



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/03671/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 17 July 2019**

**Decision & Reasons Promulgated  
On 01 August 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR WAQR HYDER SHAH  
(ANONYMITY DIRECTION NOT MADE)**

Claimant

**Representation:**

For the Appellant: Mr L Tarlow (Home Office presenting officer)  
For the Respondent: Mr P Turner (Counsel)

**DECISION AND REASONS**

1. This is an error of law hearing. The Secretary of State appeals the decision of First-tier Tribunal (Judge Borsada) (FtT) promulgated on 29 October 2018 in which the appellant's appeal on human rights grounds was allowed. I shall refer to the parties as the Secretary of State and the Claimant.
2. The appeal was allowed on human rights grounds. The FtT found that paragraph 322(5) Immigration Rules did not apply as it found that the Claimant had not been dishonest in declaring a false income figure to HMRC for the purposes of obtaining leave to remain. The FtT concluded

that the Claimant met the Immigration rules and allowed the appeal on human rights grounds.

### **Grounds of appeal**

3. The Secretary of State (“SSHD”) argued in grounds of appeal that the First-tier Tribunal erred by making a material misdirection of law to the extent that the First-tier Tribunal Judge absolved the Claimant of any blame for discrepancies in his declared income to HMRC, by accepting the Claimant’s account that his accountant was to blame for the discrepancy. The SSHD relied on **R (on the application of Samant) v SSHD [2017] UKAITUR JR/6546/2016** and **Abbasi JR/138/07/2016**.
4. It was further argued that in reaching its decision the First-tier Tribunal erred by placing significant emphasis on the fact that the Claimant had not been penalised or prosecuted by HMRC.

### **Permission to appeal**

5. Permission to appeal was granted by Upper Tribunal Judge Rimington on 17 June 2019. Judge Rimington found that it was arguable that the FtT erred in concluding that the Claimant was not personally responsible for his tax returns [5.1] and further arguably erred by placing significant emphasis on the lack of action by HMRC.

### **Hearing Submissions**

6. At the hearing before me Mr Tarlow relied on the grounds of appeal and submitted that the FtT was wrong to find that the Claimant was not dishonest and further erred by placing too great weight on the absence of any punishment by HMRC.
7. Mr Tarlow however did concede that the grounds of appeal had been somewhat superseded by the decision in **Balajigari v SSHD [2019] EWCA Civ 673**.
8. Mr Turner responded by submitting that there was no error of law in the decision. Upper Tribunal Judge Rimington granted permission based on a misunderstanding of the Tribunal’s decision and reasons with reference to paragraph 5.1. The reasons for granting permission given did not accurately reflect what is in fact stated in the decision at 5.1 and at no place in the decision did the FtT find that the Claimant was not personally responsible for his tax returns. Mr Turner argued that had the Upper Tribunal Judge not made this mistake it is likely that permission would not have been granted. Nevertheless he argued that the FtT had regard to all the documents fully, appraised the reasons given by the Home Office, considered the Claimant’s evidence and taken into account that he had been subject to rigorous cross-examination and reached findings

that the Claimant had not been dishonest. The reference to the lack of action on the part of HMRC was an aside rather than a matter upon which the FtT placed significant emphasis. Mr Turner further submitted that the FtT was correct to take an holistic approach to paragraph 322(5) and that it was appropriate for the FtT to look at the Claimant's character, immigration history etc. rather than confining itself to the one issue in relation to dishonesty.

9. Mr Turner submitted that the Court of Appeal in **Balajigari** clearly stated that the failure to take any action by HMRC was a matter that could be taken into account and therefore the SSHD was no longer in a position to pursue the grounds on that point.

### **Decision Re Error of Law**

10. I heard the submissions from Mr Tarlow and from Mr Turner. I was satisfied that there was no material error of law in the decision made by First-tier Tribunal Judge Borsada. I therefore dismissed the appeal by the Secretary of State.
11. I was satisfied that the FtT fully considered the Claimant's oral evidence and found him to be an entirely credible witness. The Tribunal found that the Claimant's reasons for acting as he did with regard to his accounts were entirely plausible and consistent with his character, his mental ill-health and the evidence that he gave as to his background in Pakistan. The FtT provided reasons for why the Claimant was not dishonest and one factor that was taken into account was that the HMRC had taken no action. This was by no means a significant matter as indicated in the determination by the Tribunal Judge saying "I note".
12. The FtT had the benefit of hearing the Claimant give oral evidence and that he was subject to rigorous cross-examination. The FtT considered other relevant issues with regard to paragraph 322(5) and reached a sound and sustainable decision on the evidence before it.

### **Decision**

13. There is no material error of law in the decision which shall stand.

No anonymity direction is made.

Signed

Date 31.7.2019

GA Black  
Deputy Upper Tribunal Judge G A Black

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

Signed

Date 31.7.2019

Deputy Upper Tribunal Judge G A Black