Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02258/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 February 2020	**On 2 March 2020**

Before

UPPER TRIBUNAL JUDGE KEKIC
UPPER TRIBUNAL JUDGE SHERIDAN

Between

MOHAMMAD AFROZ YUSUFBHAI SHAIKH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Hodgetts, Counsel instructed by ATM Law Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is appealing against the decision of First-tier Tribunal Judge Bonavero ("the judge") promulgated on 9 August 2019 dismissing his human rights claim.

2. The appellant is a citizen of India who was granted leave to enter the UK as a student in November 2007. He subsequently extended his leave, first as a Tier 1 Postgraduate, and then as a Tier 1 General Migrant.

3. On 5 August 2016 the appellant applied for leave to remain as a Tier 1 General Migrant. On 3 January 2018 he varied the application to one for Indefinite Leave to Remain on the basis of 10 years continuous long residency under paragraph 276B of the Immigration Rules. On 22 January 2019 the application was refused.

Decision of the Respondent

4. The respondent accepted that the appellant had accrued 10 years of lawful leave as required by paragraph 276B(i)(a) of the Immigration Rules but refused his application under 276B(iii) with reference to paragraph 322(5). Under paragraph 322(5) of the Immigration Rules leave to enter or remain in the UK should normally be refused if, in light of the conduct, character or associations of the applicant, it would be undesirable to permit him or her to remain in the UK.

5. The reason the respondent considered paragraph 322(5) applicable in this case was that in an application dated 5 April 2011 for leave to remain as a Tier 1 General Migrant the appellant claimed that he had earnings from self-employment of £55,120 covering the period between 1 March 2010 and 28 February 2011. However, he declared income of only £1,120 from self-employment to HMRC during the corresponding period (covering the 2009/10 and 2010/11 tax years).

6. The respondent noted that the appellant would not have been granted leave as a Tier 1 General Migrant in 2011 if the figures declared to HMRC had been used in the application for leave to remain.

7. The appellant, at the respondent's request, completed a tax questionnaire. In response to a question concerning whether he had ever corrected or resubmitted a tax return the appellant answered in the affirmative, giving as an explanation that there had been a miscalculation and negligence by a former accountant. The appellant submitted a letter from his current accountant stating that they had found the miscalculation when asked by the appellant, in November 2015, to review his tax affairs for the previous five years. The letter states that shortly after they brought the error to the appellant's attention he instructed them to amend his tax return and declare the correct earnings to HMRC; and that the amendment was accepted and approved by HMRC without any late filing penalty.

8. The respondent did not accept the appellant's explanation and found he had been dishonest. Several reasons were given. These were:

    a. It was his responsibility to ensure the tax return was correct.

    b. With his application for leave to remain in April 2011, the appellant provided an accountant's letter confirming he had self-employment

income of £55,120. However, just six months later he declared an income of only £1,120 to HMRC. It is not plausible that the appellant would be unaware of the difference or that an accountant would provide different figures to HMRC and the respondent within such a short time period.

c. The appellant has qualifications/education in business, accountancy and auditing.

d. He amended his 2011 tax return, and paid the required tax, shortly before making the application in 2016. This timing is indicative of an attempt to rectify the position because of the Immigration application.

e. The appellant's health issues do not explain why the discrepancy occurred.

9. The respondent proceeded to consider the appellant's family and private life. The application was rejected on human rights grounds as it was not accepted that there were very significant obstacles to return to India (under paragraph 276 ADE(1)(vi)) or that there were circumstances which would render refusal a breach of article 8 ECHR because it would result in unjustifiably harsh consequences.

Decision of the First tier Tribunal

10. At paragraph 12 of the decision the judge directed himself that:

> [I]t is for me to ascertain, on the balance of probabilities, whether the appellant acted dishonestly in the supplying of figures to either HMRC or the Home Office in relation to his earnings for 2010/11

11. The judge did not believe the appellant and found that he had been dishonest. The judge accepted that the appellant's former accountants dissolved in 2013 and consequently did not find damaging to his credibility the absence of correspondence from them since that date. However, he reached the conclusion that there were a number of factors which, considered together, established that the appellant had, on the balance of probabilities, been dishonest. These were:

a. The scale of the discrepancy. The judge noted that the appellant paid income tax in 2010/11 of £215 instead of £18,217 (a tax rate of 0.4% rather than 33%).

b. The appellant's claim that he did not ever communicate with his former accountant in writing was inherently implausible.

c. Neither the appellant nor his wife suffered from "material ill-health" at the relevant time.

d. The appellant had qualifications in business making it inconceivable he would believe he owed so little tax.

e. The date of repayment to HMRC makes it likely the purpose was to facilitate his Immigration application

12. At paragraph 20 of the decision the judge concluded:

> As is perhaps obvious from the foregoing, I do not believe the appellant's account. On the balance of probabilities, and bearing in mind the considerable caution with which a finding of dishonesty must be approached, I find it more likely than not that the appellant was dishonest in the submission of his 2010 – 11 tax return.

13. At paragraph 21 the judge briefly considered other factors relevant to article 8 ECHR, stating:

> I have not been provided with any reasons for which the appellant's circumstances in the UK are compelling, or for which his private life here is particularly well developed. I note he has done some charity work in the UK, but I do not find this a weighty factor in my assessment of the proportionality of the appellant's removal.

Grounds of Appeal

14. There are four grounds of appeal.

15. First, the grounds submit that the judge misapplied the burden of proof.

16. Second, the grounds argue that the judge's consideration of the evidence was inadequate.

17. Third, it is argued that the judge failed to assess whether the discretion under paragraph 322(5) was appropriate.

18. Fourth, the grounds submit that the assessment of the appellant's private life was irrational and failed to take relevant factors into account.

Analysis

Ground 1: Burden of Proof

19. It is well established – and was not in dispute before us – that where, as in this appeal, dishonesty is alleged, the burden of proof lies with the respondent in respect of the allegation.

20. There were two strands to Mr Hodgetts' submissions on the burden of proof.

21. Firstly, he argued that the judge failed to direct himself properly to the burden of proof. This submission is unpersuasive because (a) as Mr Hodgetts acknowledged, the judge did not misstate the law on the burden of proof – rather, he merely did not state it; and (b) it is not an error of law for a judge to not set out the law. What matters is whether, in substance, the law has been

properly applied. This was discussed by the Upper Tribunal in another context in *Dube (ss.117A-117D)* [2015] UKUT 00090 (IAC) where it was stated in the headnote that "it is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form". The same applies in this case: what matters is whether the judge applied the burden of proof properly, not whether he set it out in the decision.

22. Secondly, Mr Hodgetts submitted that the judge had, in substance, placed the burden on the appellant by expecting him to prove he had a medical condition which impeded him from attending to his tax affairs and by giving weight to his inability to adduce evidence from his former accountants who were dissolved in 2013. This argument fails to appreciate that even though the legal burden fell on the respondent, a substantial discrepancy between earnings declared to HMRC and the respondent can give rise to a justifiable suspicion that calls for an explanation. This was explained in *Balajigari v SSHD* [2019] EWCA Civ 673 at [42], where it is stated:

> A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a suspicion that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.

23. We are satisfied that the approach taken by the judge to consideration of the evidence was consistent with *Balajigari.* First, having regard to the size of the discrepancy, the judge took the view that it called for an explanation. Second, he considered the appellant's explanation (along with the evidence adduced by the appellant) and found it unconvincing. Third, the judge, after consideration of the evidence, reached the conclusion that the appellant had been dishonest. Although the judge did not state in terms that he found the respondent had discharged the burden of proof he did state, at paragraph 20, that he kept in mind the considerable caution with which a finding of dishonesty must be approached. Reading the decision as a whole we are satisfied that the judge appreciated that the burden of proof lay with the respondent and – in substance – found that the respondent had discharged the burden.

Ground 2: Inadequate Consideration of Evidence

24. Mr Hodgetts, both in the grounds of appeal and in oral submissions, advanced several arguments which were intended to show that the judge did

not properly consider the evidence and failed to take evidence into account. We consider each of his submissions in turn.

25. First, Mr Hodgetts submitted that the judge failed to address his mind to the possibility that the appellant was merely careless. This contention has no merit because it is plain that the central issue addressed by the judge was whether the appellant had been dishonest (as maintained by the respondent) or merely careless (as claimed by the appellant). Even from the most cursory of glances at the decision it is apparent that the judge considered the possibility that the appellant was careless. For example, at paragraph 13 the judge stated that the appellant's case was that his former accountants had made a mistake and at paragraph 15 he stated that the discrepancy did not necessarily point towards a finding of dishonesty.

26. Second, it is submitted that the judge failed to take into account the evidence of the appellant that his former accountants submitted the tax return online without affording him an opportunity to check the figures. At paragraph 13 the judge summarised the appellant's case as being that his former accountants made a mistake but, as emphasised by Mr Hodgetts, he did not mention that the appellant claimed to have never seen the tax return. However, as observed by Ms Fijiwala, the reasons given by the judge for not believing the appellant (such as that it was not plausible he would believe he was required to pay so little tax and that he claimed to have never communicated in writing with the accountants) addressed the appellant's contention that he did not see the tax return before it was written. This submission is not persuasive because, although the decision is brief and does not set out the appellant's case in detail, reading it as a whole it is clear that the judge, when giving his reasons, had in mind the appellant's claim that he never saw the tax return.

27. Third, Mr Hodgetts argued that it was irrational for the judge to find it implausible that the appellant had no documentation from his former accountant given that there is no expectation that a person would maintain tax records for more than 6 years and he could not obtain copies from the accountancy firm as they had dissolved in 2013. This argument is misconceived because the claim that the judge found implausible was not that the appellant failed to retain documents but that the former accountants never communicated with him in writing. The judge was entitled to find it is implausible that a firm of accountants would only communicate with a client orally. Mr Hodgetts argued that the judge erred by not taking into account the close proximity of the accountants to the appellant. This argument cannot prevail because (a) the judge did take into account that the appellant lived close to the accountants (this is explicitly referred to in paragraph 16) and (b) an accountant being located close to a client does not make it any less implausible that the accountant would never correspond with the client in writing.

28. Fourth, it is argued that the judge failed to consider evidence about the appellant's, and his wife's, health difficulties at the time the tax return was completed. This argument has no merit because, as highlighted by Ms Fijiwala, the judge recorded at paragraph 17 of the decision that Counsel for the appellant conceded this point. Mr Hodgetts submitted that if the concession was made as recorded by the judge it was wrong and is withdrawn. However, if the concession was made then the judge did not err by proceeding in accordance with it. The alternative – that the concession was not made as recorded by the judge – was not pursued by Mr Hodgetts. He was right not to do so given the absence of evidence (such as a witness statement from the appellant's representative in the First-tier Tribunal) to support such a contention.

29. In any event, the judge's conclusion that the appellant and his wife were not suffering from "material ill-health" is entirely consistent with the evidence, which shows no more than that the appellant's wife travelled to India for treatment relating to IVF/fertility and that the appellant suffered from leg pain. Given that the appellant was able to build a business and earn over £50,000 in 2010/11 despite his wife's treatment and his leg pain, it was clearly open to the judge to find that these health concerns were not sufficiently distracting to explain why the appellant would not notice that he paid a vastly lower rate of tax than would be expected given his income.

30. Fifth, it is argued that the judge erred by having regard to the appellant's qualifications given that he had no relevant expertise or education in accountancy or tax that would equip him to understand his tax liability. This contention fails to appreciate that the point made by the judge is simply that a person running his own business who has some education in commerce/business would be unlikely to consider it realistic that he was only expected to pay what the judge described at paragraph 18 as "an effective tax rate of 0.4% on his earnings."

31. Sixth, Mr Hodgetts argued that the judge failed to consider the letter from the appellant's current accountants, which is summarised above at paragraph 7. However, as pointed out by Ms Fijiwala, the judge in fact referred to the most significant contents of the letter at paragraph 9, where he noted that it was the appellant's case that his current accountants brought the error by his former accountants to his attention. In any event, it was not necessary for the judge to consider the letter in detail because the appellant's current accountants were not – and did not purport to be - in a position to comment on what occurred in 2011. Mr Hodgetts maintained that the accountant's letter corroborated the appellant's account because it showed he did not know that there was a mistake in the 2010/11 tax return until it was identified by his current accountants several years later. This argument has no merit because all that can be discerned from the letter is that when the appellant instructed his

current accountants in November 2015 to review his tax returns for the previous five years he did not tell them there was an issue with the 2010/11 return.

32. Seventh, it is argued that the judge erred by not considering letters attesting to the appellant's good character. Mr Hodgetts is correct that the judge did not refer to the letters. However, the fact that friends and colleagues think highly of the appellant – and that he engages in charity work – is of little relevance to the question of whether, over 8 years ago, whilst in the early stages of building a business, he intentionally understated his income to HMRC in order to reduce his tax liability (or overstated his income to the respondent in order to obtain leave to remain). A judge does not need to refer to every item of evidence; and whilst the decision might have been better had the letters been mentioned, the failure to refer to them, given their limited relevance, does not amount to an error of law. In any event, even if the letters were overlooked, this error would not have been material because they were only peripheral to the issue in dispute and, on any legitimate view, would have been given only little weight.

33. Eighth, Mr Hodgetts argued that the judge fell into error by not taking into account the letter from HMRC dated 14 June 2016 which confirmed that a penalty for late payment was not imposed. However, it is clear from paragraph 9 that the judge took this into consideration, as he referred in that paragraph to the appellant's argument that "the fact that HMRC chose not to impose a penalty on the appellant when he brought these matters to their attention is highly significant, though not dispositive".

34. Ms Fijiwala, in her submissions, did not address all of the points raised by Mr Hodgetts to support his contention that the evidence was not adequately considered. However, she made the overarching argument that the judge engaged with the material evidence and gave clear reasons which support the conclusion reached. She characterised the second ground of appeal as a mere disagreement. We agree. Although some of the evidence that was before the First tier Tribunal was not referred to in the decision (such as the current accountant's letter and letters of support) and other parts of the evidence were considered only implicitly (such as the letter from HMRC), reading the decision as a whole it is clear that the judge has engaged with the appellant's central argument – that he was not aware of the mistake made by his accountant – and has given cogent reasons, supported by the evidence, for rejecting it.

35. Having addressed the specific points raised by Mr Hodgetts, we remind ourselves that this a case in which there was a vast discrepancy between the income declared to HMRC and to the respondent. The judge found (in a finding that is unchallenged) that the appellant paid income tax of £215, instead of £18,217, on an income of £55,120 in the 2010/11 tax year. Nothing

in the evidence comes close to explaining why the appellant, who is an educated businessman, did not - even if he never saw the 2010/11 tax return - find it incongruous that despite earning over £55,000 in the 2010/11 tax year he was expected to pay only £215 in tax. Moreover, even if, because he lacked prior experience of the UK tax system, he did not appreciate at the time that he had paid far too little tax, that does not explain why, after seeing how much tax he was required to pay in subsequent years, it did not occur to him then that a mistake might have been made in 2011. The evidence clearly pointed to this being a case of dishonesty rather than carelessness and therefore even if some of the shortcomings in the decision could be characterised as an error of law (which we do not accept) they were not material to the outcome as the judge's conclusion that the appellant was dishonest was clearly open to him and consistent with the evidence.

Ground 3: Discretion under paragraph 322(5)

36. Paragraph 322(5) of the Immigration Rules involves the respondent undertaking a two-stage analysis. The first stage is to decide whether it is undesirable to grant leave to an applicant in the light of his or her dishonesty. If it is, the second stage – since such undesirability is a presumptive rather than mandatory ground of refusal – is to decide as a matter of discretion whether leave should be refused. The second stage involves consideration of whether, notwithstanding the undesirability of the applicant being granted leave, there are factors outweighing the presumption that leave should be refused. In *Balajigari* at [39] the Court of Appeal explained:

> There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily indefinite leave to remain) to migrants whose presence is undesirable.

37. The grounds submit that the judge erred by "failing to assess whether the discretion under paragraph 322 (5) was appropriate". This submission is not developed in the grounds of appeal and was mentioned only briefly by Mr Hodgetts at the hearing. It is not entirely clear what point is being made, but our understanding is that the appellant is contending that the judge did not, after having found that there was dishonesty, consider whether, notwithstanding that dishonesty, refusal of leave was appropriate. There is no merit to this submission as it is clear that the judge did not dismiss the appeal solely because he found the appellant had been dishonest but, at paragraph 21, considered whether there were factors weighing in his favour.

Ground 4: Assessment of private life under Article 8

38. Mr Hodgetts argued that the judge's assessment of article 8 was deficient because he did not consider the obstacles the appellant would face integrating in India or the strength of his private life in the UK. Ms Fijiwala submitted in

response that it did not appear that any arguments had been made in the First-tier Tribunal to support the contention that was now being advanced. She also argued that the appellant could not conceivably succeed under article 8 given the weight that must be given to his dishonesty.

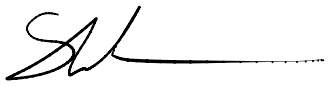
39. We agree with Ms Fijiwala. The judge cannot be faulted for not addressing a point that was not put to him. In any event, the judge's assessment of article 8, although brief, is sufficient given the circumstances of the case. In the article 8 proportionality assessment there was little that could weigh in the appellant's favour. He has been in the UK a long time and has developed friendships (and been involved in charity work) but this private life was established when his immigration status was precarious and, in accordance with s117B(5) of the Nationality Immigration and Asylum Act 2002, can be given only little weight. Moreover, this is clearly not a case where there would be obstacles (let alone very significant obstacles) to integration in India given the appellant's (and his wife's) close connection to the country. It is notable that his wife travelled to India for medical treatment, which is strongly indicative of being an insider in India in terms of understanding how life is carried on and having a capacity to participate in it. Given the finding of deception, it was clearly open to the judge to conclude that the appellant's private life in the UK did not outweigh the public interest in effective immigration controls.

Decision

40. The decision of the First-tier Tribunal did not involve the making of a material error of law.

41. The appeal is dismissed.

Signed



Upper Tribunal Judge Sheridan Dated: 24 February 2020