy letter dated March 2018, was before the Upper Tribunal as it reached its decision in May 2018, although it was not of course before the FtT, it cannot be said to be new evidence in the particular context of a challenge to the refusal of the petitioner's application for permission by the Upper Tribunal. In any event, in the light of the findings which I have already made, the petitioner's application for relief before this court must succeed on the basis of the arguable errors of law which have been identified.

Disposal

[20] For these reasons I sustain the plea-in-law for the petitioner, repel pleas-in-law two and three for the respondent, and grant decree of reduction of the decision of the Upper Tribunal dated 15 May 2018 in respect of the petitioner's application for permission to appeal. I propose meantime to reserve all questions of expenses.