



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

Appeal Numbers: HU/06436/2018
HU/08847/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 8th May 2019**

**Decision & Reasons Promulgated
On 6th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

**MR ANTHONYPILLAI KAMALADAS
MRS PRASHNTANI KAMALADAS
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Sharma

For the Respondent: Ms N Willocks-Briscoe

DECISION AND REASONS

Introduction

1. The Appellants, born on 7th April 1982 and 5th May 1988 respectively, are both citizens of Sri Lanka and are married. Applications had been made by the Appellants for leave to remain in the United Kingdom on the grounds of ten years' long residency. In February and April 2018 the Respondent had refused the Appellants' applications and the Appellants appealed that decision. Their appeal was heard by Judge of the First-tier

Tribunal Isaacs sitting at Hatton Cross on 19th February 2019. The judge had dismissed the appeals on all grounds.

2. Application for permission to appeal to the Upper Tribunal was made and granted by the First-tier Tribunal on 10th April 2019. It was said that it was arguable that the judge had failed to direct herself with regard to the burden and standard of proof in relation to questions of dishonesty under paragraph 322(5). Directions were issued for the Upper Tribunal firstly to decide whether an error of law had been made in this case and the matter comes before me in accordance with those directions.

Submissions on behalf of the Appellants

3. Mr Sharma submitted in line with the Grounds of Appeal noting that the judge had failed to correctly establish the burden and standard of proof in cases of this nature. It was said that at paragraph 58 the judge had simply gone straight to the issue of finding a lack of credibility on the Appellant's account and therefore placed the burden of evidence on the Appellant. It was said the judge had failed to properly explain the second stage of the burden and standard of proof, namely that the Appellant needed to demonstrate if necessary an innocent explanation by meeting a basic level of plausibility. It was further submitted that the judge had misunderstood the accountant's evidence in respect of how they had failed to notice matters because of a problem with their software.

Submissions on behalf of the Respondent

4. It was submitted the issue was whether or not the error of law, if one occurred, was material. It was said that as a fact it was accepted that no accounts had been submitted by the Appellant for the period 2010 to 2015, and therefore it could properly be inferred that the Respondent had discharged the initial burden of disclosing real suspicion in the instant case thereby establishing the evidential burden of proof.
5. At the conclusion I reserved my decision to consider the submissions and evidence in this case. I now provide that decision with my reasons.

Decision and Reasons

6. The Respondent had refused the first Appellant's appeal under paragraph 322(5) of the Immigration Rules, and that of the second Appellant in respect of her application to remain on the basis of her family life with her husband.
7. The judge noted the Appellants' representative accepted at the outset that the second Appellant's appeal stood or fell in line with that of the first Appellant (paragraph 7).
8. It was an accepted fact that the Appellant had failed to submit tax returns for the period 2010 to 2015. The Appellant's case was that was the fault of his accountants.
9. Having set out the facts, submissions and relevant law the judge began his assessment of the case at paragraph 58. He stated as follows "I did not

find the Appellant's explanation for the failure to file tax returns which declared the dividends he says he received between 2010 and 2015 credible for the following reasons".

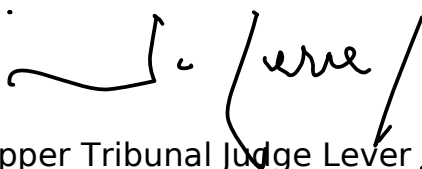
10. The case of **Balajigari [2019] EWCA Civ 673** amongst other matters, found that the approach taken by the Home Office in respect of refusal under paragraph 322(5), insofar as this class of case was concerned was flawed. Firstly, if the Home Office found on the evidence available there was real suspicion of dishonesty they should have provided the Appellant an opportunity to give an innocent explanation. Secondly, even after a definitive finding of dishonesty it could not necessarily be concluded that rendered a person undesirable under paragraph 322(5) given that factors would need to be considered in the round. Where a person had been provided with an appeal a refusal by the Home Office, in those circumstances, did mean that the appeal system allowed for an Appellant found to be dishonest and refused by the Home Office under paragraph 322(5) to provide such an explanation. If the appeal was based under Section 82 of the 2002 Act on the basis that the proposed removal was an unlawful or disproportionate breach of Article 8 of the ECHR then that meant inevitably facts would be considered in the round (paragraph 221 to 223).
11. The judge at paragraph 8 set out his self-direction on the burden and standard of proof in the case, namely that the burden was on the Appellant and the standard of proof was a balance of probabilities. That was a misdirection. It did not take account of the need for the Respondent initially to discharge the evidential burden of there being a real suspicion in those cases where the Respondent asserted dishonesty/deception. Only if such evidential burden was met was there then a need for the Appellant to provide an innocent explanation by meeting the basic level of plausibility. In cases where the Respondent asserts something as serious as dishonesty/deception, it is important that there is an adherence to the recognised procedure and discharge of the burden and standard of proof and the case of **Balajigari** underscores that need for fairness in such proceedings. In those circumstances it was a material error for the judge to misdirect himself and thereafter consider the evidence in line with that misdirection in a case of this nature.

Notice of Decision

12. A material error of law was made by the judge in this case and I set aside the decision of the First-tier Tribunal and direct that the matter be heard afresh in the First-tier Tribunal.

No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Lever.

Date

