Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05162/2018**
HU/09850/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 20 September 2019	**On 30 September 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MUHAMMAD USMAN AMIN
MUBARAM USMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik instructed by Salam & Co Solicitors.
For the Respondent: Ms S Jones Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Lenier ('the Judge') promulgated on 20 December 2018 in which the Judge dismissed the appeals of the appellants, citizens of Pakistan, on human rights grounds.
2. Permission to appeal was refused by another judge of the First-Tier Tribunal on 21 January 2019 and by a judge of the Upper Tribunal on 13 March 2019 following a renewed application for permission to appeal.

3. The appellant appealed to the High Court on a 'Cart' application resulting in permission to appeal being granted by that Court for the reasons set out below.
4. The matter comes before the Upper Tribunal for it to consider whether the Judge erred in law in a manner material to the decision to dismiss the appeal.

Background

5. The appellants are citizens of Pakistan born on 23 January 1982 and 6 April 1989 respectively. They are married and have a child born in the United Kingdom on 9 June 2017. An application for leave to remain on the basis of the first appellant's long residence made on 19 September 2016 was refused on 5 February 2018 for the reasons set out at [2 – 16] of the decision under challenge in relation to the first appellant and [17] in relation to the second appellant whose application as a dependent upon the first appellant fell in line.
6. Having considered the documentary and oral evidence the Judge sets out findings of fact from [69] of the decision under challenge.
7. It is not disputed the first appellant entered the United Kingdom on 6 February 2006 and so by the date of the hearing before the Judge had resided lawfully for over 12 years although an issue arose as to whether the first appellant met the suitability requirements pursuant to paragraph 276B(ii)(c) and (iii). The respondent also refused the application by reference to paragraph 322(5), a general ground of refusal.
8. Paragraph 276B the Rules sets out the requirements for a grant of indefinitely leave to remain on the basis of long residence in the following terms:

> 276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> (a) age; and
> (b) strength of connections in the United Kingdom; and
> (c) personal history, including character, conduct, associations and employment record; and
> (d) domestic circumstances; and
> (e) compassionate circumstances; and
> (f) any representations received on the person's behalf; and
>
> (iii) the applicant does not fall for refusal under the general grounds for refusal.
>
> (iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.
>
> (v) the applicant must not be in the UK in breach of immigration laws, except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded. Any previous period of overstaying between periods of leave will also be disregarded where –

> (a) the previous application was made before 24 November 2016 and within 28 days of the expiry of leave; or
>
> (b) the further application was made on or after 24 November 2016 and paragraph 39E of these Rules applied.

9. Paragraph 322(5) provides that leave to remain or variation of leave to remain in the United Kingdom should normally be refused…..

> (5) The undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322 (1C), character or associations or the fact that he represents a threat to national security.

10. The respondent believed these provisions were engaged as it is said the first appellant had used deception/dishonesty. It was not disputed the first appellant had declared different income figures initially to the Home Office and HMRC which resulted in a potential advantage to him; the higher income figures declared to the Home Office in 2011 and 2013 meaning he gained additional points for his Tier 1 application whereas the lower income figures declared to HMRC in his 2010/11 and 2012/13 tax returns meant he initially paid less tax than was owed.
11. The Judge records at [74] that it was not disputed that the first appellant had later contacted HMRC and voluntarily disclosed what he claimed were errors in his tax returns and that he subsequently repaid the necessary tax along with interest and that HMRC had not imposed any penalty which, according to the guidance, was consistent with them regarding the first appellant's actions as having been careless rather than dishonest. The Judge records that the final income figures accepted by HMRC were broadly, although not entirely, in line with the level of income the first appellant originally declared to the Home Office in his Tier 1 application.
12. The Judge records at [75] that the first appellant's case was that the two discrepancies in the tax returns were errors perpetrated by his accountants which he corrected once he became aware of them. The level of income claimed in both Tier 1 applications was said to be correct with the first appellant pointing out he had submitted management accounts along with all the other required documents with his application. On both occasions the documents were accepted by the Home Office caseworker who considered that they corroborated the claimed income. In accounting for some of the discrepancy between income levels declared to the Secretary of State and HMRC the first appellant relied upon the different 12-month periods that each had considered.
13. The Judge considered the Home Office applications and tax returns relating to the application of 4th April 2011 between [77 – 82] recording in the final two paragraphs the following:

> 81. Whilst the revised HMRC figure was slightly different to that declared initially to the Home Office, I am satisfied it was sufficiently close to the original figure that the difference can be accounted for by the different 12 month periods considered.

> 82. There is sufficient credible evidence to show Mr Amin's declaration of income to the Home Office in support of his Tier 1 application of 4 April 2011 was accurate. The respondent has not shown, in respect of this application, that Mr Amin was dishonest or used deception.

14. The Judge considered the application of 22 May 2013 between [83 – 87] concluding in the final paragraphs:

> 86. I have, again, taken into account that the refusal letter accepted the later recalculated tax liability from HMRC was "more in line with those claimed to UKVI as part of the Tier 1 application." The revised tax calculation showed total income received £32,807.
>
> 87. The revised figure would not have entitled Mr Amin to be awarded 20 points under the "previous earnings" category, as this required earnings between £35,000 and £39,999.99, at the relevant time. However, there was a six-week difference between the two twelve month periods relied on by the Home Office and HMRC. Given this, and the fact I placed weight upon the chartered accountants letter (which I assumed was based on financial evidence that they had examined), I accepted there was sufficient evidence to support Mr Amin's original declaration of income to the Home Office in support of his Tier 1 application being accurate. The respondent has not shown, in respect of this application, that Mr Amin was dishonest or used deception when declaring his level of income.

15. The Judge thereafter considers the tax returns commencing with an assessment of the 2010/2011 tax return to HMRC between [88 – 112]. The Judge notes the first appellant did not dispute the figures in the refusal letter regarding the income he initially declared to HMRC. At [91] the Judge notes the first appellant's explanation for the discrepancy was that he had relied upon his accountant, Ghani and Co when submitting the tax returns claiming the error in income was because they made a mistake in the preparation of the accounts. At [93] the Judge noted the appellant also relied upon a letter from TM Financial Services Ltd dated 2 January 2016 confirming the first appellant had asked them to "investigate the figures individually and compare the figures of the management accounts against tax returns for the years 2010/11, 2011/12 and 2012/13." The Judge notes at [95] that according to TM Financial Services account of their instructions from the first appellant they were asked from the outset to compare income figures from the management accounts to those on the tax returns. The first appellant had not just asked TM to check the accounts generally, as would be expected, but specifically directed their attention to the problem they later found to exist. The Judge concludes this was more supportive of the first appellant's prior awareness that such a problem existed and was less supportive and an innocent error, of which he was unaware. At [96] the Judge writes:

> 96. It was not consistent with his account of never having seen or been sent the tax return or his alternative explanation that he was sent a copy of the return in 2013, but he never looked at it. If this was the case, it would be expected that TM would discover the relevant error, rather than being directed to it in initial instructions by Mr Amin.

16. The Judge concludes from analysing the evidence relating to this document the following between [109 – 112]:

> 109. I also noted that the TM letter confirmed that, during the year when no immigration application was made, which was 2011/12, "you did not produce management accounts for the year." It was striking that Mr Amin's overall earnings were very significantly less than either of the two surrounding years, when he did make immigration applications. His gross earnings during 2011/12 amounted only to £18,551. During 2010/11, his earnings exceeded £35,000. During 2012/12 his earnings exceeded £30,000. However, he declared no error in the tax return for 2011/12.
>
> 110. Whilst this evidence is, at best, circumstantial, it did show an unusually large blip in earnings, potentially consistent with deliberate underreporting of earnings for all three years, but figures being amended only where it was necessary to prove higher income for immigration purposes.
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> 111. In relation to this report of income to HMRC, Mr Amin produce the penalty notice from HMRC, dated 22 July 2016, this stated, "we will not charge a penalty based on the additional amount of tax shown on this return", (page 218).
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> 112. I am satisfied Mr Amin's account regarding submission of his tax return, and its later amendment raise potentially significant discrepancies, which are further considered below in the context of the evidence as a whole.

17. The Judge considers the 2012/2013 tax return to HMRC between [113 – 126] in which the Judge finds at [123 – 126]:

> 123. I am not satisfied that any satisfactory explanation has been provided by IH Accountants or by Mr Amin for what was said to be an error in the tax return. The letter from TM Financial Services stated that there had been an "understated discrepancy of £7481 in the tax return, under the subheading of Your Turnover". This discrepancy is investigated and no valid reasons are found why this figure was left out in the first place".
>
> 124. Mr Amin did not mention this letter from TM when writing to HMRC, when he reported his correct turnover is £9750. Given the difference in earnings from self-employed considered above, it is clear that the two turnover figures for self-employed were very different indeed. Whilst TM did not provide the specific figures, if the discrepancy was £7451 and the correct figure was £9750, then it appears Mr Amin must initially have told HMRC that he had made only about £2500 in turnover, but he later told them this figure was closer to £10,000.
>
> 125. This was a very noticeable difference. Moreover, turnover, which is simply a measure of total sales, should be easily calculable by adding up payments for work done. It appears inherently improbable that an error of this magnitude from what should be a simple calculation would be made either by Mr Amin or by his accountants.
>
> 126. Again, in relation to the 2012/2013 tax return, I am satisfied Mr Amin's account raised serious potential issues, further considered below in the context of the evidence as a whole.

18. The Judge summarises the overall findings pursuant to the Immigration Rules between [127 – 160] in which the Judge finds that certain factors point towards

Mr Amin having used deception or dishonesty in his tax returns, rather than having made honest errors although accepting it was necessary to consider the evidence as a whole before concluding whether or not this had been established by the respondent [127].

19. The Judge had the benefit of seeing and hearing Mr Amin give oral evidence and did not find him to be a credible witness [128] for the reasons set out in the decision under challenge.

20. At [135] the Judge finds:

> 135. It stretches credulity, in my view, that not only had two sets of accountants failed to send him a tax return, but, in both cases, this resulted in a major error going undetected. Moreover, the end result of both errors that Mr Amin's income was substantially less, and he paid substantially less tax.

21. The Judge took into account the fact the first appellant disclosed the errors to HMRC voluntarily although noted the first appellant's oral evidence that he only did so after receiving advice from immigration solicitors who told him that previous earnings would be scrutinised in the long residence application which the Judge was satisfied was the likely impetus to declare the mistakes to HMRC.

22. At [137] the Judge finds:

> 137. Moreover, during the year when no immigration application was made, Mr Amin's income remained relatively very low compared to the surrounding two years, so he paid much less tax. However, no error was discovered in this tax return. This overall picture was much more consistent with deliberate dishonesty, rather than innocent error.

23. The Judge also finds the differential between figures disclosed to the Home Office and HMRC was so large it was reasonably expected the first appellant would notice the tax was too low [138].

24. The Judge found the use of different accountants for the purposes of immigration applications and tax returns and the use of TM Financial Services, who do not appear to be qualified accountants, evidence of a further potentially suspicious factor.

25. The Judge noted there was no explanation for the error in the second tax return noting at [141] the first appellant did not blame either accountant or referred to the fact they had not sent in the tax return for checking when writing to HMRC.

26. At [144 – 145] the Judge writes:

> 144. I note that HMRC were unaware of the very different level of income shown by the management accounts of Pursglove and Brown, which were prepared for a very similar period. HMRC were not sent these accounts. They were also unaware that, virtually simultaneously, Mr Amin was declaring a much higher income for immigration purposes. They were unaware that he declared the errors only after receiving immigration advice that his previous earnings would be considered when he made his next application, which provided an impetus to him to increase them in line with what he had originally declared to the Home Office. Had HMRC been privy to this information, I am satisfied that they might well have formed a very different view.

> 145. For the avoidance of doubt, I am satisfied, based on the evidence as a whole, that the respondent has met the initial evidential burden in terms of his assessment that the appellant misrepresented his earnings in both of the relevant tax returns. I do not accept that the appellant's explanation was credible or met the minimum level of plausibility. I am satisfied that the respondent has established that Mr Amin used to dishonesty and/or deception when submitting his tax returns the 2010/11 and 2012/13.

27. Having found dishonesty proven the Judge then considered whether paragraph 322(5) applied making the first appellant's presence in the UK undesirable given his conduct between [146 - 156] in which the Judge concluded that there was sufficient reliable evidence which calls into question Mr Amin's character and conduct to the extent that it is undesirable to allow him to remain in the United Kingdom, in accordance with paragraph 322(5).
28. Thereafter the Judge considers the merits of the appeal pursuant to article 8 ECHR, this being a human rights appeal, including consideration of the best interests of the child pursuant to section 55 Borders, Citizenship and Immigration Act 2009.
29. The Judge finds at [164] when considering the weight to be given to the public interest in this case,

> 164. Nonetheless this form of dishonesty is very serious. The findings in relation to the tax returns weigh heavily in favour of the public interest in removal. In accordance with section 117 B(1), the maintenance of effective immigration controls is in the public interest, and this factor weighs heavily against the appellant's, given the use of deception.

30. The Judge sets out the conclusion on the proportionality issue at [168] in the following terms:

> 168. Whilst I accept that both appellants have established a private and family life here, and it was clear the couple were well liked within the community, overall, I did not accept that there was sufficiently exceptional factors to outweigh the strong public interest in removal. I am satisfied the removal decision is proportionate to the legitimate aim in this case, which is the economic well-being of the United Kingdom. One aspect of this aim is the maintenance of effective immigration control. The appeals are dismissed.

31. The appellants challenged the decision in relation to which permission to appeal was eventually granted by the High Court for the following reasons:

> 1. The claimant seeks permission to bring judicial review proceedings with respect to the determination of UTJ Judge Caravan dated 13 March 2019 refusing permission to the claimant to appeal the determination of the FTT Judge Lenier promulgated on 20 December 2018.
> 2. The first and second claimants are citizens of Pakistan. Their respective dates of birth on 23 April 1982 and 6 April 1989. They are married and have a child who was born in the UK on 9 June 2017. The first claimant entered the UK on a student visa he has been lawfully in the UK pursuant to a variety of visas since 2006. The second claimant entered the UK as a dependent spouse on 4 August 2015. She too has been in the UK lawfully since that date.

3. The claimants were refused leave to remain by the Defendants as a consequence of the determination by the Defendant that the first claimant had been deceitful or dishonest in his dealings with HMRC and/or UK Visas and that it was therefore undesirable for him to remain in the UK (paragraph 322 (5) of the Immigration Rules).
4. It is arguable that while the discrepancy in the first claimant's accounts gives rise to a suspicion of dishonesty that discrepancy was dispelled by the evidence provided by the first claimant and there was an error of law in the FTT Judges determination. The decision of the Court of Appeal in *Balajigari & Ors v SSHD* [2019] EWCA Civ 673 provides clear guidance as to the way in which earning disparity cases such as this are to be considered and, unless the Upper Tribunal all the interested party wishes there to be a hearing of the substantive application, this is a matter which requires further consideration of the Upper Tribunal both with respect to the applicability of paragraph 322 (5) and potential interference with article 8 rights.

Error of law

32. There had been a number of cases considering the issue of paragraph 322(5) and the relationship between figures declared to HMRC and UKVI. The latest providing definitive guidance is that of the Court of Appeal in *Balajigari v SSHD [2019] EWCA Civ 673* from which the following principles can be extracted:

(i) it is clear from the terms of paragraph 322 (5) that it was not intended only to apply to cases in which there is a threat to national security [32];

(ii) para 322 (5) involves a two-stage analysis, whether it applies first and then discretion falls to be considered [33];

(iii) for the first stage there must be reliable evidence of sufficiently reprehensible conduct and an assessment, taking proper account of all relevant circumstances known about the applicant including positive features of their character of whether their presence in the UK is undesirable [34];

(iv) the conduct can only be sufficiently reprehensible if it is dishonest [35]. It is very hard to see how the deliberate and dishonest submission of false earning figures to HMRC or the Home Office would not meet the threshold [37];

(v) the SSHD should incorporate the balancing exercise into the decision-making process, in so far as **Dadzie** and **Ojo** said otherwise the CA would disagree [38];

(vi) the guidance in **Khan** (see below) was endorsed with the qualification that para 37 of the guidance may misstate the position; a discrepancy between earnings declared to HMRC and SSHD may justifiably give rise to a suspicion of dishonesty but it does not justify that conclusion. It calls for an explanation and the SSHD must decide in the light of the explanation or lack of one whether he is satisfied the applicant was dishonest [42];

(vii) where SSHD is minded to refuse ILR on the basis of reprehensible conduct he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion of reprehensible conduct. There does not have to be an interview; a written procedure may suffice [55] [56], but the availability of administrative review did not satisfy the requirements of procedural fairness [58];

(viii) the SSHD is not bound to take the same view as HMRC [68];

(ix) there is no **Tameside** duty on the SSHD to make enquiries of HMRC as to how they have dealt with relevant errors [69]; the applicant can draw attention to what action HMRC did or did not take [75];

(x) in the generality of cases a Tier 1 applicant for ILR is likely to have built up sufficient private life for Article 8 to be engaged by his removal [86];

(xi) an adverse decision by the SSHD necessarily means that if the applicant has leave it can be curtailed so a person with leave is equally liable to removal [90];

(xii) this means that the tribunal will have to reach its own conclusions as to whether the interference was justified rather than conducting a rationality review – the situation was analogous to **Ahsan [2017] EWCA Civ 2009** [92];

(xiii) like **Ahsan** the appropriate route of challenge is by appeal to the FTT rather than JR to the UT [95];

(xiv) where an applicant has not included a human rights claim in their ILR application they will need to make a fresh application or wait until steps are taken to enforce removal [100] [101];

(xv) the CA discussed the position in the current litigation [103];

(xvi) the applicant will need an opportunity to give evidence and call witnesses it is unlikely that a mere assertion that the matter was a "mistake" will be accepted without a full and particularised explanation of what the mistake was and how it arose [106].

33. Mr Malik referred to the correct test for assessing the merits of the claim in an appeal of this nature referring to submissions made by of the appellant

Balajigari before the Court of Appeal set out at [34 – 39] of their judgement. At [33 - 34] the Court of Appeal write:

> 33. Against that background, Mr Biggs submitted that, properly interpreted, paragraph 322 (5) involves a two-stage analysis. The first stage is to decide whether paragraph 322 (5) applies at all - that is, that it is "undesirable" to grant leave in the light of the specified matters. If it does, the 2nd stage – since such undesirability is a presumptive rather than mandatory ground of refusal - is to decide as a matter of discretion whether leave should be refused on the basis of it. That analysis seems to us correct in principle.
>
> 34. As to the first stage, Mr Biggs submitted that there are three limbs to the analysis. There must be: (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii about the applicant at the date of decision, whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character). Again, that seems to us the correct and helpful analysis of the exercise required at the first stage, but it will be useful to say something more about the elements in it, especially as they apply to an earnings discrepancy case.

34. At [35] the Court of Appeal accepted that an earnings discrepancy case could constitute sufficient reprehensible conduct for the purposes of paragraph 322 (5) if but only if the discrepancy was as the result of dishonesty on the behalf of the appellant.
35. It is not disputed that the provision of inaccurate earnings figures to either HMRC or the Home Office in support of an application for leave under Part 6 A as a result of mere carelessness or ignorance or poor advice cannot constitute conduct rendering it undesirable for the applicant to remain in the United Kingdom as such errors will be genuine or innocence in the sense they are honest and so do not meet the necessary threshold.
36. A reading of the determination shows the Judge was aware that a structured approach was required.
37. The decision of the Court of Appeal had not been handed down at the date of the hearing meaning the Judge only had available as a source of reference and guidance the decision of the Upper Tribunal in *R (on the application of Khan) v Secretary of State for the Home Department (dishonesty, tax return, paragraph 322 (5)) [2018] UKUT 38* in which it was found:

> (1) 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 (care see Balajigari above) Such an inference could be expected where there is no plausible explanation for the discrepancy;
> (2) Where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty;

(3) In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the "balance of probability", a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences;
(4) For an Applicant simply to blame his or her accountant for an "error" in relation to the historical tax return will not be the end of the matter, given that the accountant will or should have asked the taxpayer to confirm that the return was accurate and to have signed the tax return. Furthermore, the Applicant will have known of his or her earnings and will have expected to pay tax thereon. If the Applicant does not take steps within a reasonable time to remedy the situation, the Secretary of State may be entitled to conclude that this failure justifies a conclusion that there has been deceit or dishonesty;
(5) When considering whether or not the Applicant is dishonest or merely careless the Secretary of State should consider the following matters, inter alia, as well as the extent to which they are evidenced (as opposed to asserted):

(i) Whether the explanation for the error by the accountant is plausible;
(ii) Whether the documentation which can be assumed to exist (for example, correspondence between the Applicant and his accountant at the time of the tax return) has been disclosed or there is a plausible explanation for why it is missing;
(iii) Why the Applicant did not realise that an error had been made because his liability to pay tax was less than he should have expected;
(iv) Whether, at any stage, the Applicant has taken steps to remedy the situation and, if so, when those steps were taken and the explanation for any significant delay.

38. At [42] of the decision of the Court of Appeal decision there is specific reference to the guidance in *Khan* in the following terms:

> 42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting point" mis-states the position. A discrepancy between earnings declared to HMRC and to the Home Office may justifiably give rise to a *suspicion* that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point to be legitimate the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in light of the explanation (or lack of it), whether he is satisfied that the appellant has been dishonest.

39. Mr Malik refers to the finding at [127] of the decision under challenge in which having examined the evidence regarding the 2010/2011 and 2012/2013 tax returns to HMRC the Judge writes:

> 127. Based on the above, I am satisfied certain factors pointed towards Mr Amin having used deception or dishonesty in his tax returns, rather than having made honest errors. However it was necessary to consider the evidence as a whole, before concluding whether or not this had been established by the respondent.

40. It is not made out the Judge adopted an incorrect or impermissible approach when finding that the appellant's conduct inferred the use of dishonesty or that the Judge concludes that the evidence gave rise to suspicion in light of the decision of the Court of Appeal such as to give rise to material legal error.

41. The Judge spent considerable time examining in detail the available evidence to establish whether the element of dishonest conduct had been made out in this appeal. Mr Malik accepted in his submissions that he could not challenge the factual findings of the Judge as they do not on the face of it reveal any arguable legal error in the assessment of the evidence. There is in particular no challenge in the grounds to the findings at [138], [139 – 145] or [150 – 155] of the determination under challenge in which the Judge writes:

> 138. Moreover, the differentiation between the figures disclosed to the Home Office and HMRC was so large it would be reasonable to have expected that Mr Amin would noticed the tax was too low. In particular, this was the case during 2012/13, in relation to the £11,000 difference between the amounts earned full self-employment.
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> 139. Mr Amin used four separate sets of accountants. It was unclear why he used Pursglove and Brown twice to prepare the accounts presented in support of his immigration applications but did not use them for his tax returns for the same years, although this was likely to be quicker and cheaper, as most of the work was done.
>
> 140. He changed accountants for the two questioned tax returns. He used TM Financial Services, who did not appear to be qualified accountants, to comment on the discrepancies on the accounts. Whilst this could, of course, be innocent and done for logistical purposes, in the light of the evidence as a whole, it is a further potentially suspicious factor.
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> 141. There was no explanation for the error in the second tax return. IH Accountants did not provide any evidence, although, at the date when Mr Amin was writing about this mistake to HMRC, they were still trading. Ghani & Co provided an explanation in line with TM Financial Services, but not until, and neither explanation was consistent with the letter Mr Amin wrote himself to HMRC. Moreover, he did not blame either accountant or refer to the fact that they had not sent him the tax return for checking, when writing to HMRC.
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> 142. Mr Amin relied upon the lack of penalty imposed by HMRC. In line with their standard guidance, this did amount to their acceptance that the understatement in the tax returns arose from carelessness, rather than being deliberate.
>
> 143. Whilst I have taken this into account, HMRC were being told by Mr Amin that the issues arose due to a typo and an error. They had no information from the Home Officer so had no reason to believe there was any other motivation.
>
> 144. I note that HMRC were unaware of the very different level of income shown by the management accounts of Pursglove and Brown, which were prepared for a very

similar period. HMRC were not sent these accounts. They were also unaware that, virtually simultaneously, Mr Amin was declaring a much higher income for immigration purposes. They were unaware that he declared the errors only after receiving immigration advice that his previous earnings will be considered when he made his next application, which provided an impetus for him to increase them in line with what he had originally declared to the Home Office. Had HMRC been privy to this information, I am satisfied that they might well have formed a very different view.

145. For the avoidance of doubt, I am satisfied, based on the evidence as a whole, that the respondent has met the initial evidential burden in terms of his assertion that the appellant misrepresented his earnings in both of the relevant tax returns. I do not accept that the appellant's explanation was credible or met the minimum level of plausibility. I am satisfied that the respondent has established that Mr Amin used dishonesty and/or deception when submitting his tax returns for 2010/11 and 2012/13.

…….

150. In the current case, I did not accept that the tax returns were not sent to Mr Amin on either occasion, or that he was not asked to sign these. It was noticeable that the signature pages were not produced. I was also satisfied, for the reasons above, that the differential in income figures between the Home Office and HMRC was sufficiently great on both occasions, that Mr Amin should have been aware that he was being asked to pay too little tax.

151. Whilst Mr Amin did take steps to remedy the situation, this did not happen for some years, and not, in my view, within a reasonable time. Moreover, Mr Amin accepted that he took steps because he was advised to sort out tax affairs in the context of a new immigration application. I do not believe he would have taken this step without such a necessity.

152. There was no explanation from IH Accountants and, based on the above findings, questions remained about the explanation for the entry on the tax return of 2010/11.

153. I have also taken into account the respondent's policy guidance of paragraph 322 (5). I note that it is not necessary for a conviction to be obtained, before the paragraph applies, although it is stated that he is unlikely a person will be refused under character, conduct or associations ground for a single conviction.

154. There has been no criminal prosecution in this case and no conviction. Mr Amin is a man of good character. He has produced many character letters testifying to his well respected status in the community and voluntary work that he has carried out. His immigration history has been otherwise good. He has contributed to the economy through regular employment. I have taken all these factors into account.

155. However, I also take into account that HMRC were unaware of the accounts which were produced by Pursglove and Co at virtually the same time as the tax returns and the very differing levels of income that these betrayed. Had they been so aware, I am satisfied their assessment of Mr Amin's actions and motivation might well have been different and led to a much more robust response.

42. A challenge to the finding regarding the possible reaction of HMRC had they were aware of the whole history of this matter, on the basis that the same is speculation, does not establish arguable legal error. The observation by the

Judge that had HMRC been aware of the true position as disclosed by the differing set of accounts they would have been unlikely to be of the opinion that the error was a matter of mistake or a typo is not an arguably irrational finding. In addition to not disclosing all the available documents to HMRC, which would have led to the discrepancy being identified which would have had a number of consequences for the appellant, the appellant also clearly sought to mislead HMRC in the explanation he provided for the discrepancy between the figures set out in the tax returns and those he eventually disclosed following the advice from his immigration solicitors.

43. What the above demonstrates is that the Judge did not infer dishonesty without more. The Judge clearly examined the evidence very carefully establishing reliable evidence of sufficiently reprehensible conduct having taken proper account of all relevant circumstances before concluding whether the appellant's presence in the United Kingdom was undesirable. The Judge clearly sets out within this assessment the positive features of the appellant's character as disclosed in the evidence.

44. Mr Malik submitted that the Judge had also erred in relation to the assessment of the second stage of the test which is the question of discretion. At [39] the Court of Appeal wrote:

> 39. Mr Biggs submitted that at the second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted it was at this stage that the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise. That seems to us in principle correct. There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily *indefinite* leave to remain) to migrants whose presence is undesirable.

45. The Judge clearly considered the appellant's character at [154] above, indicating there was an assessment of other aspects in the Judge's mind, before concluding the first appellants character and conduct meant it was undesirable to allow him to remain in the United Kingdom. Mr Malik submitted that it was not sufficient for the analysis referred to by the Court of Appeal to be undertaken separately in an article 8 assessment as it was necessary as part of article 8 ECHR to establish whether an appellant was able to satisfy the relevant Immigration Rules. If it was found the appellant's exclusion was desirable subsequent to paragraph 322 (5) that was a material factor when considering the weight to be given to the public interest.

46. In this case although the Judge concludes it is undesirable to allow the appellant to remain in the United Kingdom at [156] and then goes on to consider whether the appellant could meet the requirements of the Immigration Rules relating to long residence or outside the rules pursuant to article 8 ECHR afterwards as a separate distinct aspect of the appeal, the findings made by the Judge in relation to that aspect are relevant to the balancing exercise referred to by the Court of

Appeal at [39] of their judgement where they specifically referred to the need to include in the decision making process any human rights issues which arise.

47. The Judge's findings at [157 – 168] are in the following terms:

> 157. As a result, I do not find that Mr Amin meets the requirements of the immigration rules relating to long residence, in accordance with paragraph 276B. I am also satisfied the suitability requirements of the rules are not met in relation to paragraph 276ADE. It was not submitted that there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK, and I am satisfied this provision of paragraph 276 ADE is not met.
>
> 158. In relation to Mrs Usman, for the avoidance of doubt, there were also not very significant obstacles to her integration back into Pakistan for the reasons given in the decision letter. Again, no such obstacles were raised at the hearing.
>
> 159. The appellant's have a child, Muhammed Essa Amin, who was born in the United Kingdom on 9 July 2017. He is also a national of Pakistan. Paragraph EX.1 (a) or (b) do not apply to the appellants, given they are nationals of Pakistan, and Muhammad has not lived here for seven years.
>
> 160. In light of the above findings, I am satisfied the requirements of the immigration rules are not met by the appellants. I now, therefore, turn to Article 8 outside the rules and consider whether there are exceptional circumstances which mean the appeal should be allowed. However, I note the immigration rules are designed to operate on the basis that decisions taken in accordance with them are compatible with Article 8, in all but exceptional cases, (**Agyarko**).
>
> 161. I firstly have to consider the best interests of the child, Muhammed, under Section 55 of the Borders, Citizenship and Immigration Act 2009. His best interests are a primary consideration.
>
> 162. Muhammad is a citizen of Pakistan but was born here. He lives with his parents, both of whom are citizens of Pakistan. He is not yet two years old. It is clearly in his best interests to remain with his parents within the family unit, wherever they are settled. Whilst he will already possess some limited integration here, his primary integration is likely to remain within the family unit, by virtue of his age. There was no disclosure of significant health problems or any other factors which would cause him difficulty returning to Pakistan. In my view, Muhammed's best interests are to remain with his parents, whether they remain here or return to Pakistan.
>
> 163. I have taken into account the Mr Amin's long residence here and the couples otherwise unblemished immigration history. I have taken into account evidence of some charity work carried out voluntarily within the community by Mr Amin. There were copious character letters, speaking to the appellant's general honesty, hard work and dedication. It was clear Mr Amin and Mrs Usman were regarded as a close and warm family unit, considered by many to be valuable members of the community. It appears likely that Mr Amin's use of deception above was out of character.
>
> 164. Nonetheless this form of dishonesty is very serious. The findings in relation to the tax returns weigh heavily in favour of the public interest in removal. In accordance with Section 117 B(1), the maintenance of effective immigration controls is in the

public interest, and this factor weighs heavily against the appellant's, given the use of deception.

165. It is in the public interest that persons who seek to remain in the United Kingdom are able to speak English and are independent financially. Whilst the appellant used an interpreter, it was clear he could speak English fluently. It is also clear he was financially independent and there was no evidence of dependence upon public funds. However, **Rhuppia v Sec State the Home Department [2018] UKSC 58** confirmed that financial independence from the state was not a positive, but a neutral factor.

166. It is necessary to establish exceptional circumstances. These were defined in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** as being, "not ….. A test of exceptionality" but as 'something very compelling,' required to outweigh the public interest."

167. I am not satisfied any such factors have been established. The appellants have spent most of their formative lives in Pakistan, although Mr Amin has been resident here for a very significant period. They would not have lost their cultural, linguistic or social connections there. Mr Amin is highly educated and has had much experience in IT, both as a self-employed consultant and in employment. Neither appellant produced evidence of significant health problems, sufficient to impact upon removal. The family will be likely to be able to support themselves in Pakistan.

168. Whilst I accept that both appellants have established a private and family life here, and it was clear the couple were well liked within the community, overall, I did not accept that there were sufficiently exceptional factors to outweigh the strong public interest in removal. I am satisfied the removal decision is proportionate to the legitimate aim in this case, which is the economic well-being of the United Kingdom. One aspect of this aim is the maintenance of effective immigration control. The appeals are dismissed.

48. The Judge did not have benefit of the Court of Appeal guidance as that judgement had not been handed down by the date the decision was promulgated. What is clear is that all relevant aspects which the Court of Appeal state should be considered in an appeal of this nature were considered by the Judge. Having found that it was undesirable for the appellant to have leave to remain the Judge considered whether there were factors that outweighed the presumption that leave should for that reason be refused within the Article 8 assessment and at [154] of the decision under challenge. The Judge, arguably, did exactly as the Court of Appeal require in a case of this nature albeit in a slightly different format.

49. From the findings made, when applying the structure of the decision required following the Court of Appeal judgement, I find that no arguable legal error material to the decision to dismiss the appeal on all grounds has been made out as the decision would have been the same.

50. This is an appeal that differs from many in which there was clear evidence before the Judge of duplicity of documentation for different purposes and deliberate attempts by the appellant to mislead HMRC even if it was properly found that the information provided to UKVI in support of earlier applications

was not shown to be infected by dishonesty. The Judge's conclusion paragraph 322(5) had been made out by the respondent and that the decision is proportionate is clearly within the range of findings open to the Judge on the evidence.

Decision

51. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

52. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 20 September 2019