Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17859/2019 (P)

THE IMMIGRATION ACTS

Decided Without a Hearing under Rule 34	**Decision & Reasons Promulgated**
On 19 October 2020	**On 26 October 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KASSIM ADEWALE SHITTU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: CW Law Solicitors (Written Submissions)
For the Respondent: No representative or submissions

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria who was born on 22 May 1972. He entered the United Kingdom on 8 October 2006 with entry clearance as a student valid until 31 October 2007. That leave was subsequently extended as a student, as a Tier 1 dependent partner, as a Tier 1 (Post-Study) Migrant and as a Tier 1 (General) Migrant until 25 April 2016. On 22 April 2016, the appellant applied for indefinite leave to remain (ILR) as a Tier 1 (General) Migrant which was refused on 14 December 2018. On 26 December 2018, the appellant applied for an Administrative Review but that

was withdrawn on 12 January 2019 when the appellant made a human rights application seeking ILR on the basis of ten years' continuous lawful residence in the UK under para 276B of the Immigration Rules (HC 395 as amended).

2. On 16 October 2019, the Secretary of State refused the appellant's application under para 276B and Art 8 of the ECHR. In relation to para 276B, the Secretary of State concluded that the appellant had been dishonest in the levels of income he had claimed in his application for leave as a Tier 1 (General) Migrant in 2016 in relation to the tax year 2012/2013 and in his declared income to the HMRC for that tax year.

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. His appeal was heard on 9 January 2020 by Judge J Hillis. The appellant gave oral evidence before the judge and sought to explain the discrepancy in his declared income to the Home Office and the HMRC for the tax year 2012/2013. He sought to explain the omission of £43,454 of undeclared income to the HMRC which he had only declared to the HMRC in June 2016 following his application for ILR as a Tier 1 (General) Migrant.

4. Judge Hillis did not accept the appellant's explanation and that he had been honest in his declarations to the Home Office and HMRC. Judge Hillis concluded that para 322(5) of the Immigration Rules applied, which set out a general ground of refusal, where there was am "undesirability" of permitting an individual to remain in the UK because of his cduct, character or associations. As a result, the appellant could not succeed under para 276B because, applying para 276B(iii), a ground of refusal under the general grounds for refusal applied. Further, the judge found that the appellant's removal would not breach Art 8, in particular the judge did not accept that the appellant had a continuing relationship with his children.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal but, on 26 June 2020, the Upper Tribunal (UTJ Reeds) granted the appellant permission to appeal only on the ground challenging the judge's finding under para 322(5). The judge refused permission on grounds 2 and 3 which challenged the judge's application of Art 8.

6. In granting permission, UTJ Reeds also made directions in the light of the COVID-19 crisis. She expressed the provisional view that it would be appropriate to determine the issues of whether the First-tier Tribunal erred in law and whether, if it did, the decision should be set aside without a hearing. The directions invited submissions from the parties both on the substantive issues and on whether the error of law could be determined without a hearing.

7. In response, the appellant filed submissions (together with evidence not apparently available before the First-tier Tribunal) on 2 September 2020. Those submissions raised no objection to the appeal being determined, at the error of law stage, without a hearing. The grounds, instead, focused exclusively upon the substantive issue under the ground upon which UTJ Reeds had granted permission. The submissions

also invited the UT to consider the other grounds of appeal, challenging Art 8, upon which permission was refused.

8. The respondent did not file a rule 24 reply or submissions in response to UTJ Reeds' directions.

9. In the absence of any objection from either party, and having regard to the interests of justice and the overriding objective of determining the appeal justly and fairly and the nature of the legal issues raised, I am satisfied that it is appropriate to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Senior Vice President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom.

The Law

10. The appellant's application for ILR was made under para 276B on the basis of ten years' lawful continuous residence. So far as relevant, para 276B provides as follows:

> "276B The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years' continuous lawful residence in the United Kingdom.
>
> (ii) Having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
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> (a) age; and
>
> (b) strength of connections in the United Kingdom; and
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> (c) personal history, including character, conduct, associations and employment record; and
>
> (d) domestic circumstances; and
>
> (e) compassionate circumstances; and
>
> (f) any representations received on the person's behalf; and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
>
> .... ."

As regards the general grounds of refusal, the relevant provision is para 322(5) which provides:

> "322(5) 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 paragraph 322(1C)), character or associations ….;"

11. That general ground of refusal is a ground on which leave "should normally be refused", consequently it is a discretionary rather than mandatory ground of refusal.

12. In Balajigari and Others v SSHD [2019] EWCA Civ 673, the Court of Appeal accepted that there were *two-stages* in applying para 322(5) – "undesirability" and "discretion". At [33], Underhill LJ (giving the judgment of the Court) said this:

> "33. … Mr Biggs submitted that, properly interpreted, paragraph 322 (5) involves a two-stage analysis. The first stage is to decide whether paragraph 322 (5) applies at all – that is, that it is "undesirable" to grant leave in the light of the specified matters. If it does, the second stage – since such undesirability is a presumptive rather than mandatory ground of refusal – is to decide as a matter of discretion whether leave should be refused on the basis of it. That analysis seems to us correct in principle."

13. The Court of Appeal identified that in relation to the first stage - "undesirability" - there were *three* limbs. At [34], Underhill LJ said:

> "34. As to the first stage, Mr Biggs submitted that there are three limbs to the analysis. There must be: (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character). Again, that seems to us a correct and helpful analysis of the exercise required at the first stage, but it will be useful to say something more about the elements in it, especially as they apply to an earnings discrepancy case."

14. As regards limb (ii), at least in a "earnings discrepancy" case such as this appeal, the Court in Balajigari recognised the need to prove "dishonesty" by the individual (at [35]-[37]). At [35], Underhill LJ said:

> "35. …Mr Biggs' position was that an earnings discrepancy case could constitute sufficiently reprehensible conduct for the purpose of paragraph 322 (5) if but only if the discrepancy was the result of dishonesty on the part of the applicant. That was not disputed on behalf of the Secretary of State, and in our view it is correct. The provision of inaccurate earnings figures either to HMRC or to the Home Office in support of an application for leave under Part 6A as a result of mere carelessness or ignorance or poor advice cannot constitute conduct rendering it undesirable for the applicant to remain in the UK. Errors so caused are, however regrettable, "genuine" or "innocent" in the sense that they are honest, and do not meet the necessary threshold."

15. At [37], Underhill LJ added the following in respect of requirement for 'dishonesty' when applying para 322(5):

> "37. We should make three other points about dishonesty in the context of an earnings discrepancy case:
>
> > (1) We were referred to the recent decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC, [2018] AC 391, considering the correct approach to what constitutes dishonesty. The principles summarised by Lord Hughes at para. 74 of his judgment in that case will apply in this context, but we cannot think that in practice either the Secretary of State or a tribunal will need specifically to refer to them.

> (2) Mr Biggs submitted that even dishonest conduct may not be sufficiently reprehensible to justify use of paragraph 322 (5) in all cases and that it would depend on the circumstances, the guiding principle being that the threshold for sufficiently reprehensible conduct is very high. We do not find it helpful to generalise about the height of the threshold, though it is obvious that the rule is only concerned with conduct of a serious character. 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.
>
> (3) Mr Biggs submitted that dishonest conduct would only be sufficiently reprehensible if it were criminal. We do not accept that that is so as a matter of principle, although it is not easy to think of examples of dishonest conduct that reached the necessary threshold which would not also be criminal. The point is, however, academic in the context of earnings discrepancy cases since the dishonest submission of false earnings figures to either HMRC or the Home Office would be an offence."

16. Then, at [38], Underhill LJ said in relation to limb (iii) of stage one and the "balancing exercise":

> "38. As for the third limb of the first stage of the analysis, Mr Biggs submitted that the assessment of undesirability requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. That would include such matters as any substantial positive contribution to the UK made by the applicant and also circumstances relating to the (mis)conduct in question, e.g. that it occurred a long time ago. In support of that proposition he relied on the judgment of Foskett J in *R (Ngouh) v Secretary of State for the Home Department* [2010] EWHC 2218 (Admin), which also concerned the application of paragraph 322 (5), albeit in relation to a different kind of conduct: see paras. 110, 120 and 121. While we would not say that it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly, we agree that it would be good practice for the Secretary of State to incorporate it in his formal decision-making process. In so far as Lord Tyre may be thought to have suggested otherwise in *Oji v Secretary of State for the Home Department* [2018] CSOH 127 (see para. 28) and *Dadzie v Secretary of State for the Home Department* [2018] CSOH 128 (para. 28) we would respectfully disagree."

17. The Court then noted that even if the first stage was established, para 322(5) required the decision-maker to exercise discretion and factors which might outweigh, albeit only exceptionally, the presumption that leave should be refused on grounds of "undesirability". At [39] Underhill LJ said:

> "39. Mr Biggs submitted that at this second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted that it is at this stage that the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise. That seems to us in

> principle correct. There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily *indefinite* leave to remain) to migrants whose presence is undesirable."

18. The burden of proof, on a balance of probabilities, lies upon the Secretary of State to establish the general ground of refusal, including the individual's dishonesty.

19. In Yaseen v SSHD [2020] EWCA Civ 157, the Court of Appeal recognised that the similar "undesirable" provision found in para 276B(ii) equated in large measure to para 322(5), despite each representing a discrete test, and the approach to para 276B(ii) mirrored that to para 322(5). The Court adopted the approach in Balajigari.

The Judge' Decision

20. Although I have set out both para 276B(ii) and para 322(5), in fact before Judge Hillis the respondent only relied upon para 322(5) despite having also relied upon para 276B(ii) in the decision letter. Before Judge Hillis the respondent's representative accepted that if the discrepancy in the income submitted by the appellant in his leave application and HMRC tax return for 2012/2013 had been made innocently, rather than dishonestly, then para 322(5) would not apply (see para 22 of the determination). The respondent's submission was that the discrepancy had been made dishonestly. The appellant's contention was that it had been made innocently and the respondent had not established to the required standard that the appellant had been dishonest.

21. The judge identified the sole legal issue under the Rules in para 33 of his determination as follows:

> "33. The sole issue to be resolved in this appeal is did the Appellant deliberately enter false figures in his previous application to mislead or deceive the Home Office into granting him leave to remain when he did not meet the minimum annual income under the Rules? I am grateful to [the Respondent's representative] for his very proper submissions that if the figures in the Appellant's application and in his Tax Returns were an innocent mistake that his application could not have been refused pursuant to para 322(5) of the Rules".

22. At para 34, the judge noted, somewhat curiously, that the appellant had submitted a document saying that he had withdrawn instructions from his legal representatives because of their "sub-standard, poor communication and poor preparation of his appeal" but then, before the judge, they represented the appellant.

23. Then at paras 35–41, the judge dealt with the appellant's oral and documentary evidence which sought to explain the discrepancy of £43,454 between his declared income in his 2012/2013 tax return and in his 2016 application for further leave:

> "35. The Interim Financial Information document at AB13 is dated 25th February, 2013. I note that he has not signed the declaration at AB15 dated 7th March, 2013 which states *'In accordance with the engagement letter, I*

approve the Interim Financial Information which comprises the Trading and Profit and Loss account, the Balance Sheet and related notes for the period ended February 25, 2013. I acknowledge my responsibility for the Interim Financial Information, including the appropriateness of the applicable financial reporting framework as set out in note 1.1 and for providing Mantax Consulting Limited with all information and explanations for their compilation'. I conclude that this is an acknowledgement by the Appellant that he accepts responsibility for the information given to the accountants used to compile the document.

36. At AB17 the gross turnover for the business Kassim Shittu T/AS Dewtech Engineering Services was GB£11,906 and the net profit was GB£5,773. The balance sheet shows net liabilities of GB£377 and a bank balance of GB£173. In my judgment, those figures are vastly different from the contents of the Santander Bank statement of Dewtech Engineering Services submitted dated from 26th April, 2012 to 5th April, 2013 at AB21 to AB22.

37. This account started with an opening balance of GB£1 and had a closing balance at the end of the year of GB£1,368.11. By my calculations they show deposits totalling GB£16,525. These figures are wholly at odds with the tax returns at AB25 which claims to show a UK income of GB£21,611 with a grand total income from all sources of GB£65,065 which includes the figure of GB£43,454. The Tax Return at AB26 shows an income in the UK of GB£26,534 and a grand total of GB£69,3232.

38. The accounts submitted for Qitech Services Limited for the period 1st August, 2012 to 31st July, 2013 are 'abbreviated and audited accounts' and include a Balance Sheet detailing fixed assets of GB£267 for 2012 and GB£159 for 2013, cash at bank and in hand of GB£1,600 for 2012 and Nil for 2013. They also show trading losses of GB£4,300 for 2012 and GB£9,218 for 2013. The Balance Sheet for 31st July, 2014 at AB83 shows net liabilities of GB£9,218 for 2013 and GB£11,298 for 2014.

39. The accounts at AB97 for Dewtech Engineering Services Limited for 31st July, 2016 show a profit of GB£269 for 2015 and GB£10,786 for 2016 and the Balance Sheet shows total liabilities of GB£11,029 and GB£96 for 2016.

40. The PAYE summaries at AB110 to AB116 do not, in my judgment, show tax paid which is commensurate with the Appellant's claimed income from employment. Additionally, the schedule of 'Employee Total Pay Levels' for Dewtech Engineering Services Limited for 2018 to 2019 are not for the relevant period being considered in this appeal. Additionally, they are inconsistent with the levels of turnover in the previous years of accounts set out above. They claim that the total employees' pay for GB£62,475.29 which is wholly inconsistent with the turnover shown in the previous years and no evidence has been submitted to show the source of the very large increase in turnover which would be needed to pay these wages.

41. I further conclude that the contents of the Santander Bank statements at AB120 to AB147 are, in my judgment, wholly inconsistent with the figures submitted in the Appellant's tax returns and his previous application for leave to remain in the UK as shown above".

24. In other words, the judge concluded that the documents did not support the appellant's claim that he had income for 2012/2013, including the discrepant figure

of £43,454, as he had claimed in his 2016 leave application and formed part of his amended income disclosed to the HMRC in 2016.

25. Then, at para 42, the judge rejected the appellant's account and that he had made an honest mistake:

> "42. I do not find the Appellant to be honest and reliable in his oral testimony before me. He was wholly unable to give a credible explanation to the 'coincidences' and inconsistencies in the figures highlighted by [the respondent's representative] during his cross-examination. The Appellant has failed to produce documentation of his claimed foreign income from his now dissolved business in Nigeria".

26. The "coincidences" that the judge refers to in para 42 is that the discrepancy in income made in his tax return for 2012/2013 of £43,454 and said to be from "Dividends from foreign companies" exactly matched the sum of the additional income he claimed that he had earned in additional salary set out in the 2016 amendments he made to the HMRC and his 2012/2013 tax return.

27. At para 43 the judge reached his conclusion on the evidence as follows:

> "43. In my judgment, following a careful and anxious scrutiny of all the documents submitted by the Appellant, including his accounts and in addition to the Appellant's oral testimony I conclude that the Respondent has shown, on a balance of probabilities, that the Appellant submitted false figures for his income to the HMRC and with his relevant previous application for leave to remain in the UK".

28. Reading paras 42 and 43 together, therefore, the judge found that the respondent had established that the appellant had dishonestly submitted false figures either in his income to the HMRC or in his application for leave.

29. The judge then went on in paras 44–46, to find that the appellant had not established a breach of Art 8, in particular based upon the best interests of his children whom the judge found now lived with their mother in Scotland and with whom the appellant had no contact.

The Grounds

30. It is helpful to read the appellant's grounds of appeal with the submissions made more recently in response to UTJ Reeds' directions. As I have already stated, the appellant sought permission to appeal on three grounds: ground 1 relates to the application of para 322(5). Grounds 1 and 2 relate to the judge's approach to Art 8, in particular in relation to his finding that the appellant had no contact with his children. UTJ Reeds only granted permission on ground 1. She refused permission on ground 2 and 3 as not being arguable. I will return to these later. I focus, therefore, upon ground 1.

31. In ground 1, the appellant raises a number of points. First, he contends that the decision was procedurally unfair on the basis that the Secretary of State had not carried out a "minded to refuse" notification in relation to the appellant's tax affairs

as required by Balajigari. Secondly, it is contended that the judge was wrong to apply the same approach to para 276B(ii) as to para 322(5). Thirdly, the judge's adverse finding on the appellant's credibility and that he was dishonest is said to be inadequately reasoned. Finally, it is contended that the judge failed to carry out the "balancing exercise" required by Balajigari in taking into account not only, if established, that the appellant was dishonest but also his whole history and conduct.

Discussion

Ground 1

32. I will deal with each of the points raised in Ground 1 in turn.

33. First, whilst the Court of Appeal in Balajigari indicated that fairness required the Secretary of State, before making an adverse decision based upon dishonesty in a 'discrepant income or earnings' case, to allow the appellant an opportunity to deal with that allegation principally through an interview, that complaint has no traction when the appellant has exercised a right of appeal and has had a full opportunity at an appeal hearing to provide an 'innocent explanation' (see Ashfaq (Balajigari: appeals) [2020] UKUT 226 (IAC)). It is noted in the headnote:

> "If the decision of the Secretary of State carries a right of appeal, the availability of the appeals process corrects the defects of justice identified in Balajigari".

34. Secondly, to the extent that the grounds contend that the judge, in some way, misapplied para 276B(ii), that ground also has no merit in this appeal. As I have already indicated, although the Secretary of State in her decision letter dealt not only with para 322(5) but also para 276B(ii), before the judge the respondent only relied upon para 322(5). The judge's findings relate exclusively to that general ground of refusal which, of course, the judge found had been established. Even if there were some, albeit fine, distinction between the application in this sort of case of para 276B(ii) and para 322(5), the judge only applied para 322(5).

35. Thirdly, the appellant contends that the judge erred in finding that the appellant was dishonest. The correct approach in 'discrepant income/earnings' cases is set out by Martin Spencer J in R(Khan) v SSHD (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 384 (IAC). It suffices to refer to the detailed judicial headnote:

> "(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."

36. In Balajigari, the Court of Appeal largely approved the approach of Martin Spencer J in Khan (at [40]-[44]) with one caveat. At [42], Underhill LJ pointed out a "danger" in the "starting-point" in paras (i) and (ii) of the headnote as follows:

> "42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. 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."

37. In this appeal, the judge correctly identified that the respondent had to establish that the appellant had been dishonest (see para 43 of the determination). There was a

significant discrepancy and the appellant put forward an 'innocent explanation'. The judge gave extensive reasons at paras 35–42 (based on the material relied upon by the appellant) and at paras 42–43 (looking at the appellant's evidence more generally) why he did not accept the appellant's 'innocent explanation' as to why his tax return in 2012/2013 failed to disclose income of £43,454. The grounds, and the submissions made, do not seek to identify errors in the judge's reasoning. The challenge is, as expressed in the grounds, one of inadequacy of reasons.

38. The appellant's explanation was undoubtedly a detailed one. It was not, however, always consistent. Although there is some suggestion in the appellant's documents that the mistake was that of his accountants at the time, that does not appear to have featured as a principal contention before the judge. It would have, in any event, lacked any real strength in the absence of supporting evidence, including potentially evidence given orally and subject to cross-examination, from his accountants (see Khan; Abbasi [2020] UKUT 27 (IAC) and Ashfaq).

39. The appellant's contention was, in essence, that there was no real mistake and that all his income had been appropriately reported to HMRC, albeit not exclusively in the tax year 2012/2013 (see his letter dated 9 March 2018 at pages 8-10 of the appellant's bundle). It was this contention which the judge dealt with in detail when examining the supporting evidence relating to the appellant's claimed further income totalling £43,454. As I have said, that reasoning in paras 36–41 is not subject to any reasoned challenge either in the appellant's grounds or in the further submissions.

40. The appellant refers to the fact that the appellant did not sign the Interim Financial Information document (at page 15 of the appellant's bundle) which had been the initial basis upon which the appellant's tax return for 2012/2013 was submitted. It is not entirely clear to me why the grounds contend that the judge erred by noting that the appellant, even though it had not been signed, was responsible (at least in principle) for that submission. He clearly was (see Khan at headnote para (iv)) and that the accountant should have asked him to confirm the contents of his tax return even if the accounts were not signed.

41. Further, there remained the somewhat surprising coincidence that, in retrospect, the appellant's now asserted income and dividends from foreign companies of £43,454 exactly mirrored each other. That was a coincidence that the judge was entitled to take into account as was the fact that the correction to his income for the 2012/2013 year was made with HMRC shortly after he made his application for ILR in 2016.

42. In my judgment, the judge gave adequate reasons for rejecting the appellant's innocent explanation and his finding that the significant discrepancy in the income which he had claimed in his 2016 leave application and in his tax return for 2012/2013 was dishonest and, therefore, fell within para 322(5) of the Rules.

43. The final issue raised in the grounds is that, having found that the appellant was dishonest, the judge failed to carry out the balancing exercise required by limb (iii) taking into account both the negative aspects of the appellant's circumstances

(principally the dishonesty) and any other positive aspects of his circumstances in determining whether the "undesirability" element was satisfied.

44. The Court of Appeal, as I have already noted, in Balajigari recognised that a "balancing exercise informed by weighing all the relevant factors" was required in order to determine whether the "undesirability" element in para 322(5) was met (see [38]). However, it is important to notice that the Court of Appeal also stated that:

> "We would not say that it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly".

45. On the face of it, Judge Hillis concluded that para 322(5) was satisfied on establishing that the appellant had been dishonest in his dealings with the Home Office and/or HMRC. In the most recent submissions made on behalf of the appellant, it is stated at para 20 that the judge

> "misdirected himself by failing to balance up appellant's overall conduct and his historical past throughout his over thirteen years' lawful residence in the UK".

The submissions do not, however, point to any particular aspect of the appellant's "history" that the judge should have taken into account other than the fact that the appellant had been, so the grounds assert, in the UK lawfully for thirteen years. At best, it could be said that the appellant has, on the evidence, not been guilty of any offending or does not have any other bad character factor which would be relevant to his circumstances. He is, therefore, apart from the dishonesty issue, a person of good character.

46. The appellant relies upon the Court of Appeal's decision in Yaseen where the court remitted to the Tribunal an appeal in order that the balancing exercise could be carried out. At [46], Irwin LJ (with whom Simler LJ and Sir Jack Beatson agreed) said this:

> "46. In my judgment this appeal should succeed on a simple but important ground. In all but the most extreme cases, where the conduct complained of is such that on any view the balance must fall against an applicant, even where a sufficient character or conduct issue is proved, a balancing exercise is required. In this instance there was at least some positive material. I would remit the matter for a re-hearing to permit such an exercise".

47. In that case, positive material including character references as well as material showing his employment and earnings and letters and materials from successive firms of accountants were submitted on his behalf (see [11] of the judgment). Whilst in that case, the Court of Appeal was not content to conclude that the balance must necessarily fall against that applicant, I am satisfied that it would inevitably fall against this applicant. Outside of the issues concerning Art 8, there is little, or no, positive material that could weigh in his favour so as to outweigh the dishonesty established by the respondent to the judge's satisfaction. His lawful residence in the UK for a period which would, otherwise, fall within para 276B will not suffice to override the inevitability of his dishonesty leading to a conclusion that the "undesirability" element in para 322(5) was satisfied. Neither the grounds nor the more recent submissions identify any discrete matters of any significance that might

lead to the balance being struck in the appellant's favour. Consequently, any error by the judge in failing to carry out the balancing exercise was not material to his decision that para 322(5) applied. There is no proper basis upon which the Upper Tribunal should set aside his decision for that immaterial error.

48. Consequently, I reject ground 1. The judge was entitled to find that para 322(5) applied on the basis of the appellant's dishonesty and, as a result, the appellant could not succeed under para 276B because of sub-para (iii).

Grounds 2 and 3

49. As regards the remaining grounds of appeal, as I have already noted, the appellant was not granted permission by UTJ Reeds on either of these grounds. That was because she did not consider them arguable. They plainly are not arguable and, if permission had been granted, I would have rejected these grounds.

50. As regards ground 2, the appellant relies upon s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended) and that he has a "genuine and subsisting parental relationship" with his British citizen child (or children) in the UK. If that is the case, then if it would not be reasonable for his children to leave the UK then the appellant's removal is not in the public interest. The judge dealt with this at paras 44–45 of his determination:

> "44. The letter from the Appellant to the mother of their children dated 20th August, 2013 at AB152 shows that the Appellant was not living with his wife and children as at the date of the letter. There is no indication in his witness statement that he is living with his children or has any access [or] physical contact with them. The documents submitted at AB161 to AB165, in my judgment, show, on a balance of probabilities, that the children's mother is now living in Scotland with them and that he has no contact with them and does not know their address. There is no evidence before me to show that there are any pending legal proceedings before the Courts by the Appellant to seek contact or access to his children.
>
> 45. I infer from the evidence taken as a whole that the children are living happily and safely with their mother in Scotland. There is no suggestion before me that they would be required to leave the UK with the Appellant, I conclude it is in their best interests to remain with their mother living in the UK".

51. Looking at the birth certificates at pages 149-151 of the appellant's bundle, the appellant would appear to have three children in the UK aged 9, 6 and 4 years old. The eldest child has a different mother to the other two children: she is the appellant's ex-wife. There is mention in his witness statement of a "partner" (para 14) but no evidence to support the claim or that she is the mother of the younger two children.

52. The appellant has, with the grounds of appeal, appended evidence which seeks to support a contention that he is pursuing contact through the courts in Scotland. That application only relates to the eldest child. It is wholly unclear what was (and now is being) said about the appellant's relationship with the younger two children. The

grounds and documents are wholly opaque. There is (and was) no supporting evidence relating to them. Importantly, however, the material concerning the eldest child was not available to Judge Hillis as UTJ Reeds noted in refusing permission on this ground. The only information before Judge Hillis was that the last court documents dealing with contact in England dated back to 2014. These also only relate to the eldest child. The most recent information refers to the appellant as having not seen his child for eight years. The judge was undoubtedly entitled to find that the appellant's eldest child lived with his mother in Scotland. There were no ongoing contact proceedings since the most recent document dated back to 2014. The appellant does not claim that he has any ongoing relationship with his eldest child since the move to Scotland with his mother. There is nothing to support any on-going relationship with the other children. In those circumstances, the appellant simply could not establish that he had a "genuine and subsisting parental relationship" with is child/children such that s.117B(6) could apply and require the judge to decide whether it would be "reasonable" for them to leave the UK.

53. For these reasons, therefore, ground 2 has no merit and I reject it.

54. Turning to ground 3, this seeks to challenge the judge's conclusion that Art 8 was not breached but again seeks to rely upon his relationship with his child who lives with his mother in Scotland. The contention appears to be that it was in that child's "best interests" to continue to have a relationship with the appellant, his biological father. Whilst that is no doubt true as a generalisation, in this case the appellant had no relationship with his child whom he had not seen for some years. His child lived with his mother in Scotland and, in the absence of evidence that the appellant's separation from his child was having a deleterious effect upon his child, it was entirely open to the judge to find that the best interests of his son were currently fulfilled by his living with his mother in Scotland. For these reasons, ground 3 is also without merit.

55. There is no other challenge to the dismissal of the appeal under Art 8.

Decision

56. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of a material error of law. That decision stands.

57. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 October 2020

TO THE RESPONDENT
FEE AWARD

Judge Hillis made no fee award as the appellant's appeal had been dismissed. That decision also stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 October 202