



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00467/2019
HU/02688/2019

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2019

Decision & Reasons Promulgated
On 14 January 2020

Before

HIS HONOUR JUDGE BIRD
SITTING AS JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

DOST MUHAMMAD ALI
ASHRAF ALI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Hodgetts, Counsel, instructed by ATM Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First Tier Tribunal (“FTT”) Judge R Sullivan, sent out on 24 July 2019, dismissing the appellants’ appeals against the Secretary of States’ refusal to grant indefinite leave to remain.

The Background

2. The appellants are married. The first appellant was born in Pakistan on 17 July 1982 and first entered the United Kingdom as a student on 4 September 2006. He was granted leave to remain until 31 March 2010. On 5 March 2010 he applied for further leave to remain as a tier 1 post study work migrant and leave was granted to 20 March 2012. On 2 April 2011 he applied for further leave to remain as a tier 1 general migrant. On 21 May 2013 he applied for further leave which was granted until 3 July 2016.
3. The second appellant was born in Pakistan on 17 April 1988 and first entered the United Kingdom on 4 March 2016 as the first appellant’s spouse. She was granted leave to enter until 3 July 2016.
4. On 22 April 2017 the first appellant made an application for indefinite leave to remain on the basis of 10 years’ lawful residence. The second appellant applied for indefinite leave to remain on 22 April 2017 relying in her husband’s application.
5. The first appellant’s application was refused on 20 December 2018 and the second appellants was refused on 28 January 2019. The first appellant’s refusal was based on earnings declarations made in respect of the tax years 2010/2011 and 2012/2013. There was a discrepancy between the earnings declared to the Home office for those periods in respect of his immigration applications and the earnings declared to HMRC for tax purposes. The Secretary of State refused the application relying on paragraph 322(5) of the Immigration Rules, on the ground that the it was undesirable to permit the first appellant to remain in the United Kingdom. The second appellant’s application was in effect tied to that

of her husband. The parties proceed on the basis that the outcome of her appeal is parasitic upon her husband's appeal (see paragraph 9 of the FTT decision).

Discrepancy Details

6. In his tax return for the year 2010/11 the first appellant declared PAYE income of £18,462 and no income from self-employed earnings. A neighbour prepared the tax return for him. On or about 2 April 2011 the first appellant declared his earnings to the Secretary for the 2010/11 tax year as including £12,985 of self-employed earnings. On 11 November 2015 the first appellant informed HMRC that he had in fact earned a profit of £12,985 from self-employed in the tax year 2010/11. On 4 May 2016 the first appellant was assessed on the basis of the new declaration to pay further tax in the sum of £3,179.40 plus interest bringing the total to £3,585.86.
7. In the immigration application made on 21 May 2013 the first appellant claimed to have income from self-employment in the tax year 2012/13 of £7,260. In his tax return for the same year, which he completed on-line, he declared no income from self-employment. On 27 February 2014, a matter of weeks after filing the return, he made a voluntary declaration to HMRC of a profit from self-employed income of £6,650.

The Appeal

8. Although no right of appeal lies against a refusal to refuse indefinite leave to remain, it is here accepted that the appellant's Art.8 rights are engaged. A right of appeal therefore lies.
9. Paragraph 322(5) of the Immigration Rules specifically gives rise to a presumption the leave will be refused as a result of:

“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.”

10. The FTT Judge found that the first appellant had been dishonest in respect of income declared to HMRC in the tax years 2010 to 2011 and 2012 to 2013. We will refer in more detail to her careful decision below.
11. The grounds of appeal are detailed and lengthy, but can fairly be summarised in the main as asserting that the FTT Judge made material errors of law by failing to address the correct test when determining dishonesty. We deal with the grounds of appeal at paragraphs 33 and onwards below.

The correct approach to dishonesty

12. The correct approach to be taken by the Tribunal when dealing with questions of dishonesty in earnings discrepancy cases under para.322(5) of the Immigration Rules is set out in the Court of Appeal decision in R (Balajigari) v SSHD [2019] 1 WLR 4647.
13. We will consider the correct approach in some detail and then go on to ask ourselves of the FTT has failed to follow that correct approach.
14. In order to put the issue of dishonesty in context, it is necessary to look at paragraphs 34 to 40 of Balajigari. Briefly, in considering the “undesirability” of permitting a person to remain in the United Kingdom, the Secretary of State should have: “...reliable evidence ofsufficiently reprehensible conduct” and then undertake “an assessment, taking proper account of all relevant circumstances known about the applicant at the date of the decision, of whether his presence on the UK is undesirable (this should include positive features of their character)” (see para.34 of Balajigari). This assessment is referred to as the balancing exercise (see para.38 and 130).
15. Once the question of undesirability is dealt with, a discretion arises (see Balajigari para.39). This appeal is not concerned with the exercise of the discretion and we need say no more about it.

16. In an earnings discrepancy case, the provision by the applicant of inaccurate earnings figures to HMRC or to the Secretary of State is capable of constituting “reliable evidence of sufficiently reprehensible conduct”, but only if there is a finding that the inaccurate figures were provided “dishonestly” (at para.37(2) the Court of Appeal noted that “in the context of an earnings discrepancy case it is very hard to see how the deliberate and dishonest submission of false earnings figures whether to HMRC or to the Home Office [would not be “sufficiently reprehensible” and so not reach the necessary level of dishonesty]”).
17. If satisfied that inaccurate figures were provided dishonestly, the next step would be to assess, taking proper account of all relevant circumstances known about the applicant at the date of the decision, whether his continued presence in the UK is undesirable. That exercise is clearly important and should be carried out in a balanced way. It should include positive features of the applicant’s character (*Balajigari* para.35) but will also (given that it is undertaken after, and in the light of, a finding about dishonesty) be taken against the background of the finding of dishonesty.
18. A significant difference between the income declared to the Secretary of State and income declared to HMRC is therefore, of itself, not enough to justify a conclusion (even a rebuttal conclusion) of dishonesty. There must be more. A significant difference in declared earnings is sufficient to raise a suspicion of dishonesty. In order fairly to deal with the suspicion, the applicant should be given an opportunity to provide any innocent (or at least, non-dishonest) explanation. If the applicant is asked for an explanation and provides none, or provides an explanation the Secretary of State finds to be unconvincing, it may be appropriate for the Secretary of State to “infer” dishonesty (see *Balijigari* at para.42). To put it another way, the Secretary of State must decide, considering the discrepancy in the light of any explanation (or the lack of an explanation) if the discrepancy is dishonest.
19. As to the “inference” of dishonesty, we remind ourselves, as Lord Neuberger explains at paragraph 126 of *Stack v Dowden* [2007] 2 AC 432, that “an inferred

intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements” .

20. In stating the position in this way, the Court of Appeal emphasised that there should be no inference of dishonesty until all of the disagreed with the view expressed by Martin Spencer J in Shahbaz Khan [2018] UKUT 384 (IAC) that a significant difference between declared incomes, entitled the Secretary of State to draw an inference that the applicant had been deceitful or dishonest and that once that inference had been drawn the applicant would have an opportunity to present evidence to displace it and the Secretary of State would then need to “carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty”.
21. Dealing with the question of standard of proof the Court of Appeal agreed with Martin Spencer J’s approach in Khan that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty. This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences (see para.43 of Balijigari).
22. The guidance in Balijigari (see para.37) on the exercise of determining dishonesty is succinct and focussed. The Court of Appeal refer to para.74 of Ivey v Genting Casinos [2018] AC 391 at para.37(1) of the judgment. Para.74 provides (insofar as relevant as follows):

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the

question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

23. However, the Court of Appeal go on to note (para.37(1)) that, in practice, a Tribunal is unlikely to need to make any reference to these principles. It seems to us that the guidance set out in Balajigari at para.42 allows the fact finder to approach the question without reference to the detail of Genting. The decision maker must consider the discrepancy in the light of the explanation given and may then come to the conclusion that the applicant has been dishonest. In so doing the decision maker is bound to apply "*the (objective) standards of ordinary decent people*".
24. To summarise the correct approach set out by the Court of Appeal in Balajigari, assuming there is a significant difference in declared incomes, the Secretary of State should seek an explanation for the difference. She should then consider, in light of the explanation whether the applicant was acting dishonestly in declaring significantly different incomes. If she concludes that there is no dishonesty that is an end of the matter. If, on the other hand, she decides that there was dishonesty, then she must go on to conduct a balancing exercise, taking account of all relevant factors and decide if the applicant's continued presence in the United Kingdom is undesirable. If she concludes it is not, that is an end of the matter. If she concludes it is, the discretion then arises.

The Decision

25. At paragraphs 10 to 13 of the FTT decision, the Judge sets out the law. The Judge rightly identifies at paragraph 11 that guidance as to the burden and standard of proof in respect of dishonesty in cases such as this is to be found in Khan and Balajigari. Those cases clearly establish that the burden is on the Secretary of State to establish dishonesty and that the standard of proof is the balance of probabilities (bearing in mind the serious nature of the allegation

and the serious consequences which follow from such a finding of dishonesty) see para.43 of *Balajigari*.

26. The FTT Judge had before her evidence from the appellants in the form of witness statements. She heard oral evidence from the first appellant. The second appellant's witness statement was agreed. She had a witness statement from the first appellant's neighbour. He was not called to give evidence and his statement was not agreed. The FTT therefore had before it a good deal of evidence of the first appellant's explanation for the discrepancy between both tax returns and declarations made to the Home Office.
27. At paragraph 19 of the decision the FTT judge sets out the factors that apply to both returns (both discrepancies). One such factor is specific to the first appellant (he is an IT expert and holds a Masters Degree in Accounting and Information Systems) the remaining 2 are generic. The FTT Judge took account of the fact that the online tax return system works by posing a number of initial questions the answers to which determine the next step. For example, the system will ask if the taxpayer has any income from self-employment. If the answer is "yes" then the taxpayer will be prompted to provide details of that income. If the answer is no, no further questions on self-employed income will be put. The FTT judge also refers to the fact that a summary sheet is provided for the taxpayer to check through.
28. At paragraph 20 the Judge made findings as to the 2010/11 tax return and at paragraph 21 makes findings in respect of the first appellant's explanation for the discrepancy. At paragraph 22 the Judge makes findings in respect of dishonesty. In doing so the Judge takes account of the fact that the first appellant made a voluntary declaration in respect of additional income to HMRC and takes into account his explanation for the initial under-declaration and the evidence of his neighbour who is said to have completed the tax return for him.
29. At paragraph 23 the FTT Judge makes findings about the 2012/13 tax return. At paragraph 24 the Judge deals with the first appellant's explanation for the

under-declaration and at paragraph 25 the Judge makes her findings in respect of dishonesty. By way of introduction the Judge expressly gives credit for the fact that there was a voluntary declaration swiftly made to deal with the under-declaration.

30. Having dealt with dishonesty the Judge moves on at paragraph 26 to list specific factors including his established life in the United Kingdom which are to his credit. At paragraph 27 the Judge lists those factors, including the dishonesty she has found, which weigh against him. In our view the FTT Judge was here conducting the required balancing exercise.
31. At paragraph 28 the Judge turned to the *Balijigari* guidance. She makes 3 points. First there is reliable evidence of his conduct, secondly his conduct was (as she has found) deliberate and dishonest and thirdly his presence on the United Kingdom is undesirable. It seems to us that the first 2 points cover the need to show “reliable evidence of ... sufficiently reprehensible conduct” in accordance with the *Balijigari* guidance. The third point is the outcome of the assessment or balancing exercise required. The factors taken into account are those set out at paragraphs 26 and 27.
32. At paragraphs 29 to 33 the Judge deals with procedural fairness and at paragraph 34 with proportionality asking herself if there are compelling reasons why leave should be granted.

The grounds of appeal

33. The appellants rely on six grounds of appeal. In summary:
 - a. Insufficient reasons are provided for the finding of dishonesty and the finding is irrational in that it takes no account of “motivation”
 - b. The FTT Judge misunderstand *Khan* and failed to take account of the fact that the decision had in fact been overruled or disapproved of and failed to apply the correct burden and standard of proof

- c. The FTT Judge erred in her approach to the witness evidence of the appellant's neighbour
 - d. The FTT Judge failed to consider "carelessness"
 - e. The Judge failed to take account of the fact that HMRC had not issued a penalty and failed to take proper account of the appellant's accountant's evidence
 - f. The FTT Judge failed to conduct the requisite balancing exercise.
34. We will deal with the grounds in the same order:
- a. The FTT Judge dealt carefully with the evidence before her. It is plain that she had in mind the swift correction of the 2012/13 return. Bearing in mind the approach set out in *Balajigari* it seems to us that the FTT Judge explained her conclusions with appropriate care and there is no basis on which can be said that the conclusion was not open to her. The Court of Appeal in *Balajigari* were at pains to point out (para.37(1)) that there would generally be no need for the FTT to refer to the detail set out in *Genting*. In our view the FTT did not need to give specific consideration to motivation. The FTT correctly applied the relevant test and the approach to finding dishonesty as a matter of law cannot be faulted.
 - b. It seems to us that the decision in *Khan* was largely approved by the Court of Appeal in *Balajigari*. Insofar as *Khan* addressed the standard of proof the Court of Appeal expressly endorsed the decision (see para.43). In our view it is plain that the FTT Judge properly applied the law and did not start from the assumption that a material discrepancy in earnings declarations gave rise to an assumption of dishonesty. Rather the FTT Judge carefully deals with the explanation for the discrepancy and makes findings of fact before going on to consider the question of dishonesty. There is no basis on which it can be said that that the FTT Judge (having referred to the decisions which deal with the burden of proof at para.11) then failed to approach the issue correctly. Again in our view the

structure of the judgment makes it clear that the FTT Judge approached the matter correctly.

- c. There is nothing in this ground. The FTT Judge considered a witness statement prepared by the appellant's neighbour and was fully entitled (and indeed right) to accord the statement less weight than would have been the case if the witness had been tendered for cross-examination.
- d. There is nothing in this ground. The FTT Judge dealt with the evidence and clearly considered whether the appellant had made a "genuine mistake" in respect of each return (see para.22(c) and para.25(a)).
- e. The FTT Judge had evidence that no penalties were charged (see the appellant's witness statement at paragraph 9(c)(ii)) and at paragraph 16 of the decision makes it plain that she had taken the appellant's bundle (which included his witness statement) into account. The decision makes express reference to the absence of penalties at paragraph 18 where the FTT Judge notes the appellant's submission that this means HMRC accepted there had been a simple mistake. In our view the Judge clearly took the absence of a penalty into account. Further the FTT Judge referred to evidence from the appellant's accountant at paragraph 24(d) and (e). In the latter sub-paragraph the FTT Judge noted the accountant's explanation fell short of the "full and particularised explanation" generally required (see *Balajigari* para.106). The accountant's letter was in the appellant's bundle which the Judge confirmed she had taken into account.
- f. It is important to understand how the balancing exercise should be conducted. It is clear from *Balajigari* that the assessment follows on from any finding of dishonesty. In our view, the FTT Judge conducts the exercise at paragraphs 26 and 27 expressing her conclusion at paragraph 28(c). At paragraph 27 the Judge refers to her findings of dishonesty and refers to the exercise of "weighing" evidence against the background of those findings.

35. We therefore find that none of the grounds of appeal is made out. In granting permission to appeal, FTT Judge Osborne described the FTT Judge's decision as "careful". He carved out from that description the potential failure to address carelessness. We have concluded (see appeal ground (d)) that the decision makes it plain that the FTT Judge considered the possibility of a genuine mistake. We do however agree that the FTT Judge's was careful and in our view carefully reasoned.
36. In our view the FTT Judge considered all of the evidence before her, including the oral evidence of the first appellant after cross examination. It seems to us that the FTT Judge's conclusions on dishonesty were essentially factual. The Judge applied the law correctly and was entitled to reach the factual findings she reached. For those reasons we dismiss the appeal.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

The appellants' appeals to the Upper Tribunal are dismissed.

The decision of the First-tier Tribunal stands.

Signed: N Bird

His Honour Judge Bird, sitting as a Judge of the Upper Tribunal

Dated: 10 January 2020