



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/22052/2016
HU/00189/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 4 June 2019**

**Decision & Reasons Promulgated
On 13 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M O S

MS K B S

(ANONYMITY DIRECTION MAINTAINED)

Respondents

Representation:

For the Appellants: Ms Jones, Senior Home Office Presenting Officer
For the Respondent: Ms Asanovic, Counsel

DECISION AND REASONS

Introduction

1. The appellant in this case is the Secretary of State and the respondents are Mr S and Ms S a husband and wife. However, for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where the appellants were Mr and Ms S.

Background

2. Mr and Mrs S are married citizens of Nigeria, the first appellant being granted entry clearance as a student on 1 August 2006 and entering the UK on 29 August. The second appellant entered the UK on 12 May 2010 with entry clearance as a Tier 4 dependant from 16 April 2010. They were granted further leave to remain on a number of occasions. On 22 February 2016 the first appellant applied for indefinite leave to remain under Tier 1 which was refused on 22 February 2016 an administrative review was requested on 7 March 2016. The first appellant then applied for indefinite leave to remain on the basis of ten years' continuous lawful residence on 16 March 2016 at which point the application for administrative review was considered withdrawn and the second appellant applied for leave to remain in line. The first appellant's application was refused on 8 September 2016 and his wife's application was refused on 2 November 2016.
3. The appeal originally came before the First-tier Tribunal on 16 November 2017 with those appeals dismissed in a decision promulgated on 30 November 2017. That decision was set aside by the Upper Tribunal in a decision and reasons promulgated on 28 November 2018, with the appeals remitted to the First-tier Tribunal. In a decision and reasons promulgated on 25 March 2019 Judge of the First-tier Tribunal Bristow allowed the appellants' appeals on human rights grounds.
4. The Secretary of State appeals with permission on the grounds that:
 - (1) The Tribunal sets out findings based on the **Muhandiramge (S-LTR.1.7) [2015] UKUT 00675 (IAC)** test based on Counsel's assertion that the respondent's bundle did not contain corroborative evidence. The Secretary of State stated this was not put to the Presenting Officer;
 - (2) The figures quoted in the refusal letter were not disputed and the Tribunal did not consider the appellant's evidence. The Presenting Officer cross-examined on alleged discrepancies in two tax years and the appellants sought to explain these discrepancies. However, the Tribunal did not make findings beyond the **Muhandiramge** point. Similarly, the Tribunal failed to make findings on the absence of evidence from the accountant. It was submitted that the judge materially erred in failing to go on to make findings on the evidence. It was submitted that it was not rational for the Tribunal to make these findings given that the figures were not disputed.

Error of Law Discussion

5. Ms Jones relied on **R (on the application of Khan) v Secretary of State for the Home Department (Dishonesty, tax return, paragraph 322(5)) [2018] UKUT 00384 (IAC)** and in particular paragraphs 32, 33 and 34 which confirmed that where the respondent discovered a significant difference between income declared to HMRC and that claimed in a previous application the respondent was entitled to draw

an inference of dishonesty. She submitted that the appellant had not disputed the HMRC figures for 2011 and 2013 and submitted that this was not a case of the type highlighted by the Court of Appeal in **Balajigari [2019] EWCA Civ 673** in that the appellant had had a proper opportunity to address the issues and that he had been interviewed and had had an opportunity to rebut the allegations. Ms Jones further submitted that paragraph 12 of the appellants' Rule 24 response was not correct in relation to paragraph 4 of the grounds of appeal. Ms Jones further submitted that paragraph 33 of **Khan** reminds that it is not for an appellant to blame the accountant.

6. Ms Asanovic indicated that although the Secretary of State in the grounds for permission to appeal asserted that Counsel's assertion was not put to the Presenting Officer the Presenting Officer had not supplied a witness statement to substantiate this and it was disputed. It was further Ms Asanovic's case that the argument that Secretary of State had not discharged the initial burden of proof was relied on at the initial hearing before Judge Grimmett in November 2017 and was reflected in the skeleton argument dated 16 November 2017 on which the appellant continued to rely.
7. Ms Asanovic relied on her Rule 24 response, it being her submission that permission to appeal was granted by First-tier Tribunal Judge Feeney on different grounds from those pleaded in that where was no dispute about HMRC figures and where that evidence was available it was an error of law not to consider that evidence in determining the appeal and in any event the respondent would have been entitled to rely on the documents supplied by the appellant. Ms Asanovic submitted this was not a **Robinson** obvious point and that the grant of permission went beyond what was permissible. It was the further submission in the Rule 24 response that the procedural protection of the boomerang of proof would be meaningless if it varied depending on what the case for the appellant was; in order to progress smooth progressive appeals, appellants provide information and evidence should the matter proceed past the stage of respondent's case however, that cannot mean that as a result the respondent no longer carries the burden of proof. Ms Asanovic further relied on her Rule 24, that since the date of decision, 8 September 2016, the respondent had completely failed to make good any of the assertions made in the reasons for refusal letter or supply any evidence of these assertions, whereas the first appellant had supplied complete financial information as well as an analysis of his finances by a newly instructed firm of accountants. It was further submitted that there was no difference in the application of burden of proof depending on whether the case was disputed or accepted in part or full and where dishonesty is alleged the original burden of proof must be discharged. Ms Asanovic further relied on **MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)** and **Shehzad and Chowdhury [2016] EWCA Civ 615**

Error of Law Conclusions

8. The First-tier Tribunal Judge set out the **Muhandiramge** burden of proof and the burden of proof “boomerang”. The judge also identified at [38] that the refusal letter does not constitute evidence. It was the judge’s findings that the respondent’s bundle did not contain the first appellant’s tax returns for the years April 2011 and April 2013 and the judge identified what evidence was in the respondent’s bundle. However, it was not disputed by Ms Asanovic that the 2011 and 2013 tax returns were in the appellant’s bundles and as identified in the grounds for permission to appeal and by the permission judge there was no dispute in relation to these figures (although Ms Asanovic indicated that there was a dispute in relation to other issues she accepted that the 2011 and 2013 tax returns were in the appellant’s bundle and were not disputed).
9. I do not agree with Ms Asanovic that the permission judge granted permission on new grounds when in actual fact the permission judge identified that the grounds related to a material misdirection and a failure to make findings including when the evidence in question, (namely the 2011 and 2013 tax returns) was not in dispute. The fact that the evidence was before the Tribunal in the appellant’s bundle was implicit in the grounds.
10. Ms Asanovic was unable to identify any authority which would support her assertion that the judge was correct to ignore the fact that this evidence was not disputed in relation to the 2011 and 2013 HMRC figures and was in the appellant’s bundle. In circumstances where Ms Asanovic indicated that the respondent photocopying the evidence presented in the appellant’s bundle in relation to the 2011 and 2013 HMRC evidence and re-serving it as the respondent’s bundle would have discharged the initial burden of proof, I am of the view that the judge erred in not going on to consider the appellant’s explanations for these figures.
11. As identified in the grounds for permission to appeal, the Tribunal erred in failing to make findings beyond the **Muhandiramge** point in the circumstances where the evidence was before the First-tier Tribunal, including the first appellant’s explanation. Although Ms Asanovic is correct in identifying the burden of proof there was nothing to prevent the respondent relying on the figures which were before the court in the appellant’s evidence and were not disputed, in discharging that initial burden of proof. **Shehzad** confirms including at paragraph 3, that,

“It is also common ground that the Secretary of State bears the initial burden of furnishing proof and deception and that this burden is an ‘evidential burden’. That means that, if the Secretary of State provides ‘prima facie’ evidence of deception, the burden ‘shifts’ onto the individual to provide a plausible innocent explanation, and that if the individual does so the burden shifts back to the Secretary of State”
12. The Secretary of State identified discrepancies including in relation to the 2011 and 2013 HMRC tax returns. The figures in those tax returns were not disputed. The fact that those tax returns were physically in the appellant’s bundle rather than the respondents, did not prevent the

respondent from relying on them to discharge the initial burden of proof, particularly in circumstances where it was undisputed evidence. **MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)** which reminds of the duty on the respondent to provide any document relied on, does not assist the appellants as the documents in question were before the Tribunal. As acknowledged at the hearing before me, **Muhandiramge** confirmed that proceedings before tribunals have been considered to operate with a greater degree of procedural flexibility and informality. Such flexibility is reflected in The Tribunal Procedure Rules 2014, including Rules 4 and 14.

13. In those circumstances it was incumbent of the judge to go on to consider the appellant's explanation for these figures and make findings of fact including in following the guidance in **Balajigari and Others**. Whilst I accept that both **Shen** and **Balajigari** were judicial reviews and this was a statutory appeal that does not alter the duty on the judge to make findings on the evidence. Whilst the claim that the Muhandiramge issue was not raised previously was not actively pursued by Ms Jones and is not made out, the failure of the judge to make findings on the remaining evidence (the appellant's explanation for the discrepancies) was a material error where the 2011 and 2013 HMRC tax returns were in evidence and not disputed.

Notice of Decision

14. The decision of the First-tier Tribunal contains an error of law such that it shall not stand and is set aside. No findings are preserved. Given the nature and extent of the fact-finding required, including in relation to the appellant's explanation for the figures in question, the case is remitted to the First-tier Tribunal, de novo to be considered other than by Judge Grimmett or Judge Bristow.
15. To assist the First-tier Tribunal both parties are to file and serve consolidated bundles of all the evidence being relied on at the remitted hearing.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 12 June 2019

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award was sought or is made.

Signed

Date: 12 June 2019

Deputy Upper Tribunal Judge Hutchinson