



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06168/2018

THE IMMIGRATION ACTS

Heard at Field House
Via Business for Skype
On 20th May 2021

Decision & Reasons Promulgated
On 20th July 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR ATIQUE REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs instructions by Vision Solicitors Ltd
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Fenoughty promulgated on 25th November 2020 and dismissing the

appellant's appeal against the Secretary of State's decision of 5th February 2018 to refuse his application for indefinite leave to remain in the United Kingdom under paragraph 276B and paragraph 322(5) of the Immigration Rules.

2. The appellant entered the UK as a student in September 2006 and made successful applications for Tier 1 status in 2008, 2011 and 2013. The 2011 and 2013 applications were based on annual income which exceeded £35,000 in those years.
3. The appellant married his wife, a Dutch national, on 28th March 2011, they had a daughter on 6th March 2013 and separated approximately six months later when the wife returned to live in the Netherlands and a court order was made on 9th December 2015 providing for contact between the appellant and his daughter.
4. In 2016 the appellant declared to the HMRC that errors had been made by his accountants who had mistakenly overwritten the income declared used for the applications for the tax years ending April 2011 and 2013. The applicant paid the tax due of £9,147.97 and £9,123.19 respectively. On 2nd September 2016 he made an application for indefinite leave to remain under paragraph 276B of the Immigration Rules.
5. That application was refused, and his appeal was heard on 15th November 2018 and the decision was set aside and the matter reheard on 7th January 2019. That second decision was set aside by the Tribunal and the matter was again remitted for rehearing.
6. The refusal letter of the respondent dated 5th February 2018 recorded that the appellant had made an application in February 2016 and following a pause in considerations had been sent a tax questionnaire by UK Visas and Immigration ("UKVI") with a request for further evidence, which he returned on 28th August 2017. The refusal letter rejected the appellant's explanation that the registered accountant had submitted a self-assessment tax return declaring earnings considerably lower than their client's actual earnings. It was concluded the appellant had misrepresented his earnings at various times and from time to time and changed what he had represented in respect of his earnings to HMRC and/or UKVI for the purpose of reducing his tax liability or for the purpose of obtaining leave to remain or both. As he had a Masters of Business Administration degree it was considered not credible that he would have not noticed the considerable discrepancy between the sums declared to HMRC.
7. It was noted that paragraph 322(5) was not mandatory, but it was not accepted that the appellant had satisfactorily demonstrated that his failure to declare to HMRC his earnings 'were genuine errors'.
8. Also under paragraph 276B(ii)(c) it was undesirable for him to be given leave to remain taking into account his character and conduct.

9. It was noted in respect of his private and family life that his child was not a British citizen and was not living in the UK and had not lived in the UK for seven years prior to the application. There were no exceptional circumstances.

Grounds for Permission to Appeal

10. The application for permission to appeal noted that the First-tier Tribunal found the respondent was:

“Entitled to infer that he had been deceitful or dishonest in relation to the income declared to the HMRC and/or UKVI for the years ending April 2011 and 2013. It was a rational conclusion that he had not been completely honest or transparent in relation to his income, either with the Home Office or with HMRC” (paragraph 94).

The appeal was dismissed essentially for this reason.

11. The judge also found that the appellant’s child’s best interests were for her father, the appellant, to remain in the UK to ensure regular face to face contact but this did not constitute a “particularly strong” Article 8 ECHR claim making the respondent’s discretionary use of paragraph 322(5) and 276B(ii) and (iii) was not disproportionate in the circumstances.

12. It was submitted that the grounds of appeal were as follows.

Ground 1

The judge materially erred in law by failing to make necessary findings of fact. In particular, the judge failed to decide for herself whether the appellant was dishonest and if so whether he was dishonest in respect of his dealings with the HMRC, the respondent or both.

13. As the House of Lords explained in **Huang [2007] UKHL 11** the FtT’s function:

“Is not a secondary, reviewing, function dependent on establishing that the primary decision maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it”.

14. It was accepted the judge made several findings but she did not make any findings as to whether (a) the appellant acted dishonestly, and (b) whether he acted dishonestly in respect of HMRC or the respondent or both. Instead, the judge merely found it was a “rational conclusion that he [the appellant] had not been completely honest or transparent in relation to his income with the Home Office or with HMRC”.

15. It was apparent the judge did not make the required findings identified by this ground of appeal. At paragraph 103 the judge states “I have found the respondent was entitled to find that he had been dishonest and that paragraph 322(5) was engaged”.

16. The judge also wrote at paragraph 111 “he has been found to have misrepresented his income either to HMRC or to UKVI and as a consequence, he does not meet the provisions of the rules...”.
17. When read in context and in the light of paragraph 94 and 103 and the absence of any findings by this judge as to dishonesty and as to the precise particulars of the dishonesty and that noting the reference in paragraph 111 to “he has been found” must be to the findings of the respondent, not those of the FtT, there are simply no findings by the judge on these matters.
18. It was submitted that was an error of law and material.
19. The grounds further read:

“It cannot be assumed that the judge would have found the appellant behaved dishonestly and certainly no assumptions can be made about what the findings the FtT would have made as to the extent and details of any dishonesty (for e.g. where there was dishonestly (sic) in respect of HMRC, or in respect of applications to the respondent, or both)”.

This was clear because the judge made several findings at paragraph 93 that were in fact consistent with the appellant’s case.

20. She found in respect of both relevant tax years the appellant submitted the correct figures to HMRC only for these to then be overwritten later. Whilst this was admittedly odd it was consistent with the appellant’s attempt to explain the discrepancies by surmising that a second firm of accountants submitted incorrect data to HMRC. It was extremely hard to understand why the appellant would have submitted correct data to HMRC only to amend this later if his intention was to commit tax fraud. The judge does not evaluate the implications of these points because she does not consider herself whether the appellant was dishonest.
21. Further, even if the judge found the appellant acted dishonestly the judge made no attempt to determine whether the appellant lied to HMRC or to the respondent or whether he lied to both organisations or as to whether he was dishonest in some other way.
22. As the Upper Tribunal observed in **Ashfaq (Balajigari: appeals) [2020] UKUT 226** it is necessary to consider which of the various possibilities are correct.

Ground 2

23. The judge materially erred by failing to consider and decide for herself whether the appellant’s presence in the UK with his being given ILR was undesirable. Without prejudice to the generality of the point the judge erred by treating the evaluation of whether the appellant was undesirable as part of the evaluation of whether paragraph 322(5) and 276B(ii) should have been deployed as a matter of the respondent’s discretion.

24. As held in **Balajigari v SSHD [2019] EWCA Civ 673**, the application of paragraph 322(5) required a two-stage analysis, see paragraph 33, 37 and 38. In effect, there was a two-stage analysis, the first stage to decide whether paragraph 322(5) applied at all – that it is undesirable to grant leave in the light of the specified matters, and if it does since such undesirability is a presumptive rather than a mandatory ground of refusal, to decide as a matter of discretion whether leave should be refused on the basis of it. As to undesirability there must be (1) reliable evidence of, (2) sufficiently reprehensible conduct, and (3) an assessment taking proper account of all relevant circumstances.
25. The second stage:

“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” (paragraph 39 of **Balajigari**).
26. The grounds submitted that a similar analysis applied in respect of 276B(ii) which accordingly requires the decision maker to evaluate whether it would be undesirable to grant a person ILR bearing in mind all relevant factors.
27. The judge must decide for herself the relevant facts and issues and the judge was required to decide for herself whether the appellant’s presence in the UK was “undesirable” and to do so after conducting the balancing evaluation referred to above. The judge plainly failed to do this and conflated the requirement to evaluate undesirability with the second stage question as to whether it was proportionate in terms of Article 8. This was clear from paragraphs 103 to 104.
28. At paragraph 103 the judge reiterated that “she has found the respondent was entitled to find that he had been dishonest, and that paragraph 322(5) was engaged”.
29. At paragraph 104 she states “the decision not to grant leave, following paragraph 322(5) is discretionary. I do not accept Mr Biggs’ submission that discretion should not have been exercised to refuse leave in the circumstances”.
30. It was tolerably clear therefore that the judge conflated the evaluation of undesirability with the discretion as to whether to use paragraph 322(5). That was a fundamental error.
31. A key submission to why it would not be undesirable for the appellant to remain in the UK was the fact the appellant’s child’s best interests lay in the appellant remaining in the UK.
32. The judge simply failed to consider the submission adequately or at all.

Ground 3

33. The judge materially erred in making a perverse finding, i.e. a finding unsupported by evidence by relying on an assumption that the appellant would be able to make periodic visits to see his daughter in the Netherlands if he were to reside in Pakistan.
34. The appellant's evidence was that he would face real difficulties in obtaining leave to enter the Netherlands primarily because he had limited ties to Pakistan and he would have been found to have been undesirable in the UK.
35. The judge does not explain how in the light of them the appellant could periodically visit the Netherlands.

Ground 4

36. The judge materially erred by acting procedurally unfairly when assessing the appellant's credibility. The judge relied upon inconsistencies between the appellant's oral evidence and his witness statement of 2nd January 2020 but these were not put to the appellant during the hearing. That was procedurally unfair as per the well settled principles of **R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531**. In judicial procedure it is axiomatic that a witness should be given the opportunity to comment on inconsistencies.
37. In submissions, at the hearing before me, Mr Biggs acknowledged that the grant of permission effectively gave no reasons but submitted that the judge after a lengthy process and setting out of her conclusions for whatever reason did not make any findings on dishonesty and nor did she explain how the appellant was dishonest either in respect of HMRC or the Home Office or both and was required to do so for which he relied on **Ashfaq**. He agreed that it was open to the Tribunal to find that the appellant was dishonest in respect of both but the primary point was that the judge made no finding of dishonesty at all but referred to whether the Home Office was entitled to do so contrary to **Huang**. This statement was not an isolated slip as the remainder of the decision showed. In relation to ground 2 Mr Biggs accepted that it was for the Secretary of State to exercise discretion and the Tribunal at the second stage must consider whether it was compatible with Article 8 but the judge conflated the first and the second stage. The judge failed to make a finding on undesirability. The first stage required (1) reliable evidence of, (2) sufficiently reprehensible conduct, and (3) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision on whether his presence in the UK is undesirable. The second stage was consideration of the factors outweighing the presumption that leave for that reason should be refused. The judge conflated the third limb of the first stage with the second stage.
38. Mr Biggs acknowledged that the second ground linked to the first ground as to whether dishonesty was found.

39. In relation to ground 3 Mr Biggs submitted that the finding at paragraph 101 that the appellant would be able to have periodic visits to the Netherlands was unsupported at paragraph 32 and 33 by the evidence.
40. In relation to ground 4 there was procedural unfairness. Mr Biggs conceded that the grounds of appeal did not challenge the judge's finding on discrepancies but stated that the discrepancy between the January 2020 statement and the oral statement should have been put to the appellant. When I raised the availability of re-examination at the hearing before the First-tier Tribunal to address that Mr Biggs acknowledged that he did not have in his bundle the statement of January 2020. It transpired that the appellant had instructed further solicitors (this was the third time this matter had been considered before the First-tier Tribunal) and it would appear that this January 2020 statement was not in the bundle. Mr Biggs acknowledged **Doody** as pleaded in the grounds for permission to appeal and accepted that generally speaking an advocate was required to be aware of the contents of what was in the papers and deal with that at examination-in-chief but that general obligation was not fatal because the statement the judge relied upon was not in the appellant's bundle as the solicitors had not included that within the papers. Thus he did not have the opportunity to allow the appellant to address the inconsistency, albeit the appellant may have been aware of an earlier statement.
41. I raised the case of **Hassan Gheisari v Secretary of State for the Home Department [2004] EWCA Civ 1854** with Mr Biggs, particularly at paragraphs 11 to 14. Mr Biggs responded that this was a very different assertion from a finding of fact and the judge should have made specific findings on dishonesty.
42. Mr Walker relied on the refusal of the grant of permission of Judge Loke. In relation to ground 1 that merely states the judge was required to make a finding of dishonesty. It was not incumbent upon the judge to go further and determine whether the appellant had been dishonest with HMRC or SSHD. In any event paragraph 93 made plain that the judge found the appellant had been dishonest with HMRC.
43. In relation to ground 2, paragraph 322(5) states leave should normally be refused where it would be undesirable for a person to remain in the UK in the light of their conduct. It is clear that the judge's secure findings of dishonesty on the part of the appellant amounted to undesirable conduct. The judge at 104 went on to consider whether a discretion ought to have been exercised with reference to the relevant authority.
44. Ground 3, at 101 the judge conceded it may well be easier for the appellant to visit his daughter from the UK but properly concluded it was possible for the appellant to maintain communication by Skype or periodic visits. That was a finding which was open to the judge given there was no independent evidence to indicate the appellant would be unable to visit his daughter from Pakistan.

45. Ground 4, the judge was plainly entitled to assess the entirety of the evidence and the inconsistencies therein when making credibility findings. It was not incumbent upon the judge to put every inconsistency to the appellant in order to reach his findings.
46. Mr Biggs' submitted, by way of response, that paragraph 93 belied the assertion that the judge made a clear finding. Paragraph 93 of the determination set out a series of clearly express and specific findings of fact but not a finding on dishonesty.
47. It appeared that the judge failed to make a finding on dishonesty and evaluated the use of paragraph 322(5) by asking whether it was open to the respondent to rely on the Rule in the circumstances and that was plainly wrong in law.
48. If the judge was required to determine the specificity how a person accused of being undesirable in respect of paragraph 322(5) of the Immigration Rules had been dishonest, the nature and extent of the applicant's dishonesty would inevitably be relevant to (a) the balancing of factors required by paragraph 322(5) in respect of the evaluation of undesirability, and (b) to the proportionality of the appellant's removal in respect of Article 8 more generally.
49. In respect of ground 2 Judge Loke's reasoning did not explain why the appellant's arguments were wrong and the judge made no finding that the appellant's presence in the UK was undesirable.
50. Mr Biggs submitted that the matter should be set aside in its entirety and none of the findings preserved. There should be a fresh evaluation of the facts because of the error of the procedure in the judge's approach which had meant the hearing was not fair.

Analysis

51. The primary ground of appeal was that the judge had failed to make any findings on dishonesty. The specific factual findings the judge did make, however, which ranged from paragraph 65 to 114 were not challenged and Mr Biggs conceded that point.
52. From paragraph 65 the judge made a series of crucial findings in relation to the appellant's explanation as to the overwriting of the business accounts and the judge further, made a series of adverse credibility findings. The judge had recorded that the appellant had a Masters of Business Administration degree and that the respondent had stated it was not credible that he would not have noticed the considerable discrepancy between the sums declared to HMRC and on his Tier 1 (General) application and the tax implications this would have (9). The question of dishonesty was central to the appeal and that is evident from reading paragraphs 1 to 64 of the determination.
53. At paragraph 65 the judge found:

"There are several aspects to the appellant's account which are inconsistent or contradictory, for which he has failed to give an adequate explanation. These

inconsistencies significantly undermine the credibility of his explanation for the discrepancy between the figures declared to the UKVI, and the revised figures declared to HMRC by the appellant's original accountants, Mahmood".

54. That clearly makes a finding on the appellant's credibility.
55. From paragraph 66 onwards, the judge addressed the two streams of income which was the appellant's explanation for the "overwriting" in the two years of accounts ending 2011 and 2013. At paragraph 67 the judge found that the appellant's assertion in his written statement (November 2020), that he knew the reason why Mahmood Accountants filed a second stream of income – in order to avoid a late filing penalty – contradicted his oral evidence that he did not instruct these accountants at all in relation to tax returns for year ended 2011 and 2013 (at paragraph 67). The judge also noted that, inter alia, then the appellant claimed that he only ever instructed one firm of accountants at a time and Mahmood took action without his knowledge (paragraph 69). At paragraph 70 further implausibility became apparent when the appellant stated that he had "dis-instructed them (Mahmood) part-way through the year, so they must have had incomplete information, which they submitted to HMRC". The judge pointed out the contradiction and inconsistency at paragraph 71 that there was included in the evidence invoices from Mahmood for the tax years ending in 2011 and 2013.
56. Again at paragraph 72 the judge noted that the "appellant said he had not instructed Mahmood to [do] enter the lower figures and had not instructed them to file tax returns for him for these two years".
57. At paragraph 74 the judge found that the appellant stated in his witness statement of November 2020 that problems with HMRC figures arose and were pointed out to him during court proceedings over his child and his "wife wished to obtain further child maintenance. He said she obtained his financial documents, including their joint bank statements and gave them to a friend who was an accountant without his knowledge" and at the hearing she represented herself. The judge found in fact that the proceedings related to child residence and contact only, not to finance and further the wife was represented by a solicitor. The judge also noted that the "court order in respect of the appellant's daughter provided for her to spend time with him in the UK at Christmas and in the summer, and, in the Netherlands on alternate weekends". Clearly the court saw fit to make an order that the appellant should have contact in the Netherlands and could travel to do so.
58. At paragraph 77 the judge recorded that the appellant:
- "Told the Tribunal that he did not know, until December 2015 that Mahmood had gone out of business in June 2015. In his UKVI questionnaire dated 28th August 2017, he said Mahmood had submitted his tax returns for the years ending April 2015 and April 2016. This could not have been true, if Mahmood had gone out of business in June 2015".*
59. Critically at paragraph 78 the judge found:

“The appellant says he has not obtained supporting evidence from his accountants because they went out of business in June 2015 and May 2017 respectively. This does not explain why he did not obtain an explanation from JSR, before May 2017, for the situation which arose, when he became aware of it in December 2015”.

The judge concluded that “the absence of this evidence [from JSR Accountants] undermines the appellant’s credibility”.

60. At paragraph 80 the judge found:

“The appellant’s explanation for the substitution of lower figures to the HMRC for the tax return for 2012/2013 is essentially the same as his explanation for the substitution of the lower figures two years before. I therefore find that his explanation is equally lacking in credibility”.

As the judge also found, there was no statement from Apex (the appellant’s later accountants) and no accountant from that firm attended to give evidence to explain how they “discovered that Mahmood had overwritten earlier data, or how they had come to the conclusions in their letter of 21st December 2015”. In their letter they referred to the second tax return filed by Mahmood in January 2012 but no copy of the “second tax return filed by Mahmood Accountancy”.

61. The judge added at paragraph 82 that “there was no explanation for the absence of a witness statement as to the circumstances in which Apex were instructed, and the reasons for their conclusions”.

62. Finally at paragraph 85 the judge concluded:

“It is unclear from the evidence exactly how the substituted figures came to be submitted to HMRC. However the appellant has been given every opportunity to explain the situation, and I have found his explanations to be implausible, contradictory, inconsistent and insufficient to support his claim that the discrepancies in his tax affairs [a] (sic) resulted from an error by his accountants”.

63. And indeed at paragraph 88 the judge noted paragraph (3) of the headnote of **Ashfaq** which states:

“The explanation by an accountant said to have been made or contributed to an error is essential because the allegation of error goes to the professional standing. Without evidence from the accountant the Tribunal may consider that the facts laid by the Secretary of State establish the appellant’s dishonesty”.

64. The judge proceeded at paragraph 89 to find:

“I do not accept that the appellant would not have been able to obtain an explanation from JSR who did not close down until mid-2017, some eighteen months after the appellant claims to have discovered the discrepancy ... The absence of evidence which could reasonably have been expected to be available, significantly reduces the weight that can be placed on the various explanations offered by the appellant”.

65. In the overall context of findings relating to dishonesty, and the citations from the legal authorities, found the appellant not credible and it is clear that the judge rejected the appellant's explanation that he was not dishonest.
66. Although the findings from paragraph 93 onwards were heavily criticised as merely adopting the mantle of the Secretary of State these were merely a superfluity of findings and clearly indicated that the judge agreed with the findings of dishonesty made by the Secretary of State. The critical findings of rejecting the appellant's explanation had already been made by the time the judge arrived at his confirmatory findings at paragraph 93, and at paragraph 94 the judge stated:

"The burden of proof lay on the respondent in establishing the facts on which it relied. Having raised the suspicion of dishonesty, and having considered the appellant's various unsatisfactory explanations, I find that it was entitled to infer that he had been deceitful or dishonest in relation to the income declared to the HMRC and/or UKVI for the years ending April 2011 and 2013. It was a rational conclusion that he had not been completely honest or transparent in relation to his income either with the Home Office or with HMRC".

67. However, a clear finding at 85 had been made that the judge had rejected the appellant's explanation in relation to dishonesty. The founding ground of the appeal was as per **Huang**, that the judge's function was not a reviewing function and that "the appellate authority must decide for itself whether the impugned decision was lawful". From the findings cited above in detail it is self-evident that the judge found the appellant not credible and dishonest.
68. Even if that were not the case, at the hearing I referred Mr Biggs to **Hassan Gheisari** which at paragraph 11 states that it is permissible where the Adjudicator having independently considered the question agrees with the reasoning given by the Home Office refusal letter simply to say so and "the Home Secretary's reasons then become the Adjudicator's by express adoption. But if they turn out to be inadequate, so will the Adjudicator's decision be".
69. What was said in **Hassan Gheisari** was that what saved the Adjudicator's decision from a deficiency of reasons was that single passage and the reference to "his evidence lacks the ring of truth" and the Court of Appeal stated that:

"This, I am prepared on consideration to accept, goes beyond simply echoing the Secretary of State's incredulity. It expresses, however laconically, the Adjudicator's own evaluation of the veracity of the account that he has been given. That was his task. Although for much of this appeal I was of the view that he failed to perform it, I am prepared in the end to accept, slender though it is, that it represents his independent judgment on the critical matter upon which the issue of risk to the appellant hinged namely whether he had indeed been arrested, ill-treated and liberated as he claimed".

70. In this particular instance I consider that the judge's independent reasoning and endorsement of the Secretary of State's findings is sufficient to conclude that the appellant was indeed dishonest. Contrary to the grounds on reading the decision as

a whole, it is clear that the judge found the appellant to have been dishonest and this is not merely an assumption. It is also sufficiently clear that the judge found the appellant was in fact dishonest in respect of both the HMRC and the UKVI because of the use at paragraph 94 of

“Dishonest in relation to the income declared to the HMRC and/or UKVI particularly in light of the second statement ‘it was a rational conclusion that he had not been completely honest or transparent in relation to his income either with the Home Office or with HMRC”.

71. The grounds submit that the judge did not evaluate why the appellant would have submitted correct data to HMRC initially only to amend it later if his were to commit a tax fraud. That is not difficult at all. The appellant is recorded as having extracted a declaration of income at a higher rate which was used to support an application to UKVI then overwritten the income and obtained a lower income declaration for tax purposes. As recorded at paragraph 2 the appellant had made successful applications for Tier 1 status in both 2011 and 2013, those applications were based on an annual income which exceeded £35,000 in those years.
72. It is now known that it is only when applicants apply for indefinite leave to remain that their income declarations are cross-referenced with HMRC by the Home Office.
73. In relation to the second ground the judge specifically found therefore that the appellant had been dishonest and the judge specifically noted at paragraphs 37(2) of **Balajigari** which described that even dishonest conduct may not be sufficiently reprehensible to justify use of paragraph 322(5) in all cases and it would depend on the circumstances, “the guiding principle being that the threshold for sufficiently reprehensible conduct is very high”. The Court of Appeal specifically stated however, that in this regard:

“We would accept that as a matter of principle dishonest conduct will not always in every case reach a sufficient level of seriousness, but in the context of an earnings discrepancy case it is very hard to see how the deliberate and dishonest submission of false earnings figures, whether to HMRC or to the Home Office, would not do so”.

74. The grounds submitted that the judge failed to assess properly whether the conduct was undesirable in the light of (1) reliable evidence, (2) sufficiently reprehensible conduct, and (3) an assessment of the relevant circumstances as at the date of decision. I find the judge had indeed when considering whether it was undesirable conduct considered (1) the relevant evidence, (2) in relation to the sufficiently reprehensible conduct stated in terms at 104 “I do not accept Mr Biggs’ submission that discretion should not have been exercised to refuse leave in the circumstances”. That also refers to the relevant circumstances.
75. I am not persuaded that the judge failed to decide for herself the relevant facts and issues as identified above. The judge had assessed the evidence and as stated found that the appellant was dishonest. As pointed out at paragraph 37, the Court of Appeal stated that:

“We would accept that as a matter of principle dishonest conduct will not always in every case reach a sufficient level of seriousness, but in the context of an earning discrepancy case it is very hard to see how the deliberate and dishonest submission of false earning figures whether to HMRC or to the Home Office would not do so”.

It was submitted the judge had not approached the third limb properly but as I pointed out in the hearing the touchstone was the dishonesty. At 104 the judge did indeed state there must be separate consideration of whether despite the conclusion that it was undesirable for the applicant to have leave to remain there were factors such as the welfare of the children who may be affected which might outweigh the presumption. At the close of 104 the judge specifically stated that there would “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 to migrants whose presence is undesirable”. The judge clearly considered that this fell within one of those non-exceptional cases.

76. Then at 105 the judge did proceed to consider the analysis of whether notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain there were factors outweighing the presumption such as the welfare of any minor children who may be adversely affected. I am persuaded that the judge did indeed undertake that analysis at paragraph 105 stating “all relevant factors require consideration including the interests of the child, which would be a primary factor but would not necessarily be sufficiently strong to outweigh the statutory presumption of refusal of leave under paragraph 322(5)”. The judge specifically stated “I do not find there to be any factors which would mean it would be wrong to refuse leave to remain to the appellant, as such factors weighing in favour of his presence in the UK are not strong”.
77. In other words, I find that the judge made his consideration of the first stage of the analysis at paragraph 104 and the second at 105 having found that the appellant’s conduct was dishonest. A separate analysis of paragraph 276B in the context of the underlying and axiomatic finding of dishonesty would not take the matter further.
78. In relation to ground 3 the child in question is not even within the United Kingdom and there is a court order to the effect that the father will have contact with the child in the Netherlands. The father has no settled status in the United Kingdom and this must have been known to the court when a contact order was being made because the appellant is a citizen of Pakistan. As the judge notes at paragraph 99 the child will remain in the Netherlands with the mother, who is her primary carer, and he will have to visit her in the Netherlands. The judge made a finding at paragraph 100 that the appellant would be able to set up a business in Pakistan and would be able to travel to meet her. He is not expected to have a residence permit as the judge stated and he had not shown that he would be unable to travel to the Netherlands for the purpose of that visit. Further, he would be able to establish contacts in Pakistan relatively quickly. In effect, the judge found that the appellant had not been able to establish on the evidence that he would be unable to retain contact with the daughter

in the Netherlands as per the court order. The judge stated at paragraph 101 “there is no evidence that their relationship would be significantly altered if he lived in Pakistan rather than the UK and continued to keep in touch with her by Skype and periodic visits”. There was nothing perverse in that statement.

79. In terms of ground 4 it transpired at the hearing before me that the appellant had not provided his solicitors, who in turn had not provided Mr Biggs with the previous witness statement given to his previous solicitors, and that had Mr Biggs seen that previous statement of 2nd January 2020 he would have been aware that the oral evidence the appellant was giving contradicted that statement.
80. As I pointed out in the hearing **R v Secretary of State for the Home Department ex parte Doody** confirms that it depends on the circumstances as to what is fair. It may be that the previous two First-tier Tribunal decisions had been set aside but the evidence that the appellant had supplied to the court nevertheless stands particularly if it has been in a written sworn witness statement. That statement had emanated from the appellant himself and he must have been aware of its existence.
81. That said, the judge found there were a number of aspects to the appellant’s account which were inconsistent or contradictory. In fact, the contradiction appears between the November 2020 statement and the oral evidence. The January statement appears by way of context. As the judge pointed out at paragraph 67 in his November statement of 2020 the appellant said the second stream of income was submitted without his knowledge but to prevent a late filing penalty. As the judge identified, it was inconsistent that the appellant claimed to know why Mahmood Accountants submitted these figures to the HMRC and indeed Mr Biggs invited the Tribunal to excuse the degree of speculation. The judge cogently found that the accountants would have contacted the appellant to finalise the accounts for these years and yet he claimed he only discovered it in December 2015. Additionally, the appellant himself stated at the hearing he only ever had one firm of accountants acting for him at any one time which he also contradicted (see above).
82. I conclude that it was open to Mr Biggs to put these further contradictions in re-examination but moreover and importantly open to the appellant to have provided his current representatives with the witness statement already and previously submitted to the court by his former solicitors, no doubt with the full knowledge of the appellant as he signed the sworn witness statement previously tendered.
83. As such, I find no error of law in the First-tier Tribunal decision and the decision will stand.

No anonymity direction is made.

Signed *Helen Rimington*

Date 15th July 2021

Upper Tribunal Judge Rimington