IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01868/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 9 December 2019

Decision & Reasons Promulgated
On 13 January 2020

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR SAJJAD ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Masood, Counsel for Trent Law Solicitors
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of Judge Chambers of the First-tier Tribunal dated 2 August 2019. The appellant had made a human rights claim and in a decision dated 18 January 2019 the respondent refused

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this on the principal basis that it was contrary to paragraph 276D of the Immigration Rules because it did not meet the requirements of paragraphs 276B(ii) and 276B(iii) with reference to paragraph 322(5) due to his character and conduct. The respondent noticed that in his interview in October 2016 the appellant was asked about his previous application for leave to remain based on claimed earnings £56,933.80 for tax year 2012/2013 and why this figure differed from the HMRC record £27,499 for the same year. The respondent recorded that the appellant had stated that when he was filing his tax returns he asked the accountant in 2016 to review the figures and the accountant found omissions in 2013 and that alarmed him as he did not know about it and he asked his accountant to rectify the errors and to submit the correct tax returns to HMRC.

2. The respondent considered that his responses to questions regarding the discrepancy in his earnings did not credibly explain why his declaration of earnings was considerably lower than given in his Tier 1 (General) Migrant leave to remain application. The respondent considered his claim that his accountant found omissions in 2013 which he was then asked to rectify lacking in credibility as it was only in April 2016 that these figures were revised. The respondent stated that it was the appellant's legal responsibility in regard to the accuracy of tax returns submitted to HMRC and therefore the respondent did not accept that he would solely rely on his accountant to file and submit tax declarations on his behalf. Furthermore, the fact that the appellant had retrospectively declared these claimed earnings to HMRC after such a long period did not satisfy the respondent that he had not previously been deceitful or dishonest in his dealings with HMRC and/or UKVI.

3. The respondent was not satisfied that the self-employed earnings the appellant had declared in his previous Tier 1 (General) Migrant application was consistent with his declarations made to HMRC in the relevant tax period. It was considered that there would have been clear benefit to himself either by failing to declare his earnings to HMRC with respect to reducing his tax liability or by falsely representing his earnings to UKVI to enable him to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant. The respondent went on to consider whether in light of the declaration of different amounts of income, his character and conduct was undesirable and that he should be refused under general grounds set out in paragraph 322(5) to the Immigration Rules. The respondent stated that whilst a paragraph 322(5) refusal was not a mandatory decision, he considered that the appellant's actions in declaring different incomes would mean that a refusal under this provision was appropriate.

4. The appellant appealed. The appeal came before Judge Chambers of the First-tier Tribunal who in a decision dated 2 August 2019 dismissed the appellant's appeal against the refusal of 18 January 2019. The judge noted at paragraph 2 that the appellant had submitted further evidence including a bundle with some 277 pages. Having set out the main principles established by the Court of Appeal in Balajigari [2019] EWCA Civ 673 the judge set out his findings at paragraphs 9 to 20. At paragraph 16 the judge considered that the very significant gap between what was

actually earned and what was declared was such as could not be a slip-up or error or oversight on the part of the appellant, and certainly not on the part of his accountants. The judge stated in paragraph 17 that the appellant could not have failed to notice the very significant discrepancy amounting to some tens of thousands of pounds in the appropriate tax for the relevant years. At paragraph 18 the judge noted that although the appellant had corrected his returns with HMRC, if he had not earned the amount in the first place then he could not in any way have met the earnings threshold at the relevant time of his earnings based application. The judge noted it was agreed by the appellant there was something in the region of over £25,000 in respect of recalculated tax liabilities due from him. The judge considered that the appellant had not met the requirements of paragraph 276B, and at paragraph 20 stated that it was established that the appellant's actions in declaring different amounts of income to HMRC and UKVI were dishonest and rendered it undesirable to allow the appellant to remain in the United Kingdom with the result that the refusal under paragraph 322(5) was the appropriate response.

5. The appellant's grounds identify eight separate heads. They clearly overlap considerably but submit in essence that the judge failed to consider all the relevant circumstances and failed to take into account or evaluate the appellant's third bundle of documents, in particular the expert accountant report from Protax Chartered Certified Accountants. It was submitted further that the judge had failed to take into account the appellant's explanation for the errors that had occurred. I heard submissions from both representatives. I shall not rehearse their details except to say that they were succinct and well proposed.

6. I am persuaded that the judge materially erred in law in several respects.

7. First, although stating that he had taken into account the appellant's evidence at paragraph 2 and referring later on at one point to having considered "all the circumstances" (paragraph 18), there is nothing to indicate that the judge engaged with the Protax report and also the further complaints the appellant had made against his previous accountant. Mr McVeety submits that the appellant was wrong to describe the report from Protax as an expert report. I see merit in that submission, but it remains that it was a report by certified accountants and it needed to be considered by the judge and weighed in the balance. There is nothing to indicate that the judge engaged with its contents at all.

8. Secondly, although the judge does refer in at least one respect to the appellant's explanations for the discrepancies, on analysis the judge did not take proper account of their contents. In paragraph 16 the judge said that if there was error on the part of the accountants and discrepancies had occurred "the mechanism for that error is not explained". That is an incorrect description of the appellant's further evidence which, inter alia, pinpointed a particular error in relation to investment income. In paragraphs 17 and 18 there are apparent references to the appellant's explanation that in light of the actual mechanisms for the error set out in the appellant's documentation it cannot be said that the explanations were incapable of explaining

the appellant's failure to recognise that the figures given by his accountants were false. At the very least, the judge needed to say why he considered the detailed explanations given were not credible.

9. Thirdly, despite citing Balajigari the judge appears not to have taken account of the approach set down in that case for consideration of the application of paragraph 322(5). At paragraph 34 Underhill LJ sets out that the first stage of the analysis under this paragraph is to consider whether the evidence is reliable; whether it demonstrates sufficiently reprehensible conduct; and whether

> "(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 United Kingdom is undesirable (this should include evidence of positive features of their character)".

Looking at the decision of the judge, I cannot see that there was any consideration of this further component of the first stage of assessing undesirability. There is nothing to indicate that the judge considered any factor other than the perceived dishonesty in relation to the discrepant declarations to HMRC on the one hand, and UKVI on the other. That is inconsistent with the guidance given in Balajigari.

10. Fourthly, the Court of Appeal in Balajigari identified a second stage of assessment or analysis, it being stated by Underhill LJ at paragraph 39 that the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. This second stage has specific regard to the fact that paragraph 322(5) is in discretionary terms. There is no indication that the judge considered the exercise of this discretion at all. The respondent's refusal decision letter did refer to this discretion (see my summary at paragraph 4 above); and in that context it is just possible that at paragraph 20 the judge may have had this discretionary element in mind when he stated that the refusal under paragraph 322(5) was "the appropriate response". However, the judge made no assessment of the issue regarding undesirability and the discretionary element or, if he did, he simply reduced the entire analysis to the sole issue of alleged dishonesty, without considering whether there were any positive features.

11. For the above reasons I conclude that the decision of the judge must be set aside for material error of law.

12. Both parties were in agreement that if I found any material error of law the appropriate step in a case of this type would be to remit it to the First-tier Tribunal in Manchester. It will be important when it returns to the First-tier Tribunal that the relevant judge pays close regard to the guidance given in Balajigari. By the same token, the appellant's representatives must be prepared to explain in much more precise and coherent fashion what it considered were the mechanisms (did they

relate solely to investment income?) that led the appellant to fail to realise that his original accountant was inflating his income.

No anonymity direction is made.

Signed Date: 7 January 2019

Dr H H Storey
Judge of the Upper Tribunal