



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003749
First-tier Tribunal No:
HU/04219/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 April 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

Nimesh Soni
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rahman of Counsel, instructed by Lawise Solicitors

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 20 March 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Juss promulgated on 5 July 2022, in which the Appellant's appeal against the decision to refuse his human rights claim dated 28 July 2021 was dismissed.
3. The Appellant is a national of India, born on 13 September 1983, who first entered the United Kingdom on 4 October 2008 with leave to enter and remain as a student to 31 January 2010 and then to 2 June 2010. He was then granted leave to remain as a Tier 1 (Post Study Worker) to 14 April 2012; and as a Tier 1 (General) migrant to 7 May 2016. On 14 April 2016 the Appellant applied for indefinite leave to remain as a Tier 1 (General) Migrant, which was refused the same day and a second application on 5 May 2016 was refused on 8 November 2016. A third application on the same basis was made on 30 December 2016 which was initially refused on 1 February 2018 but by agreement following an

application for Judicial Review, that decision was withdrawn and the matter reconsidered. The Respondent issued a minded to refuse letter on 26 April 2021, to which the Appellant responded on 10 June 2021 and the decision to refuse on 28 July 2021 is the subject of these appeal proceedings.

4. The Respondent refused the application on the basis that the Appellant did not meet the requirements of paragraph 245CD(b) and (g) of the Immigration Rules and with reference to paragraph 322(5) of the Immigration Rules on the Appellant's character and conduct. The decision letter sets out a very detailed analysis of the Appellant's claimed earnings and tax declarations, with reference to questions asked in the minded to refuse letter which in essence led to the conclusion that the Appellant had in the past dishonestly inflated his earnings for an immigration advantage and that there were initially, lower declarations of earnings to HMRC (corrected shortly before the first application for indefinite leave to remain). The Respondent considered the second part of the test in paragraph 322(5) of the Immigration Rules and did not apply discretion in the Appellant's favour as although he had eight years' lawful residence, some of it was obtained using dishonesty and there was no evidence of any positive contributions to the community.
5. The Appellant did not claim to have any partner, parent or dependent children in the United Kingdom such that he did not meet any of the requirements for leave to remain under Appendix FM. In relation to his private life, the Respondent decided that the Appellant did not meet any of the requirements in paragraph 276ADE of the Immigration Rules, specifically that he would not face any very significant obstacles to reintegration on return to India, a country in which he lived up to the age of 28. There were no exceptional circumstances or compassionate factors to otherwise warrant a grant of leave to remain in the United Kingdom.
6. Judge Juss dismissed the appeal in a decision promulgated on 5 July 2022 on all grounds. In essence, the Appellant was not found to be credible. The accountants letter upon which he relied did not explain nor accept responsibility for the errors in the first tax return considered; the Appellant had failed to answer or give any credible explanation to the wide range of matters relied upon by the Respondent, even on what should have been relatively straightforward and simple points.
7. In relation to Article 8, it was found that the Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules and that there would be no unjustifiably harsh consequences of his removal. In particular, the Appellant has siblings, aunts and uncles in India and although he has been in the United Kingdom for thirteen years, that was not sufficient to outweigh the public interest in his removal.

The appeal

8. The Appellant appeals on two grounds. First, that the First-tier Tribunal erred in law in failing to follow the two-stage test required under paragraph 322(5) of the Immigration Rules when there was evidence of the Appellant's positive contribution, good character and integrity which should have been balanced in an exercise of discretion. Secondly, that the First-tier Tribunal erred in law in making inadequate findings under paragraph 276ADE of the Immigration Rules and in failing to make a rounded assessment of whether the Appellant could reintegrate in India. There was, for example, no reference to his lack of residence, lack of social network, lack of home to return to and lack of financial support.

9. At the outset of the hearing, in the absence of a rule 24 notice on behalf of the Respondent, Ms Everett accepted that the First-tier Tribunal had not considered or undertaken the second part of the test in paragraph 322(5) of the Immigration Rules, the balancing exercise, but that that was not necessarily material in this case.
10. On behalf of the Appellant, Mr Rahman highlighted the evidence that was before the First-tier Tribunal in relation to the Appellant (whilst accepting that none of this was expressly brought to the attention of the Judge during the hearing), which included a statement from the Appellant that he owned a house with a mortgage, attended charity events and contributed to children in need; evidence of his degree studied for between 2008 and 2010 and his employment history since.
11. It was submitted that for the reasons given in Yaseen v Secretary of State for the Home Department [2020] EWCA Civ 157 and by reference to the decision in R (Balajigari) v Secretary of State for the Home Department [2019] 1 WLR 4647, the balancing exercise is important and good practice to undertake and its absence may be an error of law. That case did not involve any allegation of dishonesty, but highlighted possible positive factors to take into account such as length of residence, living in a self-supporting and law-abiding way, proper behaviour since failing to submit a tax return, a good work record, high level of education and good references. In Yaseen, no balancing exercise was undertaken and the appeal was remitted for that to be considered. Mr Rahman submitted that the factors relevant to the Appellant in this appeal were similar to those in Yaseen and were material such that they should have been balanced in the second part of the test.
12. As to the second ground of appeal, Mr Rahman submitted that there was simply a lack of engagement by the First-tier Tribunal with the requirements of paragraph 276ADE of the Immigration Rules and this was material because the Appellant had lost ties with India having been in the United Kingdom for 15 years and there was no consideration of whether he would have a family home or any financial support to return to. The Appellant was also now too old to seek employment with the government in India. It was submitted that the length of time the Appellant had been in the United Kingdom was alone sufficient to establish very significant obstacles to his reintegration in India.
13. On behalf of the Respondent, Ms Everett accepted that the First-tier Tribunal had erred on both grounds of appeal in that there was no consideration of the second part of the test in paragraph 322(5) of the Immigration Rules nor any detailed consideration of paragraph 276ADE of the Immigration Rules; but did not accept that either was material to the outcome of the appeal. In relation to the balancing exercise, whilst the evidence of the Appellant's contribution was commendable, it would not on any rational view be of sufficient strength to outweigh the significant adverse credibility and dishonesty findings. Similarly, on the second ground of appeal, the factors relied upon by Mr Rahman do not even come close to showing that there would be very significant obstacles to the Appellant's reintegration in India and it is noted that the Appellant had failed to disclose family members there initially.

Findings and reasons

14. There is no dispute on either ground of appeal that the First-tier Tribunal erred in not expressly dealing with the balancing exercise as the second part of the test for paragraph 322(5) of the Immigration Rules and in regards to paragraph

276ADE of the Immigration Rules, there is no more than a statement in paragraph 22 that the Appellant can not succeed under the Rules. In both cases, the issue is solely whether those errors are material errors of law.

15. In relation to the first ground of appeal, it is helpful to set out in more detail what is said about the need for a balancing exercise by the Court of Appeal in Yaseen:

“41. ... Where there is “deliberately false information”, the Respondent will generally seek to refuse ILR. However, even then an opportunity will be given for explanation. The Ministerial Statement makes clear that the scale of misstatement is relevant, that all information will be taken into account, each case being considered on its own merits. No such statement can prescribe outcomes across the whole range of cases. There is a world of difference between “deliberately false information” to avoid paying significant amounts of income tax and “minor tax errors”. The statement does not, and cannot pretend to, address every case along that spectrum.

42. Nor are those conclusions altered, in my judgement, by the reasoning or decision of this Court in Balajigari. The Court proceeded on the basis that declared policy in relation to paragraph 322(5) meant that dishonesty was required in “earnings discrepancy” cases. Even then, as the court said in paragraph 34 of the judgment quoted above, a balancing exercise was proper practice. No doubt where dishonesty is proven in an earnings discrepancy case, very strong positive factors will be necessary before the balance will be thought to tilt back in favour of the applicant for ILR. Discrepant tax returns are strong evidence of crime. Either leave to remain was sought using inflated figures, or the tax returns represent an attempt to defraud the Revenue, and thus to cheat the public finances of the country where the applicant seeks indefinite leave to remain. But even then, a balancing exercise is “good practice” and its absence may be an error of law: see paragraph 38 of Balajigari set out above.

...

46. ... 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. ...”

16. The facts of the present case are different to those in Yaseen, not least because that case involved considerations of conduct and character for the purposes of paragraph 276B of the Immigration Rules and there was no allegation or finding of dishonesty (the issue solely being the late filing of a tax return) and a number of positive factors were identified in the appellant’s favour.
17. In the present case, there were clear findings of dishonesty by the Appellant in relation to his earnings contained in applications for leave to remain in the United Kingdom and a finding that the Appellant had failed to provide a credible explanation for the very detailed points in the Respondent’s refusal letter and

equally detailed Respondent's review for the appeal hearing. It is not necessary to set out the very lengthy and numerous points made by the Respondent, nor the findings in paragraphs 17 to 21 of the decision of the First-tier Tribunal in which it was found that all of the Respondent's points were sustainable; it suffices to say that there were very strong dishonesty findings covering a number of distinct matters which the Appellant almost entirely failed to engage with or offer any explanation of beyond a blanket denial of wrong doing. The factors against the Appellant were at the far end of the spectrum and were very weighty indeed against him.

18. The Court of Appeal stated in Yaseen that a failure to conduct a balancing exercise would not always be an error of law (albeit it would be good practice to undertake one), however, in all but the most extreme cases, where on any view the balance must fall against an appellant, such a balancing exercise should be undertaken. I find this is one such extreme case where no balancing exercise was required and in any event, even if one had been undertaken, the only rational outcome would be against the Appellant. The dishonesty findings against the Appellant are so extensive and wide ranging that it would not be rational for the balance to fall in the Appellant's favour even on very strong evidence of positive factors. This is an Appellant who has obtained leave to remain by using deception and who failed to respond at all to the vast majority of allegations put to him by the Respondent as to his earnings dating back to the tax year 2010/11. It would need exceptionally strong positive factors to outweigh the dishonesty findings in this case, but none relied upon on the Appellant's behalf would be sufficient, alone or cumulatively. At its highest, the Appellant relied upon fifteen years' of residence in the United Kingdom, but only three years were not tinged by dishonesty; and the Appellant had obtained a degree and then engaged in employment here with some annual charitable contributions. On these facts, even if the balancing exercise had been undertaken, it is clear that the factors relied upon by the Appellant could not rationally have outweighed the dishonesty findings. In these circumstances, the First-tier Tribunal did not err in law in failing to undertake the second stage balancing exercise for the purposes of paragraph 322(5) of the Immigration Rules and in any event, even if an erred in failing to do so, it would not be material to the outcome of the appeal.
19. The second ground of appeal concerns the First-tier Tribunal's lack of detailed assessment of paragraph 276ADE of the Immigration Rules and specifically paragraph 276ADE(1)(vi) as to whether there would be very significant obstacles to the Appellant's reintegration in India. It is not clear as to whether the Appellant specifically relied on this provision at the hearing before the First-tier Tribunal, but in any event, at its highest, the evidence in the Appellant's favour on this point was his length of residence in the United Kingdom and that his parents have died. Although Mr Rahman referred to a lack of family home and financial support in India, it is not clear that that was in evidence before the First-tier Tribunal.
20. The test for "very significant obstacles to reintegration" was set out in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813, at paragraph 14 (which applies equally to the same requirement in paragraph 276ADE(1)(vi) of the Immigration Rules), as follows:

"In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c)... is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It

is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

21. In the present appeal, the Appellant lived in India up to the age of 28 and has family members remaining there. There is nothing to suggest that he would not be enough of an insider to operate within society and rebuild relationships in India. There is also nothing to suggest that he no longer speaks the language and would not be able to use his education and work experience to seek employment or set up his own business there. The Appellant's length of residence in the United Kingdom is not sufficient on its own or in combination with any other factors to establish that there would be very significant obstacles to reintegration. This is a high threshold which on any rational view, the Appellant falls very far short of. Whilst there is no detailed analysis by the First-tier Tribunal as to why the Appellant does not meet the requirements of paragraph 276ADE of the Immigration Rules, there is no basis upon which it could be suggested that he did, and that is before any suitability requirements are considered which he would inevitably not meet because of the extensive dishonesty findings. The finding that the Appellant could not meet the Immigration Rules is unarguably correct and even if fuller reasons had been given, the outcome of the appeal would be the same such that any error could not be material. There is no separate challenge to the findings of the First-tier Tribunal on Article 8 grounds, that removal would not be a disproportionate interference with the Appellant's right to respect for private life.
22. For these reasons, although it would have been good practice for the First-tier Tribunal to undertake the balancing exercise and to include reasons why the Appellant did not meet the Immigration Rules; neither are material errors of law which could have affected the outcome of the appeal. The Appellant's appeal was inevitably bound to fail for the reasons set out above.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30th March 2023