



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04970/2018
HU/04969/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre

Decision & Reasons Promulgated
(delivered orally at the hearing)

On 23 May 2019

On 13 June 2019

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SUMAN SARANGI
PRIYANKA BANDELA**

Respondents

Representation:

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

For the Respondents: Mr J Gajjar, Counsel, instructed via Direct Access

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Abebrese) which allowed the appeals of the respondents (whom I shall refer to as “the claimants”) under Art 8 of the ECHR.

2. The claimants are a married couple and are both citizens of India. They were born respectively on 11 August 1985 and 30 April 1985. Their appeals concern an application made on 3 January 2017, by way of variation of an earlier application for further leave as a Tier 1 (General) Migrant which had been made on 18 November 2016, based upon ten years' long residence under para 276B of the Immigration Rules (HC 395 as amended). The second claimant's appeal is dependent on that of the first claimant. The claimants were refused leave respectively on 5 and 8 February 2018.
3. Before the judge the claimants' case was that they had established ten years' continuous lawful residence, and as I understand it there is no dispute over that, but in refusing the claimants' application for leave, the Secretary of State had been wrong to apply para 322(5) of the Immigration Rules to the first claimant.
4. Paragraph 322(5) contains a discretionary general ground of refusal. It applies where:

"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 para 322(1C)), character or associations or the fact that he represents a threat to national security".
5. In this case the Secretary of State applied that provision because of differences in the first claimant's submissions of his income to HMRC for the tax year 2010/2011 and that put forward as his income for that period in a previous application for leave under Tier 1 made on 14 March 2011.
6. The background is this. The first claimant's declared income in his tax return to HMRC for the year 2010/2011 when initially made in 2012 was earned income of £17,600 but there was no declared income from self-employment. On 22 October 2013 the first claimant made an amended submission to HMRC in which he declared a sum in relation to his self-employment of £17,500. Therefore, the corrected revised tax calculation which was made in October 2013 was based on a total taxable income of £35,100. There then followed a further revision of his declared income in August 2016 where, although the employment income remained the same, the self-employed earnings were increased by a little under £2,000 but his expenses were reduced by some £16,000 so that his taxable income increased from £35,100 to £53,482.
7. In his application for leave to the Home Office the first claimant had declared his income for the relevant year to be £46,329. The Secretary of State considered that the discrepancy with his initial declaration of income to HMRC was sufficient to engage para 322(5).

The Judge's Decision

8. Before Judge Abebrese the first claimant gave evidence and I have been taken today to his witness statement in relation to that. There was also a substantial bundle of documents which were relied upon, in particular a document emailed to one of the

first claimant's accountants, which, it was said, supported his case that the discrepancy was at worst careless and was not dishonest.

9. In his determination, the judge dealt with the evidence and found, in para 27 and thereafter, that the appellant was credible. The appellant's evidence, which is summarised in paras 27 to 31, relates how he came to discover that the initial submission to HMRC in relation to the tax year 2010/2011 was wrong and that, having changed his firm of accountants, the error was corrected in the first amendment in 2013 so as to declare the self-employment income of £17,500.
10. As the judge's reasoning is challenged by Mr Howells, who represented the Secretary of State, it is necessary for me to set that out. The judge said this at paras 27 to 31:
 - "27. I find the appellant credible for the following reasons. The appellant does have a degree in business administration but I do not find this qualification would have provided him with expertise in tax matters of the UK. The appellant therefore in relation to tax matters acted appropriately in seeking the advice of an accountant to handle such matters. The appellant I find did disclose all relevant information to his accountant and that he did keep abreast of matters and that he came to know from his accountant that his tax return figures had not been correctly completed by his accountant Dwiref Patel who advised the appellant that the deadline to complete the corrected figures to HMRC was 31 January 2013.
 28. I find it credible that the first appellant was informed by his accountant that the correct figure had been filed with HMRC and that he should expect a bill in due course. I find it credible that the first appellant was also informed that his accountant would be out of the country between the period of April 2013 to June 2013. The appellant did wait for a period of six to seven months and he had not received any correspondence from HMRC and at this stage he did try to take steps to make contact with his accountant.
 29. The appellant in these circumstances was justified in seeking to instruct new accountant firm to further progress the matter from Sivapalan & Co. The appellant paid the amount of tax that was assessed by HMRC after the correct figures were provided to HMRC. This in my view shows that the appellant showed every intention that he did not intend to deceive the respondent or HMRC and if it were not for the particular facts especially reliance on his previous accountant that he could have provided the correct figures from the outset and paid the appropriate tax.
 30. The appellant also explains that from November 2015 he started trading through a limited company, i.e. Sarangis IT Consultancy Ltd. He instructed a new accountancy firm because of changes that had taken place at Sivapalan & Co. The first appellant's new accountants found that a typographical error had been made in respect of his expenses in the tax year 2013, which brought his net earnings down for that year. [I interpolate there that the judge means the tax year 2010/11 but the correction was made in 2013.] I have taken into account and given weight to the fact that the respondent has not charged the first appellant with any penalty on his

tax rectification in accordance with their own policy. Furthermore the first appellant does not have any outstanding tax with HMRC.

31. The appellant also explained why his SA02 did not show the declared figures in 2013. Mr Sivapalan retired from his firm in November 2014 and he therefore requested documents from HMRC in respect of his tax returns in 2013 and that the appellant had declared and paid tax. He claims that eventually they did find his information and they informed him that the information could only be updated manually on the system. The first appellant has acknowledged that the appropriate figures were not provided by his previous accountants but he has been proactive in providing the correct figures to HMRC and in my view his conduct does not make him undesirable to remain in this country."

11. Then at para 32 the judge reached the following conclusion:

"I note that the Rules under paragraph 322(5) is not mandatory and the conduct of the first appellant does not amount to anything which may be deemed to be criminal or a threat to national security and at the very least he has been careless as it could be argued that he should have been more diligent in scrutinising the documents prior to their filing with the respondent. I accept the submissions made by the respondents and the authorities which he has provided. I note in particular the statement made by Judge Taylor in Kadian that the fact that the appellant had not declared his income whilst being highly regrettable cannot properly be described as conduct such as that set out in the respondent's guidance. The appellant has not been involved in criminal activity or involved in activity which is a threat to national security."

The Submissions

12. On behalf of the Secretary of State Mr Howells relied upon the grounds of appeal, which he developed in his oral argument. His submissions were as follows. The judge failed to apply the reasoning process to the evidence as set out by the Upper Tribunal in its decision in R (on the application of Khan) v Secretary of State for the Home Department [2018] UKUT 00384 (IAC) in the judgment of Spencer J. Further, Mr Howells submitted that the judge misdirected himself by relying on the unreported case of Kadian, which he had taken to decide that para 322(5) did not apply to cases of this sort where the Secretary of State relies on discrepancies in income submitted to HMRC and in an application for leave made to the Secretary of State. Mr Howells submitted that that was not consistent with the recent decision of the Court of Appeal in R (on the application of Balajigari and others) [2019] EWCA Civ 673, where it was accepted that provided dishonesty was established, para 322(5) could in principle be engaged where there were the discrepancies in income declared.
13. Mr Gajjar, who represented the claimants, submitted that the judge had found that the claimant's conduct was at worst careless. He had accepted the first claimant's explanation and had therefore concluded that the discrepancies did not establish on the evidence that the first claimant had been dishonest. Any reference by the judge to Kadian had to be seen in the context of the judge having determined already in

paras 27 to 31 that the first claimant's behaviour was innocent and that he was at worst careless in what he had done. In respect of that, Mr Gajjar particularly relied on the fact that the evidence which the judge accepted showed that the first claimant had sought to deal with the misstatement of his self-employed income in 2013, well before his application for leave in December 2016 was made in which he submitted the discrepant income to the Home Office. He helpfully took me through the evidence which the judge had before him, in particular the witness statement of the first claimant and the documentary evidence including an email to his first firm of accountants in July 2013 which demonstrated, Mr Gajjar submitted, in essence that the first claimant was seeking to rectify this in an honest way some time before the application for leave was made.

14. Mr Gajjar submitted that the process and relevant matters set out by Spencer J in Khan were in fact considered by the judge when he looked at the background documents, the claimant's explanation and when the correction to HMRC had initially been made. Mr Gajjar pointed out that the 2013 correction resulted in the first claimant's declared income exceeding that which would have been required for his subsequent application under the points-based system, which required him to establish an income of £35,000 and the correction in 2013 resulted in a declared income of £35,100.
15. Mr Gajjar submitted that the Secretary of State could only succeed if the judge's factual finding that the first claimant was not dishonest, but at worst only careless, was perverse and that was a high standard to reach.

Discussion

16. It is clear from the Court of Appeal's decision in Balajigari that in order for the Secretary of State to establish, and the burden of proof is on the Secretary of State, that para 322(5) applies it must be established that the individual was dishonest. That is a precondition to para 322(5) applying. It is also clear that the judge found as a fact that the first claimant was not dishonest but, although slightly inelegantly put in para 32, he was at worst only careless.
17. Mr Howells relied upon what was said by Spencer J in Khan. In the headnote the approach is summarised as follows:
 - “(i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy.
 - (ii) Where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation and

evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty.

- (iii) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the "balance of probability", a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences.
- (iv) For an Applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter, given that the accountant will or should have asked the tax payer to confirm that the return was accurate and to have signed the tax return. Furthermore the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty.
- (v) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):
 - i. Whether the explanation for the error by the accountant is plausible;
 - ii. Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;
 - iii. Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;
 - iv. Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay."

18. The decision in Khan did not set out a straitjacket as to the approach that should be followed before a decision maker - there it was the Secretary of State - reached a decision in respect of para 322(5). It provides a helpful guide, and no more than that, to how a decision-maker should approach the task. The approach was largely approved in Balajigari ([40]-[44], but note at [42] the caution expressed in relation to the "starting point" in (i) and (ii)). The importance of the guidance is that it emphasises that the decision-maker should consider carefully the evidence of the explanation or otherwise for the discrepancy in the submitted income to HMRC and the Secretary of State in the application for leave.

19. Here, it is clear to me that the judge did consider all relevant matters. He had the first claimant's explanation and he accepted that, looking at the material that was submitted, in particular that his income was a matter addressed by the first claimant with his first firm of accountants and, when that proved to be of no effect, through a second firm of accountants in 2013, well before, as Mr Gajjar submitted, the first claimant made his application for leave in December 2016.
20. In my judgment, the judge was entitled to accept the first claimant's evidence as to how the discrepancy arose. It is perhaps axiomatic to state that an appellate tribunal should be cautious in interfering with a factual finding based upon all the evidence and should only do so if the conclusions reached are inadequately or irrationally reasoned, or the decision itself is an irrational one. Here, in the paragraphs of the judge's decision that I set out above, he gave clear and adequate reasons based upon all the evidence why he accepted as credible the first claimant and his explanation as to how the initial figures submitted to HMRC were inaccurate and how he sought to have those corrected through his accountants in 2013 and then subsequently again by a further firm of accountants in 2016. The judge no doubt had well in mind that the initial correction in 2013 looks, on the face of it, to be wholly unconnected to any immediate or foreseeable application for leave which would only be made some three years later. It was, in itself, without the further correction sufficient to meet the requirements of the Rules.
21. There was also documentary evidence that provided some support to the first claimant's explanation and, as I have said, the judge was entitled to accept the first claimant's evidence. The judge's reasons were not inadequate and his conclusion is simply not one that can be described as having been irrational in that no reasonable judge properly directing themselves could reach it. It was a finding open to the judge.
22. The judge's reference to the decision of Kadian in para 32 has, in my judgment, to be seen in the light of his prior finding that the first claimant had not been shown to be dishonest. It may be that the judge in Kadian did understate the application of para 322(5) but the present judge's reference to it in para 32 did not, in my judgment, affect in any material way his finding that it had not been established by the Secretary of State that the first claimant was dishonest. It may be that the decision in Kadian is best archived in the light of the Court of Appeal's decision in Balajigari.
23. In this appeal, having found in the claimants' favour under para 322(5), the judge went on to allow the claimants' appeals under Art 8 of the ECHR. It was accepted before me that the judge's decision to allow the appeal under Art 8 could not be challenged if the judge's conclusion in relation to 322(5) was sustainable. It is accepted that the first claimant met the requirement of the long residence rule in para 276B. There is no conceivable reason why it could be said that his removal would be proportionate if he meets the requirements of the Rules on that basis, and the contrary was not argued before me.

Decision

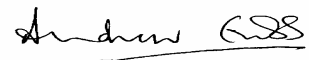
24. For those reasons therefore, the judge did not materially err in law in allowing the claimants' appeals under Art 8.
25. The Secretary of State's appeal to this Tribunal is accordingly dismissed.

Costs

26. The final issue concerns an application by the claimants for costs, relying upon rule 10(3)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). That is the relevant provision and it allows the Upper Tribunal as a matter of discretion to make an order of costs in the circumstances where
"the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings".
27. The approach to that provision is identified in a number of important cases which for these purposes are drawn together in the Upper Tribunal's decision in Thapa & Ors (costs: general principles; s 9 review) [2018] UKUT 0054 (IAC). In that case the Upper Tribunal, presided over by its President, Lane J, pointed out that as a result of earlier guidance in the case of Cancino [2015] UKFTT 00059 (IAC) the application of rule 10, or rather the exercise of discretion under rule 10, should be done with significant restraint.
28. As the case law such as Cancino makes clear, the requirement to show unreasonable conduct imposes a significant hurdle. Here, the Secretary of State raised grounds based on the then leading case of Khan, a case which has, with some slight caveat, been approved by the Court of Appeal in Balajigari. The Secretary of State's grounds were considered to be arguable when the First-tier Tribunal granted permission on 31 December 2018. It is difficult in my view to conclude that the Secretary of State sought permission to appeal unreasonable and certainly in continuing proceedings after permission was granted.
29. Mr Gajjar relied upon his rule 24 response, which is dated 7 February of this year, and submitted that in the light of that, the Secretary of State should in effect have withdrawn his appeal to this Tribunal. Whilst Mr Gajjar's rule 24 response sets out the claimants' case as to why the judge's decision was not reached in error of law and should stand, it did not, in my view, demonstrate unequivocally that the Secretary of State's appeal was now a hopeless one or one that had no arguable merit despite the fact that the First-tier had granted permission on the basis that it did have arguable merit.
30. Of course, today I have, in my judgment, concluded that the Secretary of State's grounds were not made out. That is not to say that the grounds were not arguable to start with and that therefore Judge Pedro was wrong to have granted permission. Indeed, there are many appeals in the Upper Tribunal which are unsuccessful. That is not inconsistent with the appeal to the Upper Tribunal initially being at least arguable.

31. In these circumstances, I am not satisfied that the Secretary of State behaved unreasonably in seeking permission to appeal to the Upper Tribunal, and that would of course have been at a time when the claimants would not have incurred any costs in any event, or in continuing his case in the Upper Tribunal following the grant of permission in December of last year, or in the light of Mr Gajjar's rule 24 response in February of this year. The claim remained arguable and pursuing it was not unreasonable. I therefore decline to make an order for costs in favour of the claimants.

Signed



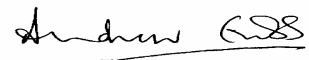
A Grubb
Judge of the Upper Tribunal

12 June 2019

TO THE RESPONDENT
FEE AWARD

Judge Abebrese made no fee award as none was requested. I heard no submissions by the claimants that that order should not stand. Accordingly, no fee award is made.

Signed



A Grubb
Judge of the Upper Tribunal

12 June 2019