Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00843/2019
HU/03522/2019

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 12 December 2019	**On 19 December 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

(1) GOLAM MORTUZA
(2) NILUFA YASMIN

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Hussain, solicitor. Hubers Law
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against a decision of First-tier Tribunal Judge T Lawrence promulgated on 24 July 2019 ("the Decision") dismissing their appeals. The First and Second Appellants are husband and wife. The First Appellant appeals against the Respondent's decision dated 20 December 2018 refusing his human rights

claim made in the context of a refusal of indefinite leave to remain as a Tier 1 (Entrepreneur) Migrant. The Second Appellant appeals against the Respondent's decision dated 7 February 2019 refusing her human rights claim in the context of a refusal of leave to remain based on her relationship with the First Appellants.

2. The Respondent refused the First Appellant indefinite leave to remain on the basis that there were discrepancies between the amount of self-employed earnings which he had declared in applications made to her in 2011 and 2013 when compared with the earnings declared to HMRC in the same periods. The Respondent therefore refused the human rights claim on suitability grounds, and because there were no very significant obstacles to the First Appellant's integration in India. She refused the Second Appellant's application on the basis that family life could be continued in the couple's home country and there were no very significant obstacles to her integration in India.

3. The Judge refused an application by the Appellants for an adjournment. The Second Appellant was said to be unable to attend because the couple's children were unwell. It was also said that the First Appellant's accountant had intended to attend the hearing to give evidence but was unable to do so due to a family emergency. The Judge found that the First Appellant had acted dishonestly in his declarations of income and therefore could not meet the Immigration Rules on grounds of suitability. He also agreed that there were no very significant obstacles to either of the Appellants' integration in their home country and that family life could continue there. He considered the best interests of the couple's two children but found that those were met by remaining with their parents. The children were aged one and two years respectively. For those reasons, the Judge dismissed the appeals.

4. The Appellants appealed on a number of grounds including in relation to the Judge's treatment of the adjournment request and some of the findings made by him.

5. Permission to appeal was refused by First-tier Tribunal Judge Chohan on 9 October 2019 in the following terms:

> "... 2. The grounds assert that the judge erred in failing to consider the full facts and evidence in the case and by refusing an adjournment request.
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> 3. Contrary to what is stated in the grounds, the judge did consider carefully the facts and evidence and the findings made were open to the judge. Adequate reasons have been given. Furthermore, the judge has given adequate reasons for refusing the adjournment request.
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> 4. The grounds are a disagreement with the judge's findings and nothing more. There is no arguable error of law."

6. The Appellants renewed their application for permission to appeal to this Tribunal. On 7 November 2019, Upper Tribunal Judge Blundell granted permission in the following terms:

> "... This is an earnings discrepancy case. The grounds are lengthy but they may be grouped under three heads. By the first, it is submitted that the judge's refusal to adjourn was unfair. By the second, it is submitted that the judge failed to take material matters into account in resolving the central issue of deception against the first appellant. By the third, it is submitted that the judge's decision on Article 8 ECHR grounds was legally erroneous, although it seems that this ground essentially repeats the first.
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> I consider it arguable that the judge's refusal to adjourn was unfair (AM (Somalia) [2019] 4 All ER 714 refers, at [56]). Whilst he directed himself to the over-riding objective at [18], he did not direct himself to rule 28 and he considered whether the absence of the second appellant furnished a "sufficiently compelling" reason to adjourn, rather than assessing whether it was in the interests of justice to proceed in her absence. Nor did the judge consider whether the hearing could proceed fairly in the absence of the first appellant's accountant. In the circumstances, ground one is arguable. It follows that ground three may also be argued, although it is not clear to me how it takes matters any further.
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> Ground two is decidedly less meritorious. The challenges therein presented are actually expressed as disagreements on a number of occasions and may well be thought to amount to nothing more than that. Nevertheless, I grant permission on this ground because of my decision on ground one."

7. The matter comes before me to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

DISCUSSION AND CONCLUSIONS

8. The focus of the submissions made, as the permission grant, is the Judge's refusal to adjourn to allow the Second Appellant to attend and give evidence and for the First Appellant's accountant to do likewise.

9. The Judge dealt with the adjournment request at [16] to [18] of the Decision as follows:

> "16. Mr Hussain made an application to adjourn the hearing as a preliminary issue, on two grounds. The first was that Appellant 2 was unable to attend because her children had been slightly unwell; no alternative childcare was available, and she should be able to attend the hearing of her appeal. The second ground was that Appellant 1's accountant had been due to appear as a witness, which was considered to be essential. The accountant had informed the Appellants on the day before the hearing that he had needed to travel on that day by airplane to attend to a family emergency, but that he would be prepared to give evidence for them on a later date.
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> 17. Mr Mavrantonis opposed the application on the grounds that the Appellants had known about the hearing for months and the hearing should not be rearranged around the availability of the accountant. Also, there was no evidence supporting either ground and Appellant 2's appeal was completely dependent upon Appellant 1's appeal.

> 18. I refused the adjournment for the following reasons. I had regard to the overriding objective in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to enable the Tribunal to deal with cases fairly and justly, which includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; seeking flexibility in the proceedings; ensuring so far as practicable, that the parties are able to participate fully in the proceedings; and avoiding delay, so far as compatible with proper consideration of the issues. With those considerations in mind, the attendance of Appellant 2 as an observer only was not a sufficient compelling reason to delay the appeal given that she was not to be called as a witness and Appellant 1 and his representative were attending and could report back to her on the proceedings. In relation to the accountant, there had been no indication that the accountant was due to attend, and no witness statement had been submitted for him, which was not capable of being explained by the claimed emergency that had arisen the day before the hearing that it was now said it was necessary for him to attend to give evidence at a hearing that had been listed some months in advance."

10. Mr Hussain accepted that there was not a witness statement before Judge Lawrence, either from the Second Appellant or the accountant. He said that it was proposed to take a handwritten statement from the Second Appellant on the morning of the hearing and to file it at the hearing. The accountant had wished to draft his own statement as a professional and would have brought that along to the hearing if he had attended. Mr Hussain accepted that no such statement had been obtained subsequently from either witness. The First-tier Tribunal had given directions on 23 January 2019 for the filing of evidence "as soon as ..available" and there was no explanation for the failure to produce such evidence sooner. There was no application before me to adduce any further evidence to explain that failure or expand upon either the reasons for the inability to attend or what evidence the witnesses would have given. Mr Hussain said that the Appellants' children's illness was one for which medical attention was not required and therefore there was no medical evidence available in that regard. The accountant had not provided any evidence about what was said to be his family emergency.

11. Mr Hussain fairly accepted that there was a distinction to be drawn between the implications of the Second Appellant's absence and that of the accountant. The Second Appellant could only give evidence as to the couple's Article 8 rights and that was evidence which the First Appellant could himself give. That is not to belittle the Second Appellant's wish to attend the hearing of an appeal to which she was a party but, as the Judge noted at [18] her inability to attend was not of itself good reason to delay for that reason. It cannot sensibly be suggested that the refusal to adjourn on account of her position was unfair to the Appellants (particularly given the lack of any witness statement from the Second Appellant at the relevant time or since).

12. I turn then to the position as regards the accountant. This is a case in which the Respondent had taken issue with the First Appellant's earnings due to

discrepancies between income declared to HMRC and that declared to Home Office. I accept therefore that evidence which the accountant could give might have more relevance.

13. However, the evidence has to be considered in light of the evidence that the accountant had already produced (in the form of a letter) and the explanation which the First Appellant gave for the discrepancies. Dealing first with the letter, that appears at [AB/24] and is dated 1 July 2019. It reads as follows:

> "We can confirm that we act for the above named client in our capacity as his accountant and business advisors.
>
> We write this letter to clarify a few points, especially the way that income has been shown to the Home Office for HSMP purposes and then presented on a Tax Return to HMRC (Inland Revenue). As you can appreciate our client was self-employed and the information and the dates that the Home Office require under their rules and regulation are not and have never been in line with the rules and regulations of HMRC.
>
> Therefore the information will vary from what was declared to the Home Office and that declared to HMRC. For example the Home Office require information from one day to another one in accordance with the client's application, whilst HMRC are interested in the financial year of 6th April to the following year 5th April.
>
> It will be near impossible and especially without the full information to be able reconcile the income shown to both institutes. Therefore we recommend that you read the information independent of each other.
>
> We also like to mention client amended his 2010-11 tax return on 22nd March 2012 by one of his friend because client shared his thoughts with his friend that he might forgot to add more expenses which he incurred in business after 15th March 2011 and before 31st March 2011. His friend submitted his tax return without consulting us. That was reflecting on his 2010-11 amended tax return.
>
> Client approached us now to review his 2010-11 tax return. We will go through again client's 2010-11 tax return and will do necessary action if it's need to take.
>
> Please feel free to contact us if you need any further information."

14. A number of points can be made about that letter. First, as there appears, the amended tax return (which was relied upon by the Respondent) was not amended by the accountants at all. As I understood Mr Hussain's submissions and the Appellant's evidence (in particular [7] at [AB/22]), the amended tax return on which the Respondent relied was amended by the First Appellant and not the accountant so it is difficult to see what evidence the accountant could supply. Second, it follows from this that the explanation given for the amendment must come from the First Appellant himself. He could therefore give that evidence (and did: see [33] of the Decision). Third, the accountant's letter makes no mention of the later tax return on which reliance was also placed. Fourth, the letter makes no attempt to explain the discrepancies. Indeed, the accountant says that it would be

"near impossible" to carry out any reconciliation. Fifth, and crucially, the letter does not suggest that the accountant was proposing to provide any further evidence. He says that he would be reviewing the earlier tax return. However, that is not said to be for the purposes of explaining the discrepancies or providing any evidence about it. As I read that paragraph, the suggestion is that the accountant was proposing to carry out the review as an accountant, presumably to check that the appropriate tax had been paid and that the amendment was justified.

15. I accept, as did Mr Lindsay, that the Judge has not made any express reference to the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). The guidance there given is as follows:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."

16. I accept that the central question for me is whether the Appellants have been deprived of a fair hearing. However, as Mr Lindsay submitted, the prior question and the issue raised by the Appellants is whether the Judge has applied the right test. In that regard, the Judge had regard to the overriding objective and the need to conduct the hearing fairly and justly. Mr Lindsay also submitted, and I accept that this also answers the point which found favour with Judge Blundell concerning rule 28 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. That concerns a Judge's decision to proceed in the absence of a party. He/she must be satisfied that the absent party has notice of the hearing (or that all reasonable steps have been taken to notify) which does not apply here as the First Appellant attended and the Second Appellant is his wife. The second sub-requirement is whether it is in the interests of justice to proceed with the hearing in that party's absence. Although no reference is made to rule 28, the approach taken by the Judge is consistent with that rule. Whilst he may not have adopted that precise wording (and the reference to "sufficiently compelling reason to delay" is perhaps unfortunate), I am satisfied that his broad approach was correct. In any event, as regards the Second Appellant, for the reasons I have already given, I do not accept that her absence deprived the Appellants of a fair hearing.

17. Neither do I accept that the Judge has erred in relation to the accountant's absence. As the Judge points out at [18] of the Decision, there was never any indication that

the accountant was due to attend nor any witness statement from him or evidence about the emergency which is said to have affected his ability to attend (or indeed that he had intended to attend absent that emergency). Even now such evidence is lacking. I have already set out at [14] above, why the evidence of the accountant was not in any event central (at least in the form in which it then and now appears).

18. Moreover, the accountant's evidence needs to be considered alongside the findings made. Since those findings form the basis of ground two, and although Judge Blundell found that ground "decidedly less meritorious", I set those findings out below in order to provide context:

> "33. I first consider the allegation of dishonesty relating to the admitted discrepancies between the earnings that Appellant 1 had claimed in his 28 March 2011 application as a Tier 1 (General) migrant and information provided to the Respondent by Her Majesty's Revenue and Customs (HMRC) for the tax years ending in April 2010 and April 2011:
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> 33.1 Appellant 1's claim is that he had made an honest mistake in omitting to account for allowable expenses in his original declaration to HMRC. Appellant 1 explained in his witness statement that he subsequently amended the declaration because naively he 'never thought, as a layman, that the expenses for business needed to be added'. That explanation is however undermined by his statement in oral evidence that the original declaration had been prepared with the assistance of the professional accountants who provided a letter supporting the 2013 application to the Respondent and who have provided a letter dated 1 July 2019 in relation to the discrepancy in the 2011 declarations.
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> 33.2 The accountants in the 1 July 2019 letter state that Appellant 1 had been advised by a friend who had submitted an amended declaration to HMRC, and that claim was repeated by Appellant 1 in his oral evidence. Appellant 1 further stated in oral evidence that the friend had had accountancy experience and qualifications and, when discussing the matter with the friend, Appellant 1 had come to realise that there were additional expenses he could have claimed for travel and hotels when travelling in relation to unsuccessful attempts to obtain new business.
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> 33.3 HMRC confirm that the adjustment of taxable self-employed earnings was not in relation to turnover, which is consistent with Appellant's 1's explanation that the reason for the adjustment was a late realisation that his tax liability should have been reduced by is allowable expenses. However, that explanation is not supported by a copy of the tax return calculations and/or accounts, let alone any evidence of the expenses that [he] claims to have neglected to incorporate in his original tax declaration to HMRC, nor has Appellant 1 provided a statement by the friend he claimed in oral evidence had assisted him in his late realisation that he could reduce his tax liability in that way, still less any appearance by the friend as a witness, and that claim is undermined by his account of having been assisted by professional accountants to submit the original declaration.
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> 34. I next consider the allegation of dishonesty relating to the admitted discrepancies between the earnings that Appellant 1 claimed in his 20 April

2013 application as a Tier 1 (General) migrant and information provided to the Respondent by HMRC for the tax year ending in April 2013.

34.1 Appellant 1 had claimed in the 30 April 2013 application to have received £37,252.02 in earnings from self-employment between 7 April 2012 and 6 April 2013, of which £22,695.14 was earned through employment with ASDA Stores Ltd and £14,543 was net profit from self-employment.

34.2 HMRC had however informed the Respondent that Appellant 1 had declared £10,370 self-employment income for the tax year ending April 2013. That lower amount, added to the earnings from employment, gave a total of £33,065.14, which would have reduced the points awarded to the Appellant for previous earnings by 5 points, bringing him below the number of points required to warrant a grant of leave lto remain under the relevant category within the Immigration Rules.

34.3 The accountant's letter dated 29 April 2013 that was submitted to the R in evidence with the 30 April 2013 application states that 'for all intentions and purposes a set of accounts have been prepared, showing net taxable income (After deducting all expenses) for the period ended from 1st August 2012 to 31st March 2013 to be £14,543.' [sic]. That set of accounts has not been produced in evidence and there is no explanation of the discrepancy in the 2013 self-employed earnings in the 1 July 2019 letter by the same accountant.

34.4 Mr Hussain pointed out that the P60 and HMRC records for the tax year ending in April 2013 show a higher amount of gross earnings than had been declared, of £24,641.36 for that period, which in his submission would, when added to the self-employed earnings declared to the HMRC, provided Appellant 1 with the number of points required to warrant a grant of leave to remain under the relevant category within the Immigration Rules in any event. However, Appellant 1 says in his witness statement that he 'relied' on the £22,695.14 earnings shown by his payslips, which if true means that he would have overestimated the amount he needed in self-employed earnings to obtain the number of points he required for a grant of leave, which provides a motive for dishonest inflation of the self-employed earnings in the declaration to the Respondent.

35. I place significant positive weight in favour of the Respondent's allegations on my consideration that the two sets of discrepancies share the characteristic that the self-employed earnings declared to the Respondent by Appellant 1 were higher than the self-employed earnings he declared to HMRC.

36. I place significant positive weight in favour of the Respondent's allegations on my consideration that the discrepancies also share the characteristic that the Appellant would, if his statement that he relied on his payslips in relation to the 2013 declaration to the Respondent is true, have thought that self-employed earnings of the amounts that he has declared to the HMRC would not have been sufficient to obtain the number of points he required for a grant of leave, when added to the employed earnings he had, or thought he had, received for the relevant period.

37. I also place some, albeit little, positive weight in favour of the Respondent's allegations on the confusing explanation given by Appellant 1

as to why he had needed to correct or resubmit tax returns in the questionnaire completed by him on 28 March 2017. Appellant 1 stated in oral evidence that the explanation he had given in the questionnaire related to an occasion in June 2012 when he was stopped by an Immigration Officer on return from a trip overseas, which he had either been told or had assumed was related to his amendment of the 2011 tax declaration. However, the written question is perfectly clear, and his explanation makes no sense and is inconsistent with the explanations given in his witness statement, the 1 July 2019 letter by the accountant, and in oral evidence.

38. Mr Hussain asserted that the Respondent was required as a matter of procedural fairness to interview Appellant 1 having formed the suspicion of dishonesty relating to HMRC data. I disagree:

38.1 Firstly, the policy document states on its face that it applies to all migrants whose most recent grant of LTR was Tier 1 (General), which was not so in Appellant 1's case. Moreover, and in any event, the Court of Appeal in Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673 (16 April 2019) opined as follows:

> '56. We do not consider that an interview is necessary in all cases. The Secretary of State's own rules give a discretion on him to hold such an interview. However, the duty to act fairly does not, in our view, require that discretion to be exercised in all cases. A written procedure may well suffice in most cases.

38.2 Secondly, that Court also explained, at [105], that where the Respondent has alleged dishonesty, the obligation to act with procedural fairness will be satisfied by the opportunity to adduce evidence in rebuttal in an appeal to this Tribunal.

39. Considering all of the evidence in the round, I conclude that the Respondent has discharged its burden of showing that Appellant 1 dishonestly inflated his self-employed earnings in his 2011 and 2013 applications to the Respondent, in order to achieve the number of points required to warrant a grant of leave to remain under the relevant category within the Immigration Rules.

40. The Respondent's position is that Appellant 1's dishonesty in relation to his declarations of earnings is an issue of character and conduct of a level of seriousness that would make it undesirable for him to be granted leave to remain in the United Kingdom. That is not an irrational position in my assessment; the Court of Appeal in Balajigari at [37] accepted that, although as a matter of principle dishonest conduct will not always and in every case reach a sufficient level of seriousness to justify refusal on the applicable discretionary grounds within the Immigration Rules, 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.

41. I cannot therefore find that Appellant 1 met the requirements to be granted leave to remain in the United Kingdom under the Immigration Rules on the ground of long residence, or private life. The question of whether Appellant 1's dishonesty reaches a sufficient level of seriousness such that it is

> in the public interest that he should be removed from the United Kingdom is one that requires a balancing exercise informed by weighing all relevant factors, which the Tribunal's present jurisdiction permits me to perform only outside of the Immigration Rules."

19. As there appears, none of the Judge's findings are premised on the lack of evidence from the accountant per se. The discrepancy in the 2011 return was, as I have already observed, due to an amendment made by the First Appellant himself and the Judge considered the evidence in that context. The 2013 return was not mentioned in the accountant's letter at all and therefore the Judge did not refer to evidence from that source. His findings are based on the explanation given by the First Appellant since that was the only evidence before the Judge relating to that particular discrepancy.

20. The inability of the Second Appellant and accountant to attend to give evidence did not for those reasons deprive the Appellants of a fair hearing. The evidence central to both the discrepancies relied on by the Respondent and the Article 8 claim was that of the First Appellant. He was able to attend and give evidence. The Judge heard and considered that evidence and there has therefore be no impact on the procedural fairness of the hearing.

21. Turning then to ground two, the Appellants' grounds challenging the Judge's findings appear at [14] to [24] of the pleading. In essence, those paragraphs insist that the First Appellant's explanation "should have been accepted", that adverse inferences should not have been drawn based on lack of evidence, that the Judge's approach was "harsh, and that the explanation given was "an acceptable innocent explanation". Those assertions do not reveal any error of law by the Judge. They are simply a disagreement with the Judge's findings.

22. I readily accept that this is a slightly unusual Tier 1 case in that, at least as regards the 2011 figures, the discrepancy arises not from the original tax return which was later amended but from the amendment itself. Nor, uncommonly in such cases, is reliance placed on an error by an accountant (save perhaps by inference in failing to claim appropriate deductible business expenses). However, the Judge recognised that the 2011 discrepancy was not one relating to the turnover of the self-employed business but there noted that the effect was to reduce the First Appellant's tax liability in comparison with that which would flow from the earnings as declared to the Respondent (see [33.3] in particular).

23. Further, and in any event, the Judge was also being asked to consider the discrepancy in the 2013 figures. The Judge considered that aspect at [34] and provided reasons why the explanation given did not satisfy him.

24. The Judge adopted the correct approach in his analysis of the evidence and burdens of proof in the passage which I cite above. No error of law is disclosed by ground two.

25. Although paragraphs [25] and [26] of the pleaded ground relate to the Article 8 determination, they do so only in relation to the Judge's refusal to adjourn with which I have already dealt. In fact, it may well be this part of the pleading which caused Judge Blundell to grant permission as it relates to the Second Appellant being deprived of the opportunity to present her case. I have already dealt with that aspect under ground one and explained why that ground does not demonstrate any error of law in the Decision.

CONCLUSION

26. For the above reasons, I am satisfied that the Appellants' grounds do not demonstrate any error of law in the Decision. I therefore uphold the Decision with the consequence that the Appellants' appeals remain dismissed.

DECISION

I am satisfied that the First-tier Tribunal Decision of Judge T Lawrence promulgated on 24 July 2019 does not contain a material error of law. I therefore uphold the decision with the consequence that the Appellants' appeals remain dismissed.

Signed Dated: 16 December 2019
Upper Tribunal Judge Smith