Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01845/2019**
HU/03589/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 27th September 2019	**On 30th September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR AHMAD MUDASSAR JAMIL
MRS AYESHA RASHEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Z Malik, Mamoon Solicitors
For the respondent: Mr S. Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is a national of Pakistan. He applied for indefinite leave to remain on the basis of 10 years continuous lawful residence. He came to the United Kingdom on 10 November 2007 with entry clearance as a student and subsequently obtained various leaves in other capacities.

2. His application was refused on the basis of discrepancies between his claimed earnings with the income declared to HMRC in some of those earlier applications. The respondent pointed out that paragraph 276 B (ii)(c) requires consideration of an applicant's character.

3. On 1 April 2011 he had made a Tier 1 highly skilled migrant application and claimed 25 points in respect of historic earnings of £40,258. Of this, £23,358

was attributed to self-employment from 1 August 2010 until 24 March 2011. In the similar application made on 18 May 2013 he claimed 20 points. He claimed a historic income of £37,077.70 in respect of the period 1 May 2012 to 30 April 2013 of which £12,093 was from self-employment. However, the Inland Revenue confirmed that for the tax year 2010 to 2011 he declared income of only £8358 from self-employment and for the tax year 2012 to 2013 he only declared £5085.

4. He was interviewed about this and completed a questionnaire in which he referred to having filed amended returns. He stated his current accountant spotted discrepancies which prompted the amended return. He claimed that the accountant who submitted the original returns acted dishonestly.

5. The respondent did not find his explanations credible and refused his application on the basis he did not meet paragraph 276 B. He was refused under the general grounds in paragraph 322(5).

6. The second appellant is also a national of Pakistan and is married to the first named appellant. She came to the United Kingdom as his dependent on 20 January 2015. Her application for leave to remain on the basis of human rights was refused in line with her husband's. They have a three-year-old daughter who is with them and who holds Pakistani nationality. A second child was since born to them.

The First tier Tribunal

7. Their appeals were heard by First-tier Tribunal Judge Bannerman at Manchester on 9 May 2019. In a decision promulgated on 20 September 2019 they were dismissed. The judge set out the refusal and the arguments advanced at hearing and recorded the appellant's evidence. At paragraph 49 under the heading `Standard and Burden of Proof' the judge stated:

> The burden of proof is on the appellant and the standard of proof is on the balance of probabilities.

8. At paragraph 55 the judge stated the respondent had considered the evidence pointing in each direction and concluded the respondent was justified to conclude that the appellant had acted dishonestly.

9. At paragraph 58 the judge commented that the appellant age in connection with this country was positive but his character and conduct was not. The judge described his domestic circumstances as straightforward, being married with two young children. The judge said there were compassionate factors regarding his children and the work he had been doing in the National Health Service. The judge referred to the section 55 duty and also had regard to paragraph 276 ADE. However, the judge concluded that the consequences would not be unjustifiably harsh if the family returned to Pakistan.

The Upper Tribunal

10. Permission to appeal to the Upper Tribunal was granted on the basis it was arguable the judge erred in stating the burden of proof was on the first appellant. It was also arguable that the judge may have failed to have applied the decision of Balajigari [2019] EWCA Civ 673.

11. In Balajigari the court said that paragraph 322(5) of the rules involved a two-stage analysis. Firstly, it was necessary to decide whether it was undesirable to grant leave in the light of the matters raise. There must be reliable evidence of sufficiently reprehensible conduct and an assessment, taking proper account of all relevant circumstances, as to whether the person's presence was undesirable. The court said that an earnings discrepancies case could constitute sufficiently reprehensible conduct only if the discrepancy was the result of the individuals dishonesty. Errors caused by carelessness, ignorance or poor advice did not meet the necessary threshold. Dishonest conduct would not always reach a sufficient level of seriousness to justify the application of paragraph 322(5), albeit the court said it was hard to see how the deliberate and dishonest submission of false earnings figures would not do so.

12. The second stage was to decide, as a matter of discretion, whether leave should be refused because of such undesirability. It was necessary to consider, notwithstanding the undesirability of the individual having leave to remain, if there were factors outweighing this presumption. The court said there would exceptionally be cases where the interests of children or others or serious problems about removal meant it would be wrong to refuse leave to remain, albeit not necessarily indefinite leave to remain.

13. The Court of Appeal endorsed the guidance given at paragraph 37 of R (on the application of Khan)-v- SSHD (dishonesty, tax return, paragraph 322(5))[2018] UKUT 384 except for one qualification. In that case Spencer J stated that where there was a significant discrepancy between the incomes declared an inference can be drawn that the applicant had been deceitful or dishonest. The more recent decision warned that there was a danger that this starting point misstated the position. Whilst the discrepancy between earnings declared to the respondent and to the Revenue might justifiably give rise to a suspicion of dishonesty it did not, by itself, justify such a conclusion. Rather, it simply called for an explanation. There was no legal burden on the applicant to disprove dishonesty. The Secretary of State needed to decide, considering the discrepancy in light of the explanation, whether the applicant had been dishonest. The Secretary of State must be satisfied that the dishonesty had occurred, the standard of proof being the balance of probabilities and bearing in mind the serious consequences from such a finding.

14. At the outset of the hearing before me Mr Malik and Mr Walker indicated there was consensus in that the judge had made no reference in the decision to Balajigari [2019] EWCA Civ 673and the guidance given. Mr Malik pointed out that the decision had been raised before the judge and a copy of the decision was provided. The Court of Appeal decision was promulgated on 16 April 2019 and is referred to in the written submissions that were before the judge. This was an important decision giving guidance on the approach to such cases. Both parties have submitted that a failure by the judge to refer to this decision or indicate those factors were taken into account amounts to a material error of law. I would agree with this.

15. The other point advanced by Mr Malik was that the judge erred in law by the comments about the burden of proof at paragraph 49. I do not find this point so clear. There is a danger in focusing upon a single comment in a decision. I made the point to Mr Malik that the appeal, albeit through the prism of the rules was concerned with the appellant's article 8 rights. In that context it was for the appellant to establish the existence of such a right. Mr Malik in response said it was for the respondent to justify the interference.

16. The written submissions in the First-tier Tribunal stated that with the respondent has made allegation of dishonesty and it was for the respondent to demonstrate this. I would agree with that statement in context. As the Court of Appeal said there must be reliable evidence of sufficiently reprehensible conduct. However it is not so clear if the judge was simply making a general statement. However, for practical purposes it is not necessary to labour the point because both parties are in agreement there is a material error of law in relation to a failure to reflect the decision of Balajigari in the determination.

17. Both representatives were in agreement that given the factual assessment required it was more appropriate to remit the appeal for a de novo hearing in the First-tier Tribunal.

Decision

The decision of First-tier Tribunal Judge Bannerman materially errs in law and is set aside. The appeals are remitted for a de novo hearing in the First-tier Tribunal

Deputy Upper Tribunal Judge Farrelly
27th September 2019