Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06340/2018

THE IMMIGRATION ACTS

Heard at North Shields **Decision & Reasons Promulgated**
On 3rd May 2019 **On 10th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR ALI AKBER
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner of Counsel instructed by Latif Solicitors.

DECISION AND REASONS

1. In this matter the Secretary of State was granted permission to appeal against the decision of First-tier Tribunal Judge Bircher who had allowed the Appellant's appeal pursuant to Article 8 ECHR. To ease following this decision I shall refer to Mr Ali Akber as the claimant, noting that it is the Secretary of State who brings this appeal. The FTT Judge had allowed the claimant's appeal against the Secretary of State's decision dated 9 February 2018 refusing Indefinite Leave to Remain, albeit the Judge allowed the appeal on Article 8 ECHR grounds.

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2. The Secretary of State's grounds of appeal in summary had said as follows:-

(1) That the judge had made a material misdirection of law because following the decision of the Upper Tribunal in **R (on the application of Samant) v Secretary of State for the Home Department [2017] UKAIT** and **Abbasi JR/13807/2016** that the Appellant was personally responsible for his own tax affairs and given that he would personally receive his tax bill, he would have been fully aware of the amounts declared to HMRC or the fact that no tax return was in fact made. Paragraphs 73 and 74 of **Abbasi** referred to which said in part:-

> "Essentially the applicant must take responsibility for his own tax affairs. Not only would the applicant have supplied the figures to his accountant, he would have checked them and would individually have received a tax bill".

(2) **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2015] UKUT 00384** head note (iv) which said as follows:-

> "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 tax payer 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 …".

3. Towards the end of the grounds of appeal it is said on behalf of the Secretary of State:-

> "It is argued that the view of the HMRC regarding the treatment of arrears is not relevant to 322(5) assessments – and, in any event, does not address the possibility that the original tax records were correct, but the Appellant falsified higher earnings in order to qualify under Tier 1 as there are several reasons why HMRC would not seek to take further action (as highlighted above in [22] of **Samant**) it is submitted that it is a material error of law to find that the lack of action by HMRC is determinative of whether the Appellant has acted dishonestly".

4. Since the decision of the First-tier Tribunal Judge and indeed since the grounds of appeal were drafted, the Court of Appeal has handed down its judgment in **Balajigari & Others v Secretary of State for the Home Department [2019] EWCA Civ 673**. That judgment deals in detail with paragraph 322(5) of the Immigration Rules and also considers the case of **Khan** which I have referred to already at paragraph 2(2) above and was a decision of Martin Spencer J. In my judgment, the decision in **Khan** remains important and was specifically considered in **Balajigari.** I shall return to it.

5. At the hearing before me during oral submissions, Mr McVeety said that he relied on the grounds of appeal and that there had been a failure by the claimant to lodge

the tax documents "in their entirety". There was no evidence from the previous accountants. Mr McVeety took me to paragraph 106 of **Balajigari** and said that a mere assertion was not sufficient. An explanation needed to be provided, but here nothing had been provided and there was no evidence to say that the accountants were not in business and the Appellant had fallen foul of the Court of Appeal case in this decision. Mr McVeety took me to paragraph 31 of the judge's decision where the judge had said in part as follows:-

> "This application was refused because of a failure on the part of a professional accountant to submit his self-assessment tax return in the first year of his business".

6. The judge has said that the Appellant did not realise his tax return had not been submitted but that was a perverse finding. The Appellant had not submitted his earnings. The fact that there was no tax liability required the Appellant to consider the situation. The Appellant should have asked why was there no demand from HMRC. The judge's finding that this was a "simple" mistake was just wrong. It was not a matter of a "couple of hundred pounds here or there". The earnings were in the region of £50,000 or so. The point being that any one acting reasonably would know that they would have a tax liability and would make enquiries.

7. Mr Turner in his submissions took me first to his skeleton argument. I shall not refer to all of it, but I shall summarise it alongside the oral submissions which largely reflected what was said in it. The skeleton argument and submission were that the Home Office's grounds were flawed. That any negative factor raised in the determination should have resulted in dismissal and that the Secretary of State had failed to have regard to the fact that paragraph 322(5) was not a mandatory ground. The cases of **Abbasi** and **Samant** were not reported cases and that no weight should be reported upon them. In the alternative the Appellant relied on the case of **Bapio Action Ltd** which was authority for the proposition that where one Government body acts in a certain way in pursuance of a statutory duty imposed upon it, then this is considered to be important and an information action on other Government bodies. It was said that the Home Office grounds failed to engage with the determination. It is clear that the First-tier Tribunal Judge did have the decision of **Khan** in mind and that it was submitted that when granting permission Judge O'Garro failed to have proper consideration of the fact that the Appellant was a person who had been lawfully in the UK for a period of twelve years at the date of application. It was also necessary to consider the Home Office's own operational instructions at page 2 which states that discrepancies with the HMRC data are just one aspect of the genuineness assessment when dealing with applications from Tier 1 migrants. The Appellant therefore had failed to have regard to his own guidance in treating the tax amendment as the definitive factor in the case. It was submitted that the Secretary of State was merely seeking to re-argue the case rather than challenge the matter as an error of law.

8. The Secretary of State had not made out the burden of proof in establishing dishonesty and the Appellant sought to rely on the recent decision in **Balajigari**. There were long extracts from **Balajigari** in the skeleton argument including

paragraphs 34, 35, 37 and 221. In conclusion it was submitted that the Secretary of State's appeal ought to be dismissed.

9. In his oral submissions Mr Turner also repeated some of the matters and he said that the key factor was that the previous accountants were "shut". He said in respect of the money, the £50,000, that ignored the evidence in the case, that the Appellant took on a business which was loss-making. There was a difference between nothing being filed and specific cases where no returns had been filed. I was taken at some length to the Court of Appeal's decision in **Balajigari**. I enquired about the evidence in respect of the accountants having been "shut down" but all I was shown was a witness statement in the Appellant's bundle which was before the FtT Judge dated 3rd July 2018 which said at paragraph 15:-

> "I confirm that I had closed the previous business as I had opened a new business venture and therefore I had to let go of my previous accountant. I confirm that sometime around 2012-2013 the previous accountancy firm had closed down and there was no way to retrieve any information from them."

10. Now, I have looked carefully through the judge's decision but ultimately there is no actual finding in respect of this aspect. In my judgment this was a crucial aspect of the claimant's case. In my judgment the Secretary of State's grounds of appeal which specifically ask the question of how the Appellant was taking responsibility for his tax affairs needed answering in terms of the former accountants. I also look at the Secretary of State's Refusal Letter. It is 11 pages long. Pages 3 and 4 set out in some detail the history of the claimant's Tier 1 applications to the Home Office and the history of his declarations of income in those applications, compared to the tax returns filed with HMRC. I will not set all of that out, but in summary the position is as follows:

    (1) As part of his Tier 1 application on 4 April 2011 the claimant claimed to have an income of £53.086.00 and so he was awarded 30 points for "previous earnings' categories. Whereas in fact the revised tax calculation dated 10 August 2017 showed that the total declared income was zero. Had the claimant declared income of zero then no points would have been awarded and he would not meet the points requirement for leave to remain. The same revised tax calculation now showed total tax income of £57,248 including £12084 from PAYE and £44,444 from a dividend and so this was now in line with the earnings declared to HMRC.

    (2) The refusal letter went on to say that it was not credible that a registered accountant would submit a self-assessment tax return declaring earnings which were considerably lower than their client's actual earnings.

    (3) There was a similar auditing-type of examination for the tax year 2012 to 2013.

11. In my judgment it was incumbent upon the judge to deal with this issue in terms of the accountants who were involved previously. The Court of Appeal in **Balajigari** made clear at paragraph 106 that a mere assertion of a mistake would be sufficient. In reality, there was nothing more than that assertion in this case. The fact that there was this very large amount of income, some £50,000 meant it could not be that the

accountants could simply have disappeared and that it was not possible to get the information which had been submitted, even if they had closed down in 2012/2013. Nor do I accept Mr Turner's submission that because *"Schedule 24 of the Finance Act 2007 confirms that HMRC is statutorily bound to consider imposing a penalty and, as such, it is submitted that Abbasi has arguably been decided in error. It is submitted that if HMRC have chosen not to prosecute the Applicant [then] UKVI ought not to behind their decision and place their own penalties on the Applicant, i.e. refuse ILR…"*. The reason I do not agree with Mr Turner's submission is because the Court of Appeal in **Balajigari** made clear at paragraphs 69 to 72 the opposite to his submission:

> "66. In his most bold submission Mr Saini submitted that, when paragraph 1 of Schedule 24 to the Finance Act 2007 provides that, in the circumstances to which it applies, a penalty "is payable", that means that there is always an obligation to pay a penalty and therefore one would always be imposed. On that basis, he submitted that if the Secretary of State made enquiries of HMRC and discovered that a penalty had not been imposed in a given case that would mean that HMRC had believed that a penalty was not payable and thus that it had believed that the error was innocent: otherwise a penalty would have been imposed.
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> 67. We reject that submission. The statutory language ("is payable") simply means that a *liability* to pay a penalty arises if the statutory criteria are satisfied. It does not mean there is a duty on HMRC to impose a penalty in every case where it might in principle be imposed. We are conscious that we did not hear detailed submissions on this issue, and in particular that we have not heard anything that might be said on behalf of HMRC. We shall therefore say no more about the issue here.
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> 68. At one stage, at least in his written submissions, Mr Saini appeared to suggest that it is legally impermissible for the Secretary of State to take a different view from HMRC in relation to the same matter. He referred to this in his skeleton argument as the "dichotomous views" of HMRC as distinct from the Home Office. We did not understand him to press that submission. In any event, in our judgment, the submission is a bad one. The Secretary of State has the legal power to decide the questions which arise under paragraph 322 (5) for himself and is certainly not bound to take the same view as HMRC. The two public authorities are performing different functions and have different statutory powers."

12. Alternatively, in my judgment it was incumbent upon the judge to have made a finding in line with the claimant's witness statement which set out what it did about the history of his former accountants. Did the Judge accept that evidence or not? The losing party, namely the Secretary of State in this case, was entitled to know what the finding was. In my judgment Mr Turner's submissions that the previous accountants had been "shut down" required an actual finding. There is reference to that assertion within the claimant's witness statement as I have said, above at paragraph 9. It was a fundamental issue. There is no finding by the judge on it. That properly reasoned finding ought to have been made. It cannot be inferred or implied. Nor can it be assumed. It is not merely an issue of there being a mere disagreement. I am well aware of the Court of Appeal's judgment in **R(Iran).** In my judgment Mr McVeety is correct to submit that this was such a large amount of money, namely some £50,000. It would be obvious that tax would be payable and waiting some 6 years to correct

matters required more than just an assertion that the previous accountants were to blame but were 'not around any longer'. This was the crux of the claimant's claim and that required a properly reasoned finding by the Judge on it as being essential.

13. I have not found the Home Office policy "Operational Instructions Relating to Earnings Discrepancies and Applications by Tier 1 (General) Migrants issued on 22 November 2016 and which Mr Turner relied on as assisting the claimant at this error of law hearing. That policy refers to interviewing the applicant and such like, and that discrepancies are one factor, but I do not see how that aids the claimant in respect of the fundamental issue in this case. The Judge at paragraph 31 concluded that there was a failure on the part of the accountant to submit the Appellant's self-assessment tax return and that the Appellant sought to remedy this once it came to light. That was an irrational finding. The delay was some 6 years and the initial amount of income was zero. There was no properly reasoned finding or evidence that the failure was that of the accountants or from the information that the claimant had provided to his accountants. I referred to **Khan** which the Secretary of States grounds stressed at paragraph 2(2) above. The claimant falls foul of that. I should say too that Mr Turner has said all he can on behalf of the claimant, but I am not able to agree with his submissions. In the circumstances I conclude that there is a material error of law in the judge's decision. In my judgment the error is of such a fundamental nature that none of the current determination can stand and therefore this matter has to be considered further at a hearing. I have considered whether or not that hearing ought to be here at the Upper Tribunal or at the First-tier Tribunal. In my judgment the appropriate venue is at the First-tier Tribunal, not least because it will give the Appellant a longer opportunity to obtain the evidence which, if so advised, he may seek to file and serve, to enable him to meet the Court of Appeal's judgment in **Balajigari**. It is relevant to note that the decision in **Balajigari** was handed down since the First-tier Tribunal's decision. Further, because I am setting aside the decision of the Judge in full, it provides the opportunity for there to be a hearing on all issues at the First tier Tribunal.

Notice of Decision

The First-tier Tribunal decision discloses a material error of law. The First-tier Tribunal's decision allowing the claimant's appeal is set aside. There will be a further hearing on all matters at a de novo hearing at the First-tier Tribunal hearing in due course. None of the current findings shall stand.

No anonymity direction is made.

Signed *A Mahmood* Date: 28 May 2019

Deputy Upper Tribunal Judge Mahmood