



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01412/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 22 November 2019**

**Decision & Reasons Promulgated
On 27 November 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

JASKARANJEET [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar, counsel instructed by Prime Law Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Juss, promulgated on 30 July 2019. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 1 October 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. The appellant entered the United Kingdom on 5 September 2007, with leave to enter as a Tier 4 student. She extended her leave until 24 May 2016 by way of a series of in-time applications. On 9 May 2016, the appellant applied for indefinite leave to remain as a Tier 1 migrant. That application was refused on 10 July 2017, with the appellant's application for administrative review being refused on 21 August 2017. On 4 September 2017, the appellant sought indefinite leave to remain under paragraph 276B of the Immigration Rules.
4. The Secretary of State refused the appellant's application in a letter dated 9 January 2019. It was accepted that the appellant had valid leave from 5 September 2007 until 10 July 2017 and that her leave was extended by Section 3C of the Immigration Act 1971 until 21 August 2017. Consequently, the appellant could not meet the requirements of paragraph 276B(1)(a) of the Rules because she had not demonstrated 10 years' continuous residence in the United Kingdom. In addition, the respondent declined to exercise discretion in the appellant's favour because her case also fell for refusal under paragraph 322(5) of the Rules owing to discrepancies between the income declared to the respondent in the appellant's Tier 1 applications submitted in 2011 and 2013 and that declared to HMRC. The appellant, her spouse and children, aged 2 and 4 at the time of the application, were found not to meet the requirements of Appendix FM. Nor could the appellant satisfy paragraph 276ADE (1) of the Rules nor advance any exceptional circumstances.

The decision the First-tier Tribunal

5. The First-tier Tribunal judge concluded that the appellant had not been disadvantaged by the interview process, that she had acted dishonestly, that she did not meet the requirements of 276ADE (1) and that there were no exceptional circumstances.

The grounds of appeal

6. The grounds of appeal argued, firstly, that the judge erred in his application of the burden of proof and failed to apply the three-stage test that applied in cases of dishonesty, applying *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC). Secondly, the judge failed to take into account material factors and reached inadequately reasoned or irrational conclusions. Thirdly, the judge failed to recognise that there was a two-stage discretion process, following *Balajigari v SSHD* [2019] EWCA Civ 673 and did not undertake the necessary balancing exercise. Lastly, the judge made a mistake of fact as to the ages of the children, there was no consideration of the evidence provided of their ties to the UK and nor did the judge undertake a balance-sheet approach.
7. Permission to appeal was granted on the basis sought.
8. The respondent filed no Rule 24 response.

The hearing

9. Mr Gajjar relied on all four grounds of appeal. He said the following in relation to the first ground. The judge twice gave a standard direction in relation to the burden of proof, whereas this was not a standard case. The only requirement on the appellant was for her to provide an innocent explanation. He further argued that the judge's reliance on the appellant's inability to answer questions during her interview with the Home Office was irrational.
10. As for the second ground, Mr Gajjar focused on the judge's failure to take into account a letter from HMRC which informed the appellant that her conduct, in failing to declare her entire income for the years in question, was viewed as a failure to take reasonable care with her tax affairs. He also drew my attention to the attempts made by the appellant to complain about her previous accountants, none of which was mentioned by the judge. Mr Gajjar relied on the third ground as expressed in the application for permission to appeal. Lastly, Mr Gajjar criticised the judge's mistake of fact as to the ages of the children (4 and 6 at the time of the hearing) as well as the lack of mention of the substance of the children's private and family lives, as set out in the witness statements of the appellant and her sister.
11. Ms Everett accepted that there was an arguable point in relation to the judge's application of the burden of proof however, she submitted that the error was not material, given the large discrepancies between the sums declared to the respondent and HMRC. The respondent had a prima facie case. It was not clear that the judge reversed the burden, however he looked at the appellant's explanation at [21-24] of the decision and reasons. While agreeing that it would be difficult to respond to questions about transactions, Ms Everett argued that the appellant's application was based on certain earnings and the discrepancies went to the heart of the matter. The respondent's questions were not unreasonable however, it was plausible that the appellant could not remember the transactions. Nonetheless, the judge did not accept that response and gave cogent findings.
12. As for the HMRC letter, Ms Everett argued that while there was no mention of dishonesty, HMRC were not looking at the totality of the evidence. The judge did not misdirect himself by placing no weight on it. In terms of the third ground, Ms Everett stated that there had been no complaints regarding the judge's findings set out from [21-24] of the decision. Ms Everett noted that the judge got the ages of the children wrong but argued, in essence, that there was nothing significant in the evidence which would have led to a different outcome.
13. In response, Mr Gajjar emphasised that the judge did not show awareness of the HMRC letter and furthermore, that HMRC were aware of the appellant's initial declaration, subsequent amendments and the

difference in the figures. He clarified that there was a challenge to the judge's findings on the basis that he got the burden of proof wrong, which coloured the judge's findings on the appellant's interview responses and oral evidence at the hearing.

14. At the end of the hearing, I announced that the First-tier Tribunal made material errors of law and that the decision was set aside.

Decision on error of law

15. The judge failed to direct himself appropriately regarding the three-stages to the burden of proof which applies in cases of alleged dishonesty.
16. In *SM and Qadir*, the Upper Tribunal concluded that the respondent bears an evidential burden of demonstrating that there is a case to answer, after which an appellant bears the burden of raising an innocent explanation. Where an innocent explanation is produced, the burden shifts back to the respondent.
17. At [2] of the decision and reasons the judge directed himself as follows; *"In immigration appeals, the burden of proof is upon the appellant and the standard of proof is on a balance of probabilities."* Further, at [18] he said *"I have given careful consideration to all the documents before me and to the oral evidence and submissions. I am not satisfied that the Appellant discharges the burden of proof that is upon her."*
18. There is no recognition by the judge of the differing test in deception cases nor any indication that it was applied, notwithstanding the misdirection. This is a material error given the low threshold for the appellant to provide an innocent explanation and calls into question whether the judge considered whether that explanation met the minimum level of plausibility or, in fact, applied a higher standard. That concern is amplified given the judge's somewhat harsh criticism of the appellant for being unable to recall from memory bank account transactions which were over a year old during her Home Office interview.
19. The appellant submitted a comprehensive bundle of evidence of over 200-pages. The judge mentioned that he had seen the bundle at [6], adding that he had taken it into account, even if he made *"no specific reference to it."* Indeed, he made no specific reference to any supporting document in it, other than the Home Office interview record. There are several important documents which received no attention in the decision and reasons, all of which could be said to be in the appellant's favour. The most serious omission was in relation to the letter from HMRC dated 24 June 2016, in which it was decided that the appellant *"failed to take reasonable care with (her) tax affairs."* The judge does not mention the HMRC letter at all and shows no recognition that HMRC considered the appellant's culpability. At [21], the judge considered that the grounds of appeal emphasised that no penalty had been imposed by HMRC, dismissing this as being *"neither here nor there."* That approach was erroneous given what was said at [74] of *Balajigari*:

“We further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would-be information which was within an applicant’s own knowledge and they could draw this to the attention of the Secretary of State.”

20. That the judge was unaware of the existence of the HMRC letter is underlined at [25] when the judge states, *“I find the appellant did act deceitfully or dishonestly. There is no basis for saying that she had been merely careless.”* Such a finding could not have been made had the HMRC letter been considered. The judge also neglected to assess the evidence of the complaints made by the appellant to her previous accountant as well as to ACCA or the detailed explanation from her current accountants as to how the previous errors came to light.
21. The third area in which the First-tier Tribunal materially erred was in failing to recognise that there is a two-stage analysis in deciding cases involving a refusal under paragraph 322(5), applying *Balijigari* at [33]. Firstly, there must be a consideration of the undesirability of granting leave and secondly, where undesirability is identified there must be the exercise of discretion as to whether there were factors which outweigh the presumption that leave should be refused. In this case there were a number of factors which could have been considered under the exercise of discretion which include that the appellant is paying back taxes, that HMRC considered her to have been careless rather than fraudulent and that the appellant and her family had developed ties to the United Kingdom.
22. In view of these material errors, the Upper Tribunal cannot be satisfied that the judge, if properly directed, would have reached the same conclusion.
23. While mindful of statement 7 of the Senior President’s Practice Statements of 10 February 2010, it is the case that the appellant has yet to have an adequate consideration of her immigration appeal at the First-tier Tribunal and it would be unfair to deprive her of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Birmingham IAC, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge Juss.

No anonymity direction is made.

Signed

Date: 26 November 2019

Upper Tribunal Judge Kamara