Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09202/2018

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 19 December 2019	**On 17 June 2020**

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

MUHAMMAD ASHFAQ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, instructed by Jones Whyte LLP Solicitors.
For the Respondent: Mr Govan, Senior Home Office Presenting Officer.

DECISION AND REMITTAL

1. The appellant, a national of Pakistan, appealed to the First-tier Tribunal against the decision of the Secretary of State on 27 February 2018 refusing him indefinite leave to remain under paragraph 322(5) of the Statement of Changes in Immigration Rules, HC 395 (as amended).

2. This is an 'earnings discrepancy' case. Three such cases were in the Tribunal's list on a single day. They are not otherwise linked, but the legal principles are the same in each case. Thus, the following analysis appears in each of the judgments.

3. In these cases, the appeal is against the refusal of indefinite leave to remain on the basis of ten years' lawful residence, under paragraph 276B of the Statement of Changes in Immigration Rules, HC 395 (as amended). The reason for the refusal is not that the applicant did not meet the basic requirements of paragraph 276B, but on one of the 'General Grounds for Refusal', paragraph 322(5). That paragraph indicates that leave 'should normally be refused' on the ground 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."

4. Among the various ways in which a person may accumulate ten years' lawful residence, some, including in particular, presence in the United Kingdom under the points-based system as a Tier 1 (General) Migrant ("T1GM"), will have required the person concerned to obtain extensions of leave. The applications for the extensions in turn required the applicant to declare a particular level of earnings. The next steps in the story so far as the Home Office is concerned are set out as follows by Underhill LJ, giving the judgment of the Court of Appeal in Balajigari and others v SSHD [2019] EWCA Civ 673:

> "4. The Home Office became concerned that there was a widespread practice of applicants for leave to remain as a T1GM claiming falsely inflated earnings, particularly from self-employment, in order to appear to meet the required minimum; and from 2015 it began to make use of its powers under section 40 of the UK Borders and Immigration Act 2007 to obtain information from Her Majesty's Revenue and Customs ("HMRC") about the earnings declared by applicants in their tax returns covering the equivalent period. This information disclosed significant discrepancies in a large number of cases. It also revealed what appeared to be a pattern of taxpayers who had in earlier years submitted tax returns showing earnings that attracted little or no liability to tax subsequently submitting amended returns showing much higher levels of earnings, over the required minimum, in circumstances which suggested that they were aware that the previous under-declaration might jeopardise a pending application for leave to remain. There were also instances of returns being submitted belatedly where none had been submitted at the time and where an application for leave was pending ….
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> 5. It has been Home Office practice to refuse applications for ILR in all, or in any event the great majority of, cases where there are substantial discrepancies between the earnings originally declared to HMRC by a T1GM applicant (even if subsequently amended) and the earnings declared in the application for ILR or a previous application for leave to remain ("earnings discrepancy cases"), relying on the "General Grounds for Refusal" in Part 9 of the Immigration Rules. Initially it relied specifically on paragraph 322 (2), which applies in cases where an applicant has made a false representation in relation to a previous application. Latterly, however, it has relied, either additionally or instead, on paragraph 322 (5), which embraces more general misconduct.…

> 6. It is the Secretary of State's case that his policy and practice is only to rely on paragraph 322 (5) where he believes that an earnings discrepancy is the result of deliberate misrepresentation either to HMRC or to the Home Office, in other words only where it is the result of dishonesty. But a large number of migrants have claimed that in their cases errors which were the result only of carelessness or ignorance have wrongly been treated as dishonest, and that the Home Office has been too ready to find dishonesty without an adequate evidential basis or a fair procedure …"

5. In Balajigari, the Court had before it cases where the challenge had been by way of Judicial Review, because there was no right of appeal against the decisions taken by the Secretary of State. It considered a range of arguments in support of the challenges. It concluded that paragraph 322(5) is not limited to cases of criminal conduct, threats to national security, war crimes or travel bans (para [31]), although the dishonest submission of false figures to either the Home Office or HMRC would be criminal conduct (para [37(3)]). Thus the paragraph could properly and lawfully be deployed against a person who had made different statements of his income for the purposes of obtaining leave and for the purposes of tax (para [35]). But the applicant's conduct must be dishonest in the Adedoyin v SSHD [2010] EWCA Civ 773 sense: it was not enough simply to show that the statements (or one or more of them) were factually inaccurate. Further, the misconduct must be sufficiently serious to merit refusal in these terms: 'the rule is only concerned with conduct of a serious character'; but again the dishonest and deliberate submission of false earnings figures would meet the threshold, wherever that were to be pitched (para [37(2)]).

6. The Secretary of State is not bound to make further enquiries with HMRC, and the lack of action by HMRC does not conclude the matter in the applicant's favour (paras [67], [72], [76]). Procedural fairness, however, requires that the applicant be given notice of the Secretary of State's suspicion, and a proper opportunity to meet any allegation of dishonesty and to put forward any other reason why if there were dishonesty it should not in the present case lead to refusal (paras [55]-[56]). If that is done, the Secretary of State is not required simply to accept an assertion that there has been an honest mistake (para [106]). The Court endorsed at [40] the general guidance given by Martin Spencer J in R (Shahbaz Khan) v SSHD [2018] UKUT 00384 (IAC) at [37(iv)-(vii)], which adds that the Secretary of State is to look at the explanations given, will expect evidence supporting them, and will and consider them in context, for example in the light of the applicant's knowledge and what was done to remedy the error and when. Further, the Secretary of State is not required to accept an assertion of an error made by an accountant, but again will consider the evidenced facts about the applicant's dealings with the accountant.

7. The burden of proof of showing dishonesty lies on the Secretary of State, the standard being the balance of probabilities (Balajigari para [43]). The question is whether there is a credible innocent explanation for the

discrepancy: is the applicant merely careless or does the evidence show him to have been dishonest? There will then be in principle a second issue of whether paragraph 322(5) should be applied or not, given that it is discretionary, because there may be factors outside article 8 that might impact on whether leave of some sort should be granted (para [39], but see para [20]).

8. The Court also concluded that a decision to refuse leave on this basis would be likely to involve an interference with article 8 rights, which would need separate examination. Because both Balajigari and Khan were judicial review cases, there were procedural issues relating to the possibility of raising an article 8 issue not advanced previously, and adducing further evidence. I am not concerned here with those considerations. What is important for present purposes is the clear decision justifying treatment of a refusal in cases of this sort as a refusal raising human rights issues. It is that part of the decision that has led the Secretary of State now to make decisions incorporating a refusal on human rights grounds, as the Court indicated would be possible (para [102]) and perhaps desirable. Those decisions carry a right of appeal under s 82(1)(b).

9. All the Balajigari appellants succeeded because the Court held that in each case the Secretary of State's decision-making was at fault and the decisions could therefore not stand. In three of the cases there had been no opportunity to rebut what amounted to a presumption of dishonesty arising from the figures alone; in the fourth case there had been an opportunity, but no finding of dishonesty. In one of the cases the decision to refuse leave was quashed by the Court; in the others the question was remitted to the Upper Tribunal for redetermination, but the inquiry and the remedy were limited to those available in judicial review.

10. In these appeals Mr Govan for the Secretary of State argues that the appeals process itself gives an opportunity to put all relevant facts before a judge, and that the procedural difficulties faced by the Secretary of State in the Balajigari cases do not arise. Subject to one important reservation, I agree. The landscape of appeal is very different from that of judicial review. The appeal is for most purposes limited to human rights grounds, but there needs to be an examination of whether the appellant ought to have succeeded under the Rules. Thus there is room for a factual investigation of the appellant's acts and motives and whether paragraph 322(5) was applicable to him. There is also a full opportunity for evidence to be adduced and considered, whether or not it has been deployed previously, on both the underlying events and any present factors going to article 8. What is more, there is no free-standing ground of appeal that the decision was not in accordance with the law.

11. These points make it clear that where there is an appealable decision, the role of the Tribunal will be to undertake an examination of the evidence and decide whether the refusal should be upheld or reversed, not on the grounds applicable in judicial review, but on determination of all the

relevant facts. The appeal process fills both the gaps identified by the Court in Balajigari – the procedural fairness gap because the appeal gives the relevant opportunity, and the article 8 gap because the appeal encompasses such human rights issues as are raised. By the end of an appeal process the appellant has had every opportunity to put his case.

12. I note, of course, what the Court said in Balajigari at paragraphs [59]-[61], that the opportunity to make submissions only after a decision has been made will usually be insufficient to meet the requirements of procedural fairness. But, for a number of reasons, I do not think that those observations can be taken as applying to appeals of this sort. First, they were specifically made in the context of judicial review, by reference to leading authorities on judicial review and procedural fairness, and including observations about the limited role of statutory administrative review, which is available only where there is no right of appeal. Secondly, it is not easy to detect any reservations of this sort in the Court's consideration of the possibility of affording a right of appeal in part C of its decision at [95]-[106], where the scope of its observations would appear to be severely limited if the underlying decision on the merits were to be considered as potentially unlawful even within the context of an appeal. Thirdly, and most important, although judicial review is a remedy lying outside any specific statutory regime, the statutory regime itself includes the right of appeal. Where an appealable decision is made the entire process, including the notification of the decision to the individual, envisages the possibility of the correction of the decision by an appeal. In this sense, the decision is not finally 'taken' until any appeal is over; and indeed, judicial review can have virtually no role until an appellant has exhausted his right to have the decision set aside on appeal.

13. I said above that there was one reservation. It is this. The appeal process ought to provide an opportunity for an individual to raise all the relevant matters he wishes to raise. But it may not do so if, at the time the appeal is heard, there is a restriction (imposed by the judge either of his own motion or from a current understanding of the law) which proves to have been itself unlawful. If the appeal allowed the appellant to raise questions going in substance to whether he was dishonest, the appeal to that extent will have filled the procedural unfairness gap even if that was the first opportunity he had; but if the appeal proceeded on the basis that the figures gave rise themselves to a presumption of dishonesty, it may be that the evidence adduced was in practice curtailed by what it was thought might be a possible ground of challenge. Each case is likely to depend on its facts. In particular, if all the evidence going to the issue was in fact adduced, a judge's error in the application of the law to that evidence will not necessarily prevent the Upper Tribunal from correcting the error and substituting a decision on the basis of the evidence. But it is not difficult to envisage cases where a misunderstanding of the law might require there to be an opportunity to take further evidence. For these reasons it cannot be said that in every case the actual appeal provided all the opportunities to which the appellant was entitled by law, although the

general position is that the appeal process satisfies the demands of procedural fairness.

14. One feature of the cases so far heard in the Tribunal is that is seems to be assumed on all sides that the figures originally claimed for immigration purposes were an accurate statement of the appellant's then income (on which tax would be payable) and that the tax returns at the time were a fictitious under-return. Thus, the Revenue is envisaged as the sole potential victim of the dishonesty. There is, however, no reason at all to suppose that is the truth of the matter. It may equally be the case that the figures originally submitted in the tax return were accurate, and that the immigration application was a fictitious inflation of income solely in order to claim an immigration advantage. Where dishonesty is at work, the fact that, years later, when it is convenient to do so and in preparation for an application for indefinite leave to remain, an individual chooses to pay a sum of money to HMRC as though in underpaid tax does not begin to demonstrate that his statement of income for those years is correct or was incorrect. Further, again if there is dishonesty, there may be no reason to suppose that either figure is correct: the truth may lie somewhere between them.

15. This is no doubt part of the reason why evidence from the accountants may be so important, why an appellant is likely to be so anxious to show what figures he gave to his accountant, and why Underhill LJ said what he did say at paragraphs [106] and [40] of Balajigari as summarised at paragraph [6] above. There is no reason to suppose that accountants with professional qualifications and who have continued in practice without disciplinary measures would regularly make gross errors in submissions to HMRC or its predecessors. It is in nobody's interest that accountants who make such errors should go uninvestigated. The explanation of how the error is said to have arisen is crucial, because it reflects on the accountant's professional standing. The accountant needs to have an opportunity to say or show what instructions the appellant gave and how those instructions were carried out. In a case where the accountant is found to have been actually or apparently at fault, the Tribunal may well cite the name of the accountant in its judgment and may pass a copy of the judgment to the relevant professional body. On the other hand, where there is no evidence going beyond the appellant's own statement, a Tribunal may well consider that the material adduced by the Secretary of State is sufficient to establish the appellant's dishonesty: see also Abbasi [2020] UKUT 27 at [63]-[64].

16. These observations are prompted by the somewhat complex factual matrix presented by the appellant in the present case. The appellant used at least two firms of accountants. It is his case now that the first accountant, CDOKS UK, submitted incorrect figures to HMRC (only) on numerous occasions and that that accountant has accepted that he was in error. ACCA have refused to investigate the appellant's complaint because it was made three years after the appellant discovered the discrepancies and obtained (as he claims) the accountant's

acknowledgment of the error. Although ACCA have not indicated any other difficulty, the appellant claims that this accountant cannot now be contacted, although apparently still in business. The appellant instructed a second accountant from sometime in 2016. It is claimed that that accountant had certain correspondence with HMRC, but the appellant's account of the correspondence does not accord with that in HMRC's records. The position is further complicated by the fact that the appellant was dealing directly himself with HMRC in January 2016. In determining the question of dishonesty there are two other matters that have been the subject of submissions. One is that the appellant does not claim to be illiterate in finance or economics: he has qualifications in business management. The other is that it is said that the appellant overstated his tax liability in one or perhaps two years. In view of what I said at paragraph [15] above this may be nothing to the point; or, at best, it may assist him; or, at worst, it may demonstrate a reckless lack of intention to comply with the laws of the United Kingdom. It depends on the context of that point amongst the rest of the evidence.

17. Mr Caskie's principal ground of appeal, and the only one on which permission was granted, is that Judge McManus made extensive reference in his decision to the judgment of Martin Spencer J in Khan, which post-dated the hearing. There is absolutely nothing in that ground as it stands. The judge was required to determine the appeal according to the law, whatever the law was; and Mr Caskie's submissions before the judge needed to be directed to the law, whatever the law was. In making his decision the judge was entitled to refer to whatever compendious statement of the law he found convenient, whatever its date. The only limitation, of course, is that that statement, again whatever its date, should contain no error affecting the decision the judge was to make.

18. As it happens, however, and as Balajigari at [42] shows, the statement of the law in Khan was not entirely accurate. There is no legal burden on the appellant to disprove dishonesty. Permission having been given, this Tribunal needs to determine this appeal on the basis of a correct understanding of the law so far as I can ascertain it. It is in my view abundantly clear that Judge McManus, for perfectly understandable reasons given the state of the authorities, wrongly placed that burden on the appellant. At paragraph [5] the judge clearly states that the burden of proof is on the appellant and indicates no exceptions. At [36] the correct standard is stated in relation to dishonesty, without any indication that the burden is elsewhere than on the appellant. At [34] and [38] the language used is in my view clearly that of failure to find a reason for displacing a presumption against the appellant rather than positive findings of fact against him.

19. Judge McManus' decision was based on error of law as to the burden of proof. It cannot stand and I set it aside.

20. I have given careful consideration to the question whether the appeal should be redetermined in this Tribunal and have decided that remittal is

necessary in practical terms and in the interests of justice. So far as concerns the former, it is not in my judgment realistically possible to construct what the judge's view of the evidence before him, or any element of it, would have been if he had had in mind from the first that the burden and standard of proof was that set out in Balajigari. So far as concerns the latter, given the clear statement in paragraph [106] of Balajigari and the observations above, the appellant will no doubt wish now to ensure that he has detailed, probably oral, evidence from both his accountants. In short, the appeal will need to be heard anew, probably on the basis of more extensive evidence than was called before Judge McManus.

21. I therefore remit the appeal to the First-tier Tribunal for redetermination by a judge other than Judge McManus.

C. M. G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 15 June 2020