



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/01341/2019  
HU/02639/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14<sup>th</sup> August 2019**

**Decision & Reasons Promulgated  
On 3<sup>rd</sup> September 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ROBERTS**

**Between**

**MOHAMED [A] (FIRST APPELLANT)  
FATHIMA [A] (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr B Bedford of Counsel

For the Respondent: Mr C Avery, Senior Presenting Officer

**DECISION AND REASONS**

1. These are the linked appeals against the decision of First-tier Tribunal Judge Pickup promulgated on 1<sup>st</sup> April 2019 in which the respective appeals of the Appellants made on human rights grounds were dismissed.
2. The Appellants are citizens of Sri Lanka. They are husband and wife. The first Appellant was born on 12<sup>th</sup> April 1986; the second Appellant on 26<sup>th</sup> September 1992.

3. It is accepted that the appeal of the second Appellant stands or falls with that of her husband, in that it has always been the case that her entry to the UK was as his dependant.
4. The Appellants have a daughter born in the UK in 2015. So far as their daughter is concerned she is not strictly speaking a party to the proceedings but necessarily, her position falls to be considered as linked to those of her parents. For ease of reference, throughout this decision, I shall hereafter refer to the first Appellant as “the Appellant”.
5. For the purposes of this decision, it is unnecessary to detail the Appellant’s previous immigration history other than to confirm the following:
  - The Appellant arrived in the UK on 17th September 2007 in possession of a valid student visa
  - In October 2010 he made an in time application for leave to remain as a Tier 1 post study migrant granted until February 2013 (“the 2010 application”)
  - On 1<sup>st</sup> March 2016, the Appellant made an in time application for leave to remain as a Tier 1 (General) Migrant
  - On 31<sup>st</sup> October 2017 he varied the application to one seeking indefinite leave to remain on the basis of ten years’ long residence under paragraph 276B of the Immigration Rules.
6. This application was refused by the Respondent for reasons set out in a “reasons for refusal” letter (RFRL) dated 10<sup>th</sup> January 2019. The Respondent did not dispute the fact of the Appellant’s continuous lawful residence in the United Kingdom for a period of ten years, but refused the application with particular reference to paragraph 322(5) of the Immigration Rules. Paragraph 322(5) was invoked with reference to matters revealed during the course of an investigation and enquiry showing that the Appellant’s tax returns to HMRC did not correlate with the levels of income declared in support of his previous immigration application made in October 2010.

### **First-tier Tribunal Hearing**

7. The Appellant appealed the Respondent’s refusal of his application to the IAC. He claimed that the Respondent’s decision contravened his Article 8 ECHR rights. The appeal came to be considered by First-tier Tribunal Judge Pickup on 27<sup>th</sup> March 2019. In a full and well-constructed decision, the judge noted at [8] the issue before him:

“This is one of a number of cases in which the respondent has identified a discrepancy between income declared to HMRC and the income relied on in an earlier Leave to Remain application. The respondent is not able to say whether the HMRC declaration was a fraudulent under-declaration to avoid incurring a tax liability or whether in the alternative the income declared in the immigration application was inflated. However it is alleged that one way or the

other [the appellant] must have been dishonest. The appellants' case is that he was negligent and not dishonest, and that the fault lay with his accountant."

8. The judge then noted at [11] and [12] that there is a young child aged 3 years born to the Appellants. He considered the best interests of the child as a primary consideration and noted, "it is obvious that those best interests are to remain with both parents whether in the UK or Sri Lanka".
9. At [15] the judge set out and noted the large amount of documentary evidence before him which included the Appellant's bundle (183 pages) and a copy of a recent JR decision of **R (on the application of Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384**, which deals with the HMRC discrepancy issue.
10. Having heard evidence from the Appellant who was the sole witness, the judge made detailed findings on the evidence before him including findings relating to the discrepancies which form the basis of the Respondent's case. The judge noted in particular that the Appellant was interviewed by the Respondent on 1<sup>st</sup> December 2016 and asked about the income declared in the 2010 application (Tier 1 application). The Respondent noted that his responses were vague and that, "he said he didn't have much knowledge of tax matters and his accountant couldn't make the proper account, so he had done amendments" [21].
11. The judge then over several lengthy paragraphs analysed the documents submitted by the Appellant and referred to the Appellant's oral evidence. At [29] the judge made a finding that the Appellant was "a poor witness in his own cause." The judge gave detailed reasons why the Appellant's credibility was seriously undermined, not least because the Appellant claimed for the first time that if removed to Sri Lanka his and his wife's lives would become difficult and they would face bad treatment from their families. He was asked to explain what he meant by this and he said that he had married his cousin and even though his family were convinced enough to support and attend the marriage celebration there are still problems. The Appellant was challenged further on this but resiled from an assertion that his wife would be killed, to saying she would only be treated badly in that she would not get any help. Since this was the first time that such a risk had been mentioned, the judge drew the conclusion that the Appellant was someone who was prepared to exaggerate the facts only for him having to backtrack when put on the spot.
12. Taking into account all the evidence before him, the judge made the following clear finding at [37];

"Taking all the evidence into account, I find that either the income declared in his immigration application was a dishonest exaggeration or the HMRC tax return was an under-declaration. It is not necessary for the tribunal to decide between the two and indeed it might even be something of both. However, taking all matters into account I am satisfied for the reasons advanced above that there is a strong

inference of dishonesty that has been established on cogent and clear grounds, including that detailed in the refusal decision, and which has not been displaced by the unsatisfactory, incomplete, and ultimately incredible evidence and assertions made by or on behalf of [the appellant]. This is not to put the burden on the appellant and I accept and have proceeded on the basis that the legal burden remains on the respondent throughout. Nevertheless, taken as a whole I am satisfied on clear and cogent evidence and after taking account of everything urged on me by the appellant and Ms Hashmi's written and oral submissions that there has been deceit or dishonesty on the part of the appellant and that it was not mere carelessness or negligence as has been claimed."

13. The judge having made that finding, then went on to consider as he was obliged to do, the Appellant's family and private life under the Immigration Rules. He came to the conclusion that neither the Appellant nor his wife could meet the requirements of the Immigration Rules in relation to private or family life. The judge noted the best interests of the Appellant's child, considered Article 8 through the prism of the Immigration Rules and then looked at Article 8 outside the Rules. Having taken into account all the evidence before him, the judge dismissed the appeals.

### **Onward Appeal**

14. The Appellant sought permission to appeal the FtT's decision. Permission was initially refused by the First-tier Tribunal but granted on a renewed application by the Upper Tribunal. It is to be noted that after the promulgation of the FtT's decision, the Court of Appeal handed down the case of **Balajigari [2019] EWCA Civ 673** on 16<sup>th</sup> April 2019.
15. The grounds seeking permission are lengthy and took issue over several points. The grant of permission is also lengthy and in order to give context to the proceedings the relevant parts of the grant of permission are reproduced here:
  - "3. The grounds of appeal contend, in summary, as follows. Firstly, that the wrong standard of proof was applied by the First-tier Tribunal as the burden of proof was said to be on the appellant when as deception was contended the burden was on the respondent. Secondly it is argued that the decision was not in accordance with Balajigari v SSHD [2019] EWCA Civ 673 as a discrepancy between declaration of earnings between those declared to HMRC and those declared to the Home Office on raises a justifiable suspicion of dishonesty and should not lead to a conclusion of dishonesty. Further it was necessary for the Secretary of State to be satisfied of this on the balance of probabilities but bearing in mind the very serious nature of the allegation and consequences of such an allegation. Further the process of consideration must look not only for reliable evidence of reprehensible conduct but must also consider positive features of an applicant's character and issues such as the welfare of any minor children.

4. There is no arguable error with respect to the burden of proof as at paragraph 32 of the decision the First-tier Tribunal clearly sets out that the burden of showing that the appellant is undesirable relying on paragraph 322(5) of the Immigration Rules is on the respondent, and it is also appreciated that the consequences of such an allegation are serious at paragraph 34 of the decision. It is also clear that the First-tier Tribunal did appreciate that the discrepancy was only a starting point and that there needed to be consideration as to whether the explanation displaced any inference of deceit, see paragraph 33 of the decision.
5. It is arguable however that positive features of the appellant's character have not been considered when coming to the conclusion that paragraph 322(5) excludes the first appellant from qualifying under the Immigration Rules for indefinite leave to remain, in accordance with paragraph 34 of Balajigari, and so permission is granted on this basis."

Thus the matter comes before me to determine whether the decision of the First-tier Tribunal contains such error of law that it requires to be set aside and remade.

### **Error of Law Hearing**

16. Before me Mr Bedford appeared for the Appellants and Mr Avery for the Respondent. Mr Bedford's submissions amounted to saying that the Respondent had not properly observed due process when considering the Appellant's case. He referred to **Balajigari** (paragraphs 33 and 34) and relying on those paragraphs said that firstly if the Respondent found on the evidence available there was a real suspicion of dishonesty, she should have provided the Appellant an opportunity to give an innocent explanation before making her decision. Secondly even if there was a definitive finding of dishonesty it could not necessarily be concluded that this conduct rendered a person's presence undesirable under paragraph 322(5) because there needed to be a second stage consideration of all factors concerning the Appellant in the round (including positive features of their character). Mr Bedford submitted that the Respondent had failed to carry out this second stage and this rendered the decision flawed and thus it could not stand.
17. Mr Avery responded saying that the judge had properly directed himself on the application of the law as it stood. Equally the judge had set out the issues that were before him and invited me to have regard to [32] of the decision. He submitted that the judge's findings were properly reasoned by reference to all the evidence before him and were findings which were therefore open to the judge. The grounds are simply an attempt to reargue the case and amount to no more than a disagreement with the judge's findings. Consequently there is no error in the decision and the decision should stand.

### **Consideration**

18. Having heard from the representatives, I am satisfied that the decision of the First-tier Tribunal contains no material error requiring it to be set aside. Permission in this appeal was granted on the basis that it was arguable that, contrary to paragraph 34 of **Balajigari**, positive features of the appellant's character had not been considered when coming to the conclusion that paragraph 322(5) excludes the first appellant from qualifying under the Immigration Rules for indefinite leave to remain. Mr Bedford pursued this argument, saying that the decision was erroneous because neither the Respondent nor the judge had followed the step by step guidance set out in **Balajigari**. He stated that it could not necessarily be concluded that, even if dishonesty were to be established on the part of the Appellant, it would necessarily be concluded that his presence in the UK was undesirable. Matters needed to be looked at in the round, taking into account any positive aspects of the Appellant's character.
19. Mr Bedford added a further strand to his argument to the effect that, if the Respondent had suspected dishonesty, then the Appellant should have been given the opportunity to provide an innocent explanation. He had not been given that opportunity.
20. I disagree with Mr Bedford's analysis. A fair reading of the decision shows that the judge has carefully picked his way through the evidence to ensure that the Appellant has had a full and fair hearing and thus the opportunity to put forward evidence that would show his character in a positive light and to provide explanations for his actions in relation to his tax/immigration affairs. I can find no examples within the evidence of positive features of significance in the Appellant's character of which the FtTJ has failed to take account. Indeed in contrast, it does not help the Appellant's case that the FtTJ commented on a preparedness on his part to exaggerate the facts only to have to backtrack when put on the spot, thus tending to undermine his overall credibility [29].
21. It is clear from a reading of [36] that the FtTJ spent a great deal of care and time in setting out the Appellant's explanation for the tax discrepancy. He considered all the explanations proffered by the Appellant, including blaming his accountant, being busy with a wedding, and having little knowledge of tax matters. The judge did not accept those explanations. He also noted that the net income from business profits over comparable accounting and tax periods not only never matched but was vastly under-declared. Moreover it took some four years for a correction to be made in relation to the underpaid tax, and the timing of the correction virtually coincided with preparation to make a further Leave to Remain application. The FtTJ found that the Appellant's proffered explanations were not plausible. This was a finding that he was entitled to make on the evidence before him.
22. The FtTJ set out at [34] 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. With this in mind the judge went on to conduct an Article 8 balancing exercise.

23. The judge made several findings in the round in conducting the Article 8 exercise. He reminded himself that the Appellant had no extant leave and that his leave in the UK had always been on a temporary basis. He took the Appellant's health condition into account but balanced against that the fact that no evidence had been put forward to show that the Appellant could not access medical treatment in Sri Lanka [40].
24. The judge was clearly aware that the Appellant had now been in the UK for ten years and would have developed a private life, but against that he found that the Appellant was either dishonest in either his dealings with the tax Authorities of this country or alternatively had been deceitful in his dealings with the SSHD by overinflating his income in order to gain further leave.
25. The judge went on to look at Article 8 outside the Rules but found nothing was put forward of an exceptional nature which would prevent the Appellants from continuing to enjoy their family life outside the UK. He discounted the claim of threats of family trouble put forward by the Appellant as a discredited exaggeration. He took into account the best interests of the Appellants' 3-year-old child who had been born in the UK but found that her best interests would be to remain with her parents [42].
26. In short I find that the judge has considered with care and in great detail all the evidence that was placed before him. He has made findings which were based on the evidence and which were open to him to make. His conclusions that the Respondent's decision to refuse the Appellant's application for leave to remain is not a disproportionate interference with their right to family/private life. It follows therefore that these appeals are dismissed and the decision of the First-tier Tribunal promulgated on 1<sup>st</sup> April 2019 stands.

### **Notice of Decision**

These appeals are dismissed. The decision of the First-tier Tribunal promulgated on 1<sup>st</sup> April 2019 discloses no error of law. The decision therefore stands.

No anonymity direction is made. I was not asked to make one.

Signed  
August 2019

**C E Roberts**

Date 30

Deputy Upper Tribunal Judge Roberts

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeals and therefore there can be no fee award.

Signed  
August 2019

**C E Roberts**

Date 30

Deputy Upper Tribunal Judge Roberts