Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06168/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 15 July 2020	**On 30 July 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ATIQ [R]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Biggs, Counsel instructed by Vision Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge Parkes promulgated on 24 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 5 February 2018 refusing his human rights claim, made in the context of an application for indefinite leave to remain based on long residence. The Respondent refused the application on the basis that the Appellant had misrepresented his earnings as

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between those declared to the Home Office in earlier applications for leave to remain and as declared to HMRC, in particular in the years 2010-11 and 2012-13. The Respondent therefore refused the application under paragraph 322(5) of the Immigration Rules ("Paragraph 322(5)") on the basis that the Appellant's presence in the UK was undesirable due to his character and conduct. I will come to the details of the discrepancies below.

2. In addition to his claim to be entitled to remain based on his long residence, the Appellant also prays in aid in his human rights claim his relationship with his daughter, now aged seven years. His former partner, the mother of that child, is a Dutch national and both she and the child live in the Netherlands. The Appellant however has been given contact to that child by the Family Court and the Appellant says that contact would be disrupted if he were not in the UK.

3. The Appellant's appeal was allowed by First-tier Tribunal Judge Young-Harry in a decision promulgated on 18 December 2018. However, that decision was set aside by Upper Tribunal Judge Grubb in a decision promulgated on 3 June 2019 and the appeal was remitted to the First-tier Tribunal. I note that, at [41] of Judge Grubb's decision, he held that Judge Young-Harry's finding in relation to the best interests of the Appellant's daughter should stand. That is relevant to the Appellant's grounds of appeal at this stage.

4. Judge Parkes found that the Appellant had been dishonest, and that Paragraph 322(5) had been properly applied. He went on to find that the Appellant could, if he so wished, go to live in the Netherlands and have access to his child there or could at least visit his daughter there in order to maintain contact. Alternatively, he could return to his home country of Pakistan and maintain contact from there. The Judge concluded that there were no "very significant obstacles" to the Appellant's reintegration in Pakistan, a finding preserved from Judge Young-Harry's decision. That finding is not challenged by the Appellant. Balancing the interference with the Appellant's private and family life against the public interest, the Judge concluded that it was "proportionate to expect the Appellant to leave the UK and to exercise contact with his daughter from another country" ([36] of the Decision).

5. The Appellant appeals the Decision on three grounds. The first challenges the Judge's finding of dishonesty. The second and third are directed at the findings in relation to Paragraph 322(5) and Article 8 ECHR, in particular having regard to the position of the Appellant's child and the discretionary nature of Paragraph 322(5).

6. Permission to appeal was refused by First-tier Tribunal Judge Grant on 26 February 2020 as follows (so far as relevant):

> "… 3.Contrary to what is submitted on the grounds, the judge has given cogent reasons for his findings that the appellant had acted dishonestly with respect to HMRC having taken guidance from the Court of Appeal in the case of Balajigari [2019] EWCA Civ 673 and Khan v SSHD [2018] UKUT 384 (IAC). Having taken into account the appellant's explanation which is reiterated in the grounds, the judge did not find the appellant's explanation regarding the two sets of

accountants acceptable and, on the evidence before him concluded there was cogent evidence the appellant had used deception in his tax return.

4. Having found as a matter of fact that there was cogent evidence the appellant had used deception in his tax return, it is self-evident that the appellant could not meet the suitability requirements of the immigration rules. There could be no other outcome on the facts and whilst the judge may have erred by failing to make a specific finding upon suitability, there is no possibility that any decision of the Tribunal would be different given the finding on dishonesty.

5. With regard to access to the child and the child's best interests, the appellant has a court order granting him contact with his daughter in the Netherlands where she resides with her mother. Even prior to his application for further leave he has not exercised contact with his daughter. The judge was well aware that the appellant has been granted contact with his daughter in the UK during the holidays, and considered whether the appellant should be permitted to remain in the UK for that access to continue? The judge concluded that there is little difference between the appellant staying in the UK with his daughter travelling to the UK for visits or the appellant, if in Pakistan travelling to the Netherlands to see her. The judge concluded the appellant has not fully exercised the granted contact with his daughter and that his situation did not mean his removal to Pakistan would be disproportionate in respect of the contact with his daughter. In coming to these conclusions the judge has properly taken into account the best interests of the child nothing that contact will not cease if the appellant returns to Pakistan as long as he chooses to exercise that contact.

6. Overall, the findings reached by the judge were properly open to him on the evidence before him and the judge has given cogent reasons for his findings. They disclose no arguable error of law."

7. Permission to appeal was granted by Upper Tribunal Judge Finch on 22 April 2020 for the following reasons so far as relevant:

"… In paragraph 18 of his decision First-tier Tribunal Judge Parkes did refer himself to *Balajigari & Others v Secretary of State for the Home Department* [2019] EWCA Civ 673 but then failed to take into account two very important documents when considering the explanation given by the Appellant for the discrepancies in his returns. Firstly, he did not refer to the letter and enclosure from the HMRC, dated 26 January 2012, and secondly, he did not analyse the report from Apex Accountants, dated 21 December 2015, in the necessary detail.

The family court order did not limit contact to his daughter to contact within the United Kingdom only, as can be seen from the terms of the prohibited steps section of the order. The schedule merely rehearsed the agreement between the parties as to current contact. However, it is arguable that the issue of the Appellant's daughter's best interests was not sufficiently explored.

As a consequence, it is arguable that First-tier Tribunal Judge Parkes' decision contained errors of law and it is appropriate to grant the Appellant permission to appeal."

8. The Respondent filed a Rule 24 Reply on 14 July 2020 which Mr Melvin adopted in his oral submissions. No objection was taken by Mr Biggs to the late filing of that Reply.

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

10. Notice of the hearing before me was sent to the parties on 19 June 2020 indicating that the hearing would be conducted remotely via Skype for Business given the current restrictions caused by the Covid-19 pandemic. Neither party objected to that course. The hearing was attended, also remotely, by the Appellant himself and by his solicitor, Ms Shah. All those attending remotely confirmed that there were no technical issues and that they were able to follow the hearing throughout. I had before me a bundle filed by the Appellant in the First-tier Tribunal before Judge Parkes on 3 January 2020 to which I refer below as [AB/xx], the Respondent's bundle and other sundry documents to which I refer as necessary where those relate to the grounds of appeal.

DISCUSSION AND CONCLUSIONS

11. I deal with the Appellant's grounds in order. As Mr Biggs submitted and I accept, if the Appellant succeeds in his ground one, I do not, strictly, need to deal with grounds two and three, although it may still be necessary to make some observations about those to assist the re-making of the decision.

GROUND ONE

12. The focus of ground one is the Judge's findings as to the tax discrepancies and the application of Paragraph 322(5) in that context. Those appear at [20] to [25] of the Decision as follows:

> "20. If the Appellant's evidence is correct then it would appear that he did not discuss with either firm of accountants employed that he had 2 income streams and appears not to have asked either of them if 2 tax returns would be required or how best to proceed. Given his academic training and the costs involved it would be surprising to say the least if the Appellant actually kept one or both firms in ignorance of the overall picture and had not discussed matters fully with either of them. An alternative view in these circumstances is that he used 2 different firms so that he could file the lower figure without embarrassing the accountants with the details disclosed to the firm involved in his Tier 1 application.
>
> 21. The Appellant also suggests that the higher figure was or could have been overwritten by the lower figure and that the system used for on-line submission would permit that. If that is what happened and the second firm opened the Appellant's online tax return they would have seen the higher figure, I do not believe that if the firm inputting the lower figure would have said or done nothing. It would have been an obvious issue that someone else was accessing the Appellant's on-line tax return and a firm in that position would have wanted to ascertain the nature and veracity of the figures involved.
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> 22. Given the points considered above it would appear that despite it being clear in those circumstances that the Appellant or someone acting on his behalf had put in significantly different figures they did not contact the Appellant to

ascertain what was going on or to inform him of the situation and what they had seen.

23. The Appellant was quite sanguine about the need to pay interest on the overdue tax and maintained that he could not do much without an explanation from the firms involved but they are no longer contactable. There is some evidence of the screen shot that one firm no longer deals with HSMP cases. However the request would be for an explanation of past events and it is not clear why the request could not have been pursued although this is not a central point.

24. Although the Appellant corrected his tax returns only shortly before he made his ILR application his case is that it was prompted by his wife's demand for more maintenance. As the years in question were quite some time before his family court proceedings it is not clear why his wife would have thought that there was more money available given that there appears to be no questions about later tax years.

25. Taking the evidence considered above in the round I find that the differences between the figures provided by the Appellant to the Home Office in his applications and to HMRC for tax purposes were so different that the Home Office was entitled to consider that dishonesty may have been involved. Having regard to the Appellant's explanation I do not believe that the Appellant, with an MBA, would have employed 2 different sets of accountants for his earlier year and I reject his claim about the amendment of his tax return with lower figures, if that had happened the second firm would inevitably have contacted the Appellant to ascertain the proper figures."

13. I clarified with Mr Biggs at the outset what is the Appellant's explanation for the discrepancy. It appeared to me from some of the documents that it was being suggested that the Appellant was unaware and had not authorised the second accountant, Mahmood Accountants, to file what he says was the second tax return whereas it was my understanding, as Judge Parkes appears to have understood at [25] of the Decision, that the Appellant says that both Mahmood Accountants and the first accountant, J Stanley Riz, were both authorised to file returns for the separate income streams with which each firm dealt. Mr Biggs directed my attention to the Appellant's witness statement dated 2 January 2020 at [4] to [7] which reads as follows:

"4. Shortly before lodging my Tier 1 (General) application in March 2011, I came to know that the Home Office only accepted accounts made by either fully qualified chartered accountants or certified accountants who were members of a registered body such as ACCA, CIMA, ACA, CIPFA etc. If the earnings were for the work done while you were in the UK, such documents had to come from an accountant who was a member of a recognised supervisory body in the UK, namely: ICAEW, ICAS, ICAI, ACCA, CIPFA, IFA, CIMA, AAT and from 06 April 2014, members of AIA.

5. The accountants I initially had were called Mahmood Accountancy. They were not chartered accountants, so I appointed J. Stanley Riz & Co because they had membership of the relevant supervisory bodies, i.e. ACCA, CIMA, IFA.

6. I thought that I might require two separate tax returns for each branch of my income, and therefore thought it would be best, and easier, to have two separate

> accountants. This was a mistake which led to confusion in the figures declared to HMRC. I provided Mahmood Accountancy with my financial information in relation to the travel services income stream. I also provided Mahmood Accountancy with my HMRC online log-in credentials. I provided similar details to J Stanley Riz & Co. for AR Business Services' overall income.
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> 7. I believe what happened is that J Stanley Riz & Co initially entered my overall income from AR Business Services on HMRC's online form, showing a net profit of £36,030. An SA302 document is issued by HMRC on submission of a self-assessment return; the SA302 generate by HMRC after the submission from J Stanley Riz & Co is dated 26 January 2012 with a net profit of £36,030 for the year 2010/11. It appears that subsequently, between 26 January 2012 and the self-assessment deadline of 31 January 2012, Mahmood Accountancy submitted lower figure of £5715 in relation to travel services. I understand that it is possible to overwrite a previously submitted tax return for up to twelve months following the tax returns deadline in the financial year. This is processed by HMRC as an amendment. Once the 'twelve months' window has expired, any amendments to the previously submitted tax returns can only be made in writing to HMRC and it is not retrievable fom the HMRC online portal. This is essentially how the error happened. I had expected my accountants to coordinate with each other to ensure that the figures were correct however they did not do so."

That is then the explanation which the Judge records at [25] of the Decision and there rejects for the reasons given there and in the foregoing paragraphs which I have cited above.

14. The Appellant's explanation is underpinned by documents which are those focussed upon in the grounds of appeal as being ones which were not considered by the Judge.

15. The first of those documents is a letter from HMRC dated 26 January 2012 ([AB/40]) which reads as follows:

> "With reference to our telephone conversation on 26/01/2012, please find your SA302 calculation for the 10/11 year."

Attached to that letter at [AB/41] is the SA302 which shows at its foot that it was printed on 26 January 2012 and is therefore consistent with it being that attached to the letter. That shows, for the tax year 2010-11 that the Appellant earned £36,030 profit from self-employment. From that was deducted his personal allowance, leaving him a taxable income of £29,555 on which the tax and national insurance due is shown as £8,336.20. It is not entirely clear to me why the Appellant phoned HMRC to obtain this document since I would have assumed that his accountant would have provided it to him. However, that document is consistent with the Appellant's case that, at some time prior to 26 January 2012, a tax return was filed on his behalf showing the profit on self-employment which is broadly consistent with the earnings declared to the Home Office. That HMRC was subsequently provided with different information is evident from the document at [AB/49] which gives the Appellant's income as £10,858, a taxable income of £258 and income tax and national insurance due of £449.02.

16. The second document on which reliance is placed is a letter from Apex Accountants ("Apex") dated 21 December 2015 ([AB/136-140]). Mr Biggs first asked me to note that the date is consistent with the Appellant's case that he asked Apex to provide the report in order to deal with his ex-wife's claim for increased maintenance in the context of the Family Court proceedings. He also asked me to note that Apex had tried to contact the accountants involved in the filing of the Appellant's tax returns but that Mahmood Accountancy "seems to have closed down on or before 30 June 2015" and that J Stanley Rix & Co had not responded.

17. In relation to the two years in which discrepancies were found by the Respondent (and Judge Parkes) to exist, Apex recounts what they were told by the Appellant about the circumstances of the discrepancy. In relation to the 2010-11 tax year, the letter confirms based on the documents provided, I assume, by the Appellant (since the accountants could not be contacted) that the SA302 issued by HMRC on 26 January 2012 confirmed the £36,030 figure. That appears to be reference to the document to which I have referred above. Apex goes on to refer to "the second tax return" which it says was filed just before the 31 January deadline. The report goes on to say as follows:

> "This is where the actual confusion has arisen as it has over-written the previously submitted tax return by J.Stanley Rix & Co for the same financial year and only the last submitted tax return can be retrieved from HMRC online system. Sometimes provisional income could be supplied to HMRC to avoid late filing penalty and or for the tax credits purpose but the later situation isn't applicable in your case as you don't claim any benefits or tax credits. Online amendments to your tax returns can be submitted to HMRC for up to 1 year following the deadline for any given financial year. For 2010-11 the deadline to submit the tax returns was 31 January 2012 and you had time until 31 January 2013 to file an online amendment to your tax returns submitted to HMRC in the past, after that date you would need to write to HMRC to make any amendments to your tax returns. Once the online amendments are made towards your tax returns within that 1 year time frame, the previous version can't be retrieved as it gets over-written by the latest submission and only latest version of tax returns is stored on HMRC online system for up to a certain period but if amendments to your tax returns are made in writing after that 1 year time frame, HMRC may not retain the latest version of tax returns on their online system. HMRC may charge you interest on any amounts due for this financial year past the deadline of 31 January 2012. We would go through your bank statements to find the accurate figure for your income for this financial year and you may need to submit an amended tax return to HMRC in writing".

It is common ground that the Appellant subsequently filed an amended tax return and paid the tax and interest due on that late payment.

18. I do not need to set out what is said by Apex in relation to the second year in which discrepancies were noted (2012-13) since the report follows the same format. It relies on what the Appellant told Apex which is as for 2010-11. Having regard to the documents, Apex says that two self-assessment returns were submitted (although for this later year I do not understand there to have been the confirmatory document from HMRC as to the first filing). Apex goes on to refer to the overwriting by the

second tax return as explanation for the discrepancy and points out the potential need to file an amended return.

19. As above, the discrepancies arose in two tax years but did not arise in the intervening tax year. The explanation for that appears in the Apex report as follows:

> "As you didn't need to apply for Tier 1 (General) visa during the financial year; you didn't hired [sic] J. Stanley Rix & Co to look after your financial matters for this financial year, so we have found that your tax return wasn't filed twice this time. Having gone through your tax return and SA302 document for this financial year, we have found a figure of £8742 (net profit) as your income declared to HMRC in time."

20. The above documents were those on which Mr Biggs placed particular emphasis in support of his submission that the Judge had failed to consider all relevant documents. He also made the point that the Judge had failed to have regard to HMRC's non-imposition of a penalty in relation to the amended tax returns. Although he accepted that, in the case of R (oao Samant) v Secretary of State for the Home Department [2017] UKAITUR JR/6546/2016, Collins J had pointed to the different considerations which might apply to HMRC in that regard, he pointed out that the Court of Appeal in Balajigari and Others v Secretary of State for the Home Department [2019] EWCA Civ 673 ("Balajigari") had indicated that the absence of a penalty was a relevant consideration. He also submitted that it was a more relevant consideration in the instant case because it was the Respondent's position that the Appellant had deceived HMRC and not the Secretary of State for the Home Department. I am far from sure that this is the case although he did also point to what he said was other evidence which supported the earnings being genuinely declared to the Respondent. It is not a point which I have to decide here. The issue is only whether the Judge has failed to have regard to what might be a relevant consideration.

21. Finally, Mr Biggs pointed to the evidence from Apex at [AB/161-164] which suggested that the two firms of accountants concerned were no longer in business. He submitted that the Judge had failed to have regard to that evidence when considering why the Appellant said that he had not made a complaint to the relevant regulatory body in relation to what occurred. Although the Judge had referred to those documents at [11] of the Decision, there is no indication that he recognised what those documents showed nor that he understood them, in light of what he says at [23] of the Decision (cited above).

22. Mr Melvin relied on the Respondent's Rule 24 Reply. He did not seek to argue that the Judge had in fact referred to the above evidence. The Respondent's argument as set out in more detail in the Rule 24 Reply is that the documents were not material and that a Judge is not required to cite every piece of evidence. That may be so, but the issue is whether the evidence is relevant in the context of the findings made.

23. Mr Melvin was right to observe that much of what is said in the Apex letter is merely confirmation of what they were told by the Appellant. However, that does not deal with the SA302 issued by HMRC in January 2012 which tends to confirm that a tax

return was filed prior to that date giving a broadly consistent declaration of self-employed earnings.

24. The more cogent point made by Mr Melvin is that the Appellant has failed to explain how it is that he did not query payment of the tax due prior to the amendment of his returns after the Apex report. As Mr Melvin (and the Judge) pointed out, the Appellant has a MBA qualification. He is educated. On the face of the documents, particularly the SA302 at [AB/41], the Appellant would have been well aware in January 2012 that he was liable to pay £8,336.20 and yet there is no evidence that he sought to pay that amount nor queried why he did not have to pay it. Of course, as Mr Biggs pointed out, he would not have been asked to pay that amount by HMRC. Following the amendment of the tax return prior to 31 January 2012 (on the Appellant's case), his tax liability reduced to nil for that year (see document at [AB/49]). However, that is nothing to the point. He had been told that his tax liability would be much higher and it is difficult to understand why he would not have queried what HMRC will have told him after 31 January 2012; the more so since this occurred in two tax years.

25. Mr Biggs also directed my attention to [12] of the Appellant's witness statement which reads as follows:

> "I accept that, as a result of the incorrect submission by Mahmood Accountancy, the tax liability declared to HMRC was low. It was naïve of me to not realise that the low figure reflected a mistake as I was unaware of tax rates. I had finished my studies in 2010, gaining a degree in MBA. I thereafter began to work on a self-employed basis on the old Tier 1 (General) route. My first year of work as in the tax year 2009/10. My profit from self-employment (i.e. taxable income) for that year was £9,660.00, with total tax and National Insurance payable of £952.60. As I did not pay much tax in that year, I did not gain familiarity, or a 'feel' for how much tax was payable on higher amounts of income."

26. In my view, that statement does not address the point. Not only does it fail to mention the SA302 which showed the Appellant at the relevant time that he owed nearly £9,000 in tax and national insurance but it fails to explain how, if his self-employed earnings were over three times those of the previous year, he thought it correct that he should be paying no tax at all.

27. However, I do not consider that this is an answer to the Appellant's ground one of appeal. The Judge did not take this point. Mr Melvin pointed me to [25] of the Decision which is the Judge's conclusion on dishonesty and refers to the totality of the evidence in the round. However, that sentence has to be taken in the context of what is said thereafter and in the preceding paragraphs. The Judge's reasons for concluding that the Appellant had been dishonest were that it was not credible that the Appellant would have engaged two firms of accountants or that both had submitted tax returns which had the effect of reducing the Appellant's tax liability.

28. On the basis of the documents to which I was taken, there is evidence which may well support the Appellant's case that this is what occurred. There is, as I say, other evidence which may well raise question marks about his account or the motivation

for what occurred but that is not something with which I am here concerned. The only issue for me is whether the Judge has failed to have regard to relevant evidence. For the reasons given above, I am satisfied that he has. There is therefore an error of law which is material.

29. For those reasons, I set aside the Decision. I am also satisfied that it is appropriate to remit this appeal to the First-tier Tribunal. As Mr Biggs pointed out, the evidence in this case must be considered entirely afresh and there will be a good deal of fact finding to be carried out in relation to what is the central issue, namely whether the Appellant has been dishonest. Although I am cognisant of the fact that the appeal has already been remitted once already, I consider it appropriate to remit given the degree of fact finding which is required.

GROUNDS TWO AND THREE

30. Although, as I have already noted, if I find for the Appellant on ground one, as I have done, I do not, strictly, need to consider grounds two and three. I make certain observations for the sake of completeness and also because of an issue which has arisen in this context about preserved findings which it is necessary for me to deal with for the benefit of a Judge seized of the re-making in this case. Both grounds two and three are directed at the discretion which arises under Paragraph 322(5) and in Article 8 ECHR when balancing interference against the public interest.

31. As Mr Biggs points out, Paragraph 322(5) is one of the discretionary grounds of appeal. Judge Parkes' conclusion as to the applicability of that paragraph at [26] of the Decision reads as follows:

> "I bear in mind that the burden is on the Secretary of State to prove that the Appellant was dishonest and in my view the evidence amply demonstrates that he was. In short I find that the circumstances and evidence are such that there is cogent evidence that the Appellant used deception in his tax return and that paragraph 322(5) of the Immigration Rules has been properly applied."

32. The Appellant's grounds of appeal refer to [39] of the judgment in Balajigari which reads as follows:

> "Mr Biggs submitted that at this second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted that it is at this stage that the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise. That seems to us in principle correct. There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily *indefinite* leave to remain) to migrants whose presence is undesirable."

33. The main focus of the Appellant's grounds in this regard is the position of his daughter who, it may be recalled, lives in the Netherlands with her mother. Although Mr Biggs accepted that the Section 55 duty does not extend to children outside the UK, he pointed out that this is a duty which falls on the Respondent and not strictly on the Tribunal but, nonetheless, the Tribunal has to take those best interests into account as a primary consideration when considering the lawfulness of a decision to remove.

34. Mr Biggs also accepted that the only ground of appeal is whether the decision to remove is proportionate within Article 8 ECHR. He suggested, although not strongly, that whether Paragraph 322(5) applies on a discretionary basis, might form part of the issue whether the decision is lawful within the five stages of Razgar. I do not accept that whether a decision is in accordance with the Immigration Rules ("the Rules") or policy falls within the issue whether a decision is "in accordance with the law" in the way in which that is understood in Strasbourg jurisprudence. Nonetheless, it may well be relevant to the way in which proportionality is assessed and I accept that the exercise of discretion under Paragraph 322(5) may be relevant although has a substantial overlap with the public interest side of the Article 8 balance.

35. Mr Biggs also pointed out that one of the starting points in relation to the child's best interests in this case is what is said by Upper Tribunal Judge Grubb when remitting the appeal concerning preserved findings. That appears at [39] to [41] of his decision at [AB/16] as follows:

> "39. The Judge's decision to allow the appeal under Art 8 cannot stand and is set aside.
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> 40. In these circumstances, both representatives agreed that the proper course was to remit the appeal to the First-tier Tribunal in order to remake the Art 8 decision.
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> 41. The judge's decision and findings in respect of para 322(5) cannot stand. However, it was agreed that the following findings of the judge should stand:
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> (1) in respect of the best interests of the appellant's child (para 23);
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> (2) that the requirements of para 276ADE are not met (para 24); and
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> (3) that the appellant speaks English and there is no evidence of reliance on public funds (para 26).
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> 42. I also see no reason why the concession, reflected in para 22, that, apart from para 322(5), the appellant meets the requirements of para 276B should not also stand."

36. I turn then to the relevant paragraphs of the decision of First-tier Tribunal Young-Harry as follows ([AB/6]):

> "22. I do not find the respondent's case is made out in this regard. I do not find paragraph 322(5) has been correctly applied. Accordingly I find the appellant has shown, that he meets all the requirements of paragraph 276B. The respondent does not appear to take issue with any of the other requirements. I

> find he has shown he meets all the requirements. I find this carries substantial weight on the appellant's side of the balance.
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> 23. In relation to Appendix FM, I find the appellant does not meet the parent or partner route. The appellant's minor child does not live in the UK, thus she is not a qualifying child, neither does she have settled status in the UK. I find the regular contact the appellant currently enjoys, which is facilitated by visits to the UK, can continue. I am satisfied that it would be in the best interests of the appellant's minor child, to continue to have regular meaningful contact with the appellant in the UK.
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> 24. I find the appellant does not come within any of the provisions of paragraph 276ADE(1), the appellant has failed to show, that he would face very significant obstacles to his integration on return to Pakistan. I find it is likely he retains some cultural, social and familial ties to his home country. I find such ties will assist with his integration on return. I find the appellant's failure to meet the requirements of this rule, carries some weight in the Art 8 assessment.
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> 25. …
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> 26. I accept the appellant speaks English. There is no evidence before me to suggest that the appellant has benefitted from public funds."

37. Judge Young-Harry's decision was made in the context of an allowed appeal because she accepted that the Appellant had not acted dishonestly. For that reason, the first and last two sentences of paragraph [22] of that decision could not stand and were part of the decision set aside. As Upper Tribunal Judge Grubb pointed out, though, the Respondent has not challenged any other of the requirements of paragraph 276B as not being met. For that reason, as Mr Biggs confirmed, whether the Appellant meets the long residence requirements of the Rules turns entirely on whether paragraph 322(5) is found to be applicable. In turn, whether that paragraph is applicable relies in large part on whether the Appellant is found to be dishonest.

38. As I have already noted, the only ground on which this appeal can be allowed or dismissed is whether the Respondent's decision breaches Article 8 ECHR. As Mr Biggs accepted, that is an assessment which has to be conducted as at date of hearing. Clearly, whether the Appellant can meet the long residence requirements of the Rules will depend in large part on the findings made as to dishonesty. However, other factors may be material to the assessment, irrespective of that finding. That is the position in relation to the contact between the Appellant and his child and his other family and private life circumstances. That he speaks English is a factor unlikely to change but is in any event neutral. Whether the Appellant has recourse to public funds is a factor which is unlikely to but may change. That needs to be assessed as at the date of the hearing.

39. Turning back then to the best interests of the child, I accept that Judge Parkes did not make reference to either Judge Young-Harry's decision or Upper Tribunal Judge Grubb's decision preserving the finding as regards best interests. However, I would not have found that any error in that regard was material for the following reasons.

40. What a child's best interests require is a factor which may well change over time. The evidence recorded at [16] of the Decision is particularly pertinent to the level of contact which the Appellant actually has with his daughter. He has not visited her in the Netherlands. After his application was made, he did not have his passport in order to do so but his only explanations for not making physical contact in the eight months when he could have done so was for financial reasons and because he claimed to fear the brother of the child's mother. As regards that evidence, the Judge made the following findings:

> "[27] The Appellant's daughter now lives in the Netherlands with her mother. The Appellant is currently unable to visit there as his passport has not been returned pending these proceedings. However, when the Appellant had the opportunity to visit between his daughter's departure and the Appellant's submitting this application he did not take it up. He stated that his finances were not sufficient but it appears that other legal proceedings were being pursued. In evidence the Appellant referred to plane fares of £80 and on the evidence available the Appellant has not shown that even a single visit would not have been possible.
>
> [28] With regard to the Appellant's concerns about living in Holland it has an effective Police force and judicial system. If the Appellant were to experience issues with the family of his ex-wife I am satisfied that the mechanisms present would be more than sufficient to deal with any problems. The Appellant may have been threatened in the past and I would not minimise the unpleasantness that may have entailed but no direct action appears to have been taken against him and the family were sufficiently warned off by the Police."

41. Set against the background of those findings, Judge Parkes went on to make the following findings about the Appellant's future contact with his daughter:

> "[29] The Appellant has not shown that he would be unable to live in the Netherlands. It may be that he would have to apply from Pakistan for entry and would have to meet what the Dutch equivalent of the UK's Immigration Rules are but there is no evidence either way and it is not for me to speculate.
>
> [30] As matters stand the Appellant's access to his daughter takes place during holidays in the UK. There is no other reason for the Appellant to be in the UK other than for that to take place. I accept that there is no question of the Appellant's daughter travelling to Pakistan at the moment given her age but as she gets older that would be possible without an escort.
>
> [31] Do the current arrangements, in the context of article 8 require that the Appellant should be permitted to remain in the UK for the access that currently takes place to continue? Ordinarily it is in a child's best interests to live with both parents in a stable and loving family. That is not happening in this case and there is nothing to suggest that that will be the case in the future. As it is the circumstances are already in the realms of second best or even not as good as that.
>
> …
>
> [34] There is not a great difference in the circumstances that would prevail between the Appellant staying in the UK with his daughter travelling to the UK for visits and if the Appellant lived in Pakistan and travelled to the Netherlands.

> There may be less contact but it is already reduced and less than the optimum that would be the position if the Appellant and his ex-wife had not separated.
>
> [35] It may well be better for the Appellant's daughter that he remains in the UK but as noted the difference in contact as currently exercised would not be that significant and the Appellant's failure to exercise contact in the Netherlands when he had the opportunity undermines the degree of commitment he has shown.
>
> [36] The Appellant cannot meet the Immigration Rules by virtue of his actions before his daughter was born and in that sense is in a situation of his own making. Given that the Appellant can live in Pakistan and once he has re-established himself would be in a position to travel to the Netherlands I find that the situation does not require that he remains in the UK. In the circumstances I find that it is proportionate to expect the Appellant to leave the UK and to exercise contact with his daughter from another country…."

42. Whilst, as I have already accepted, Judge Parkes does not there refer to the earlier finding that contact between father and daughter is in the child's best interests, that passage does show a careful consideration of what the child's best interests require. It recognises that contact is in the child's best interests. However, as Judge Finch pointed out when granting permission, the Family Court order which appears at [AB/175-176] did not limit the Appellant's contact with his daughter to the UK. The order already provides for some contact to take place in the child's home country of the Netherlands and no doubt the reference to contact in the UK is due only to the fact that the Appellant is physically present in the UK and the proceedings are within this jurisdiction. Whilst the order therefore recognises that some continued contact between the Appellant and his child is in her best interests, it does not necessarily mandate that such contact take place in the UK.

43. Furthermore, as with Article 8 more generally, what is in a child's best interests is not a black and white issue. It is a matter of assessment as to the strength of those interests in the balancing exercise between individual rights and the wider public interest. It will therefore be relevant how often actual contact has taken place and when relative to the child's age. In this case, the Appellant's daughter is now aged seven years. Her mother left the Appellant when his daughter was aged only about six months. The Appellant had some contact in late 2014 when the child would have been aged about eighteen months until January 2015 when the child's mother again took her from the UK. She returned in July 2015 and, following the Family Court proceedings, the Appellant was given contact by order dated December 2015 (when the Appellant's daughter was aged about two and a half years). There has been some contact between father and daughter during school holidays in the UK, but the Appellant has not visited his daughter in the Netherlands.

44. I am satisfied that Judge Parkes' assessment of what the child's best interests required and whether contact could continue elsewhere did not contain any error of law. He considered the extent of that contact presently and the impact on contact if the Appellant were to live elsewhere. Whilst recognising that continued contact was in the child's best interests, he concluded that contact elsewhere than in the UK

would have only limited impact on the extent of contact which was actually taking place.

45. For those reasons, I do not consider that the Appellant's grounds two and three are made out. I would not have set aside the Decision on that account. However, as the assessment of the child's best interests and Article 8 more widely can only take place once lawful findings have been made as to the Appellant's conduct of his tax affairs, I do not preserve Judge Parkes' findings in this regard.

46. However, nor do I consider it appropriate to preserve what Judge Young-Harry said in her decision about this. Her decision was made over eighteen months ago and the factual position has moved on. As with Article 8 more generally, the best interests of the child and the strength of that factor in the balancing exercise is something to be assessed as at date of hearing. For those reasons, when setting aside the Decision, I do not preserve any findings. It will be for another Judge to assess the rights of the Appellant and his child against the public interest, having determined first whether the Appellant has acted dishonestly in the conduct of his tax affairs.

47. It follows from the foregoing that I am satisfied that the Decision should be set aside as a whole with no findings preserved. The appeal will need to be re-heard on all issues.

CONCLUSION

48. For those reasons, I am satisfied that ground one discloses an error of law as set out above. I therefore set aside the Decision. My decision has identified an error which impacts on the previous Judge's credibility findings as to the Appellant's conduct which lies at the heart of the Article 8 assessment. Accordingly, it will be necessary for another Judge to make credibility findings which will be initial ones and will require extensive fact-finding. I therefore consider it appropriate to remit the appeal to the First-tier Tribunal for re-determination.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Parkes promulgated on 24 January 2020 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Parkes.

Signed *L K Smith* Dated: 20 July 2020
Upper Tribunal Judge Smith