Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06470/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 March 2020	**On 18 March 2020**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

UGOCHUKWU KENECHI OKOYE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Dingley, Counsel instructed by Five Paper
For the Respondent: Mr N Bramble, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Judge Sarwar sitting in Manchester who dismissed his appeal against the Secretary of State's decision to refuse his application for indefinite leave to remain in the United Kingdom with reference to paragraph 322(5) and deception.

2. The facts of this application are set out at [9] - [14] and [20]-[29] in the First-tier Judge's decision, the core facts being at [24]:

> "24. However checks with HMRC confirmed that in the Appellant's tax return for the year 2010/2011 he declared were [sic] £15,071.00 profit from self-employment and £0 PAYE income. However, this was amended on the 22 September 2016, after applying for indefinite leave to remain. The Appellant increased his profit from self-employment to £50,556.00 and declared £2,893.00 PAYE income."

Balajigari and fairness

3. The First-tier Tribunal Judge was referred to the decision of the Court of Appeal in *Balajigari v the Secretary of State for the Home Department* [2019] EWCA Civ 673 which gives the following guidance to Tribunals in the judgment of Lord Justice Underhill, with whom Lord Justices Hickinbottom and Singh agreed:

> "92. The principal substantive consequence of our finding that the refusal of T1GM ILR on paragraph 322 grounds will (typically) engage article 8 is that in any legal challenge the Tribunal will be obliged to reach its own conclusion on whether the interference is justified, rather than conducting a rationality review: as to this, see para. 104 below. In an earnings discrepancy case that means, principally, that it will have to decide for itself whether the discrepancy was the result of dishonest conduct by the applicant in the supplying of figures to either HMRC or the Home Office. If it was, in the generality of cases such a finding will be sufficient, for the purposes of the final *Razgar* question, to justify the applicant being refused leave to remain and in consequence, which is the relevant interference, becoming liable to removal. The situation is analogous to that in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, where the claimants' article 8 rights were in practice dependent on whether they had cheated in their TOEIC tests (see paras. 76 and 88 of the judgment of Underhill LJ) and this Court held that they were entitled to have that question determined by the Tribunal *as a matter of fact*. There may be exceptional cases in which it can be argued that removal would be disproportionate despite the applicant's past dishonesty, and that issue too would in principle have to be judged by the Tribunal for itself, while giving due weight to Secretary of State's assessment of the public interest. But paragraph 322(5) itself likewise allows for the possibility of such exceptional cases (see para. 39 above), and there need be no difference in the nature of the exercise whether it is expressed as the exercise of a public law discretion or as a proportionality assessment under article 8. …
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> 105. The Tribunal, as well as the Secretary of State, of course has an obligation to act with procedural fairness. Where the Secretary of State has alleged dishonesty, that will normally require the Tribunal – whether the FTT on an appeal, or the UT on a claim for judicial review – to give the claimant an opportunity to adduce evidence in rebuttal; and, given that credibility will be in issue, that will normally include an opportunity to give oral evidence himself or herself and/or call relevant witnesses (e.g. their accountant) to give oral evidence."

4. Subsequent to the *Balajigari* decision, but after the hearing and determination of this case, in *Abbasi (rule 43; para 322(5): accountants' evidence)* [2020] UKUT 27 (IAC) the Upper Tribunal in its headnote, gave the following guidance:-

> "3. *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 submission of incorrect tax returns to Her Majesty's Revenue and Customs, the First-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/or any relevant regulatory body have been informed. This is particularly so where the letter is clearly perfunctory in nature."*

Grounds of appeal

5. The appellant challenges the decision of the First-tier Tribunal in four ways, none of which is material, for the reasons I now set out.

6. **Ground 1.** The appellant asserts that the First-tier Judge erred in setting out the burden of proof in these cases because at [5], no doubt in standard text which this judge uses in all cases, he stated that the burden of proof was upon the appellant and the standard of proof was the balance of probabilities. That is a correct self-direction as to the generic burden of proof in an immigration appeal.

7. However, at [47]-[48], the Judge set out the correct burden of proof which is a shifting burden with the Secretary of State required to establish a basis for a conclusion of dishonesty from which the Tribunal is entitled to draw an inference where no plausible explanation is given, with the appellant then required to show an innocent explanation to displace the prima facie inference of dishonesty.

8. The First-tier Tribunal Judge reminded himself of the applicable civil standard of proof, balance of probabilities, which applies to assessing whether an appellant has been dishonest in relation to his tax affairs with the consequence that he is denied settlement in the UK. That is a correct statement of the standard and burden of proof and in the rest of the decision and in particular at [64] it is clear that that is the standard and burden of proof which this judge applied. Ground 1 is not made out.

9. **Ground 2.** The appellant disputes the First-tier Tribunal's finding of fact that he had advanced no explanation for the error in his tax returns. The appellant's oral evidence was that he relied entirely on his accountants and did not check his tax returns, simply signing them as drafted. He is the taxpayer and the legal responsibility for accounting correctly to HMRC for his income is on him. It is not an irrelevant fact that HMRC did impose penalties on the appellant for non-disclosure, rather than just accepting the unpaid tax and interest.

10. The appellant relies on a letter from his accountants which appears at page 23 of his bundle, but which provides no explanation at all save to acknowledge the error. That letter falls within the description in *Abbasi* of a letter which is 'clearly perfunctory in nature'. In particular, there is no evidence that having made such a significant error in a client's accounts, the accountants took any professional steps. They do not appear to have informed either their professional body or their insurers that they had made such a serious error in dealing with this appellant's tax affairs.

11. At [55] the judge says that he attached 'due weight' to the letter at page 23 'but no explanation is offered as to how the error came about': he observed at [56] that the appellant had not formally complained about the accountant's conduct and there had been no repercussions on the individual accountant. In his oral evidence, both in cross-examination and re-examination, the appellant confirmed that to be correct. The criticism in the grounds of appeal of 'due weight' as an inadequate description of the weight attached is unsound: it is difficult to see how the Judge could attach any weight at all to a letter in such perfunctory terms and I am satisfied that the Judge did not err in his appreciation of the weight to be accorded to it.

12. The First-tier Tribunal Judge was unarguably entitled to characterise the appellant's explanation of the error as 'no explanation': the appellant's response and the accountant's letter were no explanation at all. The contention in the grounds of appeal to the contrary does not provide a proper basis for interfering with the First-tier Tribunal's finding of fact applying the standard at paragraph 90 of *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982

13. **Ground 3.** The appellant contended that it was not open to the judge to have regard to whether there were any individual repercussions on the individual accountant. But that forms part of the overall evidence before and indeed the oral evidence before the Tribunal and is unarguable. Mr Dingley for the appellant did not seek to go beyond what was stated in the grounds of appeal.

14. **Ground 4.** This ground relates to the proper interpretation of *Balajigari*. The appellant relies on the Secretary of State's failure to serve a 'minded to refuse' notice, *Balajigari* having not been heard and decided in the Court of Appeal when the refusal letter was written.

15. The appellant submits that it is *Robinson* obvious that the Secretary of State ought to have done so but I confess that pre-*Balajigari* it would not have been *Robinson* obvious and indeed that given that the appellant has had the opportunity to bring his evidence and provide such explanation as he would have relied upon, had a 'minded to refuse' notice been issued, and the inadequacy of that evidence, I am not satisfied that any error (if, which I do not accept, there was such an error) is material, on the factual matrix of the present appeal.

16. The grounds of appeal disclose no material error of either fact or law in the decision of the First-tier Tribunal, which is upheld. This appeal is dismissed.

Conclusions

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

I do not set aside the decision of the First-tier Tribunal.

Signed *Judith AJC Gleeson* Date: 9 March 2020

Upper Tribunal Judge Gleeson