Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10076/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 7 August 2019	**On 15 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. U.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Brakaj, Solicitor as agent for A-R Law Chambers
For the Respondent: No attendance

DECISION AND REASONS

1. The Appellant, a national of Pakistan, entered the United Kingdom legally in April 2005 with leave to remain as a student. His leave to remain was then extended on a number of occasions, in different capacities. On 23 May 2016 he made in time, an application for a grant of

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indefinite leave to remain on the grounds of his long residency. This was refused on 16 April 2018 with reference to paragraphs 276B(i)(a) and 322(5) of the Immigration Rules. As to the first, the Respondent relied upon a break in the chain of lawful residence between 13.12.07 and 2.10.08. As to the second, the Respondent was satisfied that the Appellant had declared significantly different earnings figures in the course of previous applications for leave to remain, to those which had been declared to HMRC from time to time for the same periods when declaring his income for taxation purposes. Thus the Respondent inferred that he had been dishonest in either the information provided to HMRC or in support of his applications for leave to remain.

2. The Appellant's Article 8 appeal against that decision was heard on 18 January 2019, and it was allowed by First Tier Tribunal Judge SLL Boyes in a decision promulgated on 15 March 2019.

3. The Respondent was granted permission to appeal by decision of 20 June 2019 of Upper Tribunal Judge Coker on the basis it was arguable the Judge had erred in finding the Appellant had acted innocently.

4. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before me.

The hearing

5. The hearing of the appeal was originally listed for 2 August 2019, but on that occasion the entire list had to be adjourned because the presenting officer was indisposed on the morning of the hearing. Having consulted the Appellants and their representatives to ascertain their availability, and secured a court room, the entire list was adjourned to 7 August 2019 in an effort to minimise the expense and delay that the parties would otherwise face (two of the appeals being privately funded). Time for the service of the Notice of Hearings was thereby abridged.

6. On 6 August 2019 the Respondent applied by email of 1255 hours for an adjournment of the entire list on the basis it was anticipated that it would not be possible to provide a presenting officer as a result of seasonal staff shortages. That application was refused by email of 1414

hours on the basis there remained ample time for the Respondent to secure adequate representation, if necessary by resort to the services of the Bar. The application has not been renewed. The Respondent did not attend the hearing.

7. In the circumstances I was satisfied that the Respondent is aware of the hearing. I was not satisfied there was any good reason demonstrated as to why the appeal should be adjourned once again of the Tribunal's own motion. The issues were simple, and it was in the interests of justice to proceed with the hearing without delay and with minimal further expense, and the appeal therefore proceeded in the Respondent's absence, having considered paragraphs 2, 36, and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The challenge raised in the grounds

8. The grounds to the application for permission that was made to the First-tier Tribunal asserted that the Judge's conclusion that the Appellant acted innocently rather than dishonestly was misconceived. The draftsman was plainly under the impression that the Judge's decision turned upon the failure of HMRC to pursue the Appellant for penalties and interest (so that this was determinative of the issue of innocence/dishonesty), and thus set out at length why that failure would be immaterial to the assessment of the evidence that the Judge was required to undertake in order to decide whether the Respondent had discharged the burden of proof to show dishonesty on the Appellant's part.

9. The difficulty with any challenge framed in those terms, as identified in the refusal of permission to appeal of First-tier Tribunal Judge Gumsley of 3 May 2019, is that Judge Boyes did not approach the issue in the manner alleged. Judge Boyes explicitly stated that he did not consider the approach of HMRC to be conclusive, but that it was a matter that he had to take into account [49]. He also took into account that it was HMRC who had identified further errors in the approach taken by the Appellant's accountant to his financial affairs, when his tax return was re-submitted [50].

10. Although there is no express reference to it in his decision, I am satisfied that the approach taken by Judge Boyes to dishonesty was consistent with the guidance to

be found in AA (Nigeria) [2009] EWCA Civ 773; mere negligence, or an innocent mistake, is not to be equated with dishonesty. The Judge did follow the correct structure, and properly applied the principles set out in Royal Brunei Airlines v Tan [1995] UKPC 4, so as to distinguish between mere carelessness and dishonesty

11. In my judgement the approach Judge Boyes took was therefore entirely consistent with the guidance to be found in Balajigari [2019] EWCA Civ 673, promulgated subsequent to the hearing. It was always entirely open to an Appellant when seeking to demonstrate an innocent explanation for the discrepancy between the financial information provided to the Respondent and to HMRC to make reference to the fact that HMRC had either decided to impose no penalty, or, to impose a lower rate penalty as evidence that their enquiries had indicated carelessness or innocent mistake rather than dishonesty. Equally it was necessary that the Tribunal bear in mind that HMRC may decide not to investigate a case fully for other reasons, and that the decisions of HMRC are not determinative of the issues the Tribunal is required to make findings upon.

12. When the application for permission was renewed to the Upper Tribunal the original grounds were repeated, and in addition, it was asserted that the guidance in Balajigari was to the effect;

- If HMRC has not imposed a penalty it does not preclude UKVI from making a finding on dishonesty [#66-7]
- The SSHDs findings under 322(5) are not bound by HMRC's views as these are two public bodies performing different functions under different statutory powers [#69]
- Each case will depend on its own facts, but, where an earnings discrepancy is relied on, it is unlikely that the Tribunal will be prepared to accept a mere assertion from an applicant or their accountant that the discrepancy was simply a "mistake" without a full and particularised explanation of what the mistake was and how it arose [#106]

13. In the circumstances, and notwithstanding the grant of permission to appeal, I am satisfied that this challenge is misconceived. The Respondent does not assert that the decision is perverse in the sense that it is one that was not open to Judge Boyes on the evidence before him. The decision that he reached is more than adequately

reasoned; MD (Turkey) [2017] EWCA Civ 1958. If the grounds are intended to advance a complaint that the Judge failed to give cogent reasons, the reality is that he gave ample reasons.

14. There is of course only one standard of proof applicable: the civil standard of the balance of probabilities. It is quite clear from his decision that the Judge applied throughout the correct standard of proof,

15. The Respondent has not identified any material evidence that was left out of account or any irrelevant matter that was brought into account. Although the guidance to be found in Balajigari was not available to Judge Boyes it is perfectly clear that his decision is consistent with it. He did not treat the failure of HMRC to levy penalties as determinative of the Appellant's honesty, but instead looked at all of the evidence before him, and concluded as he was entitled to do, that this was one of those occasions upon which there had been a genuine and innocent mistake.

16. The Appellant did not seek to argue that the scale of the discrepancy between the financial information provided to the Respondent and to HMRC was insufficient to shift the evidential burden to the Appellant to provide an apparently credible innocent explanation for what had occurred. If he were able to do so, that would in turn give rise to an evidential burden upon the Respondent to establish that the explanation proffered was untrue. That was the President's analysis of how the evidential burden of proof could shift between the parties during an appeal Muhandiramge (section S-LTR.1.17) [2015] UKUT 675. As such Judge Boyes was entitled to find that the Respondent had failed to discharge the legal burden of establishing dishonesty on the part of the Appellant. There was in those circumstances no enhanced public interest in the dismissal of the Article 8 appeal.

17. Neither the grounds to the application for permission to appeal advanced to the First-tier Tribunal nor the grounds to the application advanced to the Upper Tribunal make any reference to the finding by Judge Boyes that the Appellant had met the requirements of paragraph 276B in relation to the period from 6 October 2008 until the date of the hearing on 18 January 2019, and that he was as a result entitled to a grant of ILR.

18. Accordingly it was open to the Judge to conclude that the decision under appeal engaged the Appellant's Article

8 rights and that the balance of proportionality lay in the appeal being allowed since the Appellant had established that he met the requirements of the Immigration Rules.

19. In the circumstances, and as set out above, I am not satisfied that the Judge fell into any material error of law when he allowed the Article 8 appeal, notwithstanding the terms in which permission to appeal was granted. In my judgement the grounds fail to disclose any material error of law in the approach taken by the Judge to the public interest that requires his decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 15 March 2019 contained no material error of law in the decision to allow the Appellant's human rights appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 7 August 2019