Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09741/2019

Heard at Field House
on 21 February 2020

Determination Promulgated
On 12 March 2020

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED ASLIM KHAN
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Ms Bassi Senior Home Office Presenting Officer.
For the Respondent: Mr Z Malik instructed by ITN Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The respondent appeals with permission a decision of First-tier Tribunal Judge Devittie who allowed the appellant's appeal against the respondent's decision to refuse the appellant's application for indefinite leave to remain on the basis of long residence.

Background

2. The appellant is a citizen of Pakistan born on 30 March 1988. His application for indefinite leave to remain was refused pursuant to paragraphs 276B and 322(5) on the basis that in his application of 5 April 2011 the appellant relied on earnings of £37,248 including a net profit from self-employment of £24,088 between 6 April 2010 and April 2011. HMRC records for 2010/11 showed a profit of £661. In his application of 3 June 2013, he relied on a total income of £37,349 including a net profit of £25,090 between 6 April 2012 and 5 April 2013. No self-employment profit was declared to HMRC for this period.
3. The Judge noted the appellant's explanation that he initially declared the correct figures to HMRC and paid his accountant in cash an amount to settled his liability but that the accountant, without his knowledge, amended the returns in an incorrect manner, the result of which led the respondent to accuse him of deception. The appellant stated he became aware of the errors following a letter from HMRC on 21 July 2014 and took immediate steps to contact his accountant.
4. At [11] the Judge did not find the appellant had provided a satisfactory explanation for the discrepancies in the figures declared for the reasons set out at (i) – (iv) of that paragraph.
5. At [12 – 13] the Judge sets out the core findings in the following terms:

> 12. I therefore find that there is reliable evidence to establish on a balance of probabilities that the conduct of the appellant was sufficiently reprehensible. I am however not satisfied taking proper account of all relevant circumstances known about the appellant at the date of decision, that the respondent has established the appellants presence in the UK is undesirable. These are my reasons:
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> The appellant's academic background, his immigration history, the fact that he was engaged in self-employment, do not persuade me that there is a likelihood that he would engage in any further deception in the future. I take into account that the appellant has paid in full, the extent of his liability to HMRC and he appears to have done so promptly. The appellant is in gainful employment as a subject access request consultant, and I do not have any doubt, that he has high level skills in this area of work and therefore the capacity to engage in meaningful and honest economic activity in the United Kingdom. The appellant has lived in the United Kingdom for 11 years. There is no suggestion that other than the conduct that has given rise to this appeal, appellant has engaged in any other activity in breach of the laws of the United Kingdom. He has no criminal convictions. He has developed strong friendships in the United Kingdom. There is also credible evidence that he has engaged in charitable work for reasons not related to the desire to enhance his prospects in this appeal.
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> 13. I therefore find that the appellant does meet the requirements of the immigration rules under the long residence provisions. I do not find that there are any compelling public interest considerations that weigh against appellant in the assessment of proportionality. The economic well-being of the UK is not implicated. The appellant meets the English language requirements. He has accrued 10 years lawful residence. I accordingly find that the refusal of leave under the long residence provisions has great personal consequences for the appellant that are not outweighed by the public interest, including the need to maintain effective immigration control.

6. Permission to appeal was granted to the Secretary of State in the following terms:

> 2. The respondent's basis for seeking leave to appeal is essentially that the FtT Judge made an irrational and perverse decision, particularly in the light of the judge's findings that the appellant.

7. A perverse decision is one against the weight of evidence, which is a hight threshold to cross, irrationality is a lower threshold suggesting a decision not made following a fair consideration of the evidence.

The law

8. The correct approach to a case of this nature has been confirmed by the Court of Appeal in **Balajigari v SSHD [2019] EWCA Civ 673** from which the following principles can be extracted:

(i) it is clear from the terms of paragraph 322 (5) that it was not intended only to apply to cases in which there is a threat to national security [32];
(ii) para 322 (5) involves a two-stage analysis, whether it applies first and then discretion falls to be considered [33];
(iii) for the first stage there must be reliable evidence of sufficiently reprehensible conduct and an assessment, taking proper account of all relevant circumstances known about the applicant including positive features of their character of whether their presence in the UK is undesirable [34];
(iv) the conduct can only be sufficiently reprehensible if it is dishonest [35]. It is very hard to see how the deliberate and dishonest submission of false earning figures to HMRC or the Home Office would not meet the threshold [37];
(v) the SSHD should incorporate the balancing exercise into the decision-making process, in so far as **Dadzie** and **Ojo** said otherwise the CA would disagree [38];
(vi) the guidance in **Khan** was endorsed with the qualification that para 37 of the guidance may misstate the position; a discrepancy between earnings declared to HMRC and SSHD may justifiably give rise to a suspicion of dishonesty but it does not justify that conclusion. It calls for an explanation and the SSHD must decide in the light of the explanation or lack of one whether he is satisfied the applicant was dishonest [42];
(vii) where SSHD is minded to refuse ILR on the basis of reprehensible conduct he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion of reprehensible conduct. There does not have to be an interview; a written procedure may suffice [55] [56], but the availability of administrative review did not satisfy the requirements of procedural fairness [58];
(viii) the SSHD is not bound to take the same view as HMRC [68];
(ix) there is no **Tameside** duty on the SSHD to make enquiries of HMRC as to how they have dealt with relevant errors [69]; the applicant can draw attention to what action HMRC did or did not take [75];
(x) in the generality of cases a Tier 1 applicant for ILR is likely to have built up sufficient private life for Article 8 to be engaged by his removal [86];
(xi) an adverse decision by the SSHD necessarily means that if the applicant has leave it can be curtailed so a person with leave is equally liable to removal [90];

(xii) this means that the tribunal will have to reach its own conclusions as to whether the interference was justified rather than conducting a rationality review – the situation was analogous to **Ahsan [2017] EWCA Civ 2009** [92];
(xiii) like **Ahsan** the appropriate route of challenge is by appeal to the FTT rather than JR to the UT [95];
(xiv) where an applicant has not included a human rights claim in their ILR application they will need to make a fresh application or wait until steps are taken to enforce removal [100] [101];
(xv) the Court of Appeal discussed the position in the current litigation [103];
(xvi) the applicant will need an opportunity to give evidence and call witnesses it is unlikely that a mere assertion that the matter was a "mistake" will be accepted without a full and particularised explanation of what the mistake was and how it arose [106].

Discussion

9. The Judge was aware of the guidance provided by the Court of Appeal to which there is specific reference in the decision under challenge at [9]. Insofar as the first stage is concerned the Judge finds the appellant had not provided a satisfactory explanation for the discrepancy in the figures and that his conduct was "sufficiently reprehensible". That does not appear to be an express finding of dishonesty but can be inferred as such. The Judge refers to [35] of the decision in Balajigari in which the Court of Appeal record a submission made by counsel for the appellant before them that an earnings discrepancy case could constitute sufficiently reprehensible conduct of the parent purposes of paragraph 322(5) but only if the discrepancy was the result of dishonesty on the part of the applicant which is not disputed by the Secretary of State. The Court of Appeal recognise that the provision of inaccurate figures to HMRC or the Home Office in support of an application as a result of carelessness or ignorance or poor advice could not constitute conduct rendering it undesirable for an applicant to remain in the United Kingdom. This is however recognition of errors that can be classed as genuine or innocent.
10. Notwithstanding this finding the Judge, in the decision under consideration, was not satisfied the respondent had established the appellants present was undesirable for which the Judge gives reasons. The submission on behalf of the Secretary of State by Ms Bassi is that the Judge in coming to that conclusion had not factored the appellant's deceit into the balancing exercise.
11. The determination shows the first part of the exercise was undertaken by the Judge in accordance with the guidance. It is hard to imagine that having spent a substantial proportion of the determination discussing whether the appellant had behaved in such a manner so as to constitute 'sufficiently reprehensible conduct' the Judge when immediately moving to the second stage of assessing whether that was sufficient to enable the respondent to establish the decision is proportionate, would have completely placed the initial findings relating to the first aspect of the case out of his mind. That suggests an artificial separation which, had it occurred, would enable the respondent to proceed. I do not find, however, that this was the situation. The Judge clearly having found the appellant's conduct was 'sufficiently reprehensible' in relation to the difference between the figures disclosed to HMRC and to the Home Office in 2010/11 and

2012/13 went on to consider the points in the appellant's favour regarding family and/or private life in the United Kingdom. Balancing the factors in the appellant's favour against those in favour of the respondent led to the conclusion that, notwithstanding the concerns that arose as a result of the failure to disclose correct figures to HMRC, the weight of all remaining matters tipped the balance in favour of the appellant.

12. Whilst the respondent considers this a generous decision the grounds fail to establish the Judge has erred in a manner material to the decision to allow the appeal sufficient to warrant the Upper Tribunal interfering any further in relation to this matter. The grounds are, in effect, disagreement with the outcome of the property undertaken proportionality balancing exercise. It is not established the conclusions are outside the range of those reasonably available to the Judge on the evidence. The respondent fails to establish the decision is perverse or arguably irrational in the fact sensitive assessment.

Decision

13. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson Dated the 9 March 2020