Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12628/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 November 2020	**On 2 December 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE THOMAS

Between

AKASH BAJAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Canter, of counsel, instructed directly
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. On 20 August 2020, the Upper Tribunal issued a decision in this appeal in which it was found that the First-tier Tribunal (Judge Hatton) had erred in law in several respects in dismissing the appellant's human rights appeal. The decision of the FtT was set aside and the appeal was retained in the Upper Tribunal for the decision to be remade pursuant to s12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. A copy of the decision of

20 August 2020 ("the set aside decision") is appended and should be read alongside this decision.

2. The appeal was listed for a 'resumed' hearing before this panel on 9 November 2020. Mr Canter represented the appellant, as he has done throughout. Mr Tufan, who has had no previous involvement in the case, represented the respondent. At the start of the hearing, Mr Tufan explained that he was in difficulty. Although the set aside decision had been sent to both parties (and had been received by the appellant and Mr Canter), and although the notice of hearing stated quite clearly that this was to be a resumed hearing, Mr Tufan had not been provided with the set aside decision. He had therefore proceeded, until he had spoken to Mr Canter moments before the hearing started, on the understand that the primary purpose of the hearing was to decide whether the decision of the FtT was legally erroneous.

3. This was not the only procedural complication which presented itself at the start of the hearing. For the appellant, Mr Canter stated that there were additional documents which had been sent to the Upper Tribunal. Whilst these documents (which were updating statements made by the appellant and his wife) had reached Mr Tufan, they had not reached the Tribunal's file. We arranged for copies to be made so that we could consider the statements.

4. The appellant and his wife were present to give evidence. Other witnesses had also attended. We asked Mr Tufan whether he might take some time to consider the set aside decision (a copy of which we were able to provide) and to prepare for a contested 'resumed' hearing. With his characteristic professionalism, Mr Tufan indicated that he thought he should be able to proceed and asked for twenty minutes. We acceded to that request and retired to consider the appellant's additional evidence.

5. Upon the hearing resuming, Mr Tufan confirmed that he was ready to proceed. He stated that there had been discussions between the advocates and that we might usefully hear submissions on those matters before hearing any oral evidence. We were content to do so.

Submissions

6. Mr Canter submitted that the appeal fell to be allowed without there being any need for oral evidence. He asked us to note that the respondent had set out only a single reason for concluding that the appellant did not meet the requirements of the Five-Year Route in Appendix FM of the Immigration Rules. The application had been refused on a single suitability ground (S-LTR 4.2) and it had been accepted in terms in the letter of refusal that the appellant met the remaining eligibility requirements, including the Relationship Requirement, the Immigration Status Requirement, the Financial Requirement and the English Language

Requirement. It having been held in the set aside decision that S-LTR 4.2 was of no application in this case, the appeal fell to be allowed on human rights grounds because it was clear that the appellant met the requirements for limited leave to remain as a spouse: TZ (Pakistan) & Anor v SSHD [2018] EWCA Civ 1109, at [34].

7. We invited Mr Canter to address us on the Immigration Status Requirement because, although the respondent had accepted that it was met in the refusal letter, we were concerned that the appellant had been an overstayer when he applied for leave to remain. Mr Canter submitted as follows. The appellant had been granted leave to remain as a Tier 1 (General) Migrant until 17 June 2016. Before the expiry of that leave to remain, he had applied for Indefinite Leave to Remain, on 14 June 2016. His leave was statutorily extended by section 3C of the Immigration Act 1971 from that point. Before the application was decided, the appellant varied it to one for ILR on grounds of Long Residence, following which the varied application continued to extend the original period of leave, under s3C(5) of the 1971 Act.

8. Continuing with the relevant chronology, Mr Canter noted that the ILR application was refused on 20 January 2018 and that an appeal was subsequently dismissed by the FtT. The protection of s3C continued, Mr Canter recalled, whilst any appeal was pending, which included the exercise of any onward rights of appeal to the Upper Tribunal: s3C(2)(c) refers. That period had not come to an end until permission to appeal had been refused by the Upper Tribunal (UTJ McWilliam) in a decision which was sent to the parties on 29 January 2019. Mr Canter was able to produce a copy of UTJ McWilliam's decision, which bore a date of 18 January 2019, but was not able to show us when the decision was sent to the parties. He was content to accept the date given by the respondent, which was 29 January 2019.

9. The next event, Mr Canter submitted, was that the appellant made an application for leave to remain as an unmarried partner on 8 February 2019. Before that application was decided, he varied it to be an application for leave to remain as a spouse. He did so on 16 March 2019, and the respondent therefore voided the application as an unmarried partner. We are grateful to Mr Tufan for checking the respondent's Casework Information Database ("CID") and confirming that the voiding of the unmarried partner application was because it had been varied and not because the first application was in any way invalid.

10. Having taken us through the chronology, Mr Canter submitted that the appellant had made his application for leave to remain as an unmarried partner within 14 days of the exhaustion of his appeal rights, such that his period of overstaying was to be disregarded with reference to paragraph 39E of the Immigration Rules ("Exceptions for Overstayers").

11. Mr Tufan did not seek to argue that the appellant was incapable of meeting the Immigration Status Requirement or the other substantive requirements of Appendix FM. He invited us to consider two submissions regarding the Suitability provisions of those Rules. He submitted, firstly, that the appellant was caught by paragraph S-LTR 4.2 despite what had been held in the set aside decision. Although he accepted that the appellant had not sought to deceive the respondent in his application for leave to remain and that his deceit of HMRC was not covered by the concluding words of S-LTR 4.2, he submitted that the appellant had failed to disclose a material fact (his deception of HMRC) in his previous application for leave to remain. That sufficed, Mr Tufan submitted, to satisfy one of the conditions precedent required to invoke this discretionary ground of refusal.

12. Mr Tufan submitted, secondly, that the respondent should have refused the application under S-LTR 1.6 of Appendix FM. Citing R v IAT & Anor *ex parte* Kwok On Tong [1981] Imm AR 214 and CP (Dominica) [2006] UKAIT 40, Mr Tufan submitted that the appeal could only be allowed on a TZ (Pakistan) basis if the Upper Tribunal was satisfied that all of the requirements of the Immigration Rules were met, and that it could not be so satisfied when a mandatory ground of refusal plainly applied. It was clear that it did apply, since the appellant had not only defrauded the Revenue of a significant sum; he had received a police caution for doing so.

13. For the appellant, Mr Canter submitted that the submission made by Mr Tufan in relation to S-LTR 4.2 was misconceived, since the appellant had plainly made reference to the findings made by FtT Judge Boyes in his application of 16 March 2019. Mr Tufan was wrong, in any event, to submit that the appellant had received a police caution for that conduct; his caution had arisen from events during his employment with Travelex and the respondent had produced no evidence to gainsay his account of those events. As for the application to rely on S-LTR 1.6, Mr Canter submitted that it was far too late for such an application to be made. There was no written application to do so, and the lateness of Mr Tufan's oral application was to be seen in context. The inapplicability of S-LTR 4.2 had been identified in the original grounds of appeal to the FtT and at all subsequent stages. The respondent could have sought to invoke that paragraph in the written submissions which preceded the set aside decision or by application thereafter. It was not in the interests of justice, he submitted, for the respondent to be permitted to raise such a significant matter at this late stage.

Discussion

14. We retired to consider the submissions which had been put to us. On the hearing resuming, we stated our conclusion that S-LTR 4.2 was of no application and that the respondent would not be permitted to raise S-LTR

1.6 at this stage. We accepted Mr Canter's submission that the requirements of the Five-Year Route were accordingly met and that the appeal fell to be allowed on Article 8 ECHR grounds as a result. The reasons we reached that conclusion are as follows.

15. We need not set out paragraph S-LTR 4.2 of Appendix FM; it is set out in full at [17] of the set aside decision. It is now accepted by Mr Tufan that the appellant did not make false representations in a previous application for leave to remain. It is also accepted that the appellant did not make false representations to a third party in order to obtain a document required to support such an application. The appellant's deception, as found by FtT Judge Boyes in 2018, was solely of HMRC and was to minimise his tax liability; it was not done in order to procure a document which was to be used to support an application for leave to remain. In fact, if the appellant had produced a document from HMRC which reflected the earnings declared in that forum, he would positively have undermined his application for leave to remain.

16. What Mr Tufan now submits is that the appellant failed to disclose his deception of HMRC in an application for leave to remain. Mr Canter submitted that the appellant had in fact declared the finding which had been made against him by FtT Judge Boyes when he made his most recent application for leave to remain, and he directed us to the relevant section of the application form which the appellant had submitted online on 16 March 2019. With respect to Mr Canter, however, what matters is not the extent of the appellant's disclosure in the instant application. S-LTR 4.2 is expressly directed to conduct in a previous application for leave to remain. The fact that the appellant made reference to the findings against him when he made his most recent application is of no relevance here whatsoever.

17. The real answer to Mr Tufan's submission is that which was set out at [22] of the set aside decision. The burden of proof in respect of such matters is on the respondent, to the civil standard. In the event that she asserts that the appellant failed to disclose a material fact in a previous application for leave to remain, the burden is on her to establish the relevant facts. What she is required to establish, therefore, is that a relevant question was asked in a previous application for leave to remain, in response to which the appellant failed to disclose the fact that he had deceived HMRC in respect of his earnings in the period in question. It was noted at [22] of the set aside decision that the respondent had not identified any such question. Nor, in fact, has she even provided the application form (or forms) in which the appellant is said to have failed to declare the relevant information. It cannot simply be assumed that a relevant question was asked, nor can it simply be assumed that the appellant failed to disclose his conduct when he made previous applications to the respondent. In these circumstances, the respondent has failed to discharge the evidential

burden upon her of showing that there was any failure of disclosure in a previous application or applications.

18. As regards Mr Tufan's application to rely on paragraph S-LTR 1.6 of Appendix FM[1], we do not accept his submission that we are bound to consider the point regardless of its absence from the notice of refusal, nor do we consider that it would be appropriate to permit the variation of that notice at this late stage. It is necessary to look at the chronology first.

19. The respondent's decision was issued on 8 July 2019. It was said at [19] of the grounds of appeal to the FtT that there was no basis for refusing the application on the basis of S-LTR 4.2. The appellant's appeal to the FtT was dismissed by Judge Hatton, who did not accept that submission. Thereafter, however, the appellant's grounds of appeal to the Upper Tribunal alleged squarely (at ground six) that the judge had fallen into error in concluding that S-LTR 4.2 was of any application to the facts of this case. There was no suggestion, in the Secretary of State's written response to the grounds, that she sought (or would seek, in the event of the FtT's decision being set aside) to rely upon S-LTR 1.6. Nor was any such notice given in the three months or so which elapsed between the Upper Tribunal's set aside decision and the resumed hearing before us.

20. It might legitimately be thought that the caseworker who refused this application on 8 July 2019 had considered whether to apply paragraph S-LTR 1.6 and had decided not to do so. It is to be recalled that FtT Judge Boyes had decided in October 2018 that paragraph 322(5) of the Immigration Rules applied. That paragraph is in materially identical terms to S-LTR 1.6, save for the fact that paragraph 322(5) is a discretionary provision. It would naturally have been the first port of call, for a caseworker deciding this application only eight months later, to consider whether the basis upon which the appellant had failed in his first appeal continued to apply. We think it likely that a conscious decision was made not to apply S-LTR 1.6 on the facts which were presented to the respondent in the March 2019 application. Whether that was because the appellant had 'come clean' by disclosing his previous transgressions, had paid his outstanding tax, and the caution in 2011 was from some years ago, we do not know. But we think it most unlikely that the caseworker who came to consider this application in March 2019 simply failed to consider whether S-LTR 1.6 applied.

21. Whether the respondent failed to turn her mind to S-LTR 1.6 or whether she considered that provision and decided not to apply it to the appellant, Mr Tufan submitted that we were in any event bound to consider its

[1] S-LTR 1.6 requires the refusal of limited leave to remain where "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

application. He cited the decision of Glidewell J in Kwok on Tong and that of the Asylum and Immigration Tribunal in CP (Dominica) in support of his submission. These are decisions of some antiquity in the sphere of immigration law and we note that the statutory regime – and the appellate jurisdiction under Part 5 of the Nationality, Immigration and Asylum Act 2002 in particular – has changed markedly since those decisions were issued. The essential point remains valid, however, despite those changes. Where it is submitted to a judge of the Immigration and Asylum Chamber that an appeal falls to be allowed on human rights grounds because an appellant meets the requirements of the Immigration Rules, the judge must be satisfied that *all* of the requirements of the Rules are met. He or she is not confined, in undertaking that assessment, to the points specifically identified in the notice of refusal. Under the old statutory regime, a judge (whether Immigration Judge or Adjudicator) could not allow an appeal under the Immigration Rules unless those Rules were met. Under the current statutory regime, a judge cannot allow an appeal on human rights grounds because the Immigration Rules are met unless those Rules are indeed satisfied.

22. In some circumstances, it will be apparent to a judge that an appellant is unable to meet the Rules for a reason not stated expressly in the respondent's decision. In Kwok On Tong, for example, it was apparent to the IAT that the appellant was not, as had been claimed in his application, a partner in his uncle's food shop; the relationship was one of disguised employment, contrary to the requirements of the Rules. The critical word in each of the preceding sentences, however, is 'apparent'. It was apparent in Kwok On Tong that the relationship was not one of equals but of master and servant. It might become apparent to a judge that an appeal cannot succeed on the basis contemplated at [34] of TZ (Pakistan) if, for example, an appellant is the subject of a deportation order[2]. Even where that point is not taken by a decision maker, it operates as an absolute and incontrovertible bar to an appellant satisfying the Immigration Rules.

23. Paragraph S-LTR 1.6 is of a different character, however. The decision to refuse an application under that paragraph (or its equivalents in Part 9 of the Rules) requires a decision maker not simply to consider whether a precedent fact is established; an evaluative exercise is also required. The decision maker must consider whether the individual's proven behaviour calls into question their character or conduct *to the extent that* it is considered undesirable to allow them to enter or remain in the United Kingdom: Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647, at [34]-[38] in particular. At [37](2) of the judgment of the Court of Appeal in Balajigari, Underhill LJ noted that it was very hard to see how the deliberate and dishonest submission of false earnings figures, whether to

[2] This appears as a mandatory ground of refusal throughout the Immigration Rules: paragraphs 320(2)(a), 322(1B), S-EC 1.3 and S-LTR 1.2

HMRC or the Home Office, would not reach the requisite level of seriousness. Nevertheless, an evaluative exercise is still required on the part of the respondent – and then the Tribunal – in order to hold that this ground of refusal applies in any given case.

24. Mr Tufan is not able to submit, therefore, that it is apparent that the appellant cannot succeed under the Immigration Rules because paragraph S-LTR 1.6 necessarily applies. Notwithstanding what was said in Balajigari and the Devaseelan [2003] Imm AR 1 starting point provided by FtT Judge Boyes' decision, the most that Mr Tufan can submit is that the respondent ought to have an opportunity to establish (since the burden is upon her) that the appellant's presence in the United Kingdom is undesirable. He does not seek permission to withdraw the decision; what he seeks to do, more than a year after form IAFT-5 was lodged with the FtT, is to introduce a new ground of refusal into the decision which is ultimately under appeal. We do not permit the respondent to do so for the following reasons.

25. Firstly, as set out above, the respondent has had more than ample opportunity to amend or supplement the decision under appeal. There must be some finality in litigation especially where, as here, the conduct in question took place the better part of a decade ago.

26. Secondly, to have permitted the respondent to raise the new ground of refusal would necessarily have resulted in an adjournment. The appellant is entitled to notice of the way in which the respondent puts her case under S-LTR 1.6, as is clear from Balijagari and other authorities which we need not mention. It does not suffice for Mr Tufan simply to refer to the historical conduct and to the conclusion reached by FtT Judge Boyes; the respondent would also be required to take into account: (i) that the appellant has now repaid his outstanding tax to HMRC; (ii) that she previously misunderstood the position in relation to his caution from 2011; and (iii) that there have been no further transgressions. In the event that the respondent decided, despite seemingly reaching the contrary decision in July 2019, that she did consider the appellant's presence in the UK to be undesirable, she would explain the reasoning on which she reached that conclusion and the appellant would then be entitled to respond, with evidence. Where, as here, the appellant would be exercising a right of appeal, there would be no need for a separate 'minded to refuse' stage, since he would be able to consider his position in light of the refusal letter and marshal his evidence and arguments at the hearing: Ashfaq [2020] UKUT 226 (IAC). Procedural fairness would dictate, in other words, a reasoned decision on the application of S-LTR 1.6 and an opportunity to respond to it.

27. Thirdly, although it is the appellant's conduct which is at the root of all of this, we do not lose sight of the importance of the case to him, his wife and her family. The appeals have been privately funded throughout and their

statements make clear the strain being caused to their lives as a result of the ongoing uncertainty arising from this litigation.

28. In all the circumstances, we refused Mr Tufan's application to introduce a new ground of refusal. It is not apparent to us that the appeal would necessarily be dismissed on that basis and the over-riding objective of dealing with cases fairly and justly militates against the proceedings being further delayed by the possible introduction of a new ground of appeal which might or might not prosper. The appellant has overcome the ground of refusal under S-LTR 4.2. It was accepted in terms in the letter of refusal that the remaining requirements for leave to remain as a spouse were met. We conclude that the appellant has met the requirements of the Five-Year Route in Appendix FM (under D-LTRP 1.1), as a result of which we allow his appeal on Article 8 ECHR grounds.

Postcript

29. We wish to make clear that nothing which is said in this decision is intended to represent criticism of Mr Tufan, who was placed in a difficult position by the failure of his department to ensure that he received the set aside decision in good time for the hearing.

Notice of Decision

The decision of the FtT having been set aside, we remake the decision on the appeal by allowing the appeal on Article 8 ECHR grounds.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 December 2020

ANNEX A – SET ASIDE DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12628/2019 (P)

THE IMMIGRATION ACTS

Decided without a hearing **Decision & Reasons Promulgated**

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Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

AKASH BAJAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant is an Indian national who was born 6 October 1986. He appeals, with permission granted by First-tier Tribunal Judge Shimmin against a decision which was issued by First-tier Tribunal Judge Hatton ("the judge") on 23 October 2019. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant entered the United Kingdom nearly thirteen years ago, on 24 September 2007. He held entry clearance as a student. He

subsequently made a successful application for leave to remain as a Tier 1 Migrant and was granted further leave within that tier on two subsequent occasions. On 14 June 2016, he applied for Indefinite Leave to Remain as a Tier 1 Migrant. Enquiries by the respondent revealed significant discrepancies between the self-employment earnings he had relied upon in his applications for leave to remain and those he had declared to Her Majesty's Revenue and Customs ("HMRC"). The application for ILR (which had, in the meantime, been varied to one under paragraph 276B of the Immigration Rules) was refused under paragraph 322(5) of those Rules.

The First Appeal – Judge Boyes

3. The appellant appealed against that decision. His appeal was heard by Judge S L L Boyes, sitting at Hatton Cross on 20 September 2018. In a meticulously reasoned, reserved decision which was issued on 26 October 2018, Judge Boyes concluded that the respondent had discharged the burden upon her of demonstrating that the appellant had been dishonest in his dealings with HMRC. It was undesirable for him to remain in the UK and there was nothing which weighed in favour of leave being granted. In the circumstances, Judge Boyes found paragraph 322(5) to apply, and found that the appellant was unable to meet the requirements for ILR on grounds of Long Residence. Considering the matter on outside the Immigration Rules with reference to Article 8 ECHR, Judge Boyes noted that the appellant 'is in a relationship with a British citizen' but that he had accepted that he could not meet the requirements of the Rules in reliance on that relationship. She concluded that the public interest outweighed the appellant's claim to remain in the UK.

4. Permission to appeal against Judge Boyes's decision was refused by the FtT and the Upper Tribunal. Shortly after he had exhausted his rights of appeal, the appellant made an application for leave to remain as an unmarried partner, under Appendix FM of the Immigration Rules. The application was subsequently varied to one on the basis of marriage, after the appellant had married his British partner, Shivani Phakkey.

The Respondent's Decision

5. The respondent refused the application on 8 July 2019. She noted the appellant's previous deception. She thought that he had been issued with a police caution for it. She concluded that the appellant should be refused under paragraph S-LTR 4.2 of Appendix FM. She was not in any event satisfied that the appellant could show that he and his wife could not live together in India, such that paragraph EX1 of Appendix FM was not satisfied. The respondent did not accept that the appellant satisfied paragraph 276ADE(1) of the Rules (very significant obstacles) or that there was any reason to grant leave outside the Rules with reference to Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the FtT and his appeal was heard by the judge, sitting in Birmingham, on 11 October 2019. He heard oral evidence from the appellant, his wife and her parents. He heard submissions from counsel for the appellant, Mr Canter, and the respondent's Presenting Officer, Mr Gazge, before reserving his decision on the appeal.

7. The judge set out the appellant's immigration history at [2]-[12]. He reminded himself of Devaseelan [2003] Imm AR 1 in relation to the previous decision of Judge Boyes: [13]-[15]. He considered the issues arising at [16]-[21] and set out the burden and standard of proof at [21]-[22]. He made reference to the oral and documentary evidence which was before him at [24]-[25]. Then, under the sub-heading "*Is the Appellant's application capable of succeeding under the Immigration Rules?"*, the judge considered whether the appellant fell to be refused under paragraph S-LTR 4.2. He noted that the Presenting Officer had accepted that the refusal decision had been incorrect to assert that the appellant had received a police caution for deception of HMRC; the fraud in question was 'unrelated to his immigration matters': [26]. The judge then recorded a submission made by Mr Canter and the decision he had made upon it, in the following paragraphs:

> "[27] By way of a preliminary observation, Mr Canter suggested the appellant's application cannot fall for refusal under para S-LTR 4.2, because that section of the immigration rules expressly requires that an applicant made false representations or failed to disclose material facts in respect of an application for leave to remain. Although the appellant accepts the information provided to the HMRC was incorrect the appellant asserts that the information he disclosed to the respondent in respect of his previous applications for leave to remain was accurate.
>
> [28] I am unable to accept this contention. On the evidence before me the fact that the appellant gave different information to the respondent and the HMRC in respect of his declared earnings plainly and obviously constitutes a deficiency of disclosure. Further, the appellant's income was clearly a material factor to the appellant's historical applications for leave to remain in this country. Accordingly a discrepancy between the self-employed net profit which the appellant declared to the HMRC and the respondent, demonstrates a failure to disclose material facts in respect of an application for leave to remain, within the meaning of paragraph S-LTR 4.2."

8. The judge considered what had been said by Martin Spencer J in R (Khan) v SSHD [2018] UKUT 384 (IAC); [2019] Imm AR 329 at [30]. He saw no reason to depart from Judge Boyes' findings of fact and he concluded that the appellant's 'failure to disclose a discrepancy in excess of twenty thousand pounds of earnings falls well within the ratio of Khan.' He had

'no hesitation in finding that the Respondent's discretionary power under this section of the Immigration Rules was exercised in a reasonable and proportionate manner' and concluded that the appeal fell to be dismissed under the Immigration Rules: [32]-[35].

9. The judge then turned to the second issue: "Is the appellant's application capable of succeeding outside of the Immigration Rules". Like the respondent, he accepted that the appellant had a genuine and subsisting relationship with his British wife and that Article 8 ECHR was accordingly engaged in its private and family life aspects: [36]. Having reminded himself of his findings under the Rules and the decision of the Appellate Committee in Huang [2007] UKHL 11; [2007] 2 AC 167, the judge considered that significant weight should be accorded to the public interest in maintaining a fair and effective system of immigration control. He based that conclusion on the 'huge disparity' between the appellant's earning, as declared to the respondent and HMRC in a previous application: [40].

10. At [41], the judge considered that the appellant had a 'propensity for dishonesty' because he had failed to declare his earnings to HMRC in more than one year and he had an unrelated caution for fraud. The judge noted that Judge Boyes had been aware of his relationship with a British citizen and had concluded that it was undesirable for the appellant to remain in the UK. He was required, he said, 'to determine whether further events which have taken place in 12 months since FtT Judge Boyes decision are sufficient to tip the balance in the Appellant's favour'. He noted that the relationship had developed at a time when the appellant's immigration status was precarious and he attached little additional weight to the marriage in March 2019 'especially as the appellant's relationship with his British partner was a material factor expressly taken into consideration in FtT Judge Boyes decision': [46]. S117B required the judge to attach weight to the public interest in immigration control and to attach little weight to the appellant's private life, which had been accrued at a time when his status in the UK was precarious: [47].

11. The judge considered at [49] that there was 'no discernible reason' why the appellant's wife could not relocate to India. He would be able to work there, as would she, the judge concluded. The appellant had a close relationship with his in-laws: [50]. The judge was unable to accept that the appellant's mother in law was signed off work due to stress related to the appellant's immigration status: [51]. Having considered Beoku-Betts [2008] UKHL 39; [2009] 1 AC 115 and Kugathas [2003] EWCA Civ 31; [2003] INLR 170, the judge stated that he did not accept that the relationship between the appellant and his wife and her parents amounted to a family life: [53]-[55]. The appellant's wife had said that she would not go to India but 'in spite of her misgivings', she would still have the opportunity to join the appellant in India. Alternatively, he could make an

application for entry clearance: [57]. The final two paragraphs are in the following terms:

> "[58] on the evidence before me, I consider there is insufficient basis for departing from the original findings of FTT boys in respect of the appellants previous unsuccessful human rights appeal, just over one year ago.
>
> [59] I Additionally consider that the appellants Article 8 claim is in capable of falling within the exceptional cases requirement of Razgar and that the respondents proposed interference with the appellants private and or family life in the UK is thereby justified."

The Appeal to the Upper Tribunal

12. Permission to appeal was sought and granted on no fewer than seven grounds. Rather than set out the grounds at this stage, I propose to consider each in turn, together with the submissions which were made upon them. Before I do so, I should explain the basis upon which my decision on the appeal was reached without a hearing, under rule 34(1) of the Tribunal Procedure (Upper Tribunal). Rules 2008.

13. Permission to appeal was granted by Judge Shimmin on 18 February 2020. Shortly thereafter, the global pandemic began in earnest and, by 23 March, the Upper Tribunal was closed to the public. On 5 May 2020, therefore, the papers were placed before me to decide whether progress might be made in the appeal notwithstanding the ongoing 'lockdown'. I reached the provisional view that the Upper Tribunal might fairly and justly consider on the papers the questions of whether the decision of the FtT contained an error of law and, if so, whether it fell to be set aside. I invited the parties to make submissions on that provisional view and to make submissions on the merits of the appeal in case I decided to proceed without an oral hearing.

14. On 8 June 2020, further submissions were filed and served by Mr Canter. On 24 June 2020, Mr Tan, a Senior Presenting Officer, filed and served submissions in reply. Mr Canter's responded to those submissions on 29 June 2020. Mr Tan did not respond to the suggestion that the Upper Tribunal might proceed without a hearing. For his part, however, Mr Canter submitted in his initial submissions and those of 29 June that an oral hearing was required.

15. I have considered whether the appeal can be determined fairly and justly without a hearing. In doing so, I have taken into account the views expressed by the parties, as required by r34(2). In considering the application of the over-riding objective to this situation, I have considered what was said by the Supreme Court in Osborn v Parole Board [2014] 1 AC 1115. There are no contested matters of fact before me. The resolution of the issues does not require me to consider oral evidence or the credibility of a witness. The parties have been given an opportunity to

make written submissions and have done so, at some length. Whilst I accept what is said about the persuasive power of oral argument in Mr Canter's written submissions, echoing as it does what was said by Laws LJ in Sengupta v Holmes [2002] EWCA Civ 1104, there is no rule that any contentious matter must be resolved by oral argument. All depends on the context. I am satisfied, on the facts of this individual case, that the competing arguments can be resolved fairly and justly without an oral hearing.

Analysis

16. I consider that some of the grounds of appeal are made out and that some are not. I begin with those that do show errors of law in the decision of the judge.

17. By ground six, it is submitted that the judge failed 'to properly assess the relevant paragraph of the Immigration Rules'. With respect to Mr Canter, that short description does little justice to the powerful complaint which follows. The ground of appeal, as developed over the course of [25]-[26] of the initial grounds, is actually that the judge misdirected himself in law in concluding that paragraph S-LTR 4.2 was of any application to the facts as found by Judge Boyes. This ground of appeal is based on the terms of S-LTR 4.2, which are as follows:

> S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful).

18. Mr Canter submits, as he did before the judge, that this discretionary ground of refusal only applies to applicants who have made false representations or failed to disclose any material fact in support of an application for leave or in order to obtain a document from the respondent or a third party in order to support such a claim. It could not apply, he submits, when the deception practised by the appellant in this case had been of HMRC alone, and had not been practised in order to obtain a document to support an application for leave. Mr Canter submits that the judge failed to come to grips with that submission at [28] of his decision. It was no answer to the point, he submits, that there had been a 'deficiency of disclosure' on the part of the appellant. The judge had compounded his error by relying on Martin Spencer J's decision in R (Khan) v SSHD. That decision concerned a different paragraph of the Rules.

19. In reply, Mr Tan submitted that the judge had not erred in this respect. He had been entitled to rely on the appellant's deficient disclosure in his applications for leave to remain.

20. I consider that the judge clearly fell into error in concluding that S-LTR 4.2 applied to the deception practised by the appellant. Judge Boyes found that the appellant's false representations had been made to HMRC. She accepted, in other words, that the sums he had provided to the respondent in respect of his self-employed earnings were accurate and that the £20,000 discrepancy between that sum and the sum declared for tax purposes represented an attempt by the appellant to defraud the Revenue. Judge Boyes found that such conduct was covered by paragraph 322(5) of the Immigration Rules, which provides as follows:

> (5) 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;

21. Martin Spencer J reached the same conclusion in respect of paragraph 322(5) in R (Khan) v SSHD and his conclusion was endorsed by the Court of Appeal at [35]-[37] of Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647. None of the reported decisions which I have been able to locate, however, extend the application of the very differently worded paragraph S-LTR 4.2 (or paragraph 322(2)) to the deception of a third party without an intention to secure an immigration advantage from that deception. On its face, the paragraph only applies to deception which has that advantage as its objective. There is no policy guidance before me but I would be surprised if it was not made clear in the respondent's guidance that it is the public policy rules (322(5), S-LTR 1.6 etc) which should be used when, for example, an applicant has sought only to deceive a government department other than the Home Office. I accept, in summary, that the appellant has not made a false representation which was properly capable of attracting a refusal under paragraph S-LTR 4.2, and that the judge erred in law insofar as he concluded otherwise.

22. If I understand the judge's conclusions at [28] correctly, he also reasoned that the appellant had failed to disclose a material fact in one or more applications for leave to remain. Bearing in mind that the appellant has been found, at least since Judge Boyes' decision, to have told the truth about his earnings in his applications for leave to remain, I am not sure what was thought by the judge to amount to a 'deficiency of disclosure'. It is to be recalled that a person applying for leave to remain is not under a duty of candour approximating to *uberrima fides*: Khawaja v SSHD [1984] AC 74, at [11]. In the absence of a specific question in response to which the appellant might properly have been expected to mention that he had successfully defrauded the Revenue in successive years, he was not required to disclose this fact in his application for leave to remain. The judge cited no such question, nor have I been directed to one by the respondent. Insofar, therefore, as the judge relied on the appellant's

'deficiency of disclosure' to the respondent, I am satisfied that he fell into error in that regard also.

23. In the circumstances, I am persuaded that the judge's conclusions as to the applicability of S-LTR 4.2 to the facts of this case were wrong in law and cannot stand. Ground six is made out.

24. It is logical to consider ground seven immediately, since it also bears on the correctness of the judge's consideration of S-LTR 4.2. By this ground, Mr Canter submits that even if the judge was correct to conclude that S-LTR 4.2 was capable of applying to the deception practised by the appellant, he nevertheless erred in failing to consider for himself whether the discretion inherent in that paragraph was to be exercised for or against the appellant. It was and is common ground that S-LTR 4.2 is one of the suitability grounds under which a person should normally be refused leave to remain; refusal is not mandatory, as it is when certain other paragraphs apply. Mr Canter submits that it did not suffice for the judge to consider whether the respondent's discretionary power was exercised in a 'reasonable and proportionate' manner; what he was required to do was to consider for himself the points militating for and against refusal under S-LTR 4.2 and to reach a reasoned conclusion.

25. Mr Tan submits on behalf of the respondent that the judge's treatment of this question was adequate. I cannot accept that submission. Whether one looks at very old authority from the Asylum and Immigration Tribunal or very recent authority from the Court of Appeal, it is clear that a decision-maker (whether the respondent or a judge) is required to conduct a balancing exercise: Yaseen [2020] EWCA Civ 157; [2020] 1 WLR 1359. It did not suffice for the judge to conduct a review on public law principles as he did at [33]. Even if the judge had not erred in the manner contended in ground six, therefore, his consideration of S-LTR 4.2 was deficient for the reason given in ground seven.

26. The judge's conclusion that the appellant could not succeed under the Immigration Rules was based on his decision to uphold the Suitability ground of refusal. That decision was erroneous for the two reasons I have given above and it will be set aside. Given the importance[3], in an appeal on Article 8 ECHR grounds, of a finding that an individual cannot meet the Immigration Rules, I conclude that the judge's consideration of Article 8 ECHR as a whole cannot stand and that the decision will have to be remade for the reasons above. It would be wrong, however, not to express my conclusions on the remaining grounds of appeal, although I do so rather more briefly in light of the conclusion already reached.

27. By ground five, Mr Canter submits that the judge failed 'properly to consider' the reasons given by the appellant's spouse for not being able to

[3] GM (Sri Lanka) [2019] EWCA Civ 1630 and TZ (Pakistan) [2018] EWCA Civ 1109 refer.

continue her family life with the appellant in India. As with ground six, the summary of the ground belies its strength. What is actually contended is that the judge failed altogether to engage with what the appellant said in his witness statement about the reasons that his wife could not relocate. It is fair to say that a number of those reasons (that the appellant's wife was born in the UK, for example) could not, without more, meet the demanding threshold posed by the Immigration Rules or the Strasbourg authorities. It was also asserted, however, that the appellant and his wife were responsible for caring for her elderly mother whilst her father was away during the week. Although the judge made a finding that the relationship between the appellant's wife and her parents was not one which engaged Article 8 ECHR in its family life, at [54]-[55], and although he concluded that the appellant's mother-in-law's stress did not relate to the appellant's immigration status, at [51], he failed to consider whether the appellant and his wife care for her, or to assess the consequences of any such care being removed. In the circumstances, the judge demonstrably failed to engage with the most important basis upon which it was said that family life could not continue in India.

28. By ground four, it is contended that the judge failed to consider the appellant's explanation for the police caution he had received for fraud. He had explained the circumstances in which he came to receive that caution at [27] of his witness statement and the judge had failed to consider what was said before concluding that the appellant had a 'propensity for dishonesty'. Mr Tan responds that the judge was not required to set out every aspect of the evidence and that his findings were sustainable. I accept the premise of that submission but not the conclusion.

29. The appellant presented before the judge as a man who had been found to have intentionally submitted a seriously erroneous tax return to HMRC so that he might escape his tax liabilities. That was a serious stain on his character. The extent of the stain was considered by the judge to have increased appreciably, however, as a result of the caution for an unrelated matter. In reaching that finding, which was clearly an important aspect of the public interest weighing against the appellant, the judge failed to take into account what had been said in the witness statement. The contents of that statement did not dispute the existence of the caution but shed light on the circumstances in which it came to be accepted by the appellant and his culpability for that offence. It was certainly relevant to the judge's conclusion that he has a propensity for dishonesty and the judge was required to engage with it before he made such a significant finding.

30. Ground one is also made out. By that ground, Mr Canter submits that the judge erred in his application of the Devaseelan [2003] Imm AR 1 principles. Obviously, the factual findings which had been made by Judge Boyes in relation to the appellant's tax affairs represented the starting

point for the judge. It is fair to say that there was no evidence which would have justified the judge taking a different view on this issue. Indeed, at [28] of his statement before the judge, the appellant expressly accepted that the point had been concluded against him.

31. Where it is said by Mr Canter that the judge fell into error in his application of Devaseelan, however, was in concluding that it was also of application in relation to Judge Boyes' assessment of proportionality. She was considering an appeal on private life grounds, and had concluded that the appellant's private life was outweighed by the public interest. When this appeal came before the judge, however, a different factual matric was relied upon. This was a family life case in which different considerations applied[4] and it was wrong for the judge to take Judge Boyes' assessment of proportionality as his starting point and to conclude, at [58], that there was 'insufficient basis for departing from the original findings of FtT Boyes'.

32. It seems that the judge based his approach in this regard on something he said at [46], which was that the 'appellant's relationship with his British partner was a material factor expressly taken into consideration in Ftt Judge Boyes' decision'. With respect to the judge, it was not possible to describe Judge Boyes's decision in that way. To do so tended to suggest that she had undertaken a balancing exercise which was fully informed by the appellant's relationship with his (then) partner and her circumstances. But all that judge Boyes said about the appellant's wife was "He is in a relationship with a British citizen but it was accepted before me that he does not meet the requirements of Appendix FM'. This was no evaluation of the appellant's family life with the sponsor; nor could it have been, because Judge Boyes was simply not presented with the facts, or the detailed evidence which the judge had before him. Contrary to the submissions made by Mr Tan, therefore, Judge Boyes's evaluation of proportionality (as compared to her evaluation of the appellant's dishonesty) represented little, if any, starting point for the judge's own assessment. He erred in law in approaching the matter differently.

33. Grounds two and three are not made out. Ground two criticises the judge for directing himself, at [38], that the appellant 'must satisfy me that the combined strength of his private and family life … is sufficiently compelling to outweigh the Respondent's interests'. I accept that this was infelicitous, given that it is well established that it is for the respondent to establish the proportionality of a decision to interfere with a protected right, but it was demonstrably no more than that. The judge gave himself a proper self-direction at [22] and I am satisfied, having read the decision as a whole, that he followed that direction.

[4] As illustrated, for example, by what was said by Green LJ (with whom Simler LJ agreed) at [39]-[41] of GM (Sri Lanka) [2019] EWCA Civ 1630.

34. By ground three, it is contended that the judge failed to consider what was said by Lord Reed at [51] of Agyarko [2018] UKSC 11; [2016] 1 WLR 390. I need not, with respect, set out what Lord Reed said in that paragraph about the public interest in an individual's removal possibly being reduced where he was 'otherwise certain to be granted entry clearance'. Whilst it is correct that the judge failed to engage with this submission, it was plainly not one which could prosper. Even if the appellant demonstrably met the Relationship Requirements, the Financial Requirements and the English Language Requirements for entry clearance under Appendix FM, it could not possibly be held that the appellant would be 'certain' to be granted entry clearance if he applied as a spouse. An ECO would have Judge Boyes' decision before him and would know that the appellant was a man who had attempted to defraud the Revenue of more than £20,000. Even if the remaining requirements were met, an ECO would have available to them a mandatory ground of refusal under S-EC 1.5. Where such a ground of refusal was available, it could not possibly be said that this was a case to which Lord Reed's dictum applied.

35. In summary, therefore, ground one and grounds four to seven are made out. Since I will be setting aside the decision for the reasons above, I make one further observation. I have reproduced the judge's [58] above, although it is not the subject of any grounds of appeal. I did so because I wished to note that it was erroneous for the judge to make any reference to there being an 'exceptional cases requirement'. As Lord Bingham explained in Huang [2007] UKHL 11; [2007] 2 AC 167, and as Green LJ more recently said in GM (Sri Lanka), there is no 'incremental requirement over and above that arising out of the application of an Article 8 proportionality test'.

Notice of Decision

The decision of the FtT was erroneous in law and is set aside. The decision on the appeal will be remade in the Upper Tribunal.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 August 2020