Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08847/2018
HU/06436/2018

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 4 January 2021	**On 14 January 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAMALDAS ANTHONYPILLAI
PRASHANTHINI KAMALADAS
[ANONYMITY ORDER NOT MADE]

Respondents

Representation:

For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the respondent: Mr R Halim, counsel, instructed by M & K Solicitors

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. The Secretary of State for the Home Department ("the appellant") has been granted permission to appeal against the decision of Judge of the First-tier Tribunal K M Verghis ("the judge"), promulgated on 8 March 2020, allowing the human rights appeals of Kamaladas Anthonypillai ("the 1st respondent") and his spouse Prashanthini Kamaladas ("the 2nd respondent") against the appellant's decisions dated 26 February 2018 (in respect of the 1st respondent) and 1 April 2018 (in respect of the 2nd respondent) refusing their human rights applications on the basis of the 1st respondent's alleged dishonesty.

2. The respondents are nationals of Sri Lanka. The 1st respondent entered the UK on 11 September 2006 as a student. His leave was subsequently extended to 16 May 2016, first as a Tier 1 (Post Study Work) Migrant and then as a Tier 1 (General) Migrant. The 2nd respondent was granted leave to enter as a Points Based Scheme (PBS) family member in September 2014. The 1st respondent applied for Indefinite Leave to Remain (ILR) on 16 May 2016 as a PBS Migrant and but he varied his application on 10 October 2016 to that based on his long residence pursuant to paragraph 276B of the immigration rules. The 2nd respondent's applications were made as the dependent of the 1st respondent.

The appellant's decisions

3. The appellant refused the 1st respondent's application under paragraph 322 (5) and paragraph 276B (ii) and (iii) of the immigration rules. The appellant noted that the 1st respondent's application for leave to remain as a Tier 1 (General) Migrant, made on 2 April 2011, indicated that he had an income of £40,495.78 for the relevant tax year, including £24,650 earned from dividends in respect of the 1st appellant's company (DAS IT Solutions). In his application for further leave to remain in the same capacity made on 29 April 2013 the 1st respondent claimed to have an income of £44,787.41 for the relevant tax year including dividends of £21,200 relating to his company. In response to a Tax Questionnaire sent to the 1st respondent on 24 May 2017 he provided a letter from his accountants (Multitop Accountant) dated 2 August 2017 stating that they failed to file the 1st respondent's tax returns for 2010/2011, 2011/2012, 2012/2013, and 2013/2014. The 1st respondent declared his dividends to HMRC in April 2016 and submitted late tax returns for these years later in the year. The 1st respondent was required to pay an additional £1,252.65 in tax.

4. The appellant considered the explanation from the 1st respondent and his accountants – that they were not issued tax returns by HMRC, but the appellant maintained it was the 1st respondent's responsibility for filing his own tax returns and to ensure that his earnings were correctly declared to HMRC on time. The appellant relied on the 1st respondent's answer to question 12 of the Tax Questionnaire - enquiring whether he had checked and signed his tax returns prior to them being submitted - to which he stated "yes". The appellant additionally relied on the 1st respondent's answer to question 14 of the Tax Questionnaire in which he confirmed that his accountants failed to submit his

tax returns despite the fact that he had checked and signed them. The appellant considered this was inconsistent with the accountants' claim that the 1st respondent did not receive tax returns and that they only declared his income in 2016. The appellant did not accept that an administrative error led to the failure to submit the tax returns for 4 years running. The appellant additionally relied on the 1st respondent's evidence in an interview dated 28 February 2017 in which he said that he first became aware that his tax returns had not been accurately declared in 2014. The appellant considered that the 1st respondent had little intention of declaring his tax returns based on his failure to take any action to correct his errors until April 2016. The appellant considered that the 1st respondent's presence in the UK was undesirable given his alleged various misrepresentations relating to his earnings.

5. The appellant refused the 2nd respondent's application for leave to remain as the spouse of a settled person as her husband's application for settlement was refused and because she failed to meet the eligibility financial requirements in paragraphs E-LTRP3.1 to 3.4 as she failed to supply all the specified evidence set out in Appendix FM-SE.

6. The respondents appealed the appellant's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002. Their appeals were initially dismissed in a decision promulgated on 28 February 2019 but Deputy Upper Tribunal Judge Lever set the decision aside and remitted the matter back to the First-tier Tribunal to be heard afresh.

The Decision of the First-tier Tribunal

7. At the outset of the hearing the judge indicated the joint view of both parties that the only issue in contention was whether the 1st respondent acted dishonestly in respect of his tax affairs. After summarising the position of both parties and accurately setting out the relevant burden and standard of proof, and indicating that account had been taken of the decisions in **Balajigari** [2019] EWCA Civ 673 and **SSHD v Abbasi** [2020] UKUT 00027 (IAC), the judge considered the history of the appeal. She noted, at [16], that the appeal had been adjourned from 18 November 2019 as the 1st respondent's accountant had been unable to attend the hearing as he was in Sri Lanka visiting an uncle who was unwell. Directions were issued at the adjourned hearing requiring the 1st respondent's solicitors to advise the Tribunal and the appellant if the accountant was unable to attend the next hearing and, if this was the case, the appellant was given the opportunity to send direct questions to the accountant via the 1st respondent's solicitors. The accountant was unable to attend the scheduled hearing and the appellant failed to send any questions to the 1st respondent's solicitors as per the directions [17].

8. At [18] the judge indicated that she had taken into account the background evidence before her and the fact that a specific document was not mentioned did not mean it had not been considered. The judge specifically directed herself pursuant to the principles in **Tanveer Ahmed** [2002] Imm AR 318.

9. At [19] the judge noted that there was no dispute other than in respect of whether the 1st respondent fell afoul of paragraph 322 (5). At [21] the judge stated:

> "the tribunal reminded itself of **Abbasi**, that in a case involving a decision under paragraph 322 (5) of the immigration rules, where an individual relies upon an accountant's letter admitting fault in the incorrect submission of tax returns to HMRC, the 1st-tier or Upper Tribunal is unlikely to place any material weight on that letter if the accountant does not attend the hearing to give evidence, by reference to a statement of truth, that explains in detail the circumstances in which the error came to be made; the basis and nature of any compensation; and whether the firm's insurers and/any all relevant regulatory body have been informed. This is particularly so whether letter [*sic*] is clearly perfunctory in nature."

10. The judge then set out extracts from 2 letters written by the 1st respondent's accountant dated 23 May 2016 and 2 August 2017 in which the accountant claimed that there had been an administrative error in failing to file the 1st respondent's tax returns as those returns were not issued by HMRC at the time. The letters were supported by screenshots from the HMRC website indicating that tax returns were not issued for the tax year ending 5 April 2011 and for the tax year ending 5 April 2013.

11. The judge then again referred to **Abbasi** at [26], noting the accountant's absence, but also that he did attend the First-tier Tribunal hearing on 19 February 2019 where he gave evidence and was cross-examined. The judge noted that the appellant failed to formulate any questions that could be put to the accountant in writing in preparation for the hearing. At [27] the judge found that the 1st respondent gave his evidence in "a measured way", that he answered all questions put to him without attempting to argue his case, and that it was apparent to the Tribunal that the 1st respondent did not fully appreciate the mechanisms of tax reporting and that he had not understood the difference between his personal and company accounts. The judge found that the 1st respondent demonstrated "very obvious naivety" and that when the omissions in income reporting were uncovered they were quickly resolved. The judge found that this was an indication that the 1st respondent was not attempting to evade tax due. The judge additionally noted, at [28], that the 1st respondent chose his accountants because they were less expensive than others and noted that this was unsurprising given that his chosen accountant was not a Chartered Accountant. The judge recorded evidence given by the 1st respondent that the person responsible for the company accounts at the accountancy firm had been dismissed because of mistakes she made and could not be contacted. The judge noted that the two letters from the accountant were brief but found that they were straightforward and not perfunctory. Drawing all relevant circumstances together the judge found, at [29], that the processes at the accountants firm "were not robust and did not meet professional standards" and that there were "significant competence issues" within the accountants firm

that were reflected in the admissions made in the accountants letters. Whilst the 1st respondent demonstrated naivete this was not the same as dishonesty. The judge concluded that the appellant had failed to discharge the initial burden.

12. At [30] the judge repeated that there was no dispute, "but for the issue of undeclared income", that the 1st respondent's application under paragraph 276B would have been granted and that it followed that the 2nd respondent would have met paragraph R-LTRP of Appendix FM. The appeals were allowed.

The challenge to the judge's decision

13. The grounds contend that the judge, in concluding that the 1st respondent was not dishonest, failed to consider relevant factors, namely, that the 1st respondent had signed each of his annual accounts and therefore consented to the 'inaccurate tax returns' in each of those years, that he took two years before eventually settling his tax return, and the reasons why the appellant had previously been dismissed from employment with Tesco. Had the judge considered all this evidence 'in the round' she would have found the appellant to be deceitful and dishonest. The grounds further contend that the judge fatally erred by not looking at the evidence in the round and attaching weight to unsupported testimony from an accountant, contrary to the approach in **Abbasi**.

14. The original grounds additionally contended that the judge failed to consider whether the 1st respondent satisfied the immigration rules on other occasions, but in granting permission Tribunal Judge Martin only found it arguable that the judge erred in her consideration of whether the 1st respondent acted dishonestly. Permission was not granted in respect of an alleged error in failing to consider the substantive immigration rules as it was clear that paragraph 322 (5) was the sole issue before the tribunal. The respondent did not renew her application for permission to appeal in respect of these other grounds.

15. In an email sent to the Upper Tribunal and the respondents' solicitors on 30 December 2020 Mr Whitwell sought permission to amend the grounds. He wished to challenge the judge's finding that the 1st respondent should have been given the opportunity to provide an innocent explanation by the appellant in respect of her allegation of dishonesty. The judge, it was claimed, failed to appreciate that the statutory appeal was the 1st respondent's opportunity to respond to the appellant's decision and that this was apparent from the decision of **Ashfaq (Balajigari: appeals)** [2020] 00226 (IAC), promulgated on 17 June 2020. To the extent that the judge took into account the alleged failure by the appellant to give the 1st respondent an opportunity to respond to the allegation of dishonesty in assessing his honesty, the judge misdirected herself. The amended grounds additionally challenge the weight attached by the judge at [27] to the fact that HMRC issued no penalty against the 1st respondent, and contend that the judge failed to consider the alternative possibility that the figures given to HMRC were correct and that the claimed earnings presented to

UKVI were inflated for the purposes of obtaining an immigration advantage. The amended grounds finally contend that the judge's conclusion at [29] - that even if the 1st respondent had been dishonest about his income this would not have been enough to breach paragraph 322 (5) given his continuous length of lawful residence - was perverse and disclosed no consideration of the discretionary element of the immigration rule.

16. In his oral submissions Mr Whitwell adopted points 1 and 2 of the original grounds and his amended grounds. He emphasised that the judge had erred in law in concluding that the appellant failed to give the 1st respondent an opportunity to deal with the dishonesty issue and that the judge was not entitled to treat the approach taken by HMRC as a "weighty factor".

17. Mr Halim submitted that the judge weighed up the evidence before her, including the oral evidence, and properly assessed that evidence at [27] and [29]. In so doing the judge took account of all material evidence before her. Any mistake by the judge in relation to the findings in **Balajigari** relating to procedural matters did not affect or undermine the judge's assessment of the 1st respondent's honesty. Even if the judge had erred in law in her assessment of the 1st respondent's honesty, there was no basis for asserting that her alternative finding at [29] was perverse. The judge had considered all relevant evidence "in the round" and was entitled to find that paragraph 322 (5) was not engaged.

18. I reserved my decision.

Discussion

19. Permission to appeal was initially granted by Upper Tribunal Judge Martin (sitting as a Judge of the First-tier Tribunal) in respect of Ground 1 only. Paragraphs 1 to 6 and paragraphs 9 and 10 of the 'Application To Amend The Grounds Of Appeal' refer to or rely on the decision in **Ashfaq** which was promulgated on 17 June 2020, after the grant of permission by Judge Martin. Paragraphs 7 and 8 of the 'Application To Amend The Grounds Of Appeal' rely directly on **Balajigari**, which had already been promulgated and referred to by the judge in her decision, and paragraph 11 simply asserts that the judge's conclusion at [29] was perverse. With respect to paragraph 7 and 8 and 11 of the 'Application To Amend The Grounds Of Appeal', these could have been included in the original grounds but were not. No adequate explanation has been given by Mr Whitwell as to why a renewed application was not made for permission to appeal the grounds disclosed in paragraph 7, 8 and 11. The application to amend the grounds was sent to the Upper Tribunal and the respondents' solicitors at 17:04 on 30 December 2020. Mr Whitwell sought to explain the significant delay in making the application by reference to the fact that he was the first officer to look at the case since permission was granted. I accept that this is the case, but it still does not adequately explain why the application was made so late in the day. Mr Halim took issue with the significant delay in seeking to amend the grounds but did not indicate that he

was prejudiced by the application. In these circumstances I am prepared to grant the appellant's application to amend the grounds.

20. The original grounds of appeal inaccurately assert that the 1st respondent had signed each of the annual accounts and "had therefore consented to inaccurate tax returns in each of these years." The 1st respondent did not make "inaccurate tax returns"; the issue with which the judge had to grapple was whether the failure to make tax returns in respect of the relevant tax years disclosed dishonesty by the 1st respondent. There were however no "inaccurate tax returns" and no discrepancies between the dividend income disclosed to UKVI and then (eventually) disclosed to HMRC. The tax returns signed by the 1st respondent disclosed the same income as that disclosed to UKVI. To the extent that the original grounds rely on an alleged failure by the judge to consider that the 1st respondent signed all of the tax returns lodged with HMRC, this discloses no basis for any error of law.

21. The original grounds further contend that the judge failed to consider a delay of two years before the 1st respondent settled his tax return. The basis for the alleged delay of 2 years was an answer given by the 1st respondent in his interview conducted on 28 February 2017. In his statement dated 12 February 2019 the 1st respondent explained that, in the interview, he could not remember the relevant year and stated '2014' out of nervousness, before confirming that it was in fact April 2016. Although the judge did not specifically mention this part of the witness statement she did indicate at [18] that she had taken into account of the background evidence, and at [27] she found that the 1st respondent gave his evidence in a measured way and had answered all questions without attempting to argue his case and that when the omissions in income reporting were uncovered they were resolved quickly. It is clear from the judge's detailed assessment of the 1st respondents evidence at [27] and [29] that she carefully considered the 1st respondent's evidence 'in the round', including his written and oral evidence, and found he had provided credible and plausible explanations for the failure to lodge the tax returns. This indicates that the judge found the 1st respondent credible and that she accepted his explanation in his statement, with particular reference to her finding that the omissions were "resolved quickly". This was a conclusion rationally open to the judge based on the evidence before her and for the reasons she gave. The original grounds further contend that the judge failed to take into account evidence relating to the 1st respondent's dismissal from his employment with Tesco. No mention is made of such dismissal in the Reasons for Refusal Letter and there was no indication that any submissions were made by the Presenting Officer based on the 1st respondent's former employment with Tesco. The only reference I can find on the file relates to an 'IO Report' dated 8 July 2014 recalling the 1st respondent's explanation that he had been dismissed for taking some tape from the store. It is entirely unclear whether this was brought to the judge's attention or whether submissions were made on the point and, bearing in mind the vintage of the report and the absence of any suggestion that the 1st respondent was prosecuted, I am not satisfied that the judge failed to take into account a relevant consideration.

22. The original grounds finally contend that the judge failed to apply the principles established in **Abassi** relating to the weight that can be attached to letters from accountants. It is clear however from the decision at [4] and, in particular, at [21] and [26] that the judge was acutely aware of the guidance in **Abassi**. The judge was entitled to note that the accountant had previously given evidence and was cross-examined in February 2019, and to find that the explanation for the accountant's absence was plausible (indeed the appellant does not suggest in her grounds that the accountant was fabricating his claim that he was in Sri Lanka due to the ill-health of his uncle). The judge was additionally entitled to note that the appellant was given an opportunity to put questions to the accountant but failed to do so. In these particular circumstances the judge was therefore entitled, having regard to her assessment of the two letters from the accountant, to attach the weight she did to those letters. The judge's approach does not disclose any error of law.

23. I now consider the amended grounds. Whilst I accept that the judge wrongly indicated at [29] that the 1st respondent should have been given an opportunity to explain his position before the appellant made her refusal decision (**Ashfaq** held that the appeal process fills the procedural fairness gap identified in **Balajigari**), this finding was of a procedural nature and, contrary to the assertion in the amended grounds, did not have any material impact on the judge's assessment of the 1st respondent's honesty. At [27] and [28] the judge carefully considered the manner in which the 1st respondent gave his evidence, his action on the discovery that the tax returns had not been submitted, and the reasons why he chose Multi-top as his accountants. The judge's assessment of the 1st respondent's evidence at [28] was particularly detailed and based on her assessment "in the round". The judge was entitled, at [29] to find that the processes at the accountancy firm were "not robust and did not meet professional standards" and to note that the accountant was not a Chartered Accountant. These findings are quite separate from the judge's observation that the appellant did not give the 1st respondent an opportunity to explain his position before making the refusal decision. Any error of law by the judge was therefore immaterial to her assessment of the 1st respondent's honesty.

24. Nor is there any merit in the contention that the judge erred in law in considering the actions of HMRC in not issuing a penalty to the 1st respondent as a weighty factor. The judge made it clear at [27] that the approach adopted by HMRC was not determinative and the issue of weight was ultimately one for her. The judge's assessment of the 1st respondent's honesty in any event relied on a number of different factors. It cannot be said, having regard to the decision holistically, and in particular the judge's further assessment at [28] and [29], that she gave weight to an irrelevant matter. To the extent that the amended grounds contend that the judge failed to consider the alternative possibility that the figures provided by the 1st respondent to HMRC were correct and that he inflated his earnings to UKVI to gain an immigration advantage, this is undermined by the fact that there were no discrepancies between the figures disclosed to HMRC and those disclosed to UKVI. Contrary to the situation

considered in **Ashfaq** at [14], there was no "fictitious inflation of income" or "fictitious under-return" on the facts of the present case. Nor does it appear that any submission was made by the Presenting Officer at the First-tier Tribunal hearing that the 1st respondent had lodged any inaccurate tax returns.

25. The ground relating to the alleged perversity of the judge's finding at [29] related to a finding in the alternative even if the 1st respondent was dishonest. Given that I have found that the judge's decision does not disclose any error of law requiring the decision to be set aside in respect of her finding that the 1st respondent was not dishonest, this ground falls away.

26. For the reasons given above I am not persuaded that the judge's decision contains mistakes on points of law requiring it to be set aside.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law.

The Secretary of State for the Home Department's appeal is dismissed.

D.Blum 6 January 2021

Signed Date
Upper Tribunal Judge Blum