



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04648/2018
HU/09688/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On 1 May 2019

Decision & Reasons Promulgated
On 15 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOAZZAM UMAR (FIRST CLAIMANT)
MRS MARYAM IQBAL (SECOND CLAIMANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:

For the Appellant: Ms H.Aboni, Home Office Presenting Officer
For the Respondents/Claimants: Mr Kumar, Sultan Lloyd solicitors

DECISION AND REASONS

1. The second Claimant's appeal is dependent upon that of the first Claimant. The first Claimant is a national of Pakistan born on 1 April 1975. The second Claimant is his

wife, who was born on 12 September 1984. They have a child, NT, born on 25 November 2013.

2. On 28 June 2016 the Claimants applied for ILR in the UK on the basis of ten years' lawful residence, the first Claimant having resided in the UK lawfully since 25 July 2006. The second Claimant arrived on 8 October 2015 as a dependant of her spouse and was given leave to remain.
3. The first Claimant's application for indefinite leave to remain was refused in a decision dated 29 January 2018 on the basis that the Respondent asserted that there were discrepancies in relation to the income declared to the Home Office and the Appellant's payment of tax to HMRC. The second Claimant's application was refused on 9 April 2018, essentially because that of the first Claimant had also been refused.
4. They appealed and the appeals came before Judge of the First-tier Tribunal Boylan-Kemp MBE for hearing on 9 October 2018. In a decision and reasons promulgated on 14 November 2018, the judge found that she did not accept the first Claimant's account and overall was not satisfied that his explanation as to the discrepancies in the payment of tax were reasonable. However she went on to find that this behaviour was not sufficiently serious so as to engage paragraph 322(5) of the Immigration Rules and that the Immigration Rules requirements were met which extinguished the public interest in removal and thus removal of the Claimants was proportionate. The judge proceeded to allow the appeal on human rights grounds.
5. The Secretary of State sought permission to appeal to the Upper Tribunal in time on the basis that the judge had erred materially in law in finding that paragraph 322(5) of the Immigration Rules was not applicable. It was submitted this was clearly contrary to the decision in R (On the application of Khan) v Secretary of State (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC) at headnote (i) which provides:

"(i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322(5) of the Immigration Rules. Such an inference could be expected where there is no plausible explanation for the discrepancy."

It was asserted that as the first Claimant had been found to have deliberately misrepresented his income to HMRC to avoid the correct tax liability, that the judge should have concluded that the actions of the first Claimant fall under paragraph 322(5) of the Rules and dismissed the first Claimant's appeal.

6. As the second Claimant's appeal has been allowed on the basis of the first Claimant satisfying the Immigration Rules, this has a material effect on both appeals.

7. Permission to appeal was granted in a decision dated 20 December 2018 by Designated Judge of the First-tier Tribunal Woodcraft on the basis that the judge had arguably failed to give sufficient weight in the proportionality exercise to the public interest, given the seriousness of what was found to be a deliberate concealment of the first Claimant's income for tax purposes. The grounds refer to the recent Upper Tribunal decision in Khan [2018] UKUT 384 which advocates a step-by-step approach in cases such as this. Arguably this has not been applied by the judge. Of note is a judicial review decision of Mr Justice Collins sitting in the Upper Tribunal in the case of Samant JR/6546/2016 regarding the weight or lack of it to be afforded to the absence of the prosecution by HMRC for tax evasion.
8. The Claimants' solicitors served a skeleton argument on 29 April 2018 in which they sought to defend the decision of the First-tier Tribunal Judge and also sought to rely on the findings made by the Court of Appeal in Balajigari [2019] EWCA Civ 673.

Hearing

9. At the hearing before me the Respondents, to whom I shall refer as the Claimants, were represented by Mr Kumar who sought to rely on his skeleton argument. Ms Aboni made submissions based on the grounds of appeal. She submitted the judge had erred in finding that paragraph 322(5) of the Rules did not apply because the Claimants' behaviour did not involve criminality. The judge found the first Claimant was aware of the need to declare his income to HMRC and found he would have been aware that he was not correctly declaring his income and had used dishonesty when making declarations to HMRC.
10. Ms Aboni submitted that the First-tier Tribunal Judge failed to follow the approach set out in the case of Khan (op. cit.) which was cited and relied upon in the grounds of appeal and found that, even when the discrepancies were brought to his attention in the refusal letter, the first Claimant waited a number of months before contacting HMRC. She submitted that the judge erred in finding that paragraph 322(5) requires criminality and failed to consider the public interest and the seriousness of the deliberate concealment of income in order to avoid paying tax. Ms Aboni submitted that the Claimant's skeleton argument relies on the judgment in Balajigari [2019] EWCA Civ 673, but she sought to distinguish that on the basis that it was not relevant to the extant case. This is because whilst the Respondent did not, prior to making a decision, put the issue of dishonesty to the first Claimant and seek an explanation, this was fully considered by the judge who heard evidence from him and made a clear finding that he did act dishonestly. Ms Aboni sought to rely on [222] and [223] of Balajigari where the Court of Appeal held that defects do not necessarily lead to a decision being quashed unless the Tribunal are satisfied that these are material. She submitted it would not have made any difference if the points had been put to the first Claimant by the Secretary of State. The First-tier Tribunal Judge considered his explanation, made findings on it and the outcome would not have been any different.

11. In his submissions, Mr Kumar sought to rely on the skeleton argument especially at [6] with reference to the judgment in *Balajigari* where it provides that it would in principle be possible for applicants in the Claimants' position to challenge the refusal of settlement under paragraph 322(5) on the basis that it interfered with their Article 8 rights. If such an interference were found the relevant Tribunal would decide for itself whether the applicant has acted dishonestly. Mr Kumar submitted that the decision and findings of the First-tier Tribunal Judge should stand.

Findings and Reasons

12. The First-tier Tribunal Judge in reaching her findings took account of the fact that the first Claimant failed to declare his income to HMRC for tax years 2010 to 2011, 2011 to 2012, 2012 to 2013, 2013 to 2014 and 2014 to 2015 and therefore misrepresented his income for either the purposes of reducing his tax liability or for the purpose of obtaining leave to remain or both: [11] refers.
13. The judge then made the following findings:

"17. The difficulty I have is that for whatever reason the Appellant clearly did not declare his earnings for the identified periods of pay for the resulting tax that he owed. His explanation for this is that he had two successive incompetent accountants and that he was unaware of his obligations and responsibilities. I do not find this explanation to be a plausible one especially in light of the lack of a professional complaint being made by him against either or both accountants. The evidence before me is that he was a successful businessman and therefore I find that he would have had at least a degree of understanding about the basic financial liabilities and responsibilities that running a business entails including his need to declare his income and pay his taxes especially as his current business is a contact centre so likely to be in receipt of some form of government funding which would involve stringent requirements.

18. I also find that the fact that he had paid some tax (approximately £3,000) for one of the relevant years is a strong indicator that he would have an awareness of what he should have been paying on his income during the relevant tax years ...

20. I note that the letter from HMRC indicates that the Appellant has contacted them to declare his income for the relevant years and that once he has written again with the relevant details HMRC will then try to make appropriate amendments to his tax records. I find that this does show a degree of attempting to make amends on the Appellant's part. However the Appellant was notified of the problem in the refusal letter dated 29 January 2018 and therefore a number of months have passed before he has even contacted HMRC to start to make enquiries as to what he owes which I find undermines the credibility of his account when viewed in light of the timing of this appeal hearing. Further the letter from HMRC simply sets out that the Appellant has made initial contact and not that he has paid any monies owed or successfully remedied the situation."

And at [21] the judge found:

"21. ... Overall I am not satisfied as to the reasonableness of his explanation for the resulting situation."

14. However the judge went on to find at [22] and [23] as follows:

"22. However even if the Appellant had either carelessly or more likely deliberately concealed his income in order to evade paying his tax liabilities, then I still find that the subsequent reliance on paragraph 322(5) by the Respondent is not consistent with the Respondent's own policy on the matter. Although behaviour which engages paragraph 322(5) does not require a criminal conviction it does require the behaviour to be sufficiently serious. War crimes and terrorism are examples of where it would be in the public interest to refuse an application.

23. Therefore with this in mind I find that I am in agreement with Mr Kumar that the use of paragraph 322(5) in circumstances such as the Appellant's is inappropriate as his behaviour does not involve criminality, it is not a threat to national security and is not a war crime or involve a travel ban. Overall although the Appellant's actions were less than acceptable I find that they were not so morally reprehensible that it could be reasonably argued that his behaviour called into question his right to remain in the UK under paragraph 322(5). His conduct whilst misguided leading to misrepresentation of his income is not such to fall in my view within the category of applicant referred to in the guidance. Consequently this means that I find the refusal further to paragraph 276B(ii) of the Immigration Rules is not made out."

15. I find that the judge materially erred in that, having found that she did not accept that the first Claimant had acted honestly nor his explanation for the discrepancies between the amount of income claimed to the Home Office and that provided to HMRC in respect of his tax liability, I find it was not properly open to her to find that this conduct did not fall within the remit of paragraph 322(5) of the Immigration Rules. It is clear from the jurisprudence, in particular the case of Khan (op. cit.) which dealt with this specific issue, that the Secretary of State is entitled to refuse ILR on that basis.

16. However this was a human rights appeal. The judge went on to make the following findings at [26] and [27]:

"26. In coming to the balancing exercise I need to consider the competing arguments and look at whether the decision is proportionate. The pros in this case for the Appellant are that the Immigration Rules requirements are met which must extinguish any public interest in his removal. There are no apparent cons. Therefore I find that the decision is a disproportionate interference with his private life and his appeal is allowed.

27. This then leads on to the position of the second Appellant and their child. I was not addressed by this matter by either representative."

17. The judge went on to also allow the appeal of the second Claimant and their dependent child.

18. I find the judge further erred in this assessment for the following reasons. Firstly, it is apparent that the requirements of the Immigration Rules are not met. The Respondent in the refusal decision at page 5 refused the application on the basis that the first Claimant was not able to meet the suitability requirements of the Rules due to the allegation of dishonesty, thus the application was refused with reference to S-LTR 1.6:

“The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR 1.3 to 1.5) character, associations or other reasons make it undesirable to allow them to remain in the UK.”

“Your application falls for refusal under S-LTR 1.6 due to your character and conduct in respect of the discrepancies between the income claimed to UKVI and HMRC.”

19. It is apparent, therefore, that the judge made no finding specifically in respect of the suitability requirements but rather proceeded on the basis that, despite her finding that the Appellant had deliberately concealed his income in order to evade his tax liability, his removal would nevertheless be disproportionate. I find that the judge’s finding that the requirements of the Immigration Rules were met was clearly erroneous. That must then undermine any proportionality assessment. Similarly in respect of the second Claimant whose appeal is predicated upon that of her husband.
20. I have taken into account the recent judgment of the Court of Appeal in Balajigari [2019] EWCA Civ 673 in respect of which judgment was handed down on 16 April 2019. However, I accept Ms Aboni’s submission that the cases are largely distinguishable on the basis that *Balajigari* concerned judicial review applications on public law grounds. There had been no opportunity for the applicants in those cases to have given oral evidence or have that evidence assessed prior to the Respondent reaching an adverse decision in each case that they had claimed falsely inflated earnings to the Secretary of State and those earnings were inconsistent with that declared on their tax returns for the relevant period.
21. I set out the salient parts of the court’s conclusion as follows at [221]:

“221. ... the approach taken by the Secretary of State in deciding to refuse the applications for leave to remain in each of these cases on paragraph 322 (5) grounds – which we take to have been his general approach in all earnings discrepancy cases – was legally flawed (except, for particular reasons, in Albert). This is principally because he proceeded directly from finding that the discrepancies occurred to a decision that they were the result of dishonesty, without giving applicants an opportunity to proffer an innocent explanation. But nor does he address the further questions of whether the dishonesty in question renders the presence of the applicant in the UK undesirable or whether there are other factors which outweigh the presumption in favour of removal, or give applicants the opportunity to raise any matters relevant to those questions: such cases will no doubt be exceptional, but the step cannot simply be ignored. The availability of administrative review is not an answer,

not least because the applicant is not normally allowed to produce evidence that was not produced before the original decision. That unlawfulness can be avoided for the future by the Secretary of State adopting a 'minded to' procedure, which informs applicants of his concerns and gives them the opportunity to show cause why ILR should not be refused by offering an innocent explanation of the discrepancies (which will need to be particularised and documented so far as possible) and/or drawing attention to matters relevant to the undesirability or discretion issues. ...

222. *Secondly, those defects need not lead to a paragraph 322(5) refusal being quashed if the UT is satisfied that they are immaterial – that is, that the result would have been the same even if the applicants had been given an opportunity to explain the discrepancies; and it is principally in order to consider that question that we have remitted three of the cases. There may be an issue, which we have not been able to resolve on this appeal, as to the precise calibration of the test of immateriality; but it may be of limited importance in practice."*

22. The first Claimant in this case did have the opportunity, as I stated earlier, to provide an innocent explanation to the judge but that explanation was rejected for reasons which are unimpeachable. I find that the proportionality assessment needs to be reconsidered for the reasons set out above and bearing in mind that no submissions were made by either party in respect of the position of the Claimant's wife and child.

Decision

23. I find material errors of law in the decision of First-tier Tribunal Judge Boylan-Kemp. I set that decision aside and make the following directions:

23.1. The appeal is remitted for a hearing *de novo* before the First tier Tribunal in Birmingham. The judge's findings in respect of the first Claimant at [17] to [21] are preserved.

23.2. The remit of the appeal is confined to the proportionality of removal of the Claimants only.

23.3. An Urdu speaking interpreter will be required.

23.4. The hearing should be listed for one and a half hours.

No anonymity direction is made.

Signed *Rebecca Chapman*

Date 13 May 2019

Deputy Upper Tribunal Judge Chapman