



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

Appeal Numbers: HU/24669/2018
HU/24667/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 15 May 2019**

**Determination Promulgated
On 2 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VIKAS BHASHARBHAI NANDURKAR

and

MRUNAL VIJAY AMBADE

(Anonymity Directions not made)

Respondents

Representation:

For the Appellant: Mr Whitwell, Home Office Presenting Officer

For the Respondents: Mr Knafler, Queens Counsel for Eldons Berkeley
Solicitors, London

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.

2. The appellants are citizens of India born on 28 February 1985 and 4 August 1987 respectively. They appealed against the decisions of the respondent dated 29 November 2018 refusing the first appellant's application for indefinite leave to remain on a 10 year basis. The second appellant is the first appellant's dependant. The appeals were heard by Judge of the First-Tier Tribunal Housego on 22 January 2019 and allowed on human rights grounds in a decision promulgated on 12 February 2019.
3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal O'Brien on 9 April 2019. The permission refers to the grounds which state that the Judge failed to make his findings regarding dishonesty in accordance with ***Khan*** [2018] UKUT 384 (IAC). The grounds state that the Judge failed to assess the first appellant's motive and failed to make findings on his character. They also state that the Judge made no findings in respect of the absence of any real income from the first appellant or regarding his approach to HMRC. The underlying refusal was predicated on the alternative bases of a false under-declaration of income to HMRC or a false over-declaration of income to the Home Office. At paragraph 52 of the decision it was found that the first appellant's account of his earnings, through company dividends, was not reasonably likely to be true and was not credible. The Judge found on two occasions that the amount in question was immaterial to the application but does not give any reasons why he found that that was the case. The grounds state that that is an arguable error of law and it is arguable that the dividend earnings must have been material for the Tier 1 (General) Migrant application. They state that the Judge failed to make a finding on the material issue of the first appellant's motives when providing the information. The permission states that all the grounds are arguable.
4. There is a Rule 24 response which refers to the provenance of the first appellant's consultancy earnings and states that on a proper examination of all the evidence, the first appellant was paid consultancy earnings exactly as he said he was and there was a significant amount of evidence in the bundles before the First-Tier Tribunal about this.
5. A preliminary issue was raised at the hearing. This was that the grounds were drafted before the case of ***Balajigari & Others -v-Secretary of State for the Home Department*** [2019] EWCA Civ 673 was issued and as this is the highest authority on this type of issue the grounds are not benefitting from this case. I was referred to paragraphs 32, 37, 66, 67 and 69 of that case.
6. Counsel directed me to the First-Tier Judge's decision at paragraph 52 onwards and in particular the last sentences of paragraph 54 and the fact that the first appellant had under-declared income in 2011/2012 which led to additional tax being due, but HMRC taxed him on this through his PAYE code in the next year which meant that when he filed his return in 2016 he had nothing more to pay, although there was a further small error. He paid the extra tax relating to this. This paragraph states that the first

amount of undeclared income cannot be a deception because HMRC knew about it and collected the tax without a return the next year, imposed no penalty and took no action. It was pointed out that at paragraph 66 of ***Balajigari*** it is stated that if tax is underpaid there is always an obligation to pay a penalty and one should always be imposed and it was submitted that in this case no penalty was imposed so HMRC could not have found that the appellant was dishonest. At paragraph 67 of ***Balajigari*** it is stated that there is no duty on HMRC to impose a penalty in every case where it might fall to be imposed.

7. I was referred to paragraph 54 of the First-Tier Judge's decision which states that there was no deception involved and HMRC did not regard any underpayment as serious.
8. Counsel pointed out that the appellants' applications were refused and reliance was placed on paragraph 322(5) of the Immigration Rules. It was submitted that this is not a purpose which that rule is intended to cover. It was submitted that Rule 322(5) is inappropriate as it is intended for sham marriages, national security and criminal convictions. In the First-Tier Judge's decision it is stated that the first appellant in this case has been employed for years and it cannot be correct to say that someone who is in the UK lawfully and is gainfully employed is unsuitable to remain by reasons of errors in tax returns involving small sums in the past years.
9. There were earnings discrepancies but the First-Tier Judge does not find that these were deliberate or were dishonest submissions of false earnings.
10. The Presenting Officer submitted that the Judge's approach is based on the wrong premise and that when the case of ***Balajigari***, is considered the fact that there has been no enforcement action by HMRC does not mean that there has been no dishonesty on the part of the first appellant. He submitted that Rule 3225(5) does apply to someone under or over-declaring income.
11. Counsel submitted that the application for permission to appeal was made late and he submitted that the Judge did not make the errors the Home Office states he made. He submitted that when the Judge's conclusions are considered at paragraphs 55 and 56 the Judge finds that there is no dishonesty. He submitted that the First-Tier Judge found that, because matters had been remedied, the first appellant had not been dishonest so there is no error of law. He submitted that if I find there is an error of law, it will not be material. He submitted that HMRC knew about the additional income and collected tax on it the next year. The First-Tier Judge found that as HMRC did not charge a penalty and took no action against the first appellant, they clearly found the first appellant was not guilty of any serious matter. He submitted that there is no error of law and certainly no material error of law in the First-Tier Judge's decision and that the First-Tier Judge's decision should stand.

12. Counsel submitted that although the Judge accepted that there was no dishonesty relating to HMRC he stated that he was not satisfied with the source of the earnings as set out by the first appellant. Counsel submitted that this is only an aside and it is clear that the first appellant had earned money at that level and had paid tax on his earnings. He submitted that the respondent has not made any mention of the source of income when considering whether the first appellant is suitable.
13. The first appellant is now stating that he has an account of where his income came from and this has been supplied.
14. Counsel submitted that the Judge has taken everything into account when making his decision, although the way he has done this is unusual.
15. The Presenting Officer submitted that new evidence was sent in the week before this hearing and no reasons have been given as to why it was not submitted to the First-Tier Tribunal. I was asked to consider the payslips and the dates and I was asked to consider the skeleton argument.

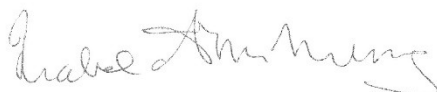
Decision and Reasons

16. No explanation has been given for late submission of the additional evidence on behalf of the first appellant as clearly this evidence should and could have been before the First-Tier Tribunal. I have however no reason to doubt this evidence. Had it been before the First-Tier Judge it would have strengthened his reasons for allowing the appeal. The Judge finds that the appellant did not dishonestly under-declare income to HMRC or over-declare income to the respondent.
17. With regard to the credibility of the appellant's account of how he earned the company money, the additional evidence supports the appellant's evidence. In any case the First-Tier Tribunal Judge took this into account and did not find that the way the appellant earned his income could be relied on as a basis for rejecting the application for leave to remain. The Judge also found that it was definitely genuine income on which the full tax had been paid.
18. Again with regard to the lack of evidence substantiating his income, this has now been provided. The First-Tier Judge found that the appellant had earned sufficient income to qualify for leave to remain, without relying on the company income.
19. It cannot be right to say that the First-Tier Judge failed to make a finding about whether the appellant had dealt honestly with HMRC. The Judge carefully considered this in his decision.
20. The First-Tier Judge therefore found that the appellant had dealt honestly with the respondent and the HMRC in terms of declaring his company income. This was the issue that had to be decided by the Judge and

proper reasons are given for reaching the decision he did. Based on what was before the Judge and the grounds of application, the Judge could not have dismissed the appeal based on how the appellant said he earned his money.

Notice of Decision

21. I find that there is no material error of law in the First-Tier Judge's decision



and that it should stand. The appeals by the first and second appellants on human rights grounds should be allowed.

22. Anonymity has not been directed.

Signed

Date 28 June 2019

Deputy Upper Tribunal Judge Murray