



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: HU/05052/2018  
HU/08539/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 10 January 2020**

**Decision & Reasons  
Promulgated  
On 15 January 2020**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

Between

**MUHAMMAD AQIB  
ATTIYA BASHIR  
[NO ANONYMITY ORDER]**

**Appellants**

and

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

**DECISION AND REASONS**

1. The appellants are a husband and wife from Pakistan. The husband is the principal appellant, the wife's status being dependent on his circumstances. By a decision sent to the parties on 10 May 2019, I set aside the decision of DUTJ Juss upholding a First-tier Tribunal dismissing the appellants' appeal on human rights grounds against the respondent's decision to refuse them indefinite leave to remain in the United Kingdom on the basis of long residence, with reference to paragraph 322(5) of the Immigration Rules HC 395 (as amended).
2. The Upper Tribunal is seised only of the human rights element of the

respondent's decision: any challenge to the refusal under the Rules is justiciable only in judicial review.

3. When setting aside the decision of the First-tier Tribunal, I had regard to the judgment of the Court of Appeal in *Balajigari v The Secretary of State for the Home Department* [2019] EWCA Civ 673. I directed the parties to file and serve written submissions dealing with the *Balajigari* question, within 14 days from the sending out of the decision, and indicated that I would then consider whether the appeal decision could be remade on the basis of the documents on the file and the written submissions, or whether a further oral hearing was required.
4. On 23 May 2019, just within the 14 days, the appellants' representatives, Aman Solicitors, sent in submissions on *Balajigari*. The respondent did not respond. Unfortunately, the file was then misplaced at Field House and has only just come to light. I now proceed to consider remaking the decision, with reference to the appellant's submissions.

## **Background**

5. The principal appellant ('the appellant', save where the context otherwise requires) entered the United Kingdom on 22 September 2006 as a student, extending his leave on multiple occasions and on 23 September 2016, 10 years and 1 day after his original arrival, he applied for indefinite leave to remain.
6. The second appellant joined him here on 28 May 2014, with leave to remain valid until 18 March 2016. On 16 March 2016, she made a dependant spouse application which on 23 September 2016 was varied to an application for leave to remain as the spouse of a settled person. The principal appellant was not a settled person on that date, but it is accepted that in practice the second appellant's status stands or falls with that of the principal appellant, her husband.
7. On 5 June 2017, the respondent wrote to the appellant to ask him to complete a tax questionnaire, which he returned promptly on 27 June 2017, with supporting documents.

## **Refusal letter**

8. On 2 February 2018, the respondent refused the appellants' applications, relying on paragraph 322(5) of the Immigration Rules HC395 (as amended) and on discrepancies between the appellant's tax returns and the income stated in his applications to the UKVI. The respondent considered that the appellant's character was damaged and that it was undesirable to allow him to remain, having regard to his character and conduct.
9. The respondent gave the appellants no opportunity to explain what had happened before making her decision. Had she done so, the

explanation now before me would have been given. The appellants say that their applications were completed by an immigration consultant named Mr Ansari, who instructed someone else at MCSO Accountants to prepare the tax returns. Mr Ansari is now in Dubai and unreachable.

- 10.** The appellants subsequently instructed different tax specialists, CBS Accountants, who have corrected the errors in the husband's tax return. The husband has paid any necessary tax and there have been no criminal proceedings on behalf of HMRC. The appellants contend, in reliance on [42] of *Balajigari*, that a 'minded to refuse' approach should have been adopted by the respondent and further, that the section 55 best interests of the appellants' son have not been considered, as well as any Article 8 ECHR circumstances outside the Rules (*Balajigari* at [39] relied upon).

### **The *Balajigari* decision**

- 11.** The judgment of the court in *Balajigari* was given by Lord Justice Underhill, Lord Justice Hickinbottom and Lord Justice Singh concurring. Underhill LJ in *Balajigari* identified three issues in what for brevity he described as 'earnings discrepancy cases': first, under domestic public law the scope of application of paragraph 322(5) and the procedural and evidential requirements for a decision of that kind; second, interference with Article 8 ECHR rights; and third, whether judicial review is a suitable vehicle for challenging paragraph 322 refusals where Article 8 is engaged. I am concerned only with the second question, the proportionality of interfering with the appellants' Article 8 rights.

- 12.** At [39], Underhill LJ dealt with the second stage of the respondent's analysis, which concerned the exercise of her discretion under paragraph 322(5):

"39. Mr Biggs submitted that at this second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted that it is at this stage that *the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise*. That seems to us in principle correct. *There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily indefinite leave to remain) to migrants whose presence is undesirable.*"

[*Emphasis added*]

- 13.** At [91], the Court of Appeal accepted that Article 8(1) ECHR would

normally be engaged in such cases, because of the length of time that appellants had been in the United Kingdom, and that where dishonest conduct had been established, 'in the generality of cases such a finding will be sufficient, for the purposes of the final *Razgar* question, to justify the applicant being refused leave to remain and in consequence, which is the relevant interference, becoming liable to removal'.

- 14.** There would always be the possibility of exceptional cases in which Article 8 outweighed the Secretary of State's assessment of the public interest. An analogy was drawn with the approach taken by the Court of Appeal on TOEIC cheats in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009. At [220]-[223] Underhill LJ summarised the Court of Appeal's overall reasoning thus:

"220. However, in broader terms the effect of our reasoning can be summarised as follows. ...

223. ... But we have expressed the view in Part B above that if the applicant enjoys a private or family life in the UK which is protected by article 8 of the European Convention on Human Rights – which is likely to be so in the typical case – the notice of liability to removal which is the consequence of refusal of ILR will constitute an interference with those rights which the Secretary of State will have to justify. If the earnings discrepancies relied on were in fact the result of dishonesty that will normally be sufficient justification, but his decision on that question will be reviewable as a matter of fact, whether in the context of a "human rights appeal" or, where no such appeal is available, in judicial review proceedings: the circumstances in which an appeal will be available are considered in Part C."

- 15.** That is the basis on which I approach the remaking of the present appeal decision.

### **Appellant's evidence**

- 16.** In the present appeal, the principal appellant did indeed give evidence at the First-tier Tribunal. It is not suggested in the written submission last year that he seeks an oral hearing, or that his evidence would be different now. The appellant submitted that he had not been convicted of a dishonesty related offence and that the errors in his HMRC submissions were the fault of his advisers, but did not represent any dishonesty by the appellant himself.

- 17.** The paragraph 322(5) assessment that he used deception has not been challenged by judicial review and I am seised only of the human rights issue. There is no updated witness statement from either of the appellants, and no evidence about their son, who was 2 years old at the date of decision and is only 4 now.

- 18.** The evidence about the family's private and family life was sparse, as was the evidence of their young son's section 55 best interests.

Neither appellant was or is a British citizen and neither has had extant leave to remain since March 2016. The principal appellant is financially independent and speaks English. The couple's son (born in 2016) was very young, too young to have formed independent links outside the immediate family. He is still not of school age. The couple were said to be expecting a second child who would be, at best, a year old now. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) is inapplicable as the parties' child, or children, are not qualifying children.

- 19.** There were character references from friends and work colleagues. Mr Khaleel Chowdhree, Trustee and Secretary of the Cultural Community Centre in Watford said simply that he had known the appellant 'for many years' and found him 'dependable, reliable, enthusiastic and a well-respected member of the community'. Euro Garages, his employer, said he was 'honest, hard-working and dedicated' and 'extremely committed to his job role and never fails to impress'. Neither of those references takes matters much further.
- 20.** There do not appear to be any other character references or evidence of exceptional circumstances, or private life in the United Kingdom outside the core family group formed by these appellants and their son (and any other child born to them since the hearing). It is right that the appellants and their small son have family life together, but both appellants lived in Pakistan before coming to the United Kingdom as adults, and the boy's section 55 best interests are to remain with his parents. It is not suggested that he, or his putative younger sibling, are anything other than happy, healthy small children. There is no reason to suppose that this family would be unable to re-establish themselves in Pakistan as a family, and the evidence before me is not nearly enough to establish exceptional circumstances for which leave to remain ought to be granted outside the Rules.
- 21.** It follows that these human rights appeals must fail.

## **Decision**

- 22.** For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision.

I remake the decision by dismissing these appeals.

Signed **Judith AJC Gleeson**  
January 2020  
Upper Tribunal Judge Gleeson

Date: 10