Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08724/2017 (P)

THE IMMIGRATION ACTS

Determined on the papers **Decision & Reasons Promulgated**
On 24 September 2020

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SAMI UR REHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

1. The appellant is a Pakistani national who was born on 7 January 1982. He appeals, with leave granted by First-tier Tribunal Judge Chohan, against a decision which was issued by First-tier Tribunal Judge Khawar on29 October 2019. By that decision, Judge Khawar ("the judge") dismissed the appellant's human rights appeal against the respondent's refusal of his application for Indefinite Leave to Remain on grounds of Long Residence.

Background

2. The appellant entered the United Kingdom on 26 July 2006, holding entry clearance as a student. He was granted subsequent periods of leave up to 9 May 2016. Before that date, he applied for further leave to remain and,

on accruing ten years' continuous residence, he varied that application to one for ILR, under paragraph 276B of the Immigration Rules.

3. There was a single ground of refusal, which was that the respondent had concluded that it was undesirable to permit the appellant to remain in the United Kingdom as a result of his conduct, under paragraph 322(5) of the Immigration Rules. She had reached that conclusion because of discrepancies between the earnings claimed by the appellant in previous applications for leave to remain and those disclosed to Her Majesty's Revenue and Customs ("HMRC") for the same periods. The appellant had made applications for leave to remain as a Tier 1 (General) Migrant in 2011 and 2013 and the earnings claimed in those applications was significantly higher than the earnings disclosed to HMRC for tax purposes. The respondent concluded that the appellant had sought to deceive the Home Office or the Revenue and that this was conduct which rendered his continued presence in the UK undesirable.

The Appeal to the First-tier Tribunal

4. The appellant appealed, and his appeal came before the judge on 12 August 2019. He was represented by experienced counsel. The respondent was unrepresented. There was a volume of rather disordered paperwork submitted by the appellant's (former) representatives. In addition to the main bundle of 181 pages, there was an unindexed supplementary bundle of 89 pages, a second supplementary bundle of eight pages, a further supplementary bundle of 16 pages, and some loose documents from his accountants. Counsel provided the judge with copies of the decisions (not the reports) in R (Khan) v SSHD (JR/3097/2017) and Balajigari [2019] EWCA Civ 673. On any view, this was a difficult case, with a mass of material which was presented in the most unhelpful fashion.

5. The judge heard oral evidence from the appellant, although he was not cross-examined due to the absence of a Presenting Officer. He heard submissions from counsel, who took him through the detailed financial material presented by the appellant and submitted, in basic outline, that the appellant's accountants had erred in completing his tax returns and that there had been no deception on the part of the appellant.

6. The judge did not accept the appellant's account. At [22], he stated that it was 'impossible to see how the Appellant's tax return [for the tax year 2010-2011] can be seen as being even vaguely consistent with the Appellant's claimed self-employment'. The discrepancy upon which he focused in that paragraph was between the self-employment sum disclosed to the respondent in that period (just under £31k) and the self-employment profit disclosed to HMRC in that tax year (just under £17k). The judge did not accept that this discrepancy was the fault of the

appellant's advisers, and he relied on the fact that the appellant was a business consultant who would have known the difference between turnover and net income: [23]. He also noted that there had been a 'considerable leap' in the appellant's earnings from the previous tax year. The judge considered there to be no adequate explanation of why the appellant would claim self-employment *income* in his dealings with the respondent which substantially exceeded his *turnover* from self-employment for the same year: [24]. The judge did not consider the evidence from Tax Direct Ltd to explain this difficulty: [25]-[26].

7. At [28], the judge concluded that the ground of refusal under paragraph 322(5) was 'entirely justified', not least because the appellant had been unable to explain himself in interview and due to the lack of any evidence from an accountant to support the appellant's account.

8. The judge then reached similar conclusions in relation to the second tax year in contemplation (2012/2013), at [29]-[36]. At [34], he noted that correspondence from the appellant's accountants did not adequately explain the difference between the self-employment *income* claimed in the Tier 1 application (just over £36k) and the self-employment *profit* figure provided to HMRC for the same year (just over £11k). At the end of this section of his decision, the judge stated that he was satisfied that the respondent's decision was 'entirely in accordance with the evidence and the law': [36].

The Appeal to the Upper Tribunal

9. The appellant instructed different representatives for his appeal to the Upper Tribunal. Grounds of appeal were settled by Mr Hodgetts of counsel on 11 November 2019. There are no fewer than six grounds of appeal, which may be summarised as follows:

   (i) The judge misdirected himself in law regarding the burden of proof.

   (ii) The judge failed to consider whether the respondent had discharged the legal burden upon her.

   (iii) The judge failed to consider whether the appellant had the *mens rea* of dishonesty, or had provided insufficient reasons for so concluding.

   (iv) The judge failed to take evidence into account which corroborated the appellant's version of events in respect of the 2010/2011 tax year.

   (v) The judge similarly erred in respect of the 2012/2013 tax year.

   (vi) The judge failed to consider the discretionary element of paragraph 322(5).

10. Permission to appeal was granted by Judge Chohan on all grounds. He noted that it was correct to state that the judge had placed the burden of proof on the appellant, as contended in ground one. He queried whether any such error was material to the outcome, however, and stated that this question needed to be explored further. Judge Chohan's decision was sent to the parties by email on 26 May 2020.

11. On 10 July 2020, Upper Tribunal Judge McWilliam issued directions to the parties. She had reached the provisional view that the appeal might properly be considered on the papers. She sought the submissions of the parties on that course of action and on the merits of the appeal.

12. On 22 July 2020, submissions in amplification of the grounds of appeal were filed and served by the appellant's solicitors. On 29 July 2020, a response was provided by Mr Avery of the respondent's Specialist Appeals Team. The response is materially as follows:

> *On consideration of the grounds of appeal and the further submission made on behalf of the appellant the respondent accepts that the judge at the first tier erred in law. She accepts that the FTT failed to consider if the Secretary of State had discharged the evidential burden.*
>
> *In the circumstances the respondent considers that a de novo hearing in the First Tier would be appropriate.*

13. Understandably, the appellant's solicitors filed no reply to these submissions.

Discussion

14. This is plainly a case in which it is in accordance with the over-riding objective to determine the appeal to the Upper Tribunal without a hearing. As I have recorded above, the parties are in agreement that the decision of the First-tier Tribunal involved the making of an error on a point of law and that it should accordingly be set aside. I require no oral submissions to determine the appeal fairly and justly to both sides and it is in the interests of the parties to determine the appeal without further delay.

15. Like the respondent, I consider it to be absolutely clear that the judge erred in law as contended in ground one. The judge was provided with copies of relevant authorities. Whether he considered Khan or Balajigari (neither of which he mentioned in his decision), it would have been clear to him that the legal burden of proof was upon the respondent in relation to the allegation under paragraph 322(5). The direction he gave himself at [5] ("The burden of proof is on the appellant to establish all material facts/issues and the standard of proof is the civil standard, that of a balance of probabilities.") was clearly wrong in a case of this nature.

16. The only issue in this case was the allegation under 322(5) and the respondent bore the burden of proving that allegation to the civil standard. As is clear from the authorities, however, the proper approach is further refined, in that it requires a three-stage assessment. The judge should have considered, firstly, whether the respondent had discharged the evidential burden of establishing a reasonable suspicion of dishonesty on the part of the appellant. It was then for the appellant to adduce a reasonable explanation for the matters of concern. Finally, it was for the judge to consider whether the respondent had discharged the legal burden, taking into account all of the evidence before him. His reasoning was not only premised on a misunderstanding of the burden, therefore; it represented an elision of these three stages.

17. Judge Chohan sagely observed that it might be said by the respondent that any such error was not material and that that issue required further consideration. I note that despite that invitation, the respondent has not sought to make any such submission. Given the respondent's stance, I do not propose to proceed down that route of my own volition. I am content to accept the submission made by both parties, that the error was a clear and serious one and that the decision should be set aside on that basis alone.

18. In the circumstances, I propose to say very little about the remaining grounds of appeal. The second and third grounds add nothing to the first, with respect to their author.

19. The fourth and fifth grounds do, in my judgment, establish further error on the part of the judge. There was material which tended to offer some support for the appellant's account which was indeed overlooked by the judge. In respect of the first period (2010/2011), the judge overlooked the material listed at [2.4.2] of Mr Hodgetts' grounds, comprising invoices from sub-contractors who were said to have undertaken work for him during this tax year. In respect of the application made in 2013, the judge failed to engage lawfully with the accountant's evidence that they had erroneously failed to account for sub-contracting work as expenses, as contended in ground five.

20. Ground six criticises the judge for failing to consider the discretionary element of paragraph 322(5) of the Immigration Rules. The merit in this ground was underlined, three months after the grounds of appeal were settled, in Yaseen [2020] EWCA Civ 157; [2020] 1 WLR 1359. At [46] of his judgment in that case, Rupert Jackson LJ (with whom Simler LJ and Sir Jack Beatson agreed), emphasised the importance "in all but the most extreme cases" of conducting a balancing exercise under paragraph 322(5), considering the matters militating for and against the exercise of discretion. The judge undertook no such balancing exercise in this case,

seemingly concluding that his primary findings of fact justified refusal under paragraph 322(5) without more.

Postcript

21. I add this. The appeal will be remitted to the First-tier Tribunal for consideration afresh. The management of the appeal will obviously be for that Tribunal. For my part, however, I would firmly expect that the evidence upon which the appellant seeks to rely should be within a single, consolidated bundle which is fully paginated and indexed. I have been critical of the judge of the First-tier Tribunal but I do not doubt that his task was rendered exponentially more difficult than it should have been by the appalling way in which the evidence was presented, and by the absence of a skeleton argument. The financial information in this case was reasonably complicated and the law has developed at pace over the last two years or so. The judge was entitled to assistance in both respects but I doubt that he received it. The next judge will legitimately expect it.

Notice of Decision

The decision of the FtT involved the making of errors on points of law. That decision is set aside and the appeal is remitted to the FtT, to be heard de novo by a judge other than Judge Khawar.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 September 2020