



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02719/2019  
HU/04133/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1 October 2019

Decision & Reasons Promulgated  
On 11 October 2019

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SOHELBHAI SIRAJBHAI VOHRA  
MRS SOHANABEN SOHELBHAI VOHRA  
(ANONYMITY DIRECTION NOT MADE)

Respondents

**Representation:**

For the Appellant/Secretary of State: Mr T Melvin, Home Office Presenting Officer

For the Respondents: Mr J Gajjar, Counsel, instructed by Burnley Legal Solicitors

**DECISION AND REASONS**

1. The Respondents are citizens of India. They are husband and wife. Their respective dates of birth are 23 December 1981 and 9 April 1987. I will refer to the Respondents as the Appellants in this decision as they were before the First-tier Tribunal ("the FTT"). I will refer to Mr Sohelbhai Sirajbhai Vohra as the Appellant.

2. The Appellants made an application for indefinite leave to remain under the immigration Rules (“the Rules”) relating to long residence and Article 8. The Secretary of State refused the application on 29 January 2019. The Secretary of State accepted that the Appellant had been here continuously for ten years and therefore satisfied paragraph 276B(i)(a) of the Rules. However, the application was refused under paragraph 276B(ii)(c) and (iii) with reference to paragraph 322(5) of the Rules because of discrepancies in income declared by the Appellant to HMRC and to the Home Office when making an application on 8 October 2015 for limited leave to remain as a Tier 1 Migrant. The Appellant’s income from employment, as a machine operator, was not sufficient to meet the requirements of the Rules. He claimed income from self-employment. The claimed additional income from self-employment which he declared to the Secretary of State is discrepant with the amount he declared to HMRC during the same period.
3. The Appellant appealed against the decision of the Secretary of State. His appeal was allowed by First-tier Tribunal Judge Housego. Judge Housego accepted that the Appellant gave an innocent explanation for the discrepancy. The Secretary of State was granted permission by First-tier Tribunal Judge P J M Hollingworth on 5 August 2019. Judge Hollingworth’s decision is succinct. It reads as follows: “It is arguable that the judge fell into error at paragraph 49 of the decision.” Thus, the matter came before me to decide whether the judge made an error of law.

*The decision of the FTT*

4. The Appellant gave evidence before the First-tier Tribunal. The judge’s findings are at paragraphs 37 to 55 of the decision.
  - “49. While HMRC may have many reasons why it simply accepts a revised tax return and extra tax, it is relevant to the question of dishonesty that they have not sought any penalty or even interest. That tends to show that they did not regard such under declaration as dishonest. That was the case for the 1<sup>st</sup> appellant.
  50. There is suspicion about the level of income declared for the immigration applications, and there are difficulties with the innocent explanation offered (the business), for the following reasons:
    - 50.1. The starting point is the inherent unlikelihood of people paying twice for bookkeeping services. It is possible that people might pay the appellant to get their paperwork in order for an accountant, but it is not likely: accountants have junior staff at lower rates than those qualified whose job is to do just that. As it is possible it is not on its own reason to find the account incredible.
    - 50.2. The appellant was not able to provide documents showing what he did which he should have kept, if they existed. Everyone keeps documents on computers and there would have been no reason to delete them.
    - 50.3. The adjustments made were made very late, and for the application. The appellant has had not just 1 but 2 accountants who he says have made mistakes, as has he.

- 50.4. There is no evidence about the box room said to have been rented (as an expense to reduce net profit from the earnings figure increased to accommodate this 'rent'), and even a witness statement from the person from whom it was said to have been rented would have been an obvious thing to have provided, but it was not.
- 50.5. The '*reconciliation*' which '*proved*' the error was a single piece of paper (in HA3), not headed paper, with no date and with no author named. It had no supporting paperwork. As I pointed out to Counsel in his submissions it could just as easily have been worked back from the desired answer.
- 50.6. The letter from the accountant asserts that there was a '*transposition error*' but does not say what it was. The letter has plainly been written to order. It refers to 26 missing invoices: but they are not identified nor located, and how it was realised they were missing, and how their value was known is unexplained. They are not correlated to the bank account. This is information given to the accountants by the appellant, so that they might say what he needed them to write, 16 months after the refusal letter was received.
- 50.7. There is nothing from any customer/client. Since the appellant's account is that he acted for friends or people he knew, the absence of anything from anyone who had used his services is significant. It is the central point of the case, as the appellant well knew, and this adversely affects his credibility.
- 50.8. The appellant was evasive when asked why his accountant was not present, but eventually said that he had not asked him to attend. The accountant is in Finchley, and the journey is not problematic. Case law indicates that this is a significant omission with adverse repercussions for credibility.
- 50.9. He provided no copies of profit and loss accounts that he said he had prepared. He could easily have redacted the names and addresses of clients and offered them as examples of what he said he did.
- 50.10. The appellant said that he had bought and resold software to a client, at a cost to him of £3,604, but there was no evidence of that purchase, and nor was the client identified, nor was there any evidence of being paid by that client.
- 50.11. The explanations put forward in the appeal are unconvincing for the reasons given in the refusal letter.
- 50.12. In summary there is only the appellant's word that he did any such work, supported by a letter from accountants that for the most part is recycling what the appellant has told them. The absence of anything tangible about the asserted business makes the account incredible.
51. However and bearing in mind the case law above as to the approach to be taken, I find significant the fact that there is a bank account with Lloyds

Bank in the name of 'Vohra Secretary of State T/A GAD Accounting Services' which is not said to be other than genuine. Money was paid into it in the period 25 September 2014 - 22 May 2015. This totalled £6,300. There were, however, no bank account statements for the period in question (2010 and 2011) and this was not explained.

52. The appellant amended his tax return for 2011/2012 and his tax was recalculated (A1:29, dated 26 February 2018). The profit from self employment was said to be £10,046, increased from £2,046 and his PAYE pay £34,333, making a total of £44,379 instead of £36,379. For his Tier 1 Highly skilled migrant visa he would have needed either £35,000 or £40,000 a year. The earnings of the appellant are not very far away in any year, and if £35,000 only in one year was this not enough, and by a very small amount. The figure was amended to one that is above the level required, so incurring a tax liability (and I take account of the possibility that this could perhaps be so as not to be too obviously just the right amount).

#### Final conclusion

53. The 1<sup>st</sup> appellant was a machine operator with McVities for 7 years, sometimes earning less than the amount required to obtain an extension to his visa. Having previously studied accountancy (at a fairly low level), he has done some work in a small way for others to augment his income to the necessary level.
54. The alternate possibility is that there has been income concealed and tax evaded. HMRC has not considered that he has done other than make a mistake, and levied neither interest nor penalty. The amount to which the returns have been amended is considerably more than immigration advantage would require, so needless tax liability if deception. There is little reason to inflate income much above the required level when the effect of doing so is additional tax, which on non existent income is a real expense. The Home Office submissions are primary that this is non existent income not income on which tax has been evaded, and there is not sufficient evidence so to conclude in this case."

#### *The ground of appeal*

5. The ground of appeal is very narrow. It challenges the specific finding at paragraph 49 and argues that the judge failed to give adequate reasons for findings on a material matter.
6. The Rule 24 response from the Appellant primarily relies on the case of *Balajigari* [2019] EWCA Civ 673 to argue that HMRC has not been silent but made an explicit assessment that the Appellant's actions constituted a "failure to take reasonable care" and this was material evidence. In any event, the finding at paragraph 49 was not dispositive of the appeal.

#### *Submissions*

7. Mr Melvin prepared a skeleton argument in which it is asserted that the failure of HMRC to impose penalties is of no relevance to the issue of dishonesty. He drew my

attention to concerns that the judge had with the Appellant's evidence generally within the decision.

8. In submissions both parties relied on the case of *Balajigari* and my attention was drawn to the following paragraphs:

"37. We should make three other points about dishonesty in the context of an earnings discrepancy case:

- (1) We were referred to the recent decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC, [2018] AC 391, considering the correct approach to what constitutes dishonesty. The principles summarised by Lord Hughes at para. 74 of his judgment in that case will apply in this context, but we cannot think that in practice either the Secretary of State or a tribunal will need specifically to refer to them.
- (2) Mr Biggs submitted that even dishonest conduct may not be sufficiently reprehensible to justify use of paragraph 322 (5) in all cases and that it would depend on the circumstances, the guiding principle being that the threshold for sufficiently reprehensible conduct is very high. We do not find it helpful to generalise about the height of the threshold, though it is obvious that the rule is only concerned with conduct of a serious character. We would accept that as a matter of principle dishonest conduct will not always and in every case reach a sufficient level of seriousness, but in the context of an earnings discrepancy case it is very hard to see how the deliberate and dishonest submission of false earnings figures, whether to HMRC or to the Home Office, would not do so.
- (3) Mr Biggs submitted that dishonest conduct would only be sufficiently reprehensible if it were criminal. We do not accept that that is so as a matter of principle, although it is not easy to think of examples of dishonest conduct that reached the necessary threshold which would not also be criminal. The point is, however, academic in the context of earnings discrepancy cases since the dishonest submission of false earnings figures to either HMRC or the Home Office would be an offence.<sup>5</sup>

Note 5: We were not referred to any particular offences concerning the dishonest making of false tax returns, but such cases would appear to fall within section 2 of the Fraud Act 2006 in the absence of any more specific provision. Section 24A of the Immigration Act 1971 makes it an offence to use deception in order to seek to obtain leave to remain.

66. In his most bold submission Mr Saini submitted that, when paragraph 1 of Schedule 24 to the Finance Act 2007 provides that, in the circumstances to which it applies, a penalty 'is payable', that means that there is always an obligation to pay a penalty and therefore one would always be imposed. On that basis, he submitted that if the Secretary of State made enquiries of HMRC and discovered that a penalty had not been imposed in a given case that would mean that HMRC had believed that a penalty was not payable and thus that it had believed that the error was innocent: otherwise a penalty would have been imposed.

67. We reject that submission. The statutory language ('is payable') simply means that a *liability* to pay a penalty arises if the statutory criteria are satisfied. It does not mean there is a duty on HMRC to impose a penalty in every case where it might in principle be imposed. We are conscious that we did not hear detailed submissions on this issue, and in particular that we have not heard anything that might be said on behalf of HMRC. We shall therefore say no more about the issue here.
68. At one stage, at least in his written submissions, Mr Saini appeared to suggest that it is legally impermissible for the Secretary of State to take a different view from HMRC in relation to the same matter. He referred to this in his skeleton argument as the 'dichotomous views' of HMRC as distinct from the Home Office. We did not understand him to press that submission. In any event, in our judgment, the submission is a bad one. The Secretary of State has the legal power to decide the questions which arise under paragraph 322 (5) for himself and is certainly not bound to take the same view as HMRC. The two public authorities are performing different functions and have different statutory powers.
69. Returning to Mr Saini's central submission, that the *Tameside* duty applies in this context to require the Secretary of State to make enquiries of HMRC about how they have dealt with relevant errors, we do not accept that submission either.
- ...
72. The Secretary of State would certainly have power to make enquiries of HMRC but he had no obligation to exercise that power. It is impossible to say that no reasonable Secretary of State could have done anything other than to make the enquiries which Mr Saini submits had to be made of HMRC.
73. We bear in mind that there may be many reasons why HMRC does or does not investigate a particular tax return. HMRC may quite properly take the view that, if a tax return has been amended, it is content to collect the tax which is due and which the applicant taxpayer accepts is due. It may or may not wish to expend the resources which would be required to enquire into a past tax return to see whether it was dishonestly or carelessly made and, if necessary, defend an appeal. In this regard we note the obvious good sense of what was said by Lane J in *Kayani v Secretary of State for the Home Department* (JR/9552/2017, judgment of 10 May 2018), at para. 27.
74. We further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would be information which was within an applicant's own knowledge and they could draw this to the attention of the Secretary of State.
- ...
106. Each case will depend on its own facts, but, where an earnings discrepancy is relied on (and without changing the burden of proof, which remains on the Secretary of State so far as an allegation that an applicant was dishonest

is concerned), it is unlikely that a tribunal will be prepared to accept a mere assertion from an applicant or their accountant that the discrepancy on was simply 'a mistake' without a full and particularised explanation of what the mistake was and how it arose."

### *Conclusions*

9. I communicated my decision and reasons to the parties at the hearing. The ground of appeal is characterised as a reasons challenge; however, it focuses on para 49 only. It may have been better characterised as the judge having considered immaterial matters. It is a narrow challenge seeking to argue that the actions of HMRC are not relevant because tax penalties are geared towards the level of tax due and not dishonesty. It is argued that in any event, there was no evidence from the Appellant to make findings on the issue. However, I take into account that there was an assessment from HMRC at page 27 of the Appellant's bundle and a proper reading of *Balajigari* indicates that what weight to attach to this was a matter for the judge. What is called for is a fact sensitive assessment. *Balajigari* is not authority that this evidence was immaterial when assessing the evidence.
10. There are clear reasons given why the judge accepted the Appellant's account when the decision is considered. Moreover, the finding at paragraph 49 cannot be characterised as determinative of the outcome of this appeal. There are other reasons why the judge accepted the Appellant's evidence. The judge was entitled to take into account the Lloyds bank account (showing a credit), that the amount declared in the amended tax return giving rise to a tax liability was over and above the earnings that the Appellant had to show to meet the Rules, and the credibility of the work done in the context of the Appellant's studies. Furthermore, the grounds ignore that the judge had the benefit of hearing oral evidence from the Appellant. There are no discrete challenges to other findings made by the judge. Whilst there were clear findings made by the judge which he accepted are capable of undermining the Appellant's credibility, the overall conclusion reached is unarguably rational. Rationality is not, in any event, pleaded in the grounds. Mr Melvin said at the start of the hearing that he did not seek to step outside the grounds but, in oral submissions he did go beyond what is in the grounds and the grant of permission, seeking to argue that the conclusion was irrational. However, this argument was not available to the Secretary of State.
11. There is no properly identified error of law that is capable of making a difference to the outcome in this case. For all the above reasons, the decision of the FTT is maintained.

### **Notice of Decision**

The Secretary of States' application is dismissed. The decision of the judge to allow the appeal is maintained.

No anonymity direction is made.

Signed *Joanna McWilliam*

Date 7 October 2019

Upper Tribunal Judge McWilliam