



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/06658/2018
HU/10079/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 December 2019

Decision & Reasons Promulgated
On 30 June 2020

Before

MR C. M. G. OCKELTON, VICE PRESIDENT

Between

FARRUKH NADEEM
ROBILA FARRUKH

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A G Hussain, instructed by Legal & Legal Solicitors and Notaries
For the Respondent: Mr Govan, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellants are nationals of Pakistan, husband and wife. The first appellant (whom I shall call "the appellant") appeals against a decision of the Secretary of State on 1 March 2018 refusing him indefinite leave to remain on the basis of 10 years continuous lawful residence in the United Kingdom. The second appellant appeals against the Secretary of State's refusal on 20 April 2018 of her application made on the basis of her family life with the appellant. The ground for the Secretary of State's decision in the case of the appellant is given as that set out in 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

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 appellant and the Tribunal will be to undertake an examination of the evidence and decide whether the refusal should be upheld or struck out, 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 the human rights issues. 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. So far as accountants are concerned, the position is as follows. 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].

15. In the present case the facts that led to the Secretary of State's decision were as follows. The appellant applied for further leave to remain on 14 April 2011. He claimed to have an income of £67,295.05p from all sources between 1 April 2010 and 25 March 2011 including £13,233.05 from employment and £54,062 from self-employment. His tax return for the 2010/2011 tax year, however, almost exactly coinciding with those dates, showed a total income of £14,329 from all sources. The appellant made an application for leave to remain on 27 June 2013. In that application, he claimed to have an income of £66,530, solely derived from dividends as the director of a limited company. His tax return for the 2012/2013 tax year claims that he received no income in that year. He made no tax return for the following year.
16. The appellant and his wife gave evidence at the hearing before Judge Handley. It is perfectly clear that the appellant had a full opportunity to explain the discrepancies insofar as he was able to do so. He set out his immigration history, having come to the United Kingdom to study and having obtained a Masters degree in Financial Management from Robert Gordon University. He said that he had started a business in 2010. He said that his tax returns had been completed by a firm of accountants. He had relied on his accountants. He thought that he had paid about £10,000 in tax in the 2010/2011 tax year, and that he had paid about the same amount in tax on the income that he had declared in the second application. He said that "mistakes had been made". He said that he had tried to get in touch with the individual who operated at that time as his accountant and who had submitted incorrect tax returns on his behalf. He said that he was currently trying to "fix everything" with HMRC, but was unable to say how much he owed. He produced no evidence of letters to his accountant or previous accountant. At the hearing before me, Mr Hussain confirmed on his behalf that no letters were ever sent, that the appellant had not identified any telephone number that he had used in order to try and make contact with his accountant, nor had he identified any particular person with whom he had tried to make contact. Mr Hussain simply submitted to me that "the appellant obviously tried to contact the accountancy company".
17. Looking to other matters, the second appellant claimed to have health problems. There were no medical reports or doctor's letters. Her medical condition relied solely on her own assertions. There was no evidence of contacts or relationships the appellant and the second appellant had made in the United Kingdom, other than that which could be derived from the business records and the mere fact that the appellant has been in the United Kingdom since 2004 and his wife since 2009. The appellants also claimed that they would be at risk of harm from the second appellant's family. No asylum claim has ever been made. There appears to have been little detail of this part of the case presented to the First-tier Tribunal.

18. Judge Handley dismissed the appeals of the appellant and the second appellant. In view of what is now said about his decision, I must set out the relevant parts in full.

“20. I have listened to the first appellant give evidence and I find that he was unclear in important parts of his evidence. I also found that he attempted to avoid some of the questions put to him. Some of his evidence lacked plausibility.

21. As indicated, the first appellant made a number of applications for Leave to Remain in the United Kingdom. It is clear that he was awarded points on the basis of his declared income and had he not been awarded these points, his application should have been refused. However, as stated in the first refusal letter, the income declared to HMRC was significantly lower from that stated in his applications for Leave to Remain in the United Kingdom. As far as I understand, it is the first appellant’s position that he placed his tax affairs in the hands of his accountants but they provided the United Kingdom tax authorities with inaccurate information. The first appellant claims that his accountants completed his Tax Returns. It is not clear to me why qualified accountants would provide HMRC with information which did not reflect the first appellant’s true financial position. This is not a case where the discrepancies involved a few hundred pounds. The discrepancies involved significant sums of money.

22. The first appellant is clearly an intelligent and educated individual who has qualifications in Financial Management. Even if his accountants had made repeated errors, the first appellant would have had the opportunity of discussing his tax affairs with his accountants. It is likely that his accountants would have wanted to confirm the accuracy of the tax returns with the first appellant prior to submitting them. His claim that he was unaware of the contents of the tax returns is not plausible. The first appellant claims that he tried to contact them on numerous occasions to discuss matters but he has provided little or no evidence to support this claim. I had no evidence that he had written to them expressing his concerns. Moreover, in spite of the claims that his accountants were grossly negligent, the first appellant has made no efforts to contact his accountants’ regulatory body to report matters. The first appellant would have known that he was liable to make payment of tax to the UK authorities. It is of significance that in the Tax Questionnaire (which he signed on 5 June 2017) he clearly stated that he had not had to correct or re-submit his tax returns. At that time the first appellant would have been aware of the discrepancies in his tax affairs.

23. At the Hearing the first appellant accepted that he had been working in 2013/14, 2014/15 and 2015/16. His evidence was that he was currently trying to “fix everything”. I had little or no evidence to support the suggestion that the first appellant has been in contact with HMRC to discuss his tax affairs. I had no evidence to suggest that he has reached an agreement to repay the money he owes. These are not the actions of man who wished to resolve matters. He has had ample opportunities to make payment of sums due to HMRC.

24. It is clear from the evidence before me (which included a statement from Jane Baxter, HMRC) that there were discrepancies in the income declared in the application forms and the income declared to HMRC. These discrepancies are significant and the income shown in the applications resulted in the acquisition of points. In JK (India) v SSHD [2013] EWCA Civ 1080 the Court of Appeal effectively confirmed that paragraph 322(1A) was deliberately couched in terms intended to prevent the making of dishonest applications with the result that applications were to be refused even though

the dishonesty employed may not be that of the applicant himself or herself. The First Refusal Letter makes reference to paragraph 322(5). Nonetheless I find that the first appellant was well aware that he had not been paying the appropriate level of tax on his claimed income. Having taken all the evidence and first appellant's explanations into account, I do not accept that the first appellant or his accountants simply made mistakes. I am not satisfied that these were minor tax errors but attempts to misrepresent self-employed earnings for the purposes of obtaining Leave to Remain in the United Kingdom. In light of the first appellant's conduct I conclude that it would be undesirable for him to remain in the United Kingdom.

25. In considering this Appeal I have had regards to the considerations listed in section 117A and 117B. I accept that each appellant will have established a private life in the United Kingdom (although I had limited information about his) but any private life was established at a time when the first appellant's immigration status was temporary and precarious. I therefore give little weight to the private lives.

26. As far as I understand it is not disputed that the second appellant has health issues. In N (2005) UKHL 31 the House of Lords held that the test in this sort of case was whether the claimant's medical condition had reached such a critical stage that there were compelling humanitarian grounds for not removing him/her to a place which lacked the medical and social services which would be needed to prevent acute suffering while he/she was dying. The fact that he/she would be deprived of medical treatment which would otherwise prolong his/her life is not the main consideration. On appeal to the EctHR in N v UK Application ECHR 26565/05 the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. A decision to remove an alien who is suffering from a serious physical or mental illness to a country where the facilities for treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3 but only in a very exceptional case where the humanitarian grounds against the removal are compelling. Article 3 cannot be relied on to address the disparity in medical care between the United Kingdom and an appellant's state of origin. These same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. The Article 3 threshold is even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities in the receiving state and resulted from some naturally occurring illness whether physical or mental. I am not satisfied that the Human Rights Convention would be breached on account of the second appellant's medical condition.

27. It has been suggested that the appellants are at risk from the second appellant's family. The Background Reports indicated that Pakistan's population was estimated to be 201,995,540 as of July 2016. Pakistan has a legal framework offering protection and a functioning criminal justice system although its effectiveness varies. The Law provides for freedom of movement within the country, although violence in some areas restricts this in practice. Pakistan's size and diversity generally allows for reasonable relocation options depending on the person's individual circumstances. I had little evidence to suggest that second appellant's family are powerful or influential. She was able to live in Pakistan without coming to any harm. I do not accept that she

or the first appellant would be at risk on return. They can relocate to a different area of Pakistan.

28. I accept that the appellants would rather remain in the United Kingdom. I also accept that the first appellant has been living in the United Kingdom for some time. However, he was allowed to remain in the United Kingdom for a considerable period of time on the basis of the inaccurate information he presented. He is clearly an educated individual who has adapted to life in the United Kingdom. I accept that it may take him some time to obtain employment in Pakistan. However, his qualifications and work experiences will no doubt assist him in that regard."

19. The grounds of appeal have to a certain extent been overtaken by the decision of the Court of Appeal in Balajigari. The remaining complaints are that the judge did not take into account the appellant's evidence that he had tried to get into contact with his accountant and that, assisted by a new accountant, he had been in contact with HMRC. It is asserted that the judge "did not give any detailed consideration to the documentary evidence before him". In relation to article 8 issues, the grounds complain that the judge "did not properly consider the evidence before him [including] the "true extent of the second appellant's medical conditions"". There is a reference to the second appellant's own witness statement, and the ground concludes by saying that "as can be clearly noted the second appellant requires specialist medical treatment which may not be available to her taking into account her particular circumstances, given the fact she would not have any family support". The grounds then assert that the judge failed to take into account that the appellants would not be able to return to Pakistan as there were family threats against them and they had been in the United Kingdom for a long time.
20. At the hearing before me, Mr Hussain relied on his grounds, adding, in relation to the earnings discrepancy evidence, the confirmation of the lack of documentary evidence to which I have already referred. In relation to the second appellant's medical condition, he described the evidence before the judge as "oral only". Mr Govan pointed out the lack of documentation and that there was no evidence of any real attempt to make any corrections after the discrepancies were discovered. As was accepted at the hearing, the appellant had not yet made any back-payments of tax. The figures presented to the First-tier Tribunal showed very substantial income from a business that the appellant had set up himself. The judge was entitled to take the view, in the absence of a proper explanation, that the appellant was fully aware that he was not paying sufficient tax. So far as the medical evidence was concerned, the judge had taken account of what there was. There was vestigial evidence of private life in the United Kingdom, but the judge had again considered what there was, taking into account s. 117B, which the appellant's representative appeared to have ignored. The appellants had failed to show any real obstacle to their return to Pakistan. In any event, in Mr Govan's submission, there was no error of law.
21. As I have said, this is clearly a case where the appellant had a proper opportunity at the hearing to give his explanation. Contrary to what is asserted in the grounds, it seems to me that the judge did take into account both what was before him and the implications of what was not before him. The appellant has a higher degree in financial management and was running his own business. Those are factors which

clearly fell into account in determining the state of his knowledge. The assertion that an accountant had misrepresented his affairs, in a way of which the appellant himself was unaware, was one which the judge was wholly entitled not to accept, bearing in mind his reservations about the appellant's oral evidence and the lack of any documentary evidence of contact with the accountants or indeed any complaint about them. The crucial findings are those in paragraph 24 of the decision, that the appellant "was well aware that he had not been paying the appropriate level of tax on his claimed income and that he had attempted to misrepresent his earnings". In my judgment those findings are amply sustained by the evidence and disclose no error of law.

22. Turning to the other issues raised in the grounds, the starting position is that the appellants cannot meet the requirements of the immigration rules, and would have to show circumstances making it nevertheless disproportionate to remove them. The details of the second appellant's claimed ill health are not the subject of any medical evidence. There is nothing that could properly support a finding that it prevents her from living in the country of which she is a national. There is no evidence at all that she would not be able to obtain there the treatment (whatever it is) that is needed. The evidence that the appellant and the second appellant might be subject to ill-treatment from her family is vague in the extreme. As Judge Handley pointed out, there does not seem to be any perceptible reason why, if they find themselves in difficulties, they should not seek the protection of the authorities, or move elsewhere in Pakistan, or both. The first appellant is highly-qualified and has a record of enterprise and entrepreneurial activity. He and his wife will clearly be able to re-establish themselves in Pakistan. Again, there was and is simply no evidence to the contrary, and once the provisions of s. 117B are taken into account together with the lack of evidence of any connections made in the United Kingdom, a decision rejecting this ground of appeal is realistically inevitable.
23. For the forgoing reasons it appears to me that there is nothing of substance in the grounds of appeal. Not only was the judge entitled to reach the conclusions he did on all the issues before him, but it is difficult to envisage that any properly advised judge could have reached any other conclusion on that evidence. His decision must stand and the appellants' appeals to this Tribunal are dismissed.



C. M. G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 26 June 2020