Neutral Citation Number: [2020] EWCA Civ 1494

Case Nos C8/2018/2372
& C8/2018/2420

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE KEBEDE
Claim No JR/2570/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/20

Before :

LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF
(1) NIMISHKUMAR NAGJOBHAI BALDHA
(2) SCHRADHABEN NIMISHKUMAR BALDHA

Appellants

- and-

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

AND ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE McGEACHY
Claim No JR/2571/2018

THE QUEEN ON THE APPLICATION OF
(1) MOHANKUMAR DHAMODHARAN
(2) NARMADHA MANI
(3) LAKSHNAA MOHAMKUMAR

Appellants

- and-

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

- -

Michael Biggs (instructed by **Hiren Patel Solicitors Limited**) for the **Appellants**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 10 November 2020

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Approved Judgment

Lord Justice Hickinbottom:

1. There are before the court applications in two cases with substantial similarities.

2. In each case:

   i) The Applicants are Indian nationals.

   ii) In terms of immigration status, the First Applicant is the principal: the claims of the other Applicants (each of whom is either the wife or child of the First Applicant) are entirely dependent upon his.

   iii) Following various periods of leave to enter and remain in the United Kingdom, the First Applicant applied for indefinite leave to remain.

   iv) The application (and subsequent administrative review) was refused by reference to paragraph 322(5) of the Immigration Rules on the basis that there were material discrepancies between the earnings declared by the First Applicant to the Secretary of State in an earlier application for leave to remain and to HMRC for the corresponding tax year. The former were significantly higher than the latter. Under the relevant part of paragraph 322(5), it is said that leave to remain should normally be refused where the Secretary of State considers it is undesirable to permit the person to remain in the UK on account of his conduct.

   v) In refusing the applications, the Secretary of State considered that, by making differential declarations, the First Applicant had been guilty misconduct. Although to an extent Mr Biggs seeks to put this in issue – to which I shall return – the decision letters generally appear to conclude that, in making differential declarations of income, the First Applicant acted dishonestly and fraudulently, and the Secretary of State refused to exercise her discretion nevertheless to grant him leave to remain. The Applicant appears to have understood dishonesty to have been the basis of the alleged misconduct on which the Secretary of State applied paragraph 322(5).

   vi) In February 2018, following that refusal, as they were legally required to do, the First Applicant and his family left the UK and returned to India voluntarily; but they challenged the refusal decision by way of judicial review.

   vii) They retained the same legal representatives.

   viii) The grounds in the judicial review were settled, not by Mr Biggs who now appears for the Applicants, but the same Counsel in each case. They were not set out in any distinctive way in the single document which comprised the Statement of Facts, Grounds for Judicial Review and Remedies. Mr Biggs has referred to other matters set out in this document – to which, again, I shall return – but the essential ground of challenge was that the Secretary of State's conclusion that the First Applicant fell within paragraph 322(5) because he had been guilty of dishonesty was Wednesbury unreasonable, i.e. not properly

open to her on the evidence. Given the state of the law as it was understood at that time, that approach was not surprising.

ix) In the decisions that the Applicants seek to appeal to this court (namely, in Baldha, that of Upper Tribunal Judge Kebede on 21 September 2018; and, in Dhamodharan, that of Upper Tribunal Judge McGeachy on 27 September 2018), the Upper Tribunal refused permission to proceed with the judicial review on the basis that, on the evidence, the Secretary of State was unarguably entitled to come to the conclusion that the First Appellant had been dishonest.

x) In each case, the tribunal decision was made following an oral hearing, but prior to the guidance of this court in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673; [2019] 1 WLR 4647, handed down on 16 April 2019, in which, amongst other things, it was held (i) that the approach of the Secretary of State in such cases was legally flawed as being procedurally unfair if she proceeded from a finding of dishonesty to a refusal of leave to remain without giving the immigration applicant an opportunity to proffer an innocent explanation (e.g. by adopting a "minded to refuse" procedure), unless that failure was immaterial (see [221]-[222]); and (b) if, as would usually be the case where he seeks indefinite leave to remain, the applicant enjoys a family or private life in the UK as protected by article 8 of the European Convention on Human Rights ("the ECHR"), then any decision of the Secretary of State is reviewable as a matter of fact, i.e. the court or tribunal on an appeal or judicial review will be required to determine any necessary issue of fact (including any issue as to whether the applicant had been dishonest) on the evidence (see [223]).

xi) In each case, still prior to Balajigari, the Applicants appealed to this court.

3. In Dhamodharan, in the grounds of appeal to this court (settled by Mr Biggs, and dated 8 October 2018), the First Applicant submitted that Judge McGeachy erred in finding that the Secretary of State's conclusion with regard to the First Applicant's dishonesty was, as a matter of law, unarguably open to her to make on the evidence; but also asserted for the first time that the Secretary of State had acted with procedural unfairness. In Baldha, the grounds of appeal to this court (again settled by Mr Biggs, and dated 2 October 2018) made the first submission, but did not make any submission based on procedural fairness. It was not until paragraph 3(2) of the Applicant's skeleton argument dated 5 June 2019 (i.e. after Balajigari had been handed down) that a proposed ground of appeal was raised in that case that the Secretary of State's decision-making was vitiated by procedural unfairness and also engaged article 8 of the ECHR.

4. On 7 July 2020, well after and clearly in the light of Balajigari, in each case, draft amended grounds of appeal were filed and served, which rely upon a single ground, namely that the tribunal judge was wrong to refuse permission to proceed; but with the following particulars:

i) The Secretary of State's decision-making was procedurally unfair.

ii) Her decision-making failed to follow the approach set out in Balajigari "and is therefore Wednesbury unreasonable".

iii) Her decision-making interfered with and breached the Applicants' article 8 rights.

5. In the light of Balajigari, in each case, the Secretary of State now accepts that:

i) Her decision to refuse the application for indefinite leave to remain should be withdrawn or quashed.

ii) She should reconsider the application by adopting a "minded to refuse" procedure. That would give the Applicants an opportunity to lodge further evidence and make further submissions on (amongst other things) the issue of dishonesty. As part of that procedure, if they had not already done so, the Applicants would also have the opportunity to make submissions on article 8 grounds, which the Secretary of State would then be required to consider.

iii) If, upon that reconsideration, the application is successful, the Secretary of State should facilitate the relevant Applicants' return to the UK.

6. Given those concessions, it is unfortunate that the parties have been unable to agree a compromise of these appeals and underlying claims; but that have not been able to agree. Thus, the matters have been listed for hearing. Three matters remain in issue, namely (i) the application to amend the notice of appeal, (ii) the application for permission to appeal and (iii) costs.

7. In my view, the application to amend is crucial in the sense that the essential ground of appeal as initially and currently put is based on the narrow – and, in my respectful view, unarguable – submission that the tribunal judge below erred in law in holding that it was unarguable that the Secretary of State was not entitled to conclude that the First Applicants had been dishonest. That ground is no longer being pursued; and, in my view, rightly so.

8. Mr Biggs submitted that the matters considered in Balajigari, over and above this issue, were raised by the Applicants and dealt with in the various decision letters; and were therefore "in play" when the claims came before the Upper Tribunal. He referred to passages in the decision letters which, looked at in isolation, suggest that the decision-maker on behalf of the Secretary of State failed to make any finding of dishonesty at all or at least on the basis of the correct burden of proof; or, having made such a finding, failed to go on and perform the discretionary balancing exercise inherent in paragraph 322(5). I accept that the decision letters were not as focused as they no doubt would have been had the decisions been made after Balajigari; but, when the letters are looked at fairly and as a whole, I consider that the decision-makers clearly concluded that, in making differential declarations of income, the First Appellant in each case had been dishonest, that dishonesty being the basis of the conclusion that the criteria in paragraph 322(5) were met. For example, in each decision latter, the decision-maker expressly concluded that the earnings declared in the earlier application for leave to remain were not "genuine" (see the decision letter of Baldha dated 15 December 2017 at page 3, and that in Dhamodharan dated 2

December 2017 at page 5). It is in my view noteworthy that, not only did each of the Upper Tribunal Judges treat the essential ground of challenge a Wednesbury challenge to the Secretary of State's entitlement to make that finding of dishonesty on the evidence before her; but that was also the essential basis of the initial grounds of appeal to this court. At the time, that was treated as the basis of the refusals.

9. Therefore, the only substantive ground of appeal that was in play at the time of the tribunal's decision in each case was rejected by the Upper Tribunal Judge, who was unarguably right to reject it. Without amendment of the grounds, this appeal is therefore unarguable.

10. Nor am I prepared to allow the grounds of appeal to be amended.

11. Mr Malik relied upon the application to amend being "very late": but, although it has been a long time coming, in terms of the procedural timetable the application is still being made before the application for permission has been determined. I do not consider that mere delay is a factor of any great weight.

12. However, this court can only interfere with a decision if the court or tribunal below was wrong; and, as I have explained, on the grounds of challenge relied upon in the judicial review, the decisions of Upper Tribunal Judges Kebede and McGeachy were not arguably wrong. It is not simply that the Applicants seek to amend their grounds of appeal; they now wish to rely upon completely new grounds of challenge to the Secretary of State's refusal, raised for the first time before this court. They wish to pursue an entirely different case than that which they pursued at first instance, abandoning the current case and replacing it; but under the umbrella of the same case number and in this court. In my view, in the circumstances of this case, that is neither an appropriate nor a sensible way to proceed.

13. The Applicants understandably wish to have their application for indefinite leave to remain lawfully determined. However, they have not foregone the opportunity to make further submissions and/or adduce further evidence on the dishonesty issue in that context: indeed, following Balajigari, a focus of their complaint is that the Secretary of State robbed them of such an opportunity in breach of the obligation to act with procedural fairness. If this claim proceeds, the best that the Applicant can achieve is to have that application redetermined by the Secretary of State under a procedure giving that opportunity. But the Secretary of State has made it quite clear that she is prepared to withdraw the original decisions and redetermine the applications by a process which includes such an opportunity.

14. Furthermore, following Balajigari, the Applicants understandably wish a focus of their claim for leave to remain now to be article 8 which, if refused, will give rise to a right to appeal in which the dishonesty issue will be determined by the First-tier Tribunal. An article 8 claim has been floated in each case; but it has not been particularised, and the Secretary of State (yet alone the tribunals below) has not yet had an opportunity to consider it. In my view, it would be inappropriate for that claim to be made, first, in this court; and, by denying the Applicants the opportunity to satisfy the Secretary of State and/or the First-tier Tribunal of the merit of any such claim, potentially unfair to the Applicants themselves. With regard to the issue of dishonesty, as described in Balajigari, whilst the judicial review jurisdiction is capable

of dealing with matters of fact, the First-tier Tribunal is experienced and better equipped to act as a fact-finder than this court on an appeal or even the Upper Tribunal on a judicial review.

15. Mr Biggs submits that, if I were to refuse permission to amend and appeal, that would be unfair to the Applicants; because, had the Secretary of State not refused the applications for indefinite leave to remain – in a manner in which she now accepts, she ought not to have done – then the Applicants would have been treated as having continued leave to remain under section 3C of the Immigration Act 1971. Upon their applications having been refused, and whilst their judicial review claims were being considered, they (voluntarily) left the UK as the law required them to do. They should not be penalised for complying with the law in this way: they ought to be allowed to return to the UK pending determination of their claim for leave to remain. Indeed, the draft revised grounds include, by way of relief, an application for a mandatory order requiring the Secretary of State to allow the Applicants to return to the UK prior to the challenged decisions to refuse being quashed, which would have the effect of reviving the Applicants right to remain under section 3C of the Immigration Act 1971.

16. Further, Mr Biggs submits that, if refused, the forthcoming article 8 claim would generate a right of appeal which, subject to certification, would be in-country if the claim were made in-country, but out-of-country of it were made out-of-country (sections 82(1)(b) and 92(3) and (4) of the Nationality, Immigration and Asylum Act 2002). He submits that, in cases such as R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42; [2017] 1 WLR 2380 (especially at [60]-[78] per Lord Wilson JSC giving the judgment of the court) and R (Ahsan) v Secretary of State for the Home Department [2017] EWCA Civ 2009; [2018] HRLR 5, the courts have emphasised the potential difficulties for out-of-country challenges. For example, once removed, an applicant may be "lost"; continued, effective legal representation may be difficult; being out-of-country would involve an applicant in substantial disadvantage in obtaining not only advice but documents and other evidence from within the UK; and the individual may lose the ability to give oral evidence which might be crucial. Their right to access to justice would be compromised.

17. Therefore, he submits, the exclusion of the Applicants gives rise to matters of practical importance; and the appeal is far from academic or serving of no practical purpose. It should be allowed to proceed. I should grant permission to amend, quash the Upper Tribunal's decisions to refuse permission to proceed and then either remit to the Upper Tribunal (which can then consider the application for a mandatory order for the Applicants' return, in the context of the judicial review of the refusal decisions which the Secretary of State accepts are unlawful) or retain the matter in this court at least long enough to allow the application for that interim mandatory relief to be considered here.

18. However, I am unpersuaded by these submissions.

19. Although Mr Malik submits that the Upper Tribunal decisions challenged in this appeal were not arguably wrong, for the reasons I have given, it is common ground

that the refusal decisions of the Secretary of State are unlawful and the Secretary of State accepts that they must be quashed or withdrawn and lawfully remade. She accepts that, if leave is ultimately granted, the Applicant should be allowed to return to the UK with their continuous leave deemed intact. If leave is ultimately refused, then of course they will have no right to be in the UK. The real issue between the parties is whether the Applicants should be allowed to return to the UK whilst the decisions on leave are remade and ultimately determined.

20. Mr Biggs relies on section 3C of the Immigration Act 1971. However, section 3C(3) of the 1971 Act provides that the leave extended by that section lapses if the applicant leaves the UK, as the Applicants here have. As a result of that statutory provision, the Applicants currently have no leave to remain as at present and consequently no right to be in the UK as a result of any such leave. Their position is dealt with in the Secretary of State's published guidance, "Leave extended by section 3C (and leave extended by section 3D in transitional cases", which (at page 7) provides:

> "Where a decision is withdrawn by the Secretary of State and the person has section 3 leave because of a pending appeal or administrative review, their section 3C leave will continue but will revert to leave under section 3C(2)(a) instead of section 3C(2)(b) as a decision on the original application will be outstanding.
>
> Where the decision is withdrawn after a section 3C leave has come to an end withdrawal of the decision does not mean that the person once again has section 3C leave. This is because section 3C leave can arise and exist only where there is s seamless continuation of leave, either extant leave or section 3C leave. Where there is a break in leave, such that section 3C leave comes to an end, section 3C leave cannot be resurrected.
>
> However, where a person had section 3C leave at a time a decision was made and that decision is withdrawn after section 3C leave has ended, the person should not be disadvantaged by the fact their section 3C leave has ended and cannot be resurrected. This means that the outstanding application should be considered as if the person still had section 3C leave (meaning they should not be refused on grounds they are an overstayer). Where on reconsideration of the withdrawn decision leave is then granted, the break in the person's leave between section 3C leave coming to an end and the grant of new leave should not be held against them in any subsequent application."

This, therefore, postulates the withdrawal of a decision by the Secretary of State – but expressly excludes section 3C continuing pending redetermination of the relevant application for leave. That guidance appears to be in line with the statutory provision which brings leave to an end when an applicant leaves the UK; indeed, in my view, a crucial point is that the bringing to an end of leave in these circumstances is the will

of Parliament as expressed in section 3C(3). It brings leave to an end even where the withdrawal of leave has been legally erroneous.

21. As I understand it, Mr Biggs accepts all of that. However, he submits that, if the court or the Upper Tribunal were to direct the Secretary of State to allow the Applicants to return to the UK and then (once the Applicants were in the UK) quash the refusal decisions, that would enable the Applicants to take the benefit of section 3C leave and be in the UK whilst their applications for leave are being determined. By that means, the consequences otherwise flowing from section 3C and the guidance, unfairly adverse to the Applicants, can be avoided. However, I am not persuaded that the court should take that course in the circumstances of these cases.

22. Of course, as the guidance accepts, the affected person should not be unfairly disadvantaged by the fact that section 3C leave has ceased and cannot be reinstated. However, the cessation of section 3C leave in the manner contemplated by the statutory provisions is clearly not sufficient in itself to amount to disadvantage which would require leave to be reinstated and a person who has left the UK to be allowed to return. What matters is the disadvantage that the relevant person has in practice, in the circumstances of his or her particular case.

23. The Secretary of State's proposal to end the current proceedings and move to another decision-making process, that will be in compliance with Balajigari and include any article 8 claim that the Applicants wish to make, has obvious advantages in terms of finality as well as potential savings of both cost and effort. I reemphasise that, if this appeal/claim continue, the best that the Applicants can attain is a reconsideration of their claims for leave to enter or remain on the basis of all relevant evidence and submissions including fresh evidence and submissions upon which they now wish to rely.

24. Given that, for the reasons set out above, the current grounds of appeal are bad in law, the appropriate focus is on the prejudice that the Applicants will or may suffer if this appeal is not allowed to be amended and to continue to enable the issue of whether the Applicants should be allowed to return to the UK immediately to be determined by this court or by the Upper Tribunal on remittal. In my view, it is unnecessary for these otherwise empty proceedings to continue for that purpose.

25. It is important to mark that any new process will of course be subject to the right of an applicant to access to justice, an issue referred to in both Kiarie and Byndloss and Ahsan; but it is insufficient for an applicant to assert that his or her application for leave to remain can only be properly made if he or she is in the UK; and/or that if such an application is in the future refused, then he or she has a right to an in-country appeal – and so must be allowed to stay in (or be returned to) the UK. Whether an out-of-country remedy is sufficient will depend on the circumstances of the case. As Lord Burnett of Maldon CJ emphasised recently in R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department [2020] EWCA Civ 1338 at [198]-[199], there are many circumstances now in which (e.g.) an out-of-country appeal in an article 8 case will be adequate to comply with the right to access to justice. It is noteworthy that, in this case, Mr Baldha and Mr Dhamodharan, far from having been "lost", have instructed legal representatives for this remote hearing; and

at least one has attended, from India, remotely. I understand that it may be less convenient; but there is in my view no compelling evidence that they will be in difficulties in pursuing the reconsidered application, and any further claims that they may have, from India. If real issues arise, then, as and when they do, they can be the subject of representations to the Secretary of State and, if necessary, to the court. As Mr Malik submitted, the First-tier Tribunal have a specific rule and procedure for ensuring that out-of-country applicants are allowed to return to the UK to prepare for and conduct any appeal hearing f justice requires it. Both the Secretary of State and, of course, the courts and tribunals are committed by the common law and article 6 of the ECHR to ensure proper access to justice. But I am entirely unpersuaded that it is necessary for this court, at this stage, to grant any relief in this regard or to maintain the current appeal/claim to allow for judicial consideration of such relief.

26. For those reasons, I refuse permission to amend; and I refuse permission to appeal in each case.

[After further submissions, each side agreed that, leaving aside the costs of this hearing, the appropriate order for costs to which neither party objected was that the Secretary of State should pay the Applicant's costs from the date on which they respectively claimed procedural unfairness, i.e. from 5 June 2019 in the case of Baldha, and from 8 October 2018 in the case of Dhamodharan, those costs to be assessed on the standard basis of not agreed; and that there otherwise be no order for costs. In respect of the costs of and occasioned by the hearing, as the Secretary of State had been directed to attend and had succeeded on each of the substantive issues (save, to an extent, on the issue of costs), it was ordered that the Applicant should pay those costs to be the subject of summary assessment on the standard basis if not agreed.]