



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

Appeal Numbers: HU/00355/2019
HU/04274/2019
HU/04279/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 20th December 2019**

**Decision & Reasons Promulgated
On 21st January 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**MOHAMMED [S]
HUMAIRA [S]
[Z S]**

(ANONYMITY DIRECTIONS NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Shah, Solicitor at D J Webb & Co Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Lawrence promulgated on 7 August 2019, in which their appeals against the decisions to refuse their human rights claims dated 19 December 2018 (in respect of the First Appellant) and 20 February 2019 (in respect of the Second and Third Appellants) were dismissed.

2. The Appellants are all nationals of India, comprising of husband and wife and their child. The First Appellant first arrived in the United Kingdom on 19 January 2006 with valid entry clearance as a student to 31 May 2007, extended to 31 July 2008. The First Appellant was then granted leave to remain under the International Graduates Scheme to 25 July 2009 and as a Tier 1 post-study migrant to 25 July 2010. The First Appellant then applied for and was granted leave to remain as a Tier 1 (General) Migrant initially to 30 September 2012 and then to 30 September 2015 and again to 1 April 2018. On 27 September 2016, the First Appellant applied for indefinite leave to remain as a Tier 1 (General) Migrant which was refused on 1 December 2016. On 19 March 2018, the First Appellant applied for indefinite leave to remain on the basis of 10 years long residence, which was refused by the Respondent on 19 December 2018.
3. The Second and Third Appellants were granted leave to remain as the dependents of a PBS migrant (the First Appellant) on 8 July 2015 until 1 April 2018.
4. The Respondent refused the First Appellant's application on two grounds. First, that he was absent from the United Kingdom between 13 October 2010 to 8 September 2011, period of 329 days and more than the permitted 180 days absence allowed in a 12 month period. Secondly, the application was refused under paragraph 322(5) of the Immigration Rules because it was undesirable to permit the First Appellant to remain in the United Kingdom in light of his conduct, character or associations and therefore also refused under paragraph 276B(iii) of the Immigration Rules for the same reason. The conduct was that the First Applicant's earlier application for indefinite leave to remain had been refused on the basis that he had been deceitful or dishonest with either HMRC and/or the Respondent by failing to declare his self-employed earnings correctly to HMRC and/or by falsely representing his self-employed income to obtain leave to remain in the United Kingdom.
5. The Second and Third Appellants applications were refused on the basis that the First Appellant had not been granted leave to remain and they did not otherwise meet the requirements of either Appendix FM or paragraph 276ADE of the Immigration Rules for a grant of leave to remain. In particular, there were no very significant obstacles to the Appellants' reintegration into India and the child had been in the United Kingdom for less than seven years and was not therefore a Qualifying Child. There were no exceptional circumstances and the Appellants would be returning together as a family.
6. In a decision promulgated on 7 August 2019, First-tier Tribunal Judge Lawrence dismissed all three appeals on all grounds. In relation to long residence, the First-tier Tribunal found that the First Appellant had provided evidence to demonstrate why he was unable to return to the United Kingdom within 180 days in 2010/11 which was capable of reasonably being considered as establishing that the absence was in

compelling or compassionate circumstances, such that in accordance with the Respondent's policy at the time, discretion could reasonably have been exercised in his favour. However, the First-tier Tribunal considered that the First Appellant could not in any event meet the requirements of continuous lawful residence because his leave to remain ended following the expiry of his right to administratively review the decision of 1 December 2016 and he did not make a further application for leave to remain until some 14 months later on 19 March 2018.

7. In relation to the earnings declaration issue and refusal under paragraph 322(5) of the Immigration Rules, the First-tier Tribunal found that the Respondent had discharged the burden of proof in showing that the First Appellant had been deceitful or dishonest in his dealings with HMRC and/or the Respondent in relation to 3 separate examples of discrepancies between his declared earnings to HMRC and to the Respondent. That was considered to be relevant to the public interest in the First Appellant's removal to be considered as part of the balancing exercise for the purposes of Article 8 of the European Convention on Human Rights.
8. The First-tier Tribunal considers Article 8 in paragraphs 51 to 62 of the decision, focusing on private life as the family would be removed together and there would be no interference with family life. The Appellants did not meet any of the requirements of the Immigration Rules for a grant of leave to remain and the weight to be attached to that private life was limited given that it was established at a time when their stay in the United Kingdom was precarious. The Appellants were noted to all speak English and there was nothing to suggest that they were not financially independent or could not be in the future if entitled to remain lawfully; these factors did not therefore add to the public interest in removal. The child's best interests (one aged four and the second child born in September 2018 under one at the time of the hearing) were considered and found to be to live together with their parents. The further factors considered are set out in paragraph 61 of the decision, including the First Appellant's dishonesty; the fact that the First Appellant had made arrangements to pay tax on his amended declarations to HMRC; the character references and letters of support for the Appellants; hardship suffered by the First Appellant from his bereavement; the Appellant's length of residence in the United Kingdom; and any obstacles to reintegration in India. Overall the First-Tier Tribunal found that the proposed interference with the private life of the Appellants and the second child was not a disproportionate interference with their right to respect for private and family life in accordance with Article 8 of the European Convention on Human Rights.

The appeal

9. The Appellants appeal on two grounds. First, that the First-tier Tribunal made a mistake of fact in relation to the Appellant's lawful residence in the United Kingdom, in that when his first application for indefinite leave

to remain was refused on 1 December 2016, he still had leave to remain as a Tier 1 (General) Migrant to 1 April 2018 and his most recent application for indefinite leave to remain was made before the expiry of his leave. There was not therefore a gap of over 14 months without leave to remain before the application was made. Further, the First-tier Tribunal failed to make any findings on the gap in residence in 2010/2011. Secondly, that the First-tier Tribunal materially erred in law in its consideration of the application of paragraph 322(5) of the Immigration Rules, by failing to consider the second discretionary stage identified in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673.

10. At the oral hearing, the Respondent indicated at the outset that she accepted that the First-tier Tribunal made a mistake of fact as to the Appellant's leave to remain which did not end following the refusal on 1 December 2016 but continued in accordance with the last grant of leave to remain and has continued pending determination of the most recent application and now appeal.
11. On behalf of the Appellants, it was confirmed that there was no challenge to the First-tier Tribunal's finding of dishonesty by the First Appellant but the appeal was pursued on the basis that the First-tier Tribunal erred in law in failing to give separate consideration to the second stage exercise of discretion in paragraph 322(5) of the Immigration Rules. It was however accepted that all of the relevant factors to such a consideration were in any event taken into account within the decision of the First-tier Tribunal but only in the context of the proportionality assessment under Article 8. It was further accepted that the factual error in the first ground of appeal would not be material to the outcome unless the Appellants were also successful in establishing an error of law on the second ground.
12. On behalf of the Respondent, it was noted that in relation to the First Appellant's absence in 2010/11, the First-tier Tribunal found in the Appellant's favour that there were compelling circumstances preventing his return to the United Kingdom sooner. As above, the error in relation to the most recent period of leave to remain was accepted. However, the error was not material to the outcome of the decision because in substance, the First-tier Tribunal considered all relevant factors for the exercise of discretion under paragraph 322(5) of the Immigration Rules, albeit in the context of a proportionality assessment under Article 8. However, because there was no difference in the factors to be considered and given the finding of dishonesty, it was inevitable that if it was expressly set out, no discretion could be exercised in the Appellant's favour under paragraph 322(5) in any event. The finding of dishonesty carries significant weight in the public interest in removal, the Appellants could not meet the requirements of the Immigration Rules and there were no significant obstacles to reintegration identified, nor were there any exceptional or compelling circumstances to outweigh the strong public interest in removal.

Findings and reasons

13. In relation to the first ground of appeal, as accepted by the Respondent, the First-tier Tribunal made a factual error as to the First Appellant's continuing leave to remain after the refusal on 1 December 2016 and therefore, in combination with the finding in paragraph 42 as to discretion in the Appellant's favour for the early period of absence in 2010/11, the First-tier Tribunal erred in finding that the Appellant could not meet the requirements of 10 years continuous lawful residence in the United Kingdom for the purposes of paragraph 276B(i) and (v) of the Immigration Rules. The factual error is also relevant to the proportionality assessment under Article 8 as it is one of the factors taken into account in paragraph 61.6 of the decision, albeit only as a factor which weighed moderately against the Appellants in relation to the public interest.
14. On behalf of the Appellants it was appropriately accepted that the errors identified in the first ground of appeal would not be material to the outcome of the appeal unless the Appellants were also successful on the second ground of appeal. If not, the moderate weight attached to the factual error in the context of the proportionality assessment could not materially affect the outcome of the appeal if removed from the balancing exercise given the very strong public interest in removal from the finding of deception by the First Appellant and against a relatively weak private life in the United Kingdom and no compelling or compassionate circumstances or obstacles to reintegration.
15. The key issue in this appeal is therefore the second ground of challenge in relation to the application of paragraph 322(5) of the Immigration Rules. The Appellants' case is that the refusal of the First Appellant's application under paragraph 322(5) is a discrete issue to be determined away from the assessment under Article 8 and that that assessment, as confirmed in paragraph 33 of Balajigari, has two stages. First, to decide whether the provision applies at all, such that it is undesirable to grant leave to remain in light of the matters identified, and if it does, the second stage is to decide as a matter of discretion whether leave should be refused on that basis. In the present case, the Appellant's claim that the First-tier Tribunal has failed to conduct the second stage discretionary assessment. Although the Appellants acknowledge that cases being successful at the second discretionary stage would be the exception, it was submitted that it was not on the facts of this case inevitable that the same conclusion would be reached as to the First Appellant's satisfaction of the Immigration Rules which would be highly material to the Article 8 proportionality assessment.
16. However, during the course of the oral hearing I asked Mr Shah to identify the factors relevant to any second stage discretionary assessment for the purposes of paragraph 322(5) of the Immigration Rules which were in addition or different to the factors already considered by the First-tier

Tribunal in the context of Article 8 and the proportionality assessment thereunder. None were identified.

17. This second ground of appeal is one of form over substance and when considering the decision of the First-tier Tribunal as a whole, whether or not the assessment was done specifically under paragraph 322(5) of the Immigration Rules or in the context of the proportionality assessment under Article 8, the outcome on the facts and on both provisions would inevitably be the same and would inevitably not be in the Appellants' favour. There is a clear and unchallenged finding of dishonesty and/or deception by the First Appellant in his dealings with HMRC and/or the Respondent in the declaration of his earnings. That carries very significant weight both against the exercise of discretion and for the public interest in removal of the Appellants. There is simply nothing on the facts of the case which could even arguably outweigh that issue to form the basis of any exercise of discretion or grant of leave to remain in the United Kingdom. This claim concerns only interference with private life of the Appellants and the second child and given the age of the children involved, their best interests are only to remain with both parents. The First-tier Tribunal did not find any significant obstacles to reintegration to India for the family, nor was there any finding of any significant private life established in the United Kingdom; nor was there anything approaching compelling or compassionate circumstances in the Appellants' favour.
18. There is no error of law on the second ground of appeal as in substance the First-tier Tribunal had considered all relevant matters to the exercise of discretion under paragraph 322(5) of the Immigration Rules, even if this had not been expressly referred to. On any view, the outcome of any express consideration of this point could not be in the Appellants' favour and regardless of this and the factual error in ground one, the outcome of the appeal was inevitable, that it would be dismissed on human rights grounds. For these reasons, as a whole, the decision of the First-tier Tribunal does not contain a material error of law capable of affecting the outcome of the appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeals is therefore confirmed.

No anonymity direction is made.

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Signed
2020



Date 17th January

Upper Tribunal Judge Jackson