



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06168/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 9 May 2019

Decision & Reasons Promulgated
On 3 June 2019

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATIQR [R]

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer

For the Respondent: Mr B Malik instructed by UK Migration Lawyers Ltd

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Background

2. The appellant is a citizen of Pakistan who was born on 27 November 1981. He first entered the United Kingdom on 21 September 2006 with entry clearance as a student and leave valid until 31 October 2009. Thereafter, his leave was extended on a

number of occasions as a Tier 1 (Post Study) Student and as a Tier 1 (General) Migrant until 5 September 2016.

3. On 2 September 2016, the appellant applied for indefinite leave to remain (ILR) relying on para 276B of the Immigration Rules (HC 395 as amended) on the grounds of ten years continuous lawful residence in the UK.
4. On 5 February 2018, the Secretary of State refused the appellant's claim under para 276B and also under Art 8 ECHR on the basis of his private and family life under Appendix FM and outside the Rules.
5. The sole basis for the Secretary of State's decision in respect of para 276B was that the 'general ground' of refusal in para 322(5) of the Immigration Rules applied, namely that it was undesirable to permit him to continue to remain the UK in the light of his conduct. The basis of that decision was that there were discrepancies in the appellant's claimed income for the tax years 2010/11 and 2012/13 relied upon in his earlier applications for leave and in his disclosed income to the HMRC for those tax years.
6. In relation to his early applications for leave, the Appellant had claimed to have a self-employed income for the tax year 2010/2011 of £37,032 whilst his self-employed income submitted to HMRC for that year was £5,715 - a discrepancy of over £31,000. In relation to the tax year 2012/2013, the self-employed income claimed in his earlier application for leave was £39,171. The figure disclosed to the HMRC for the purposes of his tax liability in that year was £8,742. That was a discrepancy of over £30,000.
7. The appellant had in 2016 sought to rectify the discrepancies with the HMRC and on 26 May 2016 a further assessment was made for the tax year 2012/2013 requesting him to pay tax of £8,123.19. Further, on 17 August 2016, and in respect of his tax liability for the year 2010/2011, a further assessment asking him to pay £9,147.97 was issued by the HMRC.
8. The Secretary of State was satisfied that the appellant had misrepresented his earnings and concluded that the discretionary 'general ground' of refusal under para 322(5) applied. That was the sole basis upon which leave was refused under para 276B on the basis of the appellant's ten years continuous lawful residence in the UK.

The Appeal to the First-tier Tribunal

9. The appellant appealed to the First-tier Tribunal. The appellant submitted a bundle of documents including a detailed witness statement at pages D1-10 of the bundle. The appellant also gave oral evidence and was cross-examined by a Presenting Officer. The essence of the appellant's case was that he had not been dishonest. He had had two sources of income, namely from his business services and travel services. The income from the former exceeded the latter. He claimed that he had employed two separate firms of accountants to deal with his two sets of business affairs. He did so on the basis that he believed that two separate tax returns had to

be submitted. His evidence was that both accountants used the “same Login details for the HMRC portal” which allowed for the provisional details of his self-assessment. The firm of accountants dealing with his business services (J Stanley Riz & Company) provided details of his business services income on the online portal. However, the firm of accountants dealing with his travel services (Mahmood Accountancy) changed the figures to reflect the income derived from his travel services. As a result, only the income from his travel services was declared to the HMRC. He said that it was the income from his business services which was declared to the Secretary of State and hence the discrepancy.

10. The appellant’s case was that he was unaware of the discrepancy until in late 2015, in the course of child proceedings concerned with his now former partner, it was pointed out by her that he had declared the incorrect income. There had been a delay in doing so but that had occurred in 2016.
11. Before the judge, the appellant’s evidence was that he had attempted to obtain supporting documents from his accountants, but the firm of J Stanley Riz & Company (who dealt with his business services income) had closed down and Mahmood Accountancy (who had dealt with his travel services income) had refused to assist him. He said that he had sent texts to the office but had had “no success”.
12. He claimed before the judge that he was not (as required for para 322(5) to apply) dishonest: the discrepancy was simply a mistake which he had corrected.
13. Judge Young-Harry gave her reasons for concluding that the respondent had not established that para 322(5) applied, in particular that the appellant had been dishonest, at paras 16-22 as follows:
 - “16. The appellant claimed, as part of his November 2011 Tier 1 extension application, that he earned £37,032 for the period 2010-2011. The respondent does not challenge this, neither does he suggest that this figure is incorrect. However the appellant declared a substantially lower figure in his HMRC tax return for the same period.
 17. As part of his April 2013 Tier 1 application, the appellant declared an income of £39,171 however he again declared a much lower figure on his tax return. The respondent does not dispute the income as declared in the April 2013 Tier 1 application.
 18. The appellant claims he did not notice the discrepancy until his wife pointed it out recently. He immediately took steps to remedy the issue with HMRC.
 19. The appellant claims the problem arose because he has two income streams, one from business services and the other from travel services. The appellant for some reason thought it would be expedient to have two separate accountants, who in turn thought it would be a good idea to submit two separate tax returns for the same year. This understandably caused great confusion and is the reason for the discrepancy.
 20. The appellant made an unprompted declaration to HMRC, asking them to rectify the figures. The fact it was unprompted, meant the appellant

avoided a penalty and no further action was taken. I find this is to the appellant's credit. I note by notifying HMRC, the appellant would be required to pay more tax; despite this he still made the decision to notified them.

21. I found the appellant's explanation credible and reliable. Although, given the nature of his business one would have expected a higher degree of vigilance, however I accept it was a mistake and it was not directly attributable to the appellant.
 22. I do not find the respondent's case is made out in this regard. I do not find paragraph 322(5) has been correctly applied"
14. The judge went on to find that the remaining requirements of para 276B were met – indeed the contrary was not, it seems, argued before her – and in the light of that allowed the appellant's appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal to the Upper Tribunal essentially on two grounds. First, the judge in reaching her finding that the appellant had not been dishonest had failed to apply the approach set out in the Upper Tribunal's decision in R (Khan) v SSHD (dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC), in particular in considering all the relevant evidence as set out in para (v) of the headnote. Secondly, the judge had been wrong to take into account (at para 20), that the appellant had made an "unprompted declaration to the HMRC" in 2016 rectifying the under-disclosed income and, therefore, liability to tax in the years 2010/11 and 2013/14.
16. On 28 January 2019, the First-tier Tribunal (Judge N Haria) granted the Secretary of State permission to appeal. On 14 April 2019, the appellant filed a rule 24 response seeking to uphold the judge's decision.

Discussion

17. The relevant provision in para 322(5) of the Immigration Rules, which is central to this appeal, sets out a 'general ground' of refusal on a discretionary basis in the following terms:
- "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 para 322(1C)), character or associations or the fact that he represents a threat to national security."
18. The proper interpretation and application of that provision has recently been examined by the Court of Appeal in the case of R (Balajigari and Others) v SSHD [2019] EWCA Civ 673. That case, concerned with a number of judicial review decisions challenges refusals of leave based upon para 322(5), recognises a two-stage approach:

- (i) an assessment of whether the individual's conduct makes a grant of leave "undesirable"; and
 - (ii) if it is, whether discretion should be exercised to refuse leave.
19. The analysis in relation to the first issue is at [33]-[38] and in relation to the second issue is at [39]-[44].
20. As regards the issue of "undesirability", the Court of Appeal accepted the submissions made on behalf of the individuals in that case that there were three limbs relevant to determining that issue. The court said this at [34]:

"There must be: (i) reliable evidence of; (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or his presence in the UK is undesirable (this should include evidence of positive features of their conduct)."
21. It was common ground between the representatives before me that the Court of Appeal's decision in Balajigari did not materially affect the issues that I had to decide. That was because the judge's decision turns upon whether the appellant had been shown to be dishonest. The Court of Appeal had accepted that dishonesty was a "touch-stone" of establishing this ground (see [36]). Consequently, if the judge's decision was legally sound, the appellant succeeded. However, if it was not legally sound and the decision was set aside, then any remaking of the decision would have to take into account the approach in Balajigari in reaching a fresh decision as to whether para 322(5) applied.
22. Consequently, the submissions before me focused on whether the judge had erred in law by failing to apply the approach set out in the UT's decision in Khan. Before I turn to that decision, Khan was considered by the Court of Appeal in Balajigari (see especially [40]-[44]). The UT's decision was, in general, approved by the Court of Appeal with the caveat that at [32] the UT in Khan had mis-stated - by putting the matter too high - when concluding that the Secretary of State was entitled as a "starting point" to infer that an individual had been deceitful or dishonest when a significant difference in disclosed income was discovered. At [42], the Court of Appeal considered that there might be a "danger" in this approach; the correct approach was that the discrepancy might raise a "suspicion" but did not in itself justify the conclusion that the individual was dishonest. The discrepancy called for an explanation and, if an explanation when sought is not forthcoming or is unconvincing, it may be legitimate for the Secretary of State to infer dishonesty. The Secretary of State must: "simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest."
23. Consequently, since the judge found that the appellant was dishonest, the only issue in the appeal before me is whether the judge was lawfully entitled to reach that conclusion. If she was, that is the end of the matter and the appellant has succeeded. However, if she made a material error in reaching that finding, then the decision in

respect of para 322(5) must be remade now in the light of the approach set out in Balajigari.

24. Mr Howells, on behalf of the Secretary of State relied principally on headnote (v) in Khan. That provides as follows:

“(v) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):

- i. Whether the explanation for the error by the accountant is plausible;
- ii. Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;
- iii. Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;
- iv. Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.”

25. Mr Howells submitted that the judge had failed to take into account, in her reasoning at paras 16-22, that there was no supporting documentation from the appellant’s accountants to support his claimed mistake on their part. Mr Howells submitted that, although the appellant said when one firm closed down and the other had refused to co-operate, he had referred to texts but these had not been produced either. Likewise, there was no evidence from his estranged wife to support his claim that she had alerted him to the discrepancy during their child maintenance proceedings in 2015. Mr Howells accepted that the headnote in Khan addressed the approach that should be taken by the Secretary of State but it ought also to apply to how a judge in the First-tier Tribunal should assess an individual’s explanation as to why was not dishonest.

26. Mr Howells did not seek to rely upon the second part of the ground, namely that the judge had been wrong to take into account that HMRC had not imposed a penalty upon him when he submitted his revised income in 2016. Perhaps straying somewhat from that ground, Mr Howells, instead, submitted that what the judge had failed to do was consider the timing of the appellant’s further disclosure to the HMRC which resulted in reassessment in August 2016, shortly before the appellant applied for ILR on 2 September 2016.

27. Mr Malik, who represented the appellant relied upon his rule 24 response. He pointed out that Khan was a judicial review decision giving guidance to the Secretary of State in the context of a decision taken without an oral hearing such as had occurred in this appeal. The judge, unlike the Secretary of State, could take into account the oral evidence and demeanour of the appellant (or any other witnesses) who gave evidence. The judge was entitled to make a holistic assessment and she

had done so. He submitted that the decision in Khan did not lay rigid guidelines. At para 21 the judge had stated that she found “the appellant’s explanation credible and reliable”. Mr Malik submitted that this was tantamount to a finding that the appellant was credible.

28. As regards Mr Howells’ second point, Mr Malik submitted that this was not directly raised in the grounds. The judge had not wrongly taken into account that the HMRC had not imposed a penalty upon the appellant. Rather, the judge had noted that the appellant had made an “unprompted declaration” to HMRC. Mr Malik submitted that consistently with what was said in Khan at [37(vi)(iv)] the judge was entitled to take into account: “Whether, at any stage, the applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.” (my emphasis).
29. Mr Malik submitted that the Secretary of State’s challenge did not establish perversity on behalf of the judge even if the decision might be considered to be generous.
30. I accept Mr Malik’s submission that the approach set out by the UT in Khan, in particular at headnote (v), is not, nor was it intended to be, prescriptive. It sets out common sense guidance as to the factors which a decision maker would likely take into account in assessing whether an individual was dishonest in his dealings with the respondent and HMRC. I do not, however, accept Mr Malik’s submission that that approach is wholly irrelevant in the context of an appeal hearing in which the individual (and indeed others) may give oral evidence. What was said was, of course, in the context of the Secretary of State’s decision making which may not involve any face-to-face contact with the individual, although that is likely to become less so as a result of the Court of Appeal’s decision in Balajigari about the requirements of fairness in cases of this sort.
31. The matter referred to in headnote (v) of Khan remain, in my judgment, equally relevant in the context of an appeal hearing. There, of course, the judge may well have the benefit of oral evidence, and in particular from the appellant giving his explanation and which can be subject to cross-examination. The rigours of that process may well form a significant part of the judge’s assessment of the appellant’s veracity in respect of his claimed lack of dishonesty. It does not, however, exclude the relevance of the absence of, for example, supporting documentation from accountants or others and the behaviour of the individual in respect of correcting discrepancies in particular the timing of any corrective action.
32. Although it is not directly quoted in headnote (v), para [37(v)] of the UT judgment encapsulates the approach as follows:

“Where an issue arises as to whether an error in relation to a tax return has been dishonest or merely careless, the Secretary of State is obliged to consider the evidence pointing in each direction and, in her decision, justify her conclusion by reference to that evidence. In those circumstances, as long as the reasoning is

rational and the evidence has been properly considered, the decision of the Secretary of State cannot be impugned.”

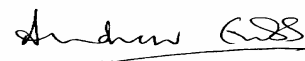
33. In my judgment, the words “Secretary of State” can be substituted by “the Tribunal” and the proposition is equally correct.
34. In my judgment, the judge did fall into error in this appeal. I do not accept Mr Malik’s submission that the judge reached her decision, at least visibly so, on the basis of accepting the credibility and veracity of the appellant during the course of his oral evidence. The judge does not directly quote any of the evidence whether in-chief or by way of cross-examination given by the appellant. All that she says at para 21 is that she found “the appellant’s explanation credible and reliable”. I do not consider that the judge’s reasoning and finding in paras 16-22 obviously turned upon an assessment of the appellant and his oral evidence. Had it done so, that might have been sufficient – at least on a perversity challenge – to sustain her reasoning and finding.
35. I accept Mr Howells’ submission that the judge failed properly to take into account all the relevant matters in assessing the appellant’s veracity and whether the Secretary of State had established that he was dishonest. There is no reference to the absence of any supporting evidence from the appellant’s two firms of accountants. Even if it could be said that the appellant’s evidence would be that he could obtain nothing from them as one had gone out of business and the other had refused to co-operate, there were still the claimed texts in which he had at least sought supporting evidence from his accountants. That evidence was not produced and the judge did not consider its absence in assessing whether the appellant’s innocent explanation stood up. There was also no supporting evidence from his estranged wife whom he claimed had alerted him to the discrepancy in the disclosure of his income to the HMRC.
36. Further, Mr Howells was, in my judgment, right not to pursue an argument that the judge had wrongly taken into account in para 20 that the HMRC had not imposed a penalty. I accept Mr Malik’s submission on this issue but that is not what the judge did in para 20. What she did there was, however, to take into account that he had made an “unprompted declaration to HMRC”. Mr Howells relied on the fact that the judge, in doing so, had failed to take into account the proximity of that exercise with the HMRC to the appellant’s application for ILR in September 2016. Mr Malik, and indeed so did Mr Howells, accepted, that this point did not directly arise out of the parts of the ground concerned with para 20. However, it does arise, in my judgment, from the general point made in Mr Howells’ principal ground that the judge failed properly to apply the approach in Khan. The need to have regard to the timing of any dealings with HMRC – which could of course ‘cut either way’ in any given case – is specifically referred to by the UT at [37(v)] which I set out above. The judge, in effect, only considered one aspect of the appellant’s “unprompted declaration” – and treated it as being in his favour – in para 20 without also taking into account the *timing* of those dealings with HMRC.

37. For these reasons, therefore, I am satisfied that the judge failed properly to grapple with all the relevant evidence in reaching her finding that the Secretary of State had not established that the appellant was dishonest and so para 322(5) did not apply.

Decision and Disposal

38. The First-tier Tribunal's decision to allow the appellant's appeal involved the making of an error of law.
39. The Judge's decision to allow the appeal under Art 8 cannot stand and is set aside.
40. In these circumstances, both representatives agreed that the proper course was to remit the appeal to the First-tier Tribunal in order to remake the Art 8 decision.
41. The judge's decision and findings in respect of para 322(5) cannot stand. However, it was agreed that the following findings of the judge should stand:
- (1) in respect of the best interests of the appellant's child (para 23);
 - (2) that the requirements of para 276ADE are not met (para 24); and
 - (3) that the appellant speaks English and there is no evidence of reliance on public funds (para 26).
42. I also see no reason why the concession, reflected in para 22, that, apart from para 322(5), the appellant meets the requirement of para 276B should not also stand.
43. The appeal is accordingly remitted to the First-tier Tribunal (to a judge other than Judge Young-Harry) to re-make the decision in respect of Art 8.

Signed



A Grubb
Judge of the Upper Tribunal

29 May 2019