



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/04526/2018
HU/09585/2018
HU/09586/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 11 June 2019**

**Decision & Reasons Promulgated
On 10 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MKA
NK
AK**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr. C. Avery, Senior Home Office Presenting Officer

For the Respondents: Mr. S. Karim, Counsel instructed by Awan Legal Associates Limited

DECISION AND REASONS

1. In a decision promulgated on 6 February 2019 I set aside the decision of the First-tier Tribunal. The appeal came before me to be remade.

2. For the purposes of this decision I refer to the Secretary of State as the Respondent, and to MKA, NK and AK as the Appellants, reflecting their positions as they were before the First-tier Tribunal.
3. I continue the anonymity direction made at the error of law hearing.

The hearing

4. I heard oral evidence from the first Appellant. Both representatives made oral submissions. I reserved my decision.
5. I have taken into account the documents in the Respondent's bundle (to O6), the Appellants' bundle from the First-Tier Tribunal (70 pages) and the first Appellant's statement and attachments prepared for the Upper Tribunal hearing. I was provided with a copy of Balajigari [2019] EWCA Civ 673.
6. It was agreed that the sole issue before me was in relation to the application of section 322(5), regarding the difference in the first Appellant's income as declared to HMRC and as declared to the Respondent. It was agreed that the first Appellant met the requirements of paragraph 276B, but for the application of paragraph 322(5). There was no suggestion that removal would be proportionate under Article 8 if I were to find that the first Appellant met the requirements of the immigration rules.

Burden of proof

7. The burden of proof lies on the Appellants to show that, at the date of the hearing, the Respondent's decision is a breach of their rights to a family and private life under Article 8 ECHR. The standard of proof is the balance of probabilities.
8. Where the Respondent has refused an application with reference to paragraph 322(5) of the immigration rules, the initial burden of proof lies on the Respondent to show that the application should have been refused with reference to this paragraph. Only if the Respondent satisfies the initial burden of proof and provides prima facie evidence of deception does the burden of proof then shift to the first Appellant to provide an innocent explanation.

Findings and conclusions

Paragraph 322(5)

9. The case of Balajigari was promulgated in April 2019, after the initial decision of the First-tier Tribunal, and after my error of law decision. This case has clarified the law in this area. I have carefully considered the reasons for refusal letter, with reference to the case of Balajigari.

Balajigari makes clear that there must have been dishonesty for section 322(5) to have been met. At [37(2)] it states:

“We would accept that as a matter of principle dishonest conduct will not always and 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.”

10. Balajigari states at [42]:

“A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.

11. This makes the position very clear that paragraph 322(5) does not fall to be used automatically when there is a discrepancy, but only when there has been dishonesty. Mr. Karim referred to [211] of Balajigari. It was submitted that the concerns which arose from the use of language in Balajigari were the same for the first Appellant. There had been no reference in the reasons for refusal letter to deception or dishonesty. Paragraph [211] states:

“We are, however, very troubled by the terms of the Reasons given for both decisions. In neither set of Reasons does the Secretary of State state in terms that he has found the discrepancies to be the result of dishonesty. Instead, the Reasons for the administrative review decision repeatedly use language which suggests a lesser threshold. In the first of the passages quoted at para. 201 above they refer to “undesirable conduct”, which is plainly the wrong test; the succeeding passages are couched in terms of the Secretary of State’s “doubt” and “concerns”; and the final passage quoted “deems” (which is an odd word in this context) Mr Albert’s conduct to have been “questionable”, which is certainly short of a finding of dishonesty.”

12. I have carefully considered the reasons for refusal letter. This states on page 4:

“The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom in light of your character and conduct. She is satisfied that you have misrepresented your earnings at various times and from time to time have changed what you have represented in respect of your earnings to HM Revenue and Customs and/or UK Visas & Immigration for the purpose of reducing your tax liability or for the purpose of obtaining leave to remain or both.”

13. Later on page 4 the Respondent states that the evidence submitted does not satisfactorily demonstrate that the failure to declare was a genuine

error. On page 5 he states that it would be “undesirable for you to remain in the United Kingdom in light of your character and conduct”. On page 6, when considering family life under Appendix FM, the Respondent states that the application falls for refusal “due to your character and conduct in respect of the discrepancies”.

14. I find that the Respondent has not stated in the reasons for refusal letter that the first Appellant has employed deception or dishonesty. The language used by the Respondent is very similar, if not the same, to that criticised by the Court of Appeal in Balajigari. The Respondent has referred to the discrepancy, but has not gone on to state that the discrepancy shows that the first Appellant has used dishonesty.
15. Therefore, while Balajigari is clear that paragraph 322(5) can be used in situations where there is a discrepancy between income declared to HMRC and the Respondent, this is only when dishonesty or deception has been used. This must be stated, and the language used by the Respondent in the decision is important. It is not enough merely to set out that there is a discrepancy. As is made clear by [42] of Balajigari, a discrepancy may give rise to suspicion of dishonesty, but discrepancy itself is not enough.
16. Following Balajigari, I therefore find that the Respondent has not satisfied the evidential burden to show that paragraph 322(5) was applicable to the first Appellant’s case, and that the first Appellant had used dishonesty.
17. In the event that I am wrong in my finding, and the Respondent had discharged the burden of proof, I find in any event that the first Appellant has discharged the burden on him to show that dishonesty and deception were not employed, and has provided an explanation for the discrepancy.
18. I was referred to the letter from the Appellants’ solicitors dated 4 March 2016 (C7 of the Respondent’s bundle). This letter accompanied the first Appellant’s first application for indefinite leave to remain. In this letter it states:

“He has also revised his income tax returns for the period of 2010-11, 2012-13 because of some errors and he has provided updated copies of returns and accounts.”
19. It was submitted by Mr. Karim that this showed that the first Appellant had raised the fact that there were discrepancies with the Respondent as early as March 2016, which is considerably in advance of the Respondent raising the issue. I find that in March 2016 the first Appellant voluntarily informed the Respondent that he had made amendments to his tax return. I accept the submission made by Mr. Karim that the Appellant’s situation is far from those where the Respondent raises a discrepancy after an application has been made. I find that this was a voluntary disclosure, and was also a voluntary amendment to his tax returns, unprompted by the Respondent.

20. Secondly, it was submitted by Mr. Karim that the first Appellant had continuously stressed the fact that he had used, and relied on, accountants. He submitted that there was nothing implausible in that. In oral evidence the first Appellant said that the discrepancy was because the accountant had not declared his self-employment income at the time. He said that he had given the accountant information about his income, but he had not known how much the accountant had declared to HMRC. He had been told by his accountant that self-employment tax was due after one and a half to three years, and he therefore thought that he would be paying his tax later. He had not queried the figures with the accountant as he thought he was paying the correct tax, in reliance on the information from the accountant.
21. The first Appellant was asked in cross-examination whether, when he had been setting up his business, he had looked into his likely tax liabilities as part of a business plan. However, I find that while the first Appellant is self-employed, he is working as a contractor. He works as a data analyst for banks. He has worked for RBS and Lloyds. He is paid on a daily rate for six month contracts. He said that there was no fixed income for the year. Before he had commenced a contract, he did not know what he would be earning over the period of a year.
22. I find that while the first Appellant is self-employed, he does not have a business in the traditional sense. He is a self-employed contractor working for banks as a data analyst. I do not find it casts doubt on the first Appellant's evidence that he did not look into likely tax liabilities as part of any business plan, given the nature of his self-employment.
23. I find that the Appellant used and relied on accountants, and I find that there is nothing implausible or unusual in this. He has no background in accountancy. At [17] of his witness statement dated 4 June 2019 he said that he did not, and does not, know accounting and taxation affairs. He relied on accountants and paid them for the services he provided. "As a person who has Information Technology knowledge, I am used to people trusting me with their Information Technology queries; in the same way I trust accountants with my tax matters, or trust lawyers with my legal matters or doctors with my health." There is nothing implausible in this.
24. It was submitted by Mr. Karim that the accountant had taken responsibility for the error. I was referred to the letter from Samantha Skyring, an accountant at TaxAssist Accountants, dated 25 May 2017 (D14 of the Respondent's bundle). She has given her ACCA membership number. Ms. Skyring states:

"I am writing to confirm that our client's tax returns for the years 2010/11 and 2012/13 was submitted with incorrect details.

The mistake was from our side as we inadvertently mixed earnings details of two clients."

25. It was submitted by Mr. Karim that it was dangerous to underplay the consequences of an accountancy firm admitting to such a mistake as it opened the firm up to being sued. It was implausible that any professional would put pen to paper in this way if he was not responsible, given the possible repercussions. It was submitted that full weight should be given to the admission by the accountants.
26. I find that there is force in this submission. It was submitted by Mr. Avery that there were some discrepancies between the evidence of the first Appellant and the evidence in the letter, in relation to how the mistake had been made. I find that these are not significant given that the accountant has admitted the mistake. The core of the first Appellant's claim is that the accountant made the mistake, which is supported by the letter. The first Appellant's evidence is that the accountants did not declare his self-employed income at all. In the letter it states that they mixed the earnings details of two clients. However, these two are not mutually exclusive. There is nothing inconsistent.
27. I have considered whether there is any inconsistency in the evidence regarding whether the first Appellant asked the accountant to look at his tax returns, or whether it was the other way round. It was submitted by Mr. Avery that there was a discrepancy. The letter states:

"Later we approached our client and pointed out this mistake and we amended the HMRC records accordingly and client was compensated."
28. In the first Appellant's witness statement he said:

"I approached my accountants and asked them to check all my previous tax years' record." [16]
29. In oral evidence the first Appellant said that he had asked his accountants to check if his tax affairs were in order as his solicitors had told him to go through his tax details prior to making his application. He therefore asked the accountants to go through it, and then the accountant told him that he had found errors. The first Appellant asked him to rectify the errors. I find that there is no inconsistency here.
30. I find that it does not detract from the first Appellant's evidence that he is still using the same accountants. He gave evidence at the hearing that, when he went to ask another accountant to rectify his returns, he was told that he would be charged "a lot" to do so, whereas his current accountants said that, as it was their mistake, they would not charge him for making the amendments. They amended it without charge. I find there is nothing untoward in the first Appellant remaining with these accountants given that they said that they would make the amendments without charge. I find it adds to the credibility of the first Appellant's evidence that the accountants rectified the error without charge, as it is consistent with their admission of responsibility.

31. I have considered the two tax periods in question. The first, 2010/2011, was the first period of self-employment. I find that the first Appellant was new to being self-employed. There is therefore nothing inconsistent in his evidence that he did not query when he was told that tax for this year would be paid later.
32. In relation to the second period, 2012/2013, he received dividend income and corporation tax on this which was paid at source (see the Company-Short Tax Return Form appended to his witness statement). There was a full declaration of the profits of his company. There was no dispute regarding his payment of corporation tax. I find that he had made a full declaration of his profits to HMRC, albeit not as self-employed income.
33. I have also taken into account the fact that HMRC did not impose a penalty on the first Appellant. Balajigari states at [74]:
- “We further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would be information which was within an applicant’s own knowledge and they could draw this to the attention of the Secretary of State.”
34. I find this is evidence that the arm of government charged with prosecuting for these kind of offences imposed no penalty. This indicates, in accordance with the policy document issued by HMRC, that it was not considered to be deliberate, or deliberate and concealed. Following Balajigari, this is information which the first Appellant was entitled to draw to the attention of the Respondent.
35. Taking into account all of this evidence, I find that the first Appellant has given a plausible explanation for the discrepancy in the amounts declared to HMRC and to the Respondent. I find that, even if the Respondent had satisfied the burden of proof to show that there was a reasonable suspicion that the first Appellant had been dishonest, the first Appellant has shown that he did not use dishonesty and that the inaccurate declarations were due to an error of his accountants.
36. I therefore find that the Respondent wrongly applied paragraph 322(5) to the first Appellant’s application. This being the only reason why the first Appellant’s application for indefinite leave to remain was refused, I find that the first Appellant has shown that he meets the requirements of paragraph 276B of the immigration rules.

Article 8

37. As stated above, it was not submitted by Mr. Avery that, if I were to find that the first Appellant met the requirements of the immigration rules, the removal of the Appellants would be proportionate. This is in line with the

cases of TZ (Pakistan) [2018] EWCA Civ 1109, and OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC).

38. TZ states at [34]:

“That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person’s article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

39. This is reflected in the headnote to OA which states:

“(1) In a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person (P) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the Secretary of State in the proportionality balance, so far as that factor relates to the particular immigration rule that the judge has found to be satisfied.”

40. I find that the Appellants have both family and private life in the United Kingdom. The first Appellant has been in the United Kingdom since July 2006, a period of 13 years. I find that he has established a private life in this period sufficient to engage the operation of Article 8. I find that the decision would interfere with his private life. To the extent that the Appellants would all return to Pakistan together, there would not be an interference in their family life.

41. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

42. In assessing the public interest, I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the first Appellant meets the requirements of the immigration rules, and the second and third Appellants are dependents on his application. There will therefore be no compromise to the maintenance of effective immigration control and, as set out above, the caselaw holds that the Respondent cannot point to the importance of maintaining immigration controls as a factor weighing in his

favour when an appellant meets the requirements of the immigration rules.

43. The Appellant speaks English (section 117B(2)). The Appellants are financially dependent (section 117B(3)). Under sections 117B(4) and 117B(5), although the first Appellant's leave here has been precarious, the Respondent has provided a route under the immigration rules where a person can apply for indefinite leave to remain if they have spent 10 years here lawfully. This indicates that the Respondent considers that more weight should be given to his private life. Section 117B(6) was not relied on.
44. Taking all of the above into account, and giving particular weight to the fact that the requirements of the immigration rules are met, I find that the balance comes down in favour of the Appellants and the decision is not proportionate. I find that the Appellants have shown, on the balance of probabilities, that the decision is a breach of their rights under Article 8 ECHR.

Notice of Decision

45. The Appellants' appeals are allowed on human rights grounds. The first Appellant meets the requirements of paragraph 276B. The second and third Appellants are his dependents.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 6 July 2019



Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. I have found that the Respondent was wrong to use paragraph 322(5), and the first Appellant met the requirements of the immigration rules apart from this. In the circumstances, I make a fee award for the entire fee paid.

Signed

Date 6 July 2019



Deputy Upper Tribunal Judge Chamberlain