



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01533/2019

THE IMMIGRATION ACTS

Heard at Field House
On 3 January 2020

Decision & Reasons Promulgated
On 30 January 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADERONKE IBIWUNMI ADEWOLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr Jarvis, Senior Presenting Officer

For the Respondent: Ms Mosaku of Emerald Solicitors

DECISION AND REASONS

1. The respondent is a Nigerian national who was born on 15 September 1983. She entered the United Kingdom in 2007, holding entry clearance as a student. She was subsequently granted further periods of leave to remain as a student and then under Tier 1 of the Points Based System.
2. From 2016 onwards, the respondent made applications for Indefinite Leave to Remain. The first two applications were made under Tier 1 of the PBS. These were refused without a right of appeal. The third

application was based on the accrual of ten years' continuous lawful residence, under paragraph 276B of the Immigration Rules. That application was made by the respondent on 22 December 2017 and refused by the Secretary of State on 12 January 2019.

3. The Secretary of State refused the application under paragraphs 276B(ii)(c), (iii) and paragraph 322(5) of the Immigration Rules. Each of these grounds of refusal was the result of the Secretary of State's conclusion that the respondent had employed deception in her past dealings with the Home Office or Her Majesty's Revenue and Customs ("HMRC"). The Secretary of State noted that there were significant discrepancies between the amount of self-employed earnings declared by the respondent to HMRC in the years 2010/2011 and 2012/2013 and the self-employed earnings relied upon by the respondent in applications for leave to remain. The Secretary of State considered that the respondent had intended to deceive one or the other department and that her conduct in that regard rendered it undesirable for her to be granted ILR. That general ground of refusal, under paragraph 322(5) of the Immigration Rules, mandated the refusal of the application under paragraph 276B of the Immigration Rules. These grounds of refusal gave rise to what was described by the Court of Appeal in Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647 as an 'earnings discrepancy case'.

The Appeal to the First-tier Tribunal

4. The respondent appealed against the decision of 12 January 2019. Her appeal came before First-tier Tribunal Judge Marisa Cohen, sitting at Hatton Cross, on 15 July 2019. The respondent was represented by Ms Mosaku. The Secretary of State was represented by a Presenting Officer. The judge heard evidence from the respondent and four additional witnesses: the respondent's husband, her two sisters-in-law and her pastor. She received detailed submissions from the two representatives, after which she reserved her decision on the appeal.
5. The judge's decision is lengthy and detailed. She summarised the decision under appeal at [8]-[11]. She directed herself as to the burden and standard of proof at [12]-[13]. She set out the evidence at [14]-[30] and the submissions made by both representatives at [31]-[38]. At [39]-[40], the judge made reference to the salient parts of the Immigration Rules and then, at [41]-[44], she made extensive reference to authority, including Balajigari and R (Khan) v SSHD [2018] UKUT 384 (IAC); [2019] Imm AR 239.
6. At [45]-[54], the judge set out her conclusions on the central question in the appeal, of whether or not the respondent had employed deception in her dealings with the Home Office or HMRC. The judge noted that the respondent had completed her own tax returns in the years 2010/2011 and 2012/2013. At [47], she recalled the size of the discrepancies between the sums disclosed to the two departments:

“As rightly pointed out by the Respondent and Mr Terrell on his behalf, the errors are striking. The Appellant’s profit from her self-employment for the year 2010-2011 was initially said to be £1638.00 with profit from all employment said to be £20,235. The total income tax due was £328.60. The figure for the Appellant’s self-employment was later corrected to £15,378.00 which together with the profit from all employment led to a total income tax figure plus Class 4 NI insurance contributions of £3,3849.64. For the year 2012-2013 the Appellant’s self-employment income was initially said to be £93.00 which together with the profit from employment of £20,442.00 led to total income tax due of £19.00 whereas in 2012-2013 the self-employment was said to be £16,373.00 together with profit from employment of £20,442 led to a figure of £4,045.12 for income tax and Class 4 NI insurance contributions.”

7. Rejecting a submission made by Ms Mosaku on behalf of the respondent, the judge concluded that there had been adequate notice of the Secretary of State’s concerns: [48]-[49]. At [50], she noted the explanations provided for these discrepancies. In respect of the first year, the respondent had not noticed that there was a misstatement in the figures and did not expect them to be inaccurate. In respect of the second year, she had a great deal going on at the time, including a new house in June 2013 and her first baby in October 2013. She had barely filed the tax return on time and had not noticed the error at the time. She had noticed the errors subsequently, in 2015, when she came to check the paperwork. She had written to HMRC in October 2015 in order to correct the errors and she had paid the tax due. The critical paragraph in the judge’s decision is [51], which it is necessary to set out in full:

“The Appellant’s oral evidence in relation to the errors was consistent with the matters set out in her witness statements. The Appellant’s oral evidence came across as straightforward and without embellishment. Significantly, I did not find evidence of exaggeration in relation to the Appellant’s circumstances at the time of submitting the tax returns in the face of significant cross-examination. Her case is relatively simple – in respect of the 2010-2011 tax return she input the wrong figures online and simply did not realise that they were incorrect. In relation to 2012-2013 she had so much going on at the time, including caring for a three-month old baby and was not in a position to appreciate the errors she made at the time of a tax submission made very close to the deadline. Together with these circumstances, I have to weigh the striking nature of the errors; the sheer difference in the figures inputted. Balancing the evidence as a whole, I find it more probable than not that the errors were the consequence of carelessness, as opposed to deliberate or dishonest conduct on the Appellant’s part. Mr Terrell submitted powerfully that even if the Appellant’s explanation could be accepted in relation to 2010-2011, by 2012-2013 on the balance of probabilities she would have realised the errors given the relatively very low figure of tax due. However, it was the 2012-2013 period when the Appellant had a

new baby and other upheaval in her life. Had it been the other way around, I may have found against the Appellant. However, in all the circumstances, I accept that the figures initially attributed to the tax returns were mere input errors and were not the product of dishonesty or deception.”

8. At [52], the judge rejected the Secretary of State’s alternative case that the self-employment was not genuine; she found the evidence in relation to the nature of the self-employment to be consistent and the oral evidence as to the way in which the errors were discovered was compelling. The respondent would have had to submit significant evidence to the Secretary of State in support of her self-employment and the respondent had given oral evidence that she had provided invoices at the time. In reaching the conclusion that there had been only carelessness or mistake on the part of the respondent, as opposed to dishonesty or deception, the judge made clear that she had not taken into account the respondent’s subsequent conduct, since she did not consider that relevant to her behaviour at the time she filed the tax returns: [53].
9. At [55], the judge stated that the appeal fell to be allowed because the requirements of the Immigration Rules had been met. In the remaining paragraphs of the decision, she explained how she would have reached the same conclusion in any event, applying a traditional Razgar [2004] 2 AC 368 analysis.

The Appeal to the Upper Tribunal

10. The respondent sought permission to appeal from the FtT, contending that the judge had failed to give adequate reasons and that the conclusion at [51] was irrational. That error was said to undermine the Article 8 ECHR analysis as a whole. First-tier Tribunal Judge Saffer refused permission on the basis that the grounds expressed nothing more than a disagreement with the judge’s analysis.
11. The respondent renewed her application for permission to appeal to the Upper Tribunal. The original grounds of appeal were relied upon, although the emphasis was altered. It was emphasised that the complaint was a rationality challenge advanced on two bases. Firstly, it was irrational for the Tribunal to have accepted that the respondent could have declared less than 2% of her taxable earnings without realising the mistake and, secondly, the judge’s approach raised concerns about ‘just how low the level of plausibility has to be to meet the standard of proof’.
12. Permission to appeal was granted by Upper Tribunal Judge Sheridan, who noted that it was

“arguably irrational;/not open to the judge to accept that the appellant had made an honest mistake given the scale of the discrepancy between her actual income and the income declared, that she had significantly understated her income on two separate tax returns and that the appellant’s explanation, arguably did not

provide a plausible explanation for how such mistakes occurred on two occasions.”

13. Before me, Mr Jarvis adopted the grounds of appeal and submitted that the judge’s conclusion had been irrational, inadequately reasoned and gave rise to concerns over the standard of proof she had actually applied. He accepted that it was for the judge to find the relevant facts and that the Upper Tribunal would be circumspect about interfering with her analysis. That was particularly so when there was ample self-direction on the part of the judge, all of which suggested that she had approached her task correctly. It was relevant to recall, however, that there were two very serious errors in the respondent’s tax returns and that she had personally completed those returns online. The judge had failed to give adequate reasons for her conclusion that the respondent had been able to make such serious errors in two years and for her acceptance of the account that these problems had only been discovered by the respondent in 2015. The reasons given in [51] of the judge’s decision did not actually provide an adequate explanation for the scale of the errors.
14. Ms Mosaku responded at some length, robustly defending the decision reached by the judge. She adopted her skeleton and reminded me, in particular, of the hesitance with which an appellate court should interfere with a factual conclusion reached by a specialist Tribunal. There was extensive evidence before the judge, in both oral and documentary form, and, having assessed that evidence with great care, the judge had concluded that the respondent had not intended to deceive the Home Office or HMRC in the period in question. The respondent had been thoroughly cross-examined, as had the additional witnesses, and the judge’s findings had been open to her. It was relevant to recall, as had the judge, that the respondent’s income from self-employment was one part of her income; she was also employed at the material times and the tax from her employment had been paid by PAYE. Also relevant was the fact that HMRC had not imposed a penalty in 2015. The judge clearly took account of the way in which the respondent had given evidence, as well as the factual content of that evidence. The judge was plainly aware of the applicable legal principles as she had directed herself meticulously. The Secretary of State’s appeal amounted, in truth, to nothing more than a disagreement with conclusions lawfully reached by the judge. In the event that a material error of law was found, the correct relief was for there to be a de novo hearing before another judge in the FtT.
15. Mr Jarvis did not wish to respond.
16. I reserved my decision on the question of whether there was an error of law in the decision of the FtT and whether, if so, the correct course was as suggested by Ms Mosaku.

Analysis

17. In considering the Secretary of State's appeal against the judge's decision, I bear firmly in mind the principles which Ms Mosaku very properly relied upon in her cogent submissions. In particular, I recall what was said by Lady Hale at [30] of AH (Sudan) [2007] UKHL 49; [2008] 1 AC 678:

"This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734, [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

18. The importance of those principles has been underscored regularly by the Court of Appeal, most recently by Floyd LJ (with whom Coulson LJ agreed) in UT (Sri Lanka) [2019] EWCA Civ 1095. At [19] of his judgment, Floyd LJ cited what was said by Lady Hale in AH (Sudan). He went on, at [26], to recall what had been said by Lord Hope in R (Jones) v FtT and CICA [2013] UKSC 19, regarding the judicial restraint which must be exercised when considering the reasons given by a first instance tribunal. Lord Hope stated that "the appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.". Floyd LJ also cited what had been said by Lord Lane CJ at p794 of R v IAT ex parte Khan [1983] QB 790, that a Tribunal's reasoning might be either expressly stated or inferentially stated.
19. Similar dicta appear regularly in decisions of the Court of Appeal in other contexts. In Mackenzie v Alcoa Manufacturing [2019] EWA Civ 2110, for example, Garnham J was held to have erred in his decision to interfere with the findings reached by the trial judge, HJJ Vosper QC, in a trial for damages for personal injury for noise-induced hearing loss. At [54], Dingemans LJ (with whom Baker and Bean LJ agreed) adopted the language of Lewison LJ in Fage v Chobani [2014] EWCA Civ 5 when he said this:

"It is established that appellate courts should be very cautious in overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulged in impermissible "island hopping" to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases

costs and delay. Judges hearing appeals on facts should only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified.”

20. With those dicta in mind, I reject the Secretary of State’s submission that the judge applied the wrong standard of proof. The standard of proof was correctly stated by her and there is nothing whatsoever in the decision to suggest that she departed from that standard in her assessment. There is reference not only to the balance of probabilities but also to the judge considering whether an assertion made is more likely than not. In fairness to Mr Jarvis, he acknowledged the difficulty he faced in making this submission, which rather withered on the vine.
21. Nor do I accept the principal submission made by the Secretary of State, which is that the judge’s decision was irrational in the Wednesbury sense. It is obviously highly unlikely that a person who earns in the region of £1300 per month from self-employment could err so fundamentally on their tax return that they innocently declared only £93 from self-employment for the entire year. As long as adequate reasons were provided for accepting that account, however, I consider that it would be open to a judge to accept that such a ‘striking’ error was indeed an innocent one. The real question in this appeal is whether the reasons provided by the judge were actually adequate.
22. In considering that question, the litmus test is whether the reasons were given in sufficient detail to demonstrate the basis upon which the judge acted and the reasons that led her to her decision. The reasons need not be elaborate or lengthy and appellate bodies must guard against complaints based on an alleged insufficiency of reasons which are, in truth, simply a disagreement with the outcome: R (Iran) v SSHD [2005] INLR 535. Ms Mosaku submitted powerfully before me that the reasons provided by the judge were adequate. She reminded me that the judge had heard from the respondent, her family members and her pastor and submitted that the judge had given adequate reasons for concluding, when confronted with that sea of evidence, that the respondent’s conduct had not been dishonest.
23. Notwithstanding Ms Mosaku’s powerful submissions, I have come to the clear conclusion that the judge’s decision does not, even when considered as a whole, provide adequate reasons for her conclusion that the respondent’s conduct was not dishonest. The critical part of the judge’s decision is [51], which I have reproduced in full above. In respect of the 2010/2011 tax year, the judge gave no adequate reasons for concluding that the respondent had personally entered incorrect figures. She simply concluded that the respondent had not realised that the figures were incorrect. Had the figure in question been marginally wrong, or even if

there had been a decimal point in the wrong place, I might have considered there to be an adequacy of reasons. But in the 2010/2011 tax year, the respondent declared only £1638 by way of self-employed income to HMRC, whereas she claimed £15378 of self-employed income in her application to the respondent.

24. It does not suffice, in my judgment, merely to state that the respondent had not appreciated that there was an error. She is an educated woman who was completing the return online herself. The completion of a tax return online requires an individual to complete separate sections for employment and self-employment and there are regular requirements to verify the information previously entered. At the end of the process, prior to submission, there is a formal warning that false information might lead to financial penalties or prosecution. Given these safeguards, it is not at all clear from the judge's decision how the respondent came to submit a tax return with such a serious error. In all the circumstances, I consider that the judge's reasons for concluding that the respondent made an innocent error in respect of the 2010/2011 tax year were legally inadequate. Even when the detailed decision is considered as a whole, the Secretary of State is unable to discern how the respondent came to make such an innocent mistake.
25. In respect of the 2012/2013 tax year, I recognise that the judge provided more reasoning. The discrepancy in this period was even more striking, as the judge noted. The respondent declared £93 to HMRC in self-employed earnings, whereas she relied on self-employed earnings of £16373 in her application for further leave to remain. The respondent attributed these errors to having a new baby and a new house, and to completing the tax return very close to the deadline. Having taken into account the evidence as a whole, including the manner in which the respondent had given her own evidence, the judge was prepared to accept this explanation. Again, however, I come to the clear conclusion that the judge omitted a step in her process of reasoning.
26. The judge explained the respondent's circumstances at the time that she personally completed the tax return but she failed to consider or to explain how those circumstances came to explain the egregious error in the figure presented. As I observed to Ms Mosaku at the hearing, there is nothing in the judge's decision which enables the reader to understand why it was that the respondent, a woman who was receiving close to £1400 per month from self-employment, declaring only £93 of that income to the Revenue for the entire tax year. Having a new baby, a new house and a degree of time pressure does not begin, in my judgment, to explain how an error of that magnitude came to be made in the first place, or how the tax return came to be submitted by the respondent. In order to submit the return, the respondent would have been asked to confirm that sum more than once and would have been warned about the consequences of a false declaration. In the face of those safeguards, it is by no means clear from

the judge's decision how the respondent's circumstances resulted in the erroneous declaration.

27. Ms Mosaku submitted that the Tribunal would require a counsel of perfection if it found for the Secretary of State on this basis, and that Mr Jarvis merely sought 'reasons for reasons' but I do not agree. The judge was required to set out with sufficient clarity the reasons why these serious errors came to be made. In respect of the 2010/2011 return, she clearly failed to do so. In respect of the 2012/2013 return, she failed to explain anything more than the respondent's circumstances at the time, and she failed to state her reasons for accepting that those circumstances led an educated woman to declare a self-employed income which was so drastically lower than the income she relied upon in a different context.
28. In the circumstances, I accept the Secretary of State's submission that the decision is vitiated by legal error and that it cannot stand. The conclusions reached at [55] were determinative of the appeal, and the Article 8 ECHR analysis which followed was not undertaken in the alternative. Ms Mosaku submitted that the appropriate relief, were I to reach that conclusion, was for the appeal to be remitted to the First-tier Tribunal for re-hearing afresh. Mr Jarvis made no submissions on relief. Since it would not be appropriate for any of the judge's findings to be preserved, I accept that remission to the FtT is the proper course. For the avoidance of doubt, that hearing will be de novo before any judge of the FtT other than Judge Marissa Cohen.

Notice of Decision

The decision of the First-tier Tribunal was vitiated by legal error and cannot stand. The appeal will be remitted to the FtT for a fresh hearing before a different judge.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'MB', with a long horizontal stroke extending to the right.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

27 January 2020