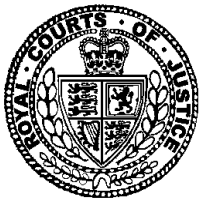

Neutral Citation Number: [2020] EWCA Civ 157

Case No: C5/2018/0820

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
Deputy Upper Tribunal Judge Birrell
HU/05252/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2020

Before:

LORD JUSTICE IRWIN
LADY JUSTICE SIMLER DBE
and
SIR JACK BEATSON

- -

Between:

TAHIR YASEEN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik (instructed by **Irvine Thanvi Natas Solicitors**) for the **Appellant**
Christopher Staker (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 29 January 2020

- -

Approved Judgment

Lord Justice Irwin:

Introduction

1. The Appellant, who is of Pakistani nationality, failed to make timely tax returns for the years 2010/11, 2011/12 and 2012/13. He filed these returns only in December 2015 after the point when his continued residence in the United Kingdom was in issue. He was otherwise qualified to be granted Indefinite Leave to Remain ("ILR") on the basis of completing ten years residence in the UK.

2. On 23 January 2016, the Respondent refused ILR on the ground of character citing two separate parts of the Immigration Rules, paragraph 276B(ii) and paragraph 322(5). The relevant language in each Rule is similar. Paragraph 276B, pared down, reads:

> "276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence … are that:
>
> [10 years residence]
>
> …
>
> (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:
>
> …
>
> (c) personal history, including character, conduct…"

3. Paragraph 322(5) similarly pared down reads:

> "322 …
>
> Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused….
>
> (5) the undesirability of permitting the person to remain … in the light of his conduct … character or dissociations …"

4. In a decision promulgated as long ago as 28 February 2017, the First-tier Tribunal ("FtT") dismissed the appeal on the ground that the delay in filing the tax returns represented a "lack of integrity" sufficient to justify the test in paragraph 267B(ii). I set out the relevant findings more fully below, but significantly the FtT did not find that the Appellant had been dishonest. It was and is conceded by the Respondent that a finding under paragraph 322(5) requires dishonesty.

5. The FtT was upheld by the Upper Tribunal ("UT") on 4 December 2017.

6. The Appellant has permission to appeal on one ground, the second of two grounds initially advanced in the application for permission. It is said that a decision under paragraph 276B(ii) requires an exercise of judgement following a balancing exercise, taking into account the positive as well as negative considerations; an exercise which was not performed by the Respondent, or by the FtT. It is argued that process is of particular importance when addressing the criterion of "lack of integrity" as opposed to dishonesty.

The Facts

7. The Appellant was born on 20 February 1984 and came to the United Kingdom in September 2005. He has had successive grants of leave to remain, culminating with a grant of leave to remain as a Tier 1 General Migrant on 17 June 2013, that leave expiring on 17 June 2016. On 18 September 2015, the Appellant applied for Indefinite Leave to Remain on the ground of long residence. By letter dated 23 January 2016, his application was refused. The Respondent's official in giving the reasons for refusal stated that the application had been considered under paragraph 276B of the Immigration Rules. It was accepted that the Appellant could establish ten years continuous lawful residence. However, with regard to the Appellant's "personal history, including character, conduct, associations and employment record" the decision-maker had considered information provided with earlier applications for leave in 2011 and 2013. Those earlier applications were based on evidence of income from employment as a security guard and evidence of self-employed earnings. The figures advanced by the Appellant at that stage were necessary for him to be granted the leave to remain then given him.

8. The letter then continued as follows:

> "When reviewing your application for indefinite leave to remain consideration has also been given to the information you have provided to HMRC about your earnings whilst living in the United Kingdom. You attended an interview at Liverpool PSC on 10 December 2015 and were asked about your tax returns submitted to HMRC.
>
> At interview you confirmed that you had only submitted Self Assessment tax returns for the tax years 2010 to 2011, 2011 to 2012 and 2012 to 2013 in December 2015. You stated that your tax returns were delayed in submission as you were not happy with your previous accountant and you did not know how to submit these returns yourself. You stated you stopped using this previous accountant at the end of 2013 on account of delays in submitting tax returns and you were not satisfied with these accountants. You engaged a new accountant, First Choice Accountants, in October 2015 and they were preparing your accounts to be submitted to HMRC, eventually submitting them in December 2015.
>
> Careful consideration has been given to the information you provided to both HMRC and to UKVI about your earnings and your explanation for this information.

> The information you provided to HMRC about your self employment has a direct impact on your tax liability and the amount of tax you would be required to pay. The information you provided to UKVI about your self employment was required in order for you to obtain your Tier 1 General visa.
>
> It is clear there **are significant differences in the information you initially provided to HMRC and the information you provided to UKVI about your earnings**." [Emphasis added]

9. The letter went on to note that the Appellant's self-assessment tax returns were only submitted to HMRC after the settlement application had been submitted and after the Appellant was called to interview. These returns were clearly late. The letter went on to note that the Appellant, when interviewed, admitted that at the end of 2013 he was aware that his self-assessment tax returns had not been submitted. The letter continued:

> "Your actions in not submitting self-assessment tax returns until requested to provide evidence of these completed returns leads to the conclusion that in light of your character and conduct it would be undesirable to allow you to remain in the United Kingdom. You therefore do not meet the requirements stated in paragraph 276B(ii)(c) of the Immigration Rules.
>
> In addition to the above your character and conduct with regards to declaring your income to HMRC would also lead to a refusal of your application under General Grounds paragraph 322(5) of the Immigration Rules. Whilst refusal under paragraph 322(5) of the Immigration Rules is not a mandatory decision, it is considered your actions in not declaring the income to HMRC when required to do so would mean that refusal under paragraph 322(5) is appropriate."

10. Despite the passage in the letter given emphasis above, there was no evidence in the decision letter that there was any discrepancy in the figures which had been submitted for leave to remain purposes and the figures as included in the tax returns. There was no basis for a suggestion of dishonesty in that sense.

The Appeal before the First-tier Tribunal

11. In the course of his appeal, the Appellant lodged a bundle of material, including a witness statement, a number of character references, material showing his employment and earnings, and letters and material from successive firms of accountants. It is clear these were intended to achieve two objectives: firstly, to rebut dishonesty or any other negative implications as to his character and conduct, and secondly, to advance positive evidence as to his character and conduct. In his statement and his oral evidence, he was frank that he had made late tax returns.

12. In the course of giving reasons for dismissing the Appellant's appeal to the First-tier Tribunal, Judge Evans noted that the Appellant's account as to how this had come about "had not remained consistent" (paragraph 29). In his written statement for the

hearing, the Appellant had "maintained in effect that he was the innocent victim of incompetent accountants", those being successively Riaz and Co in 2011, who passed his file on to Hashim & Co in 2013. When those accountants "closed", he engaged Smart Accountants. Later in 2013: "Smart Accountants stopped returning his calls and, even after a meeting, failed to progress matters. Consequently, he instructed First Choice Accountants in August 2015". His statement claimed that "on 28 December 2015 Smart Accountants accepted that the failure to lodge tax returns was their fault and they had written to him accordingly on 8 January 2016" (paragraph 29).

13. Judge Evans's conclusions of fact continued as follows:

> "30. However, the Appellant gave a very different account in the interview he had on 23 December 2015 following the Application. He referred to having only used one firm of accountants before instructing First Choice Accountants in late 2015. He had stopped using the first firm he had instructed, possibly called IH Accountants, around the end of 2013 (question 45) but did not instruct other accountants till 2015 (question 66). The reason for this was "Because I tried to do it myself but could not understand it again" ("it" being the completion of self-assessment tax returns). When asked why he had not submitted any self-assessment tax return before December 2015 he answered "I could not understand". When asked "any other reason" he replied "Just I could not understand how to". When asked "What did you not understand" he said "The procedure". (Questions 60-62)
>
> 31. The differences between the account given at the interview in December 2015 and in the witness statements are not minor. They are substantial and go the heart of his explanation of why the self-assessment tax returns were presented late. The original account suggests that the failings were largely due to him not understanding the system. The second blames the various accountants. The difference between the two accounts substantially damages his credibility."

14. Judge Evans noted that on at least two occasions in the past, accountants acting for the Appellant (including Riaz Ahmad & Co and Hashem & Co) had acted efficiently and swiftly on his behalf, by contrast with the suggestion of gross inefficiency. The judge also observed (paragraph 32.2):

> "there was nothing complicated about [the] tax returns when they were submitted. They did little more than state taxable profitable figures from self-employment and then earnings from employment. For example, the figures contained in the 2010-2011 tax return dated 16 December 2015 are practically identical to those contained in the letter from Riaz Ahmad & Co, letter dated 4 April 2011."

15. Further, the judge did not accept the Appellant was incapable of understanding his own tax affairs so as to progress them properly, he being a "well-educated man with both a BSc and a MSc from a UK university" (paragraph 33). The judge placed little or no reliance on the letter accepting fault on the part of Smart Accountants, dated 8 January 2016. The judge found that "very little weight indeed" could be attached to that, given that the Appellant had not mentioned this supposed failure in the course of his interview on 23 December 2015 (paragraph 35). Further, the judge found that the chronology of events made it clear that the Appellant:

> "…only filed tax returns after he was requested by a letter dated 7 December 2015 to attend an interview in relation to the application and to bring any/all completed self-assessment tax returns submitted to HMRC during the period you have resided in the UK".

16. Judge Evans then summarised his overall conclusion as follows:

> "37. Overall, I find that the Appellant has failed to act with integrity in relation to his tax affairs. I find that there was no good reason for the delay in their submission until after he had been requested to attend the interview which took place on 23 December 2015. I find that this is not a case where there has been an isolated failure, for example a tax return being submitted late or perhaps even not at all, as a result of carelessness or an oversight. Rather it is a persistent failure to submit any tax returns at all from when the Appellant became self-employed in December 2010 until December 2015. I find that such a persistent failure in all the circumstances provides grounds for substantial criticism of the Appellant's character and conduct. The Appellant is clearly an intelligent and well-educated man who was capable of giving instructions which resulted in prompt action by his accountants (see the letters supporting his 2011 and 2013 applications). I find that, if he had attached any important (*sic*) to filing his tax returns on time and paying the tax that he owed in a timely fashion, he would have had no difficulty in having the relevant tax returns prepared and submitted. They were very straight forward tax returns when they were eventually filed in December 2015. Further, I find that he must himself have been aware that they had not been filed, given that he had not paid the tax due under them.
>
> 38. I therefore conclude that the Respondent was correct to conclude that the Appellant could not satisfy the requirements of paragraph 276B of the Immigration Rules."

17. Judge Evans went on to reject the Appellant's Article 8 claim.

18. It is a central complaint under Ground 2 that the FtT proceeded directly from the adverse finding on conduct and character, albeit not based on dishonesty, to uphold the refusal of ILR, without considering the positive evidence as to the Appellant's

conduct and character, and without conducting the balancing exercise necessary for a lawful conclusion.

Appeal to the Upper Tribunal

19. In his decision promulgated on 4 December 2017, deputy UTJ Birrell upheld the decision below, concluding that there had been no material error of law. Judge Birrell began by noting that the basis of refusal in the letter from the Respondent was expressed to be:

> "by reference to the public interest factors set out in paragraph 276B(ii)(c) and that such conduct should also result in a refusal under the provisions of paragraph 322(5) of the Rules. The two provisions are worded differently and thus potentially contemplate different behaviours and as noted above in relation to 322, it is clear that by virtue of its opening words – "in addition to" – it supplements the grounds for refusal of extension set out in the preceding parts 2-8 of the Rules." (paragraph 14)

20. The judge went on to observe that:

> "the behaviours set out in paragraph 276B may fall short of criminality or [a requirement of] dishonesty such as for example an applicant who had received a caution for a behaviour that did not involve an element of dishonesty but where the public interest was engaged because it reflected on his character and conduct." (paragraph 15)

21. In paragraph 16, Judge Birrell noted that Judge Evans in the First-tier Tribunal had set out "an erroneous version of paragraph 322(5) making it a mandatory ground of refusal rather than discretionary". However, in the remainder of the judgment Judge Evans had made no other reference to paragraph 322(5) and "when he set out 'The Law' … he only set out paragraph 276B" (UTJ Birrell, paragraph 16).

22. Judge Birrell's key conclusions were thereafter expressed as follows:

> "17. The Judge was entitled to consider the way the appeal was argued before him. Thus in relation to his findings he only made a finding in respect of paragraph 276B at paragraph 38 there is no finding in respect of paragraph 322(5). Therefore I am satisfied that while the Judge made an error of law in setting out an incorrect version of paragraph 322(5) this would not be material if his assessment under paragraph 276B, that the Appellant failed to meet the requirements, was open to him.
>
> 18. Moreover I also note that the caselaw presented to me by Mr Malik all related to findings under paragraph 322(5) where dishonesty was clearly being alleged and sets out the test to be applied when such an allegation was being made. The basis of the refusal letter which the Judge properly analysed was that

> the Appellant had submitted his tax returns late. The word 'dishonesty' does not appear in the refusal letter nor was in put to the Appellant or argued in the submissions made by the HOPO as summarised by the Judge (paragraph 13). Mr McVitie, I note, only conceded that paragraph 322(5) required dishonesty to be established not 276B.
>
> 19. The Judge therefore set out a number of detailed and well reasoned findings at paragraphs 29-36 as to why the Appellant had failed to provide adequate explanations for his failure to file tax returns and how this reflected on his character and conduct as required by 276B.
>
> …
>
> 21. I am satisfied that it was thereafter open to him under paragraph 276B to find that given the '*persistent' nature of the conduct'* (it) *provides grounds for substantial criticism of the Appellants character and conduct*' and was therefore such that a grant of indefinite leave was against the public interest.
>
> 22. While the Judge does not explicitly state that the public interest factors set out in paragraph 276B impart a discretionary element to the decision under paragraph 276B having set out the paragraph in full in his decision there is nothing to suggest that he does not understand the Rule and I am entitled to conclude that he did. Given his findings at paragraph 37 it was open to him to conclude that given such conduct the Respondent was correct to conclude that the Appellant could not satisfy the requirements of Paragraph 276B because the public interest was engaged by his behaviour and standing back any rational tribunal would have reached the conclusion that refusal was proportionate."

The Ground of Appeal

23. The ground of appeal in respect of which permission was granted is that the UT erred in law in failing to appreciate that Paragraph 267B(ii) of the Immigration Rules required the decision-maker to conduct a balancing exercise by taking into account all relevant factors.

The Appellant's Submissions

24. Mr Malik for the Appellant accepts the facts so far as the late tax returns are concerned. He notes that the FtT judge:

> "was obviously troubled by the explanation that was put forward but did not find that the Appellant was dishonest. The FtT did not find that the Appellant sought to deceive HMRC … This is not the usual case of a person giving false information to HMRC as to his true income to avoid or minimise the tax

> liability. This is a case where … the Appellant simply delayed…"

25. Mr Malik submits that there is an important difference between acting dishonestly and acting without integrity.

26. He relies upon the concession that a finding of dishonesty is required to justify a refusal under paragraph 322(5). The Appellant says the case-law is consistent with that position: see for example the decision of Collins J in *R (Samant) v SSHD* [2017] UKAITUR JR 65462016, where it was held that mere carelessness in relation to tax affairs would not be sufficient to justify a refusal of an application for leave to remain under paragraph 322(5). Dishonesty needed to be established on the balance of probabilities.

27. Mr Malik emphasised the importance of the balancing exercise in these cases, particularly when direct dishonesty has not been established. He relied upon the decision of this court in very different circumstances, in *R (Babar) v SSHD* [2018] EWCA Civ 329. In that case the appellant had admitted very serious misconduct indeed, during his earlier career as a senior police office in Pakistan. The Secretary of State refused an application for ILR on the ground of character under Rule 276B. The Court noted that the paragraph was "poorly drafted" [12], and that the provision must be read "sensibly", envisaging that:

> "12. …there will be cases where, assessing the factors as a whole, it would not be in the public interest to refuse indefinite leave even though some factors may point in favour of refusing it. A recent policy statement from the Secretary of State issued to staff and entitled "Long Residence" confirms that this is the correct approach. When dealing with the public interest it states:
>
> > "You must assess the factors in paragraph 276B(ii) to decide whether a grant of indefinite leave would be against the public interest. You must look at reasons for and against granting indefinite leave using the factors listed and, where necessary, weigh up whether a grant of indefinite leave would be in the public interest.""

Hence, even in those circumstances a balancing exercise must be conducted by the Secretary of State and by the Tribunal.

28. The Appellant took us to the Policy Guidance entitled "*Long Residence*" issued by the Secretary of State, to which the Court was referred in *Babar*. This Guidance has gone through various evolutions. Version 13.0 was in force at the time of the decision, and version 14.0 at the time of the FtT hearing. There is only one very minor difference of wording, which I have indicated in the quotation below. Subject to that, counsel are agreed that the relevant wording was as follows:

> "You must consider whether there are any reasons why it would be undesirable on public interest grounds to grant

indefinite leave. In considering this you must take into account the person's:

- age
- strength of connections in the UK
- personal history, including character, conduct, associations and employment record
- domestic circumstances
- compassionate circumstances
- any representations on the person's behalf

The applicant must also not fall for refusal under the general grounds for refusal.

You must assess the factors in paragraph 276B(ii) to decide whether a grant of indefinite leave would be against the public interest. **You must look at reasons for and against granting indefinite leave using the factors listed** [emphasis added] and, where necessary, weigh up whether a grant of indefinite leave would be in the public interest.

…

Some factors would suggest that it would be appropriate to refuse leave. You must weigh those factors against the compassionate circumstances, if any and all the other circumstances, such as strength of connections to the UK, domestic circumstances of the case, and then decide whether a grant of indefinite leave would be against the public interest. More detailed information on each of these factors is provided later in the following sections.

It is important that you take into account all of the circumstances of the case before you decide whether a grant of indefinite leave would be in the public interest."

And:

"The applicant's employment record will often be a significant consideration. You must consider what the person has been doing while they have been in the UK, and what economic contribution, if any, they have made. Whilst not having a (sound employment record: Version 13) (record: Version 14) is not in itself a reason to refuse leave, having a good employment record along with strong ties with the UK would count in a person's favour, if they have not been a burden on public finances but have, in fact, contributed through income

> tax and national insurance contributions. Equally, the lack of such a record, and any charges they have made on public finances, would count against them."

29. Mr Malik also took us to a policy statement by the relevant Minister, made in the context of tax discrepancies: that is to say, discrepancies between statements of income made to support applications for extended or indefinite leave to remain, and returns made to HMRC in lower amounts. The Ministerial statement was made on 15 May 2018. The statement of policy explicitly related to paragraph 322(5) of the Immigration Rules. The Minister said:

> "It is important that the Government retains the ability to refuse an application where we have identified that migrants have given deliberately false information in order to extend their stay or obtain settlement in the UK. It is not the Government's policy to refuse applications by highly skilled migrants solely due to minor tax errors. Where any discrepancies are identified, applicants are given a right to explain the discrepancy. All such cases are signed off by a manager before refusal grounds are applied.
>
> …
>
> We have refused Tier 1 (General) applications under paragraph 322(5) where an applicant's character and conduct call into question their desirability of remaining in the UK. In these cases, refusals have been given where there have been substantial differences – often tens of thousands of pounds – between the earnings used to claim points in an immigration application and an applicant's HMRC records, without a credible explanation from the applicant. We take all available evidence into account before making a decision and each application is considered on its own merits."

30. On the question of the meaning of "lack of integrity" Mr Malik relies upon the consideration by this court in a very different factual context in *Wingate v Solicitors Regulation Authority* [2018] EWCA Civ 366, as to the different meanings of "dishonesty" and "lack of integrity". In that case Rupert Jackson LJ considered the existing authorities on these two formulations, noting at paragraph 93:

> "Honesty is a basic moral quality which is expected of all members of society. It involves being truthful about important matters and respecting the property rights of others. Telling lies about things that matter or committing fraud or stealing are generally regarded as dishonest conduct. These observations are self-evident and they fit with the authorities cited above. The legal concept of dishonesty is grounded upon the shared values of our multi-cultural society. Because dishonesty is grounded upon basic shared values, there is no undue difficulty in identifying what is or is not dishonest."

31. Jackson LJ went on to address the concept of a lack of integrity in the following terms:

> "Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted … the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members." [93]

32. Finally, Mr Malik relies on the decision of this Court in *R (Balajigari) and Others v SSHD* [2019] 1 WLR 4647. He accepts that this case post-dated the decision and indeed the appeals at both levels in this case, but the decision is of course declaratory of the law. The case arose from refusals pursuant to paragraph 322(5) not 276B(ii), and in some instances, cases of earnings discrepancy. However, Mr Malik highlighted the facts in the case of the appellant *Majumder*, who had no discrepancy in his figures, but who had failed to make tax returns over two successive tax years.

33. The Court in *Balajigari* emphasised the proper steps. The first being "undesirability". There were three limbs to this analysis:

> "34. As to the first stage, Mr Biggs submitted that there are three limbs to the analysis. There must be: (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character). Again, that seems to us a correct and helpful analysis of the exercise required at the first stage, but it will be useful to say something more about the elements in it, especially as they apply to an earnings discrepancy case."

34. The Court emphasised the importance of the balancing exercise:

> "38. As for the third limb of the first stage of the analysis, Mr Biggs submitted that the assessment of undesirability requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. That would include such matters as any substantial positive contribution to the UK made by the applicant and also circumstances relating to the (mis)conduct in question, e.g. that it occurred a long time ago. In support of that proposition he relied on the judgment of Foskett J in *R (Ngouh) v Secretary of State for the Home Department* [2010] EWHC 2218 (Admin), which also concerned the application of paragraph 322 (5), albeit in relation to a different kind of conduct: see paras. 110, 120 and 121. While we would not say that it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly, we agree that it would be good practice for the Secretary of State to incorporate it in his formal decision-making process. In so far as Lord Tyre may be thought to have suggested otherwise in *Oji v Secretary*

> *of State for the Home Department* [2018] CSOH 127 (see para. 28) and *Dadzie v Secretary of State for the Home Department* [2018] CSOH 128 (para. 28) we would respectfully disagree."

35. Against that background, Mr Malik advanced a list of positive factors here, which he suggests required to be weighed in the balance. He reminded us of the positive material lodged with the FtT, which I have summarised in paragraph 11 above. The Appellant had made accurate tax returns, albeit late. He had (sufficiently) long residence, and had lived in a self-supporting and law-abiding way. He had behaved properly in relation to his tax liabilities since the index events. He had a good work record, high educational achievement and good references. These were significant matters to weight in the balance. However, there was no sign that they had been: there was no discernible balancing exercise. The decision by the Respondent and the decision by the FtT had proceeded directly from the adverse finding on conduct, without more ado. That was an error of law.

36. Mr Staker in reply protested, with some justice, that much of what Mr Malik had said was not focussed on the relevant ground of appeal, but bore more directly on the original ground, in respect of which permission to appeal was refused.

37. In addressing the complaint that there had been no proper balancing exercise, Mr Staker asked the rhetorical question: what are the countervailing factors? In essence, he submitted they were no more than the absence of negative factors. Ten years residence with lawful behaviour represents a qualifying threshold, a "gateway" for an application for ILR. The absence of other offending or bad character is a neutral factor: see *ZH (Bangladesh) v SSHD* [2009] EWCA Civ 8. In that case the Court considered an application for ILR under an earlier rule, based on 14 years **unlawful** residence. It was not clear to me how this reference assisted the Respondent's case here.

38. In Mr Staker's submission there was in truth nothing advanced before the FtT which could amount to effective countervailing factors. There was simply an absence of additional negative factors. Moreover, this complaint was not advanced in the appeal from the FtT to the UT. The more serious the misconduct affecting the "character" issue, the more significant must be any positive factors before a realistic balancing exercise can be conducted. The issue on Ground 2, said Mr Staker, came down to this: even if the FtT had gone through the motions of a balancing exercise, the outcome would inevitably have been the same.

Analysis and Conclusions

39. It is helpful to begin with some clarification and context. It is plain that the Respondent's decision letter referred to both Rules (paragraph 276B(ii) and paragraph 322(5)) in an undifferentiated way. Moreover, the decision letter referred to tax discrepancies which are simply not present. But in my view, deputy UTJ Birrell was correct (see paragraph 17 of his judgment quoted above) in finding that the FtT decision was based on paragraph 276B, and not on paragraph 322(5). He was also correct therefore, that the "incorrect version of paragraph 322(5)" recited by the FtT was an error of law, but was not material to the conclusion reached.

40. Although there are strong similarities between the wording used in the two paragraphs, (and despite the poor drafting of the provisions as already noted), they are different, and are perfectly properly to be regarded as representing discrete tests, which can be applied successively by the Respondent's officials. In my view it is unarguable that they are to be equated, and that any declared policy in relation to the interpretation of paragraph 322(5) must necessarily apply equally and with the same effect to paragraph 276B. It is for that reason that permission was refused on the original Ground 1.

41. The declaration of policy as to the interpretation of paragraph 322(5) is, in any event, more nuanced than Mr Malik suggests. The relevant text is quoted in paragraph 29 above, and I need not repeat it. Where there is "deliberately false information", the Respondent will generally seek to refuse ILR. However, even there an opportunity will be given for explanation. The Ministerial Statement makes clear that the scale of misstatement is relevant, that all information will be taken into account, each case being considered on its own merits. No such statement can prescribe outcomes across the whole range of cases. There is a world of difference between "deliberately false information" to avoid paying significant amounts of income tax and "minor tax errors". The statement does not, and cannot pretend to, address every case along that spectrum.

42. Nor are those conclusions altered, in my judgment, by the reasoning or decisions of this Court in *Balajigari*. The Court proceeded on the basis that declared policy in relation to paragraph 322(5) meant that dishonesty was required in "earnings discrepancy" cases. Even then, as the court said in paragraph 34 of the judgment quoted above, a balancing exercise was proper practice. No doubt where dishonesty is proven in an earnings discrepancy case, very strong positive factors will be necessary before the balance will be thought to tilt back in favour of the applicant for ILR. Discrepant tax returns are strong evidence of crime. Either leave to remain was sought using inflated figures, or the tax returns represent an attempt to defraud the Revenue, and thus to cheat the public finances of the country where the applicant seeks indefinite leave to remain. But even then, a balancing exercise is "good practice" and its absence may be an error of law: see paragraph 38 of *Balajigari* set out above.

43. Nor is that conclusion altered, in my judgment, by the conclusions of this Court in relation to the appellants *Majumder* and *Albert*. In the case of *Majumder*, a "failure to submit tax returns at all", was equated by the respondent with the appellant being "deceitful and dishonest in your dealings with HMRC". Majumder was given no opportunity to explain what had happened, and that was a clear procedural failure (paragraph 177); it was wrong to proceed from a lack of timeously filed tax returns to the conclusion of dishonesty (paragraph 179) and there was no balancing exercise (paragraph 180). The case of *Albert* presents more complex facts, which it is not necessary to analyse.

44. In each of these cases there is nothing in the decision of this Court which could preclude the view that an individual who has, by failing to make returns, sought to postpone (and potentially avoid) paying income tax, deliberately and not out of mere carelessness, can be regarded as having shown conduct justifying refusal of ILR. But the individual must have the opportunity to explain. There must be procedural

fairness. The facts must be established and the case viewed on its merits. There should be a balancing exercise, taking into account any positive factors.

45. Resort to the phrase "lack of integrity" may well confuse rather than illuminate decision-making in this field. Although the phrase is good English, and apt as a matter of common sense, it can be hard to distinguish from dishonesty. It has also acquired something of a special meaning, as analysed by Rupert Jackson LJ in *Wingate*, implying a breach of obligations derived from a professional or other special status, rather than poor conduct or character in an ordinary citizen.

46. In my judgment this appeal should succeed on a simple but important ground. In all but the most extreme cases, where the conduct complained of is such that on any view the balance must fall against an applicant, even where a sufficient character or conduct issue is proved, a balancing exercise is required. In this instance there was at least some positive material. I would remit the matter for a re-hearing to permit such an exercise. I see no reason why the factual findings by the FtT should not be preserved. However, the extent and impact of any favourable evidence should be analysed and the balancing exercise performed. I intend no comment as to the outcome.

Lady Justice Simler DBE:

47. I agree.

Sir Jack Beatson:

48. I also agree.