



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04243/2018
HU/10035/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2019

Decision & Reasons Promulgated
On 12 June 2019

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) Mr BILAL KHAN
(2) Mrs ASMA KHAN
(NO ANONYMITY DIRECTION)

Respondents

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Ms A Jones, Counsel,
(instructed by Burney Legal Solicitors)

DETERMINATION AND REASONS

Introduction

1. Permission to appeal was granted to the Secretary of State for the Home Department by Designated First-tier Tribunal Judge

Macdonald on 15 May 2019 against the decision to allow the Respondents' linked Article 8 ECHR appeals made by First-tier Tribunal Judge Barker in a decision and reasons promulgated on 12 April 2019.

2. The Respondents are nationals of Pakistan, husband and wife, respectively born on 4 June 1982 and 28 May 1987. The First Respondent had applied for leave to remain on the basis of 10 years' lawful continuous long residence and the Second Respondent had applied on the basis of her family life with the First Respondent and their children. The First Respondent's application was refused under paragraph 322(5) of the Immigration Rules, on the principal grounds that the First Respondent had misdeclared his income tax in his 2010/2011 return and again in 2012/2013. This meant that his application also fell to be refused on Suitability grounds under paragraph 276ADE(1)(i) of the Immigration Rules. The Second Respondent's Article 8 ECHR application was refused because there were no exceptional circumstances and no compassionate factors. Their family life could be enjoyed in Pakistan.
3. Judge Barker found that the First Respondent was not credible in his explanations and had been dishonest in his income tax declarations to HMRC. He found that this was not connected with the First Respondent's applications for further leave to remain. Taking all matters into account, the judge found that the mischief of the First Respondent was not sufficient to trigger the general ground of refusal in paragraph 332(5) of the Immigration Rules. The judge went on to consider the Article 8 ECHR family life issues and the best interests of the Respondents' two children, and allowed the Respondents' appeals.
4. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald because the judge had found that the evidence on behalf of the First Respondent had been poor and that there had been dishonesty. That was not sufficiently reflected in the judge's decision to allow the appeals.

Submissions

5. Mr Tufan for the Appellant relied on the grounds submitted and the grant of permission to appeal. The judge's clear finding of dishonesty showed that the appeals should not have been allowed. The Court of Appeal in Balajigari [2019] EWCA Civ 673 had provided relevant guidance in the application of

paragraph 322(5) of the Immigration Rules, which showed that a two stage analysis was required, see [33] of that decision. The first step was to decide whether paragraph 322(5) applied at all, i.e., whether it was “undesirable” to grant leave in the light of the specified matters. The second step was to decide as a matter of discretion whether leave should be refused on that basis. The judge had found that there was no innocent explanation and that the First Respondent had been deceitful. There was no challenge to the judge’s findings about that deception. But the judge’s finding that it was not relevant to his application for further leave to remain was plainly wrong, especially as the judge had referred to the strange coincidence of the review of tax matters immediately prior to the application: see [38] of Judge Barker’s determination. The judge’s decision that discretion should nevertheless be exercised in the First Respondent’s favour was not adequately reasoned and should be set aside. The onwards appeal should be allowed and the original decision remade and the appeals dismissed.

6. Ms Jones for the Respondents submitted that there was no material error of law in the First-tier Tribunal’s determination. The judge had in effect anticipated Balijigari (above), and had applied a two stage test. He found undesirable conduct but that the discretion should nevertheless be exercised in the Respondents’ favour, for sufficient reasons which included the best interests of the Respondents’ children. That applied [39] of Balijigari. The judge’s views could not be characterised as “Wednesbury” unreasonable and should not be interfered with even if another view could be taken. The determination was very thorough and should not be set aside.
7. In reply, Mr Tufan pointed out that neither of the Respondents’ children were “qualifying”. The judge had not found any exceptional circumstances. It was unclear why the Article 8 ECHR appeals had been allowed.
8. At this stage the tribunal indicated that it wished to hear submissions from both sides as to the proper outcome of the appeals in the event that a material error of law were found, to save the parties from a further attendance. Ms Jones confirmed that she had prepared for that possibility and required no additional time.
9. With reservations as to whether further evidence was needed, Ms Jones submitted that a “balance sheet” approach was appropriate. There were strong positives. The Respondents

could show long and continuous lawful entry and presence, with 3C leave applicable. The children were born in the United Kingdom (May 2016 and July 2018) and were on a settlement path. The family were integrated and self supporting. There had been medical problems for the second child which were of great concern to the parents. The negative factors were as had been identified by Judge Barker.

10. Mr Tufan submitted that the negative factors outweighed the positive and that the family life could be continued in Pakistan without very serious obstacles.

Material error of law found

11. The tribunal reserved its decision which now follows. Appeals such as the present have arrived in significant numbers in the First-tier Tribunal and have caused a degree of difficulty. Paragraph 276B of the Immigration Rules could be made more specific in its reach, with advantage, given the Secretary of State for the Home Department's view of the serious consequences for character and conduct of tax breaches by applicants seeking further leave to remain.
12. The determination of Judge Barker was full and endeavoured conscientiously to wrestle with the issues. He applied R v Khan [2018] UKUT 384 (IAC), but unfortunately Balajigari (above) had not yet been published and he did not have the benefit of the valuable discussion and guidance there provided, not least as to dishonesty: see [35] onwards of that decision.
13. In the tribunal's reading of his decision, the First-tier Tribunal judge reached his decision to allow the appeals with palpable reluctance, as well he might have done, given his extensive adverse credibility findings reached against the First Respondent and his accountant. In effect those amounted to a finding that there had been a conspiracy to defraud HMRC, over a period of several years. Another telling finding, in the tribunal's view, is that the attempt to correct the deliberate and known errors in the First Respondent's tax returns was only made before the application for ILR. The judge considered that the misconduct was not connected with the First Respondent's income for the purpose of leave to remain, although how he reached that finding is not clear. The reasons for refusal letter stated in terms that the First Respondent's income had been misstated to assist his Tier 1 applications to succeed. Later in the determination, Judge Barker states "I am satisfied that the

appellant fulfils all the requirements of paragraph 276B and that there would be a disproportionate interference with his private life if he were removed.”

14. In the tribunal’s view, both those statements are mistaken if not contradictory: the First Respondent’s repeated dishonesty meant that he was vulnerable to refusal under paragraph 276B, as he was well aware. Hence (as the judge found) the First Respondent had attempted to put his affairs in order before making his long residence application. The judge found that there had been misconduct which brought into play paragraph 276B, yet later found that the requirements of paragraph 276B had been met. The judge can only have meant in the later reference that the long continuous lawful residence elements had been met, not the character and conduct element. In the tribunal’s view, the required two stage approach had not been followed or not followed in sufficient depth, so that the judge was inadvertently proceeding on one or more false premises.
15. It further seems to the tribunal that the judge might usefully have stepped back after reaching his properly reasoned adverse credibility findings, and asked how in the light of those findings that could possibly have meant that the First Respondent was a suitable person to be granted ILR. His character and conduct, if not also his associations, were undesirable. There was substantial under declaration of taxable income, as seen in the 2010/2011 tax year, when allowable expenses were stated as £32,044 instead of the true figure of £3,004. The character and conduct found by the judge was a finding that the First Respondent was failing in a number of respects, not merely knowingly failing to meet his income tax obligations, but conspiring with another to do so, and then with that other person lying in a tribunal.
16. It seems to the tribunal that the judge’s evaluation of the First Respondent’s conduct was inadequate, far beyond any reasonable difference of opinion on the same facts. That places the judge’s whole decision on an uncertain foundation, such that his conclusions cannot stand. The decision must be set aside and remade.

Remaking the decision

17. In this section of the decision, the tribunal will refer to the parties by their designations in the First-tier Tribunal. The First-tier Tribunal appeals were heard very recently, barely two

months ago. There was no application to admit any further evidence made to the Upper Tribunal and there was no suggestion even on instructions that there was any new issue, whether in relation to either child or any other matter. The tribunal accordingly considers it appropriate to remake the decision on the basis of the uncontested primary findings of fact reached by Judge Barker, having received the submissions set out above.

18. The appeals to the tribunal lie only on Article 8 ECHR grounds but to determine the issue of proportionality the tribunal must consider whether or not the relevant Immigration Rules are met, and if not, whether there are any exceptional circumstances outside the Immigration Rules which would render the refusal decisions or either of them disproportionate.
19. In the tribunal's view, applying the Balajigari tests to the paragraph 276B decision, the First Appellant's conduct was serious dishonesty on significant scale, involving a sustained conspiracy and deceit, for which a false account was maintained until exposed at the trial. It is immaterial that there has (at least so far) been no prosecution or criminal penalty. By any ordinary standard his conduct amounted to fraud. It is too obvious to require stating that society depends on the proper payment of tax so as to enable a free and democratic society to function, and to help it achieve its aspirations of equality, among other matters. The decision was reached on discretionary grounds under paragraph 322(5) of the Immigration Rules. The Respondent's view of the First Appellant's conduct was open to it on the facts found. Those discretionary grounds reflect the legitimate objectives set out in Article 8.2 ECHR.
20. In the case of the First Appellant's private life, nothing above and beyond his work was identified in the evidence. There is no exceptional feature and the decision to refuse the First Appellant further leave to remain on Article 8 ECHR private life grounds cannot be seen as disproportionate.
21. As to the Respondents' family life, their two children are both very young and are not qualifying children. The second child (born 27 December 2018) has faced congenital medical issues. The medical evidence consisted of some three pages in the Appellants' bundle of evidence and was not mentioned in the skeleton argument placed before First-tier Tribunal. (That explains the brief reference in Judge Barker's determination.)

Adequate specialist medical services are available in Pakistan and there was no evidence placed before the First-tier Tribunal that moving back to Pakistan would compromise the relevant child's health. The children have been brought up within Pakistani derived culture in their home and their parents will be able to induct them into life in Pakistan, where indeed they will be able to continue and/or commence their education and practice their parents' religion. There was no evidence suggesting that family life could not be lived satisfactorily in Pakistan where the wider family of both parents could be accessed.

22. The tribunal finds that the refusal of ILR to the First Appellant is proportionate. It involves no "punishment" of the children or his wife the Second Appellant. There was no evidence that the Second Appellant has a private life outside her home. She came to the United Kingdom as the First Appellant's dependant. It may not be the family's choice or preference to return to Pakistan but there are no exceptional circumstances and there was no evidence of any unjustifiably harsh consequences for the Appellants from such return.
23. The appeals are dismissed.

DECISION

The Secretary of State for the Home Department's appeal to the Upper Tribunal is allowed.

There was a material error of law in the First-tier Tribunal's decision and reasons, which is set aside, apart from its primary findings of fact.

The appeals are remade and are dismissed.

FEE AWARD

There can be no fee award.

Signed

Dated 10 June 2019

Deputy Upper Tribunal Judge Manuell