



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04346/2018
HU/10439/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 December 2019

Decisions & Reasons sent out on
On 18 May 2020

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

ISRAR AHMED
SUMAIRA AHMED

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Caskie, instructed by Maguire Solicitors (Scotland).

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellants are nationals of Pakistan. They appealed to the First-tier Tribunal against decisions of the respondent on 25 January 2018 refusing the first appellant's application for indefinite leave to remain on the grounds of ten years lawful residence, and on 16 April 2018 refusing the second appellant's application under

Appendix FM. Judge Gillespie dismissed their appeals. They now appeal to this Tribunal, with permission.

2. As the second appellant's claim is as a family member of the first appellant, it is clear that these appeals stand or fall together. In what follows, references to "the appellant" are to the first appellant. His application was refused under paragraph 322(5) of the Statement of Changes in Immigration Rules, HC 395 (as amended).
3. This is an 'earnings discrepancy' case. Three such cases were in the Tribunal's list on a single day. They are not otherwise linked, but the legal principles are the same in each case. Thus, the following analysis appears in each of the judgments.
4. In these cases, the appeal is against the refusal of indefinite leave to remain on the basis of ten years' lawful residence, under paragraph 276B of the Statement of Changes in Immigration Rules, HC 395 (as amended). The reason for the refusal is not that the applicant did not meet the basic requirements of paragraph 276B, but on one of the 'General Grounds for Refusal', paragraph 322(5). That paragraph indicates that leave 'should normally be refused' on the ground of:

"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."

5. Among the various ways in which a person may accumulate ten years' lawful residence, some, including in particular, presence in the United Kingdom under the points-based system as a Tier 1 (General) Migrant ("T1GM"), will have required the person concerned to obtain extensions of leave. The applications for the extensions in turn required the applicant to declare a particular level of earnings. The next steps in the story so far as the Home Office is concerned are set out as follows by Underhill LJ, giving the judgment of the Court of Appeal in Balajigari and others v SSHD [2019] EWCA Civ 673:

"4. The Home Office became concerned that there was a widespread practice of applicants for leave to remain as a T1GM claiming falsely inflated earnings, particularly from self-employment, in order to appear to meet the required minimum; and from 2015 it began to make use of its powers under section 40 of the UK Borders and Immigration Act 2007 to obtain information from Her Majesty's Revenue and Customs ("HMRC") about the earnings declared by applicants in their tax returns covering the equivalent period. This information disclosed significant discrepancies in a large number of cases. It also revealed what appeared to be a pattern of taxpayers who had in earlier years submitted tax returns showing earnings that attracted little or no liability to tax subsequently submitting amended returns showing much higher levels of earnings, over the required minimum, in circumstances which suggested that they were aware that the previous under-declaration might jeopardise a pending application for leave to remain. There were also instances of returns being submitted

belatedly where none had been submitted at the time and where an application for leave was pending

5. It has been Home Office practice to refuse applications for ILR in all, or in any event the great majority of, cases where there are substantial discrepancies between the earnings originally declared to HMRC by a T1GM applicant (even if subsequently amended) and the earnings declared in the application for ILR or a previous application for leave to remain ("earnings discrepancy cases"), relying on the "General Grounds for Refusal" in Part 9 of the Immigration Rules. Initially it relied specifically on paragraph 322 (2), which applies in cases where an applicant has made a false representation in relation to a previous application. Latterly, however, it has relied, either additionally or instead, on paragraph 322 (5), which embraces more general misconduct....

6. It is the Secretary of State's case that his policy and practice is only to rely on paragraph 322 (5) where he believes that an earnings discrepancy is the result of deliberate misrepresentation either to HMRC or to the Home Office, in other words only where it is the result of dishonesty. But a large number of migrants have claimed that in their cases errors which were the result only of carelessness or ignorance have wrongly been treated as dishonest, and that the Home Office has been too ready to find dishonesty without an adequate evidential basis or a fair procedure"

6. In Balajigari, the Court had before it cases where the challenge had been by way of Judicial Review, because there was no right of appeal against the decisions taken by the Secretary of State. It considered a range of arguments in support of the challenges. It concluded that paragraph 322(5) is not limited to cases of criminal conduct, threats to national security, war crimes or travel bans (para [31]), although the dishonest submission of false figures to either the Home Office or HMRC would be criminal conduct (para [37(3)]). Thus the paragraph could properly and lawfully be deployed against a person who had made different statements of his income for the purposes of obtaining leave and for the purposes of tax (para [35]). But the applicant's conduct must be dishonest in the Adedoyin v SSHD [2010] EWCA Civ 773 sense: it was not enough simply to show that the statements (or one or more of them) were factually inaccurate. Further, the misconduct must be sufficiently serious to merit refusal in these terms: 'the rule is only concerned with conduct of a serious character'; but again the dishonest and deliberate submission of false earnings figures would meet the threshold, wherever that were to be pitched (para [37(2)]).
7. The Secretary of State is not bound to make further enquiries with HMRC, and the lack of action by HMRC does not conclude the matter in the applicant's favour (paras [67], [72], [76]). Procedural fairness, however, requires that the applicant be given notice of the Secretary of State's suspicion, and a proper opportunity to meet any allegation of dishonesty and to put forward any other reason why if there were dishonesty it should not in the present case lead to refusal (paras [55]-[56]). If that is done, the Secretary of State is not required simply to accept an assertion that there has been an honest mistake (para [106]). The Court endorsed at [40] the general guidance given by Martin Spencer J in R (Shahbaz Khan) v SSHD [2018] UKUT 00384

(IAC) at [37(iv)-(vii)], which adds that the Secretary of State is to look at the explanations given, will expect evidence supporting them, and will and consider them in context, for example in the light of the applicant's knowledge and what was done to remedy the error and when. Further, the Secretary of State is not required to accept an assertion of an error made by an accountant, but again will consider the evidenced facts about the applicant's dealings with the accountant.

8. The burden of proof of showing dishonesty lies on the Secretary of State, the standard being the balance of probabilities (Balajigari para [43]). The question is whether there is a credible innocent explanation for the discrepancy: is the applicant merely careless or does the evidence show him to have been dishonest? There will then be in principle a second issue of whether paragraph 322(5) should be applied or not, given that it is discretionary, because there may be factors outside article 8 that might impact on whether leave of some sort should be granted (para [39], but see para [20]).
9. The Court also concluded that a decision to refuse leave on this basis would be likely to involve an interference with article 8 rights, which would need separate examination. Because both Balajigari and Khan were judicial review cases, there were procedural issues relating to the possibility of raising an article 8 issue not advanced previously, and adducing further evidence. I am not concerned here with those considerations. What is important for present purposes is the clear decision justifying treatment of a refusal in cases of this sort as a refusal raising human rights issues. It is that part of the decision that has led the Secretary of State now to make decisions incorporating a refusal on human rights grounds, as the Court indicated would be possible (para [102]) and perhaps desirable. Those decisions carry a right of appeal under s 82(1)(b).
10. All the Balajigari appellants succeeded because the Court held that in each case the Secretary of State's decision-making was at fault and the decisions could therefore not stand. In three of the cases there had been no opportunity to rebut what amounted to a presumption of dishonesty arising from the figures alone; in the fourth case there had been an opportunity, but no finding of dishonesty. In one of the cases the decision to refuse leave was quashed by the Court; in the others the question was remitted to the Upper Tribunal for redetermination, but the inquiry and the remedy were limited to those available in judicial review.
11. In these appeals Mr Govan for the Secretary of State argues that the appeals process itself gives an opportunity to put all relevant facts before a judge, and that the procedural difficulties faced by the Secretary of State in the Balajigari cases do not arise. Subject to one important reservation, I agree. The landscape of appeal is very different from that of judicial review. The appeal is for most purposes limited to human rights grounds, but there needs to be an examination of whether the appellant ought to have succeeded under the Rules. Thus there is room for a factual investigation of the appellant's acts and motives and whether paragraph 322(5) was

applicable to him. There is also a full opportunity for evidence to be adduced and considered, whether or not it has been deployed previously, on both the underlying events and any present factors going to article 8. What is more, there is no free-standing ground of appeal that the decision was not in accordance with the law.

12. These points make it clear that where there is an appealable decision, the role of the appellant and the Tribunal will be to undertake an examination of the evidence and decide whether the refusal should be upheld or struck out, not on the grounds applicable in judicial review, but on determination of all the relevant facts. The appeal process fills both the gaps identified by the Court in Balajigari - the procedural fairness gap because the appeal gives the relevant opportunity, and the article 8 gap because the appeal encompasses the human rights issues. By the end of an appeal process the appellant has had every opportunity to put his case.
13. I note, of course, what the Court said in Balajigari at paragraphs [59]-[61], that the opportunity to make submissions only after a decision has been made will usually be insufficient to meet the requirements of procedural fairness. But, for a number of reasons, I do not think that those observations can be taken as applying to appeals of this sort. First, they were specifically made in the context of judicial review, by reference to leading authorities on judicial review and procedural fairness, and including observations about the limited role of statutory administrative review, which is available only where there is no right of appeal. Secondly, it is not easy to detect any reservations of this sort in the Court's consideration of the possibility of affording a right of appeal in part C of its decision at [95]-[106], where the scope of its observations would appear to be severely limited if the underlying decision on the merits were to be considered as potentially unlawful even within the context of an appeal. Thirdly, and most important, although judicial review is a remedy lying outside any specific statutory regime, the statutory regime itself includes the right of appeal. Where an appealable decision is made the entire process, including the notification of the decision to the individual, envisages the possibility of the correction of the decision by an appeal. In this sense, the decision is not finally 'taken' until any appeal is over; and indeed, judicial review can have virtually no role until an appellant has exhausted his right to have the decision set aside on appeal.
14. I said above that there was one reservation. It is this. The appeal process ought to provide an opportunity for an individual to raise all the relevant matters he wishes to raise. But it may not do so if, at the time the appeal is heard, there is a restriction (imposed by the judge either of his own motion or from a current understanding of the law) which proves to have been itself unlawful. If the appeal allowed the appellant to raise questions going in substance to whether he was dishonest, the appeal to that extent will have filled the procedural unfairness gap even if that was the first opportunity he had; but if the appeal proceeded on the basis that the figures gave rise themselves to a presumption of dishonesty, it may be that the evidence adduced was in practice curtailed by what it was thought might be a possible ground of challenge. Each case is likely to depend on its facts. In particular, if all the

evidence going to the issue was in fact adduced, a judge's error in the application of the law to that evidence will not necessarily prevent the Upper Tribunal from correcting the error and substituting a decision on the basis of the evidence. But it is not difficult to envisage cases where a misunderstanding of the law might require there to be an opportunity to take further evidence. For these reasons it cannot be said that in every case the actual appeal provided all the opportunities to which the appellant was entitled by law, although the general position is that the appeal process satisfies the demands of procedural fairness.

15. I turn now to the facts of the present appeal.
16. In the present case the appellant's income was, in the years in question, derived (except for a small amount) from his partnership in a family business, A & S Properties of Perth. According to the material produced by the Secretary of State, (including documentation from HMRC), the discrepancies were as follows. In March 2011, as part of an application for leave to remain, the appellant claimed an income of £40,074.00 from all sources. His tax return for that year, ending three weeks later, showed total income of £21,782.00 from all sources. In an application for leave to remain made 5 June 2013, the appellant claimed to have an income of £41,289.00 from all sources between 1 July 2012 and 27 May 2013. The appellant's tax return for the year ending 5 April 2013 showed a total income received of £26,000.00, all from self-employment.
17. The appellant has subsequently amended his tax returns to coincide (more or less: there is a difference of a few hundred pounds in relation to the earlier return) with the figures he claimed in his applications for leave to remain. The respondent takes the view that the appellant deliberately and dishonestly provided different figures to the two government departments in order to secure the advantages of obtaining leave but paying less tax.
18. The appeals of the appellant and his wife were heard by Judge Gillespie on 20 September 2018. Mr Bryce represented the appellants, and had prepared a full skeleton argument, based to an extent on, and citing, Khan. There was oral and written evidence from the appellant, from the partnership's accountant, Mr Stewart Tough FCCA, and from one of the other partners, Afzal Noor Muhammad. The judge's decision contains his conclusions about the evidence he heard. It was challenged by Mr Bryce, who drafted the grounds of appeal, on the basis that the judge appeared to have ignored his written skeleton argument, which set out the basis for distribution of the profits of the partnership. What is, however, clear is that the judge took the view that it was for the appellant to discharge the burden of proof by showing that he had not been dishonest. As Balajigari shows, that was not correct. In these circumstances it is clear that the judge erred in law. As the application for permission proposed that if the judge's decision was set aside, the decision on the appeal ought to be made in the Upper Tribunal, there being no real issues of fact to determine, I indicated at the beginning of the hearing that I would set

aside the decision for error of law; and Mr Caskie and Mr Govan thereupon made submission on the impact of the evidence.

19. There are two elements of the grounds which, as it seems to me, have no bearing on the outcome of the appeal, and I deal with them straight away. First, Mr Bryce submits that the Secretary of State is in difficulties in this case because the original applications for leave to remain have not been produced. I can understand that there might be some cases where that would be of importance, but this is not one of them: as Mr Bryce also submits, there is no real doubt about the external facts in this case. Secondly, it is suggested that, because the appellant adjusted his tax returns, with the result that there has been no financial loss to HMRC in the end, that in some way mitigates the appellant's position. It is true that it does mean that he is not liable, as he otherwise would be, to further proceedings for underpayment of tax. It does not, however, affect the position at the time the various statements were made. The question is whether they were dishonest then.
20. Dealing first with the events relating to the 2011 tax year, the appellant's clear evidence is that his share of the partnership profits for that year was two thirds, leaving only one third for the other partners, Mr Afsal Muhammad and his wife. The relevant two-thirds share was the amount that he claimed on his application for leave to remain. Mr Tough, the accountant, endorses that; he wrote a letter at the time, which has been produced, indicating that the appellant's share of the partnership profit for the period from 1 July 2010 to 8 March 2011 was £40,074, of a total profit of £60,111. In his written statement, Mr Tough explains that the reason why the partnership profits were shared in that way was because of the other business interests of Mr and Mrs Afsal Muhammad, and for tax planning purposes. Mr Afsal Muhammad agrees with the statements of the appellant and Mr Tough.
21. So far as the tax return is concerned, the appellant says that it was prepared by Mr Tough, who acted on the instructions of Mr Afsal Muhammad. He says that he had family difficulties at the time, and implies that he did not attend very closely to the contents of the return. Mr Tough refers to "the apportionment of the profit for tax purposes". Again, Mr Afsal Muhammad is content to endorse what both the appellant and Mr Tough have said.
22. In the course of submissions on behalf of the appellant, Mr Bryce's position was that it was unlikely that the appellant had actually drawn the two thirds of the income to which he was entitled. Tax, he said, had been paid on the basis that one third of the profits were attributable to each partner, not only for the tax year ending 5 April 2011, but for subsequent tax years, apparently up to May 2016.
23. The explanation provided at one stage by Mr Bryce that, if the appellant had a two-third share in the profits, he might not have drawn the whole of that share is irrelevant: he would still be liable to tax on his share. But the truth of the matter is that the evidence taken as a whole shows that the partners must have been complicit in what the accountant was doing, which was to prepare tax returns on the basis that

the profits were shared equally, but to provide other evidence indicating that they were not. Although it is said that the reason for the unequal distribution of profits was tax planning by Afsal Muhammad and his wife, that would have completely failed, given the actual returns, reflecting equal distribution, made to HMRC. Further, if it is right that there was an unequal distribution for this purpose, the fact that it had gone wrong would be quickly apparent to Mr Afsal Muhammad and his wife when they received their tax bills. On this hypothesis, they would have agreed to allow the appellant to have two thirds of the partnership income in order to reduce their tax bills, but would find that their tax bills were not reduced. Given the clear evidence of the declaration that was actually made for tax purposes, I regard it as wholly incredible that there was an agreement between the partners for unequal distribution of profits in order to avoid tax. It follows, that the appellant's story, that he really did have an income of £40,000 from the partnership, but had not appreciated that his income had been understated for tax purposes, cannot be the truth.

24. I do not need to investigate further where the truth lies. The fact that the appellant has, in order to prepare himself for his application for indefinite leave to remain, made adjustments to his tax returns, does not show that, in the years in question, he genuinely did have the income claimed for immigration purposes. The position is that in the tax year 2011 there was a discrepancy, and that discrepancy has not even now been satisfactorily explained; in particular, the explanation given by the appellant and those giving evidence on his behalf is not the truth. I am wholly satisfied that the difference between the sum declared to HMRC and that claimed to the Secretary of State was knowing and deliberate, not accidental.
25. So far as the events of 2013 are concerned, the position is less clear, because the end of the period that was relevant for the immigration application was not near the end of a financial year. In relation to the 2013 application and the 2013 tax return, the explanation given is that the appellant was entitled, by agreement of the partners, to one half of the income of the partnership. Apart from that, the only difference is that the other partners would have by then had a further two years to appreciate that the returns being made to the tax office and the tax they were paying did not reflect the agreed distribution of partnership income, if that was the case. Again, I regard the account of the agreement for the distribution of the income as not worthy of credit.
26. I would regard either of the discrepancies identified as reasons for the refusal of the application for indefinite leave to remain as sufficiently serious to merit refusal under paragraph 322(5) if the appellant was complicit. I have found that he was complicit in both. For these reasons, I conclude that the decision under appeal was wholly merited.
27. This is, however, a human rights appeal. The appellant and his wife have family life together, and they have two children, one of which is aged over seven and so is a "qualified child" within the meaning of s 117D(1). However, Mr Govan pointed out

that there is very little evidence of that child's needs other than the medical needs which are on record; and there is no evidence that it would be unreasonable to expect either of the children to leave the United Kingdom. So far as the evidence adduced in this appeal, there is no article 8 reason why this family, all citizens of Pakistan, should not be expected to live in Pakistan.

28. For the foregoing reasons I dismiss the appeal of the appellant. Because his wife's appeal is dependent upon his, I dismiss her appeal also.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 April 2020