



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

Appeal Numbers: HU/08413/2019  
& HU/13620/2019

**THE IMMIGRATION ACTS**

Heard at Field House (via *Skype*)  
On 8 September 2020

Decision & Reasons Promulgated  
On 14 September 2020

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**(1) MOHAMMED SAMIULLAH KHAN  
(2) AYESHA HUSSAIN  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr S Muquit, instructed by Deccan Prime Solicitors

For the Respondent: Mr D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellants are husband and wife. Both are Indian citizens. They were born on 7 January 1984 and 8 June 1988 respectively. They appeal, with leave granted by the First-tier Tribunal, against a decision which was issued by First-tier Tribunal Judge Ian Howard (“the judge”) on 5 December 2019, dismissing their appeals against the respondent’s refusal of their human rights claims.

2. This is an earnings discrepancy case, as such matters have come to be called following Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647. I need not set out a great deal of the background, which was set out with clarity and concision in the decision of the judge. It suffices for present purposes to state as follows. The first appellant has been in the UK for a number of years and has made a number of successful applications for leave to remain. He made one such application on 5 June 2013. He relied on an assertion that his combined earnings from employment and self-employment were at a certain level. He was granted leave to remain in response to that application. When he subsequently applied for ILR, the respondent made enquiries with HMRC, which confirmed that the combined earnings disclosed for tax purposes were significantly lower.
3. The discrepancy between the two sums caused the respondent to conclude that the first appellant had practised deception in the past. She considered that he had either deceived the Home Officer by inflating his income artificially, so as to ensure that he met the income requirements under the Points Based System, or that he had reduced the income declared to HMRC, so as to reduce his tax liability. Either way, the respondent concluded that such conduct meant that it was undesirable for the first appellant to remain in the UK, resulting in the refusal of his application under paragraph 322(5) of the Immigration Rules.
4. The second appellant has been in the UK for a considerably shorter period. She is not eligible for ILR and she made no application for it. Her application was for limited leave to remain as the spouse of a settled person. The first appellant's application for settlement having been refused for the reasons I have set out above, the second appellant's application was also refused.
5. It is important to understand precisely the basis upon which the respondent concluded that the first appellant had sought to deceive her or HMRC in the past. There were discrepancies between the incomes from employment and self-employment which were declared to the Home Office and HMRC for the tax year in question (2012/2013) but it was only in respect of the self-employment that the respondent concluded that the first appellant had sought to deceive. It is not clear to me why she came to that conclusion when there were discrepancies in both sets of figures. It might be because the first appellant made two amendments to his 2012/2013 tax return and the respondent was satisfied that the amendment concerning his employed earnings was not simply the result of a desire to address the difficulty before an application was made for ILR. Whilst it is unclear why the respondent expressed no concern over the discrepancy in the income from employment, it is clear that she concluded that he had only sought to amend his self-employment income with HMRC because he was concerned about the effect a discrepancy might have on the ILR application which he made shortly thereafter.

6. As the appeal presented itself to the judge, therefore, the issue before him was whether the respondent had established that the first appellant had sought to deceive the Home Office or HMRC in respect of his earnings from self-employment in the 2012/2013 tax year. That was the conduct upon which the respondent relied in the letter of refusal to justify the ground of refusal under paragraph 322(5). That was the conduct upon which the first appellant had focused in his witness statement for the hearing before the FtT, and upon which Mr Muquit had focused in his skeleton argument for that hearing.
7. The appellants were represented by Mr Muquit before the judge. The respondent was unrepresented. Despite what is said at [6] of the judge's decision ("He was cross-examined, there being no presenting officer."), it is apparent from the judge's Record of Proceedings ("RoP") that Mr Muquit had him adopt his statement and the judge asked a single question. Mr Muquit adopted his skeleton argument in submissions. Nothing more was said, according to the RoP, and the judge reserved his decision. In these circumstances, the judge's focus should have remained on the self-employed earnings in 2012/2013.
8. In his decision, the judge reviewed the figures with demonstrable care. He noted at [26] that the respondent had focused 'on the self-employed income claimed to have been earned by the appellant' and, at [27], that 'no complaint is made about the employed income figure'. Notwithstanding the respondent's clear focus, the judge noted at [28] of his decision that 'both figures provided to HMRC are lower than those to the respondent' and that the 'employment figure provided to HMRC is demonstrably wrong'. The judge then analysed the figures, again with care, before noting, at [33], that 'there is £24,434 between the two figures', by which he referred to the difference between the combined (self-employed and employed) income declared to HMRC and the Home Office in the 2012/2013 tax year.
9. At [34], the judge reminded himself of what had been said in R (Khan) v SSHD [2018] UKUT 384 (IAC); [2019] Imm AR 384 and Balajigari (although he stated erroneously that the former decision endorsed the latter) before rejecting the first appellant's suggestion that the discrepancy was the result of an error on the part of his accountant. At [35], he gave the following reasons for that conclusion:

"I do not accept this explanation. The figure equates to more than £2000 a month. I cannot conceive that the appellant believed his income for 2012/2013 was as low as the declared £11,489. I am satisfied to the requisite standard that the reason for submitting the lower figure in the tax return was to avoid paying the correct amount of income tax at that time. This is an intentional act of dishonesty. I make this finding notwithstanding it was the appellant who approached HMRC

to rectify the position as I am satisfied that this was in anticipation of a forthcoming application for leave to the respondent.”

10. A number of grounds of appeal were advanced by Mr Muquit but the principal submission, made orally as in writing, may be summarised very briefly. It was said that the judge had improperly brought into consideration the discrepancy between the appellant’s employed earnings as disclosed to HMRC and the Home Office in 2012/2013. The sole focus of the refusal letter had been the self-employed earnings and the appellant had not had an opportunity, in the circumstances to address the difficulty with the employed earnings. He had been entitled to conclude, in light of the way that the refusal letter had been framed, to consider that this particular point was not a factor in the assessment under paragraph 322(5).
11. In response to this point, Mr Clarke readily accepted that the judge had erred in taking into account the discrepancy in the employed earnings. The respondent had plainly been aware of this discrepancy but it had been only on the self-employed earnings that she had focused. Mr Clarke submitted that this error was immaterial, however, because the fact remained that the total discrepancy was more than £24,434 of which a significant proportion was under-declared income from self-employment. Even if the judge had only focused on the self-employed income, therefore, he would have reached the same conclusion.
12. I am unable to accept Mr Clarke’s submission in this respect. It is plain from [35] of the judge’s decision that he was particularly concerned by the extent of the discrepancy between the combined income figures. His reasoning is very clear; because the discrepancy between the combined figures was so substantial, amounting to £2000 per month or thereabouts, no such error could have come about. Had the judge adopted the correct focus, and considered only the discrepancy between the self-employed figures, it is far from clear that he would have reached the same conclusion.
13. I consider other points made by Mr Muquit to be less compelling. Whilst it is apparent that the judge gave himself no express self-direction on the burden and standard of proof in such earnings discrepancy cases, I accept Mr Clarke’s submission that he was obviously aware of the correct approach. So much is clear from the reference to the respondent having established a *prima facie* case of deception and to the judge being satisfied ‘to the requisite standard’ that the appellant had sought to avoid his tax liabilities. These findings are clearly expressed in the language of the authorities which the judge cited at [34] and there is no indication in the decision that he failed to apply the correct approach.
14. Nor was I persuaded by Mr Muquit’s submission that the judge had erred in his application of Khan and Balajigari. The judge certainly slipped

when he suggested that Martin Spencer J had endorsed the Court of Appeal's decision. Not only would that be impossible as a matter of precedent, it would also overlook the fact that the Upper Tribunal's decision was issued in 2018 and was considered in the 2019 decision of the Court of Appeal. Notwithstanding that 'slip', it is quite apparent that the judge applied the law correctly; his fundamental error was instead in taking into account a point which had not been raised by the respondent in the notice of decision.

15. The consequence of the judge's error is that the decision must be set aside. I cannot, as I have stated above, conclude that the decision would have been the same were it not for the error.
16. I considered with the advocates at the hearing the relief which should follow in the event that I concluded, as I have, that the decision fell to be set aside. They both submitted that the appeal should in those circumstances be remitted to the FtT. Ordinarily, that would be the proper course when the error into which the FtT had fallen was of this nature. It was at this point, however, that a further complication arose.
17. Mr Clarke had very properly brought a matter to my attention at the outset of the hearing. He noted that the appellants' son had been registered as a British citizen in November 2019 (and therefore after the decision of the FtT). In light of that decision, he indicated that the respondent would be unable to resist a submission that the appellants' appeals fell to be allowed on Article 8 ECHR grounds because he accepted that they had a qualifying child who could not reasonably be expected to leave the United Kingdom (s117B(6) of the Nationality, Immigration and Asylum Act 2002 refers). In light of that indication, Mr Muquit had invited Mr Clarke to adopt a position at the outset of the hearing. Mr Clarke indicated, quite properly in my view, that he was unable simply to concede the appeal because the judge had made a finding which the respondent sought to retain, which was that the first appellant had used deception in the past. For his part, Mr Muquit considered that it was in the appellants' interests to seek to expunge that finding, given the potential consequences it might have in the future. It was in those circumstances that I heard argument on the appeal despite Mr Clarke's acceptance that the s117B(6) would be determinative of the appeal in the appellant's favour were it to be reconsidered on the merits.
18. Given these events at the start of the hearing, I considered with the advocates whether it was in the interests of the appellants or the public purse to remit an appeal for rehearing when it was accepted on all sides that it fell to be allowed on Article 8 ECHR grounds regardless of the way in which the allegation of deception was resolved. (As Mr Muquit correctly observed, a finding against the first appellant under paragraph 322(5) would be of no consequence in relation to s117B(6), since the latter is a 'standalone' provision which compels a positive Article 8 ECHR

decision where its terms are met.) On reflection, both advocates submitted that the appropriate course – in the event that I accepted that the decision of the FtT fell to be set aside – was simply to allow the appeal on Article 8 ECHR grounds without requiring there to be a further hearing before the FtT or the UT to consider the allegation of deception. On reserving my decision, that was the way in which I had intended to proceed.

19. On further consideration, I consider that it would be improper simply to allow the appeal without lawful resolution of the deception point. It does not suffice, as I had initially suggested to Mr Muquit, for the first appellant to leave the IAC without a finding on whether he deceived the respondent or HMRC in the past. That is because resolution of that point is critical to the status that he is to be granted at the end of these proceedings. In the event that his appeal is merely allowed on Article 8 ECHR grounds outwith the Rules, as Mr Clarke concedes is inevitable, he will be granted limited leave to remain. In the event, however, that his appeal is allowed on Article 8 ECHR grounds on the basis explained by the Senior President of Tribunals in TZ (Pakistan) [2018] EWCA Civ 1109 – that he satisfies the requirements of the Immigration Rules for ILR – then he can legitimately expect the respondent to grant ILR. I was wrong, frankly, when I suggested at the hearing that there would be no prejudice to the appellants if the allegation of deception remains unresolved; without resolution of that issue in their favour, the first appellant will not be entitled to ILR, with all the benefits that brings.
20. In the circumstances, and notwithstanding the respondent's acceptance that the appeals will ultimately be allowed on Article 8 ECHR grounds as a result of s117B(6), I do order that the appeals be remitted to the FtT(IAC) for consideration afresh. It will be for the next judge to decide whether the appeal is to be allowed on Article 8 ECHR grounds 'outside the Rules' or, as Mr Muquit will wish to contend, whether they fall to be allowed on Article 8 ECHR grounds because the respondent has failed to establish the sole ground of refusal under the Rules and paragraph 276B of the Immigration Rules is accordingly met.

### **Notice of Decision**

The decision of the FtT was erroneous in law and is set aside. The appeals are remitted to the FtT for rehearing afresh by a judge other than Judge Ian Howard.

No anonymity direction is made.

*M.J. Blundell*

Judge of the Upper Tribunal  
Immigration and Asylum Chamber