Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06519/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2019	**On 25 September 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

WAQAS NAWAZ BUTT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Rehman, Counsel instructed by Lawfare Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade decision following the identification of a material legal error in the decision of Judge of the First-tier Tribunal J Lebasci, promulgated on 10 May 2018, allowing the appellant's appeal against the refusal of a human rights claim (in the form of an application for Indefinite Leave to Remain (ILR) made pursuant to paragraph 276B of the immigration rules) dated 13 May 2017.

Background

2. The appellant is a national of Pakistan born in February 1982. He entered the UK December 2005 with entry clearance as a student. He obtained further leave to remain as a Tier 4 (General) Student valid until 31 August 2008. He was issued a Postgraduate Diploma in Business Administration (Level 7) in July 2008. He made an in-time application for further leave to remain as a Tier 1 (Post Study) Migrant, and then made two further applications leave to remain as a Tier 1 (General) Migrant which were ultimately granted, the last bestowing leave valid until 15 February 2017.

3. On 20 January 2016 the appellant made a human rights claim based on his 10 years Long Residence. An initial decision was made refusing the application on 12 March 2016 but this decision was withdrawn on 3 April 2017 and remade on 13 May 2017. The respondent refused the application pursuant to paragraph 322(5) of the immigration rules. This particular provision is located in Part 9 of the immigration rules dealing with general grounds of refusal and falls under the heading "Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused." It is not therefore mandatory ground of refusal. Paragraph 322(5) reads,

> (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

4. In his application for leave to remain made on 28 September 2010 the appellant stated that, for the financial year 2010-2011, he received an employment-based income of £5,207.68 (for the period 4 June 2010 to 31 August 2010) and earnings of £42,540 from dividends relating to his company (for the period 28 June 2010 to 17 September 2010). In the appellant's application for leave to remain made on 5 February 2014 he stated that, for the financial year 2013-14, he had an employment-based income of £17,479.25 (for the period 13 June 2013 to 31 January 2014) and a dividend income from his company of £41,025 (for the period 30 April 2013 to 13 December 2013). Information obtained from HMRC however disclosed that in the financial years 2010-2011 and 2013-2014 the appellant did not declare any dividend income relating to his company. The respondent noted that the appellant used the services of SJ Accountants and HSY Accountants in respect of both his Tier 1 (General) Applications and that he used the services of AWS Accountants to prepare his accounts for his application made in September 2010. The respondent observed that AWS Accountants and HSY Accountants were members of the Association of Chartered Certified Accountants (ACCA). Although the appellant had retrospectively declared his dividend income to HMRC (on 6 March 2017 and 29 March 2017). The respondent noted that, in respect of the relevant tax years, the appellant would have been classed as a higher rate taxpayer and that by failing to declare his dividends to HMRC the appellant benefited financially as

he would have appeared to have been a basic rate taxpayer. The respondent observed that paragraph 322(5) was a discretionary ground of refusal but she was not satisfied that the appellant's failure to declare this dividend income was a genuine error. The respondent was consequently satisfied that the appellant had been deceitful or dishonest in his dealings with HMRC and that it was appropriate to refuse his application for ILR.

The decision of the First-tier Tribunal

5. The First-tier Tribunal Judge noted that the appellant had no criminal convictions, that no criticism was made of his associations and that there was no suggestion that he represented a threat to national security. The judge found that the appellant had not sought to mislead the Home Office as he had provided evidence to support the income for which he claimed points in his previous applications and these figures were broadly consistent with the tax returns he had now completed and submitted to HMRC. The judge noted that the appellant had not made any false declarations to HMRC but did fail to file his tax returns in respect of the financial years 2010-11 and 2013-14. The judge did not consider that this failure was aimed at securing an immigration advantage but that it did result in financial advantage for the appellant as he was not required to pay tax on his dividend income. The judge then stated that paragraph 322(5) required a balancing act and concluded, without giving clear reasons, that the appellant had not practised deception or dishonesty to bring him within the ambit of the paragraph. The judge proceeded to allow the appeal on human rights grounds.

The 'error of law decision and the application for reconsideration of the 'error of law' decision

6. In the 'error of law' decision promulgated on 18 January 2019 Deputy Upper Tribunal Chamberlain found that Judge Lebasci erred in law by holding that paragraph 322(5) of the immigration rules requiring a "balancing act", by failing to consider whether the appellant's failure to lodge tax returns was a 'genuine error', by failing to consider the timing of the applicant's correction of his tax liability, and by failing to refer to any explanation given by the appellant to account for the omitted tax returns or to explain why she considered this to be a 'genuine error'.

7. Deputy Judge Chamberlin set the First-tier Tribunal's decision aside and a further hearing to remake the decision was listed before the same judge on 26 February 2019. The hearing was however adjourned to await the handing down on 16 April 2019 of the Court of Appeal's decision in **Balajigari v The Secretary of State for the Home Department** [2019] EWCA Civ 673. The appeal was relisted for 19 September 2019.

8. At the start of the hearing on 19 September 2019 Mr Rehman produced a document headed "Skeleton argument/application for reconsideration of decision 11th December 2018" and produced several authorities. Neither the

Upper Tribunal nor the respondent were informed in advance of any application to set aside the error of law decision.

9. Mr Rehman contended that the Upper Tribunal has power to vary or set aside an error of law decision at any point before it finally disposed of an appeal and relied on the decision in **AZ (error of law: jurisdiction; PTA practice) Iran** [2018] UKUT 00245 (IAC). Although the Upper Tribunal would only permit this to occur in 'very exceptional circumstances' as per Practice Direction 3.7 of the Practice Directions for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (made on 10 February 2010), this high threshold was met following the decision in **Balajigari**. Judge Chamberlin's conclusion that paragraph 322(5) did not require a balancing act was at odds with **Balajigari**. At [38] of the Court of Appeal authority Underhill LJ stated,

> "As for the third limb of the first stage of the analysis, Mr Biggs submitted that the assessment of undesirability requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. That would include such matters as any substantial positive contribution to the UK made by the applicant and also circumstances relating to the (mis)conduct in question, e.g. that it occurred a long time ago. In support of that proposition he relied on the judgment of Foskett J in *R (Ngouh) v Secretary of State for the Home Department* [2010] EWHC 2218 (Admin), which also concerned the application of paragraph 322 (5), albeit in relation to a different kind of conduct: see paras. 110, 120 and 121. While we would not say that it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly, we agree that it would be good practice for the Secretary of State to incorporate it in his formal decision-making process. In so far as Lord Tyre may be thought to have suggested otherwise in *Oji v Secretary of State for the Home Department* [2018] CSOH 127 (see para. 28) and *Dadzie v Secretary of State for the Home Department* [2018] CSOH 128 (para. 28) we would respectfully disagree."

10. Mr Rehman further submitted that the Deputy Judge relied on a headnote in **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5))** [2018] UKUT 00384 (IAC) with which the Court of Appeal in **Balajigari** disagreed. Mr Rehman additionally submitted that the First-tier Tribunal judge set out the evidence before her which included the appellant's bundle and witness statements and that she provided adequate reasons for concluding that the allegation of deception or dishonesty by the appellant had not been made out.

11. Having regard to the extract from **Balajigari** I accept Mr Rehman's submission that Deputy Upper Tribunal Judge Chamberlin was wrong to have found an error of law in the First-tier Tribunal's assertion that paragraph 322(5) "requires a balancing act." I am not however persuaded that the other errors of law identified by the Deputy Judge were wrong, or that the Deputy Judge's mistake undermines her overall conclusion that the First-tier Tribunal's decision contained errors on points of law requiring it to be set aside.

12. The First-tier Tribunal judge concluded that the appellant had not practised deception or dishonesty even though the failure to lodge his tax returns for the relevant financial years resulted in a financial advantage to him. The First-tier Tribunal judge however failed to give any or adequate reasons for this finding. She made no reference at all to the explanation advanced by the appellant for his failure to make a tax return for the relevant two years and no consideration was given to the timing of his correction of his tax liability. The judge failed to engage with or assess the explanation advanced by the appellant or to give considered reasons for concluding that the omissions were a genuine error. Mr Rehman boldly submitted that the appellant's explanation was considered by the respondent in the Reasons for Refusal Letter and was contained in the appellant's statements and his oral evidence, and that it was necessarily implicit in the First-tier Tribunal's decision that the explanation was considered and accepted. The fact remains however that the explanation is not contained in the decision and that it is not possible to discern how the judge approached that explanation if she had indeed considered it. There were no material findings in respect of the 'innocent explanation' given by the appellant. Nor does the First-tier Tribunal judge identify what factors she weighed up in the 'balancing act' under paragraph 322(5).

13. For these reasons I am not satisfied that there are "very exceptional reasons" to depart from the Deputy Judge's ultimate conclusion that the First-tier Tribunal's decision was infected by material errors of law requiring it to be set aside.

The appellant's evidence

14. The appellant adopted his statements dated 30 March 2017, 14 March 2018, and 25 February 2019. Although the appellant had lodged 3 separate bundles of documents, only the 2nd and 3rd bundles were contained in the Tribunal file. Mr Rehman however indicated that it was not necessary for me to have regard to the documents contained in the missing bundle and that he was placing principal reliance on the appellant's statements given the narrow issue in contention. The 3rd, short bundle contained the Short Tax Return relating to the appellant's company for the tax years 2010-2011 and 2013-2014, and a letter dated 25 February 2019 from Tax Perks Accountancy, the appellant's new accountants. During the course of the hearing Mr Jarvis located a letter, dated 3 February 2013, written by Siraj Muhammad of HSY Accountants Ltd confirming the appellant's employment and dividend income for the period February 2013 to January 2014, and some accompanying documents relating to the appellant's income and unaudited accounts relating to the appellant's company and the dividend vouchers covering that period.

15. In his statement dated 30 March 2017 the appellant stated, at paragraphs 10 and 11,

> "I confirm that upon receipt of my refusal, I contacted my previous accountants. Unfortunately no proper response was provided. They were unable to locate my

> record as they moved their offices. They kept me in the loop and finally I was told that the person who dealt with my affairs was no more with the firm. I tried to hunt down the adviser but without any luck. I have no accounting experience in this country or abroad. It is unfortunate that I was not advised properly by my previous accountants as to the filing of personal tax return. I was only advised to the extent of my company's accounts etc and was under the impression that will suffice for tax purposes.
>
> It was until now I found my new accountants and I was advised to file personal tax returns for the previous years. Upon that I requested my accountants to promptly prepare tax returns for the previous years and submit those to HMRC. I further confirm that I always promptly and with utmost diligence declared all the necessary information to the government agencies."

16. In his statement dated 14 March 2018 the appellant again stated, at paragraph 10, that his previous accountants were unable to locate his record "as they moved their offices."

17. In his witness statement dated 25 February 2019 the appellant claimed that the late filing of his tax returns not an intentional act to deceive the Home Office or HMRC but that it was "due to lack of familiarity as to taxation system or procedures and proper advice." He stated, "I must stress I am not dishonest person however, I must accept have been insensitive to probe into this and differentiate between parallel taxation system one personal and the other companies' liability to declare accounts tax etc." At paragraph 11 of this statement he said,

> "I also tried to contact the SJ Accountants / AWS Accountants to seek clarification. I found out that some reason the accountant dealt with me has left or have [*sic*] been sacked. With all honesty, I cannot account for why they failed to disclose my self-employed earning or alternatively advise me but I consider that their negligence and lack of professionalism which might have resulted in his departure."

18. And at paragraph 12 the appellant stated,

> "I have explored into this matter and tried to liaise with my last accountant but only answer which is given to me that they were only instructed to deal with the company affairs and I did not instruct them as to file my personal returns. In all honesty I am bemused with this reasoning. At no given time I was advised that I shall file my personal returns support to the business. I confirm had I known that I would have certainly filed my personal returns in time."

19. The appellant referred to his absence of any criminal record or history of evading immigration and that people with whom he had dealt judged him to be honest and respectful and reliable. It was wrong for the respondent to dispute his conduct or character in isolation based on a single innocent mistake.

20. There was no examination in chief. In cross-examination the appellant named the accountant he previously used as Siraj. This accountant used different companies, but the appellant could only recall HSY Accountants. He was

unable to recall the names of the other accountancy firms involved in preparing his accounts. The appellant met Siraj through a friend and always dealt with him on the phone. The appellant explained that SJ Accountants and AWS Accountants were 2 companies but had one office. The appellant had gone on one occasion to the office and had been told that Siraj had left. The appellant assumed Siraj had been sacked but he had not been told any details. The appellant could not recall the name of the person to whom he spoke. The person did not explain why they could not give the appellant any information. When asked whether he had made any official complaint against Siraj the appellant said he did not know where to go to lodge a complaint or who to complain to. He had not asked his solicitors for advice on lodging a complaint.

21. The appellant was aware that his company had to file tax returns but he had no idea that he had to file a self-assessment tax return. He was a layman and did not understand the tax process. He always listened to his accountant and did what his accountant told him. He did not realise he had to pay tax on his dividend income. The appellant's lawyers had asked him to get something in writing from the accountancy firms. He only went to the accountants' office on one occasion but he phoned a couple of times. When he asked about his records they told him that they didn't have any records.

22. In response to clarificatory questions from me the appellant said that he had no evidence of any correspondence between him and his accountant or the accountant's firms. He had always communicated over the phone. There was no statement or letter from the friend who introduced him to his accountant. The appellant had no emails from his accountant or the accountancy firms. The appellant explained that Siraj had himself moved office and this is what he meant in his 2017 and 2018 statements. The appellant had not contacted ACCA concerning Siraj's conduct and did not know why the accountancy firms didn't write any letter confirming what he had been told by them.

23. At the end of his evidence the appellant reiterated his innocence at his ignorance of the tax process and maintains that he was not lying. He referred to the family he had in the UK and his length of residence and his character. He stated that he had forgotten how to write in his native language. He repeated that no longer knew how to write in Urdu and confirmed that he entered the UK when he was 23 or 24 years old.

24. Mr Jarvis invited me to find that the respondent had discharged the burden of proof. Although one did not expect the appellant to understand tax law he had been aware of these allegations since 2016 and one would expect him to have made more effort through reasonable channels to obtain corroborative evidence. He was essentially asserting complete miss-practice by a Chartered Accountant and that the relevant firms refused to assist him. It was not credible that the appellant failed to make any complaint in the face of this serious allegation of negligence. He made little or no effort to obtain corroborated evidence from the firms. The appellant's evidence was changeable in respect of

the reasons for the absence of available records. It is concerning that there was no written evidence from the accountants other than that from HSY Accountants Ltd contained in the respondent's bundle. It was submitted that it was unlikely that the appellant would be unaware of his potential liabilities given the high level of his dividend income.

25. Mr Rahman invited me to find the appellant a credible witness and that his explanation was also credible. The appellant's evidence relating to Siraj was confirmed by the letter from HSY Accountants Ltd dated 3 February 2013. The fact that there was no other documentary evidence was irrelevant. It was not reasonable to expect the appellant to have lodged a complaint against his previous accountants given that he was trying to sort out his immigration problems. The appellant's explanation for the absence of records was credible. His case was a simple one - he wasn't advised of the dual taxation requirements and he reasonably relied on what his previous accountant told him. The letter from his new accountants showed that he was diligent in honouring his tax liability. I was invited to find that there was no evidence of dishonesty and the respondent had not discharged the burden of proof incumbent on her. In relation to the balancing exercise within paragraph 322(5) it was submitted that the appellant did what he required to do and that he had not been dishonest.

26. I reserved my decision.

Discussion

27. The burden of proving that the appellant was dishonest in his conduct under paragraph 322(5) rests on the respondent, and the standard is the balance of probabilities, but I must bear in mind the serious nature of the allegation and the serious consequences which follow from a finding of dishonesty.

28. The appellant accepts that he failed to lodge tax returns in respect of his dividend income in the tax years 2010-2011 and 2013-14 but attributes this to his ignorance of the tax system and the negligence of his previous accountants. I am however satisfied, for the following reasons, that the respondent has discharged the burden of proof incumbent on her to prove that the failure to lodge the relevant tax returns was as a result of the appellant's dishonesty.

29. I acknowledge that the appellant is not an accountant, and that he may have been unfamiliar with the British tax system. He is however clearly an intelligent man with a Postgraduate Diploma in Business Administration (though I appreciate that this is not a tax qualification). He must also have been aware that he received a large income from dividends derived from his company in the financial years 2010-11 and 2013-14. Even if one only has a rudimentary knowledge of tax systems one would expect to pay tax on a large income. In the circumstances it is not credible that the appellant would have failed to appreciate that tax would need to be paid on his personal income derived from his company. In the year 2010 he received an employment-based income of £5,207.68, and a dividend income of £42,540. His dividend income in 2013 was

£41,025. These are significant amounts. I simply do not find it credible that he would have failed to appreciate that this high income may expose him to tax liabilities.

30. The appellant attributes the failure in lodging his tax returns to his previous accountant. I accept that there are dishonest or incompetent accountants. The respondent's file contains a letter and income summaries and unaudited accounts prepared by HSY Accountants Ltd, an ACCA firm, for the period February 2013 to January 2014. I accept that the appellant did previously use this firm of accountants, and that Siraj Muhammad (FCCA) was associated with the firm. I do not however accept the appellant's claim that there was no correspondence and no other documentation, either in paper form or email, relating to his involvement with Siraj or HSY Accountants Ltd, or indeed with SJ Accountants or AWS Accountants. It is not credible that there would be no terms of service or other contract details between the appellant and his previous accountants, or that the accountant's services would be provided only by telephone communication without the creation of any other documents. Nor is it credible that the appellant would not have retained records relating to his instruction of his previous accountants or the information requested by the accountants or the information he provided to the firm.

31. On the appellant's account his previous accountants have been significantly negligent by failing to advise him of his need to file personal tax returns for the relevant financial years when, in light of his income, he was clearly liable as a higher rate tax-payer. Yet the appellant has not sought to lodge a complaint against his former accountants. Given the seriousness of the matter and his knowledge since March 2016 of the claimed incompetence of his former accountants, it is simply not believable that the appellant would not know where to go or to whom he could lodge a complaint. I draw an adverse inference from the appellant's failure to take any action against his previous accountants in a period of over three years and the explanation he gives for failing to do so.

32. In his February 2019 statement the appellant claimed to have tried to contact SJ Accountants / AWS Accountants "to seek clarification" but he has not produced any correspondence or documentation from this firm(s). He could not offer any explanation as to why this firm wouldn't confirm in writing what they had told him. Given the serious nature of the appellant's allegations against Siraj I do not find it at all credible that the accountancy firm(s) would fail to confirm in writing what the appellant claimed at paragraph 12 of his 2019 statement - that they were only instructed to deal with his company affairs and that they were not instructed to file his personal returns. There is no apparent reason why the accountancy firm(s) could not confirm that Siraj left their practice and the reasons for the absence of any records relating to the appellant. I find the absence of any correspondence at all from any of the accountancy firms identified by the appellant to detract from his credibility.

33. In both his 2017 and 2018 statements the appellant said his previous accountants were unable to locate his records "as they moved their offices." In his oral evidence he claimed that he meant that Siraj moved his office from the firm with whom he was associated. The appellant's previous two statements were however clear. The departure from the firm of "the person who dealt with [his] affairs" was not advanced as a reason for the absence of any records. In light of the absence of any confirmation from any of the accountancy firms relating to the appellant's previous accountancy records I find this inconsistency damages his credibility.

34. Although the appellant has retrospectively lodged his tax returns and is now in an agreement with HMRC to pay back his outstanding tax liability, this only came about following the initial refusal of his ILR application in March 2016. But for the refusal this application there is no indication that the appellant would have ever declared his dividend income to HMRC. The appellant stood to gain a significant financial advantage from the nondisclosure of his dividend income. I acknowledge that he has no criminal record and that he has not otherwise sought to evade immigration control, and I note the character references provided in support. Mr Rehman drew my attention to the letter from Tax Perks Accountancy but the information in this letter was based on what the appellant told his current accountants.

35. The failure by the appellant to lodge his tax returns disclosing his dividend income for the relevant financial years brought him a significant financial advantage. There was a prima facie basis for the respondent to suspect there had been dishonesty rather than carelessness or ignorance, and this called for an honest explanation. The appellant has made bare assertions relating to his previous ignorance of the need to submit tax returns relating to his large dividend income and the conduct of his previous accountants. For the reasons given I do not accept his assertions. I find that the respondent has discharged the legal burden of proving that the appellant was dishonest in failing to lodge his tax returns disclosing his dividend income to HMRC.

36. Paragraph 322(5) calls for a balancing exercise (see the extract in paragraph 9 above). I take into account the length of time that the appellant has resided in the UK, and the contribution that the appellant has made to the UK economy through his payment of taxes from his employment and from his company's tax liability, and the agreement he has now reached with HMRC in relation to his personal dividend income. The dishonesty however was of a serious nature and was perpetrated in two separate years. Undertaking the balancing exercise I find that the appellant's present is undesirable.

37. This remains a human rights appeal. The appellant does not meet the requirements of paragraph 276B(ii), the immigration rule in respect of which his human rights claim was made. In assessing the proportionality of the respondent's decision I take into account the factors in s.117B of the Nationality, Immigration and Asylum Act 2002. I take into account that the maintenance of

effective immigration controls is in the public interest. I accept that the appellant is fluent in English and that he is capable of being financially independent. These are however neutral factors. The appellant has always been lawfully present in the UK. He has been in this country since December 2005, over 18 years. This is a significant period and the appellant would have built up private life relationships. I accept the appellant has made new friends and established a social life, although there are relatively scant details of the nature and extent of his social life. I note that the appellant's parents and brother are British citizens and reside in this country. I have considered the statements from each of the appellant's parents which are signed and dated 31 March 2017. The appellant claimed in his statement dated 31 March 2017 that his parents could not reside here without him, but no detailed reasons were provided other than general reference to their emotional and physical health. The statements from the appellant's parents are in similar general form and there is little in the way of supporting evidence relating to their circumstances. There is no satisfactory evidence before me that there is anything beyond the normal emotional ties between the appellant and his parents. I accord weight to the private life he has established through his employment and his company.

38. The appellant is married and has a child born in January 2019 but neither his wife nor his child is a qualifying partner or a qualifying child. There is no evidence before me that there are any health or other welfare issues relating to his wife and child. It is in the child's best interests to remain with both his parents given her young age, but there is no suggestion that the family unit would be broken up as the family could all relocate to Pakistan. The appellant maintains in his statements that he has no close friends or family in Pakistan, that it would be difficult for him to find a job or establish a business, and he claimed in his oral evidence that he can no longer write in Urdu. I reject this last assertion. The appellant entered the UK as a 23-year-old. It is simply incredible that he would have forgotten how to write in his first language, the language that he grew up speaking and spoke during the formative years of his life. The appellant is highly educated and has work experience. There is no reason why he could not look for employment on return to Pakistan, or that the welfare and safety of his wife and child would be in any way jeopardised if the family were required to return to Pakistan.

39. I have weighed up the extent of the appellant's private and family life in this country, the length of his residence, the nature of his ties to his family and his immediate family's personal circumstances, including the best interests of his child. Balanced against this is the appellant's dishonesty in seeking to gain a significant economic advantage by dishonestly failing to lodge tax returns relating to his dividend income. He is a person whose presence in the UK is undesirable due to his conduct. I find that the public interest in the appellant's removal outweighs the Article 8 considerations I have considered. I consequently dismiss his human rights appeal.

Notice of Decision

The appellant's human rights appeal is dismissed

D. Blum

Signed

23 September 2019

Date

Upper Tribunal Judge Blum