Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03728/2019
HU/05034/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 January 2020	**On 10 January 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) SAQIB [M]
(2) SAIRA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: In person
For the Respondent: Mr Jarvis, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are Pakistani citizens who were born on 21 January 1983 and 8 September 1984 respectively. They appeal, with permission granted by First-tier Tribunal Judge O'Brien, against decisions which were issued by First-tier Tribunal Judge White, dismissing their appeals against the respondent's refusal of their human rights claims.

Background

2. The first appellant entered the United Kingdom in 2007, holding entry clearance as a student. He was subsequently granted leave to remain under Tier 1 of the Points Based System on three occasions. The second appellant joined him in 2012

and held leave as his dependant throughout. Their daughter was born in the UK in 2013. Having completed ten years' residence in the United Kingdom, the first appellant applied for ILR under paragraph 276B. The second appellant could not apply as his dependant in that application. She made a separate application on Article 8 ECHR grounds, with their daughter named as a dependant on that application. The first appellant's initial ILR application was refused without a right of appeal. His second application was refused on 14 February 2019. The second appellant's application was refused on 8 March 2019.

3. The grounds of refusal in the first appellant's appeal gave rise to what has become known as an earnings discrepancy case (see Balajigari [2019] EWCA Civ 673; [2019] 1 WLR 4647, at [4]). That is to say that the respondent was aware that there was a discrepancy between the earnings relied upon in a previous application for leave to remain and the sums provided to Her Majesty's Revenue and Customs ("HMRC") for the same period. In particular, the respondent noted that the first appellant had declared significantly more income in his 2011 application for leave to remain than he had declared in his tax return for that year. The first appellant stated, in a questionnaire which asked him to account for the discrepancy, that the lower sum provided to HMRC was attributable to an error on the part of his accountant and that he had taken steps to correct this error by making contact with HMRC in 2015. The respondent concluded, however, that the first appellant had been dishonest in his dealings with either HMRC or the Home Office. It was for that reason that his application was refused on general grounds. It was that conclusion which also underpinned the respondent's subsequent decision on the second appellant's application.

The Appeal to the First-tier Tribunal

4. The appeals came before the judge on 9 May 2019. The appellants were present but unrepresented. The respondent was represented by a Presenting Officer. The Presenting Officer applied for an adjournment on the basis that the respondent had failed to produce a bundle in the first appellant's case. The judge understandably felt that it was not in the interests of justice to adjourn the appeal for that reason and he proceeded with the hearing. He received oral and documentary evidence from both appellants and a submission from Presenting Officer and both appellants. He then reserved his decision.

5. The judge issued separate decisions on the appeals. In the first appellant's appeal, he found that the respondent had discharged the burden of proving that his conduct in 2011/2012 had been dishonest. He found that the appellant had either deceived the respondent in order to earn the requisite number of 'points' under Tier 1 or that he had deceived HMRC in order to reduce his tax liability: [16]. He found that the general grounds for refusal were accordingly made out and that the interference proposed with the first appellant's private life was justified and proportionate in the circumstances: [17]-[25]. He carried his primary finding of fact across into the second appellant's appeal, which was dismissed on Article 8 ECHR grounds for like reasons.

The Appeal to the Upper Tribunal

6. The appellants instructed solicitors to assist them at this stage. Advice was sought and grounds were subsequently settled by Mr Dhanji of counsel. Three grounds were advanced:

   (i) The judge had erred in law in failing to consider of his own volition whether to adjourn the hearing so that the first appellant's accountant could attend to give oral evidence;

   (ii) The judge had failed to apply the correct approach, as disclosed by cases including Balajigari and R (Khan) v SSHD [2018] UKUT 384 (IAC); [2019] Imm AR 239; and

   (iii) The judge had failed to take into account the answers given by the first appellant in the questionnaire he had completed at the respondent's request.

7. It will be noted that the each of these grounds relates specifically to the determination of the dishonesty allegation in the first appellant's appeal. As counsel noted in the grounds of appeal, however, the judge's finding of dishonesty on the part of the first appellant formed the essential foundation for the dismissal of both appeals. Permission was granted by Judge O'Brien on each of these grounds.

8. The appellants appeared before me in person, although they were accompanied by a gentleman who was said to have been the first appellant's accountant at the material time. The first appellant told me that they had been unable to pay for lawyers to represent them at the hearing because he was not permitted to work.

9. I explained that the issue before the Upper Tribunal was whether there was a legal error in the decision made by the FtT. I ensured that the appellants had copies of the salient documents (including the grounds of appeal and the decisions of the FtT) and that they were able to follow the hearing in English. These preliminaries having been completed, Mr Jarvis helpfully indicated that he intended to make a concession and that it might assist if I heard from him first. I agreed to do so.

10. Mr Jarvis indicated that the respondent was prepared to accept that the judge had fallen into procedural error in the manner contended in ground one. The grounds of appeal which had been settled by counsel provided the context in which the complaint was advanced. The appellants were unrepresented and the judge's approach should have been informed by Chapter 1 of the Equal Treatment Bench Book, which deals with Litigants in Person and Lay Representatives. This was a case in which the first appellant had stated all along that it was his accountant who was at fault in respect of the relevant tax return. There were letters from his accountant but no witness statement, and the accountant had not attended the hearing. When asked about the non-attendance of his accountant, the first appellant had said that he was willing to attend but that he, the appellant, was not aware that the accountant would be permitted to attend. The judge nevertheless proceeded to hold against the appellant the

absence of detail in the accountant's letters and the absence of the accountant from the hearing. Had the appellants been represented, that would have been entirely proper. In the circumstances of this case, however, and given the guidance in Chapter 1 of the ETBB, the judge should at least have considered whether the appellants should have been afforded an opportunity to bring the accountant to the hearing.

11. Mr Jarvis submitted that these concerns were exacerbated by the fact that a number of points which had been taken against the first appellant did not appear to have been put to him. An example of this difficulty was at [13] of the judge's decision, in which he expressed doubt about the accountant's written explanation for the discrepancy (which was that he had muddled the appellant's earnings with those of another client) because the accountant said 'nothing about whether the appellant saw the tax return'. The manner in which that concern, and others on page five of the judge's decision was phrased, suggested that the point had not been put to the appellant. If, as was clearly the case, these concerns were to form a prominent part of the judge's assessment of the first appellant's truthfulness, they should have been raised with him. It was far from clear that any such points had been put to the appellant, whether by the Presenting Officer or by the judge.

12. In the circumstances, Mr Jarvis submitted that the appellants had not had a fair hearing and that the correct course was for the appeal to be allowed and remitted to another judge at Taylor House for determination afresh. He added two observations. Firstly, that the Upper Tribunal was not bound by the respondent's concession and was required to take its own view on the question posed by s12 of the Tribunals, Courts and Enforcement Act 2007 (ie whether the decision of the FtT contained a material error of law). Secondly, that in making the concession he had made, he did not intend any criticism of the judge, who was doubtless facing a heavy list and an appellant who gave no indication of requiring an adjournment. In these circumstances, it was perhaps understandable that the judge had not turned his mind fully to the question of what was necessary in order to ensure that this particular appellant had a fair hearing.

Discussion

13. I indicated at the hearing that I agreed with all that Mr Jarvis had said. I accept, in particular, that the judge erred procedurally in failing to consider of his own volition whether to adjourn the hearing so that the appellant's accountant could attend. The letters which had been written by the accountant were plainly inadequate. As the judge noted at [11] of his careful decision, they were 'brief and devoid of detail'. It was, as the judge also noted, 'remarkable' that a professional accountant could muddle two clients' files and reduce the first appellant's self-employed earnings by £32,000 as a result. These were proper concerns but the appellants were unrepresented. They had received no professional assistance with the preparation of their cases. When the absence of the accountant was raised with the first appellant, he is recorded to have said to the judge that the accountant was willing to attend court. Given the guidance in Chapter One of the ETBB, I agree with Mr Jarvis that it was incumbent on the judge, as a result of these circumstances, to consider whether it was necessary to

give the first appellant an opportunity to bring the accountant to court to respond to the concerns in the judge's mind. I am satisfied that this was a procedural error which vitiated the judge's central conclusion that the first appellant had employed deception in his past dealings with the respondent and/or HMRC.

14. Given the nature of the error in the FtT's decision, the proper relief is for the appeal to be remitted to the FtT for redetermination de novo by a judge other than Judge White. I explained to the first appellant at the hearing that this would be the outcome and I said that I would make directions at the end of my decision, enabling him and his former accountant to understand what would be necessary in advance of the next hearing. Those directions are as follows:

In the event that the appellants intend to rely on oral or documentary evidence from the first appellant's former accountant, they must send the following to the First-tier Tribunal no later than 14 days in advance of the next hearing:

(i) Evidence of the accountant's identity and his professional standing;
(ii) A statement written by the accountant, explaining in detail how he came to confuse two client files with the result that the first appellant's earnings were reduced by £32,000;
(iii) Contemporaneous evidence in support of the statement at (ii), if necessary suitably redacted so as to protect the identity of any third party.

15. I also explained to the first appellant and his accountant that they would be well advised to read Judge White's decision carefully before attempting to comply with these directions. As I said to them, the reason that the judge's decision has been set aside is not because the concerns he expressed were in any way invalid; it is because the appellants were not given an opportunity to address those concerns. They now have that opportunity and it is imperative that they use it. In the event that they require further explanation (but not legal advice) in advance of the hearing before the FtT, they are always able to make contact with one of the FtT's Caseworkers at Taylor House.

Notice of Decision

The decisions issued by the First-tier Tribunal were erroneous in law and are set aside. The appeals are remitted to a judge other than Judge P-J S. White for hearing de novo.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

6 January 2020