IAC-FH-LW/CK-V3

IN THE UPPER TRIBUNAL

JR/3178/2019

Field House,
Breams Buildings
London
EC4A 1WR

14 February 2020

THE QUEEN
(ON THE APPLICATION OF)
ADIL MANSOOR

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE ALLEN

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Ms A Jones, instructed by Farani Taylor Solicitors appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE ALLEN: The applicant has applied for judicial review of the Secretary of State's decision of 13 March 2019 refusing indefinite leave to remain. Permission was granted on the papers by Judge Frances on 1 November 2019.

1. The decision under challenge has to be seen against the background of an earlier decision of Judge Norton-Taylor, at that time a Judge of the First-tier Tribunal. The applicant (as I shall refer to him throughout) had appealed against the decision of 26 January 2018 refusing a human rights claim which was made through the route of an application for indefinite leave to remain, itself based upon a claim of ten years' continuous lawful residence.

2. Though the Secretary of State had accepted that the applicant had acquired ten years' continuous lawful residence in the United Kingdom, it was asserted that he had acted dishonestly when stating his income in respect of two previous applications, the first made on 14 December 2010 and the second on 15 July 2013. It was said that the applicant had either significantly overstated his earnings to the respondent in order to satisfy the relevant requirements of the Immigration Rules at the time, or that he had underestimated his earnings to HMRC in order to avoid the appropriate tax liability. On either view it was contended on behalf of the respondent that he had acted dishonestly or his conduct was such that was undesirable for him to remain in the United Kingdom.

3. Having considered the evidence carefully, the judge concluded that the respondent had shown that the applicant had knowingly and dishonestly provided inaccurate figures to HMRC in respect of both of the tax returns in question. Among other things he noted the absence of evidence from the applicant's accountant and the fact that in his witness statement he appeared to be blaming the accountant for the original errors, whereas in the oral evidence he appeared to be saying that the error was in fact his own. In the judge's view there had been a shift in position which did not assist the applicant's case and also he emphasised the absence of any evidence whatsoever from the accountant, for which no sensible explanation had been provided.

4. At paragraph 54 of his decision the judge went on to remind himself that the ground of refusal relied on by the respondent was of course discretionary. He considered the discretion and, absent the situation of the applicant's son, to which he returned subsequently when considering Article 8 outside the Rules, he saw no basis to exercise discretion in the applicant's favour. On the judge's findings he had been

dishonest on two separate occasions in the past and there were no sufficiently strong mitigating factors in his case.

5. However, in his consideration of the situation outside the Rules, the judge noted that the applicant's wife and son were both British citizens, that it was in the son's best interests to remain in the United Kingdom and that, bearing in mind the respondent's policy (Family Migration: Appendix FM section 1.0b), published on 22 February 2018, he concluded that it would be unreasonable to expect the child to leave the United Kingdom and as a consequence the applicant succeeded in his appeal.

6. As a consequence of this decision, the respondent made the decision under challenge. In the decision letter, having noted that the appeal had been allowed by the First—tier Tribunal on the basis of the applicant's genuine and subsisting relationship with his children (there was a reference to this being under Appendix FM, but that is clearly wrong given that the decision was one reached outside the Rules), the respondent said that the applicant had been granted a period of thirty months' limited leave to remain under paragraphs R-LTRPT.1.1.(a), (b) and (d) of Appendix FM, which included the exceptions paragraph EX.1.(a).

7. The applicant's challenge to this decision is based on the contention that he should have been granted indefinite leave to remain. The grounds were drafted by Ms Jones who has also provided a skeleton argument and oral submiss ions before me today.

8. The first point made in the grounds of challenge is with regard to the implications for this case of the decision of the Court of Appeal in Balajigari [2019] EWCA Civ 673. The point is made that decision postdates the decision of the First-tier Tribunal and it is contended that the judge did not undertake the required two stage process and therefore did not consider whether the discretionary ground was made out for refusal because of paragraph 322(5) in light of all the other circumstances of the case. It is argued that in circumstances where the Tribunal had concluded that it was not undesirable to permit the applicant to remain having regard to his relationship with his British citizen child, it was inappropriate to grant discretionary leave under the ten year route rather than indefinite leave to remain under the Immigration Rules. It was contended that the respondent was obliged to consider, but did not consider, the discretionary ground for refusal of indefinite leave to remain in light of all the circumstances of the case. In the circumstances, it is argued, it was Wednesbury unreasonable to grant discretionary leave rather than indefinite leave to remain. In addition it

is argued that the respondent had failed to consider the passage of time since the different declarations were made as well as the applicant's family circumstances and the implications for them of having to make a number of extension applications over the next ten years and another application for indefinite leave to remain at the end of that process. It is argued that the deception should be regarded as being analogous to being spent in cases arising under the Rehabilitation of Offenders Act.

9. The point is also made that in the Summary Grounds of Defence of 30 July 2019 the respondent had specifically asked for the instant case to be included within an order made by Lane J on 14 June 2019 staying the cohort of Balajigari related cases. Reference is made to the Secretary of State's submissions in Balajigari and other cases, dated 23 July 2019, in which it is said, inter alia, that the outcome for each applicant will therefore be the same as if each had successfully pursued his judicial review claim to a conclusion: the Secretary of State would have been under the usual duty to remake the decision in question in accordance with the applicable law and policy at the time of the new decision. It was said therefore that the Secretary of State submitted that the process would render all of these judicial review claims academic and invited the applicants to agree to withdraw them. The Secretary of State would correspond individually with each applicant or their legal representatives to complete the administrative tasks necessary to give effect to this.

10. In her grant of permission in this case Judge Frances noted what had been said in the Acknowledgement of Service and the consequent stay of the application, but crucially however the respondent had not confirmed that she would withdraw and reconsider the decision in this case and following Balajigari the grounds were arguable.

11. On this point therefore it is argued in the grounds by Ms Jones in her skeleton and in oral submissions that the Secretary of Stace had made a specific direct promise to the applicant that his judicial review was academic, would be settled and a new decision made, and that he had relied upon those assurances to his detriment. As a consequence it was argued that it was not reasonable now for the Secretary of State to proceed on the basis that this was not a cohort case.

12. In his skeleton argument and oral submissions Mr Malik set out the factual background and the legislative framework, none of which is in dispute.

13. Mr Malik argued that the applicant had had every opportunity to challenge the First—tier Tribunal's finding of dishonesty

despite the fact that the appeal had been allowed, citing what was said by the Court. of Appear in Anwar [2017] EWCA Civ 2134 at paragraphs 14 to 18. The respondent had carefully considered the findings made by the First—tier Tribunal, and it was unsurprising that in the light of those findings the applicant had been granted limited leave to remain rather than indefinite leave to remain.

14. Mr Malik also placed reliance on Alladin [2014] EWCA Civ 1334 where among other things it was said that it was a matter for the Secretary of State to decide whether to exercise her discretion to grant leave to remain and if so for how long. Also it had been said in MS (India) [2017] EWCA Civ 1190 that the refusal of indefinite leave to remain as such did not engage Article 8. As a consequence, it was argued, there was no merit in the applicant's reliance on his long residence, Article 8 and his wife and children. All those matters had been carefully considered by the First—tier Tribunal and by the Secretary of State.

15. As regards Balajigari, there was nothing in that judgment that assisted the applicant. Mr Malik quoted from what had been said by Underhill LJ at paragraph 39 as follows:

> "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"

16. As regards what had been said in Balajigari about the issue of procedural fairness and the need to indicate clearly to the applicant that the Secretary of State has a suspicion of dishonesty and give him an opportunity to respond, the applicant had had a fair opportunity to the notice to provide evidence including oral evidence in response to the Secretary of State's allegation and he had provided oral evidence and an explanation of his conduct and they were found not to be credible and he had been found to be dishonest.

17. It was further argued that the fact that the judicial review claim was previously stayed was of no material significance and the applicant could not be granted relief simply on that basis. It was argued that it could not be sensibly suggested that the stay of the judicial review claim following Balajigari meant that the Upper Tribunal should quash the Secretary of State's decision.

18. The point made by Mr Malik was that even if, contrary to his further submissions, it was found that the Secretary of State had made an error, the claim should be dismissed and that it

was highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. Reliance was placed on section 31(2A) of the Senior Courts Act 1981.

19. By way reply Ms Jones argued that there had been an absolute statement that this was a Balajigari case and this point had been made in a document sent to the Upper Tribunal. The documentation had been clear that this was a Balajigari case and would follow the course of action set out in the letter of 23 July 2019 that the outcome for each applicant would be the same. The Secretary of State had changed her mind. It was not a case where section 31(2A) would apply, bearing in mind the factors such as the discretionary nature of paragraph 322(5), the fact of British children, the six further years in the United Kingdom since the conduct found to be dishonest and the grant of leave and the two—stage process that should have been undertaken under Balajigari. The applicant had been fourteen years in the United Kingdom and now had two British children as well as a British wife and there were also the respondent's section 55 duties, so it could not be said that the same decision would necessarily be reached if the decision was properly arrived at.

20. I reserved my decision.

The Law

21. The relevant legal provisions are as follows.

22. The power to grant leave to enter or remain arises under section 3(1) of the Immigration Act 1971 ("the 1971 Act") which provides:

> "Except as otherwise provided by or under this Act, where a person is not a British citizen;
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, to remain in the United Kingdom) either for a limited or for an indefinite period."

23. The Immigration Rules set out the way in which the Secretary of State would exercise his power under section 3(l) of the 1971 Act. The Immigration Rules are made by the Secretary of State and approved by Parliament under section 3(2) of the 1971 Act.

24. Paragraph 276B of the Immigration Rules provides.

"The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i)(a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and

(b) strength of connections in the United Kingdom; and

(c) personal history, including character, conduct, associations and employment record; and

(d) domestic circumstances; and

(e) compassionate circumstances; and

(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of application made within that 28 day period."

25. Paragraph 322(5) of the Immigration Rules provides:

"Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused.

…

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his

conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security."

26. Paragraph GEN.3.2 of Appendix FM to the Immigration Rules provides:

"(1) Subject to sub—paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision—maker must consider whether the circumstances in sub—paragraph (2) apply.

(2) Where sub—paragraph (1) above applies , the decision—maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub—paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D—ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR."

27. Paragraph D—LTRPT.1.2 of Appendix FM to the Immigration Rules, referred in Paragraph GEN 3.2(3) of Appendix FM to the Immigration Rules, provides:

"D-LTRP.1.2. If the applicant meets the requirements in paragraph R—LTRP.1.1.(a), (b) and (d) for limited leave to remain as a partner, or paragraph GEN.3.1(2) or GEN.3.2.(3) applies to an applicant for leave to remain as a partner, the applicant will be granted leave to remain for a period not exceeding 30 months and subject to a condition of no recourse to public funds unless the decision

—maker considers, with reference to paragraph GEN.1.1A., that the applicant should not be subject to such a condition, and they will be eligible to apply for settlement after a continuous period of at least 120 months in the UK with such leave, with limited leave to remain as a partner granted under paragraph D-LTRP.1.1., or in the UK with leave to enter granted on the basis of entry clearance as a partner granted under paragraph D—ECP.1.1. or D-ECP.1.2. (excluding in all cases any period of leave to enter or limited leave to remain as a fiancé(e) or proposed civil partner); or, if paragraph E-LTRP.1.11 applies, the applicant will be granted limited leave for a period not exceeding 6 months and subject to a condition of no recourse to public and a prohibition on employment."

Discussion

28. I have set out above the history of and background to this case. The essence of the decision in Balajigari is to be found in the summary paragraph, paragraph 221 of the decision. The main reason why the Secretary of State's approach in refusing the applications for leave to remain In those cases on paragraph 322(5) grounds was legally flawed was because he proceeded directly from finding that the discrepancies occurred to a decision that they would result in dishonesty without giving applicants an opportunity to proffer an innocent explanation. The further point was made that the Secretary of State had also not addressed further questions of whether the dishonesty in question rendered the presence of the applicant in the United Kingdom undesirable or whether there were other factors outweighing the presumption if they were removed, or giving the applicants the opportunity to raise any matters relevant to those questions. Though such cases would be exceptional, the step could not simply be ignored. It was considered that that unlawfulness could be avoided for the future by the Secretary of State adopting a "minded to" procedure, thereby informing the applicants of her concerns and giving them the opportunity to show cause why indefinite leave to remain should not be refused by offering an innocent explanation of the discrepancies (which would need to be particularised and documented so far as possible) and/or drawing attention to matters relevant to the "undesirability" or "discretion" issues.

29. The point was further made at paragraph 222 in Balajigari that those defects need not lead to a paragraph 322(5) refusal being quashed if the Upper Tribunal is satisfied that they

were immaterial, i.e. that the result would have been the same even if the applicants had been given an opportunity to explain the discrepancies.

30. This case is of course not a classic Balajigari case in the sense that there has been an appeal, albeit prior to Balajigari being decided, at which the applicant was given the opportunity to provide explanations. One can see, although it is a matter of only tangential relevance as it was not relied on by either party before me, from paragraph 8 of the judge's decision that a tax questionnaire had been completed by the applicant in response to further enquiries by the respondent into the application for indefinite leave to remain.

31. Be that as it may, it is clear that the judge gave careful consideration to the explanations provided by the applicant and found them to be entirely unsatisfactory, such that he concluded that the respondent had shown that the applicant before him knowingly and dishonestly provided inaccurate figures to HMRC in respect of both of the tax returns in question, but if in fact the figures provided to HMRC were accurate it must follow that the figures set out in the applications were inaccurate and by a very large degree and he had no credible evidence as to why such an error could have occurred.

32. As noted above, the judge also went on to consider the discretionary element of the ground of refusal, and saw no basis to excercise discretion in the applicant's favour. On the judge’s findings he had been dishonest on two separate occasions in the past and there were no sufficiently strong mitigating factors in his case.

33. It is clear in my view therefore that the process required by the Court of Appeal in Balajigari has been carried out in this case. The Applicant had every opportunity to put before the judge explanations for the discrepancies and signally failed to do so.

34. It was as a consequence of that decision that the respondent decided to grant limited leave to remain only rather than indefinite leave to remain, and in this regard one must refer back of course to paragraph 276B(ii) and paragraph 322(5) of the Immigration Rules. Contrary to what is argued in the applicant's skeleton, I consider the judge did undertake the required two—stage process. He carefully considered the exercise of his discretion and saw no reason to exercise it in the applicant's favour. I see nothing in the point in the grounds concerning the contradictory reasons for the decision given by the respondent. It is clear that the appeal had been allowed on the basis of Article 8 outside the Rules, as made

clear in the letter of 11 February 2019. There is no materiality whatsoever to the error in stating that the appeal was allowed by the First—tier Tribunal on the basis of Appendix FM.

35. Nor do I see any basis for saying that it was Wednesbury unreasonable to grant discretionary leave rather than indefinite leave to remain. In light of the finding of dishonesty by the judge, it would have been surprising if the respondent had decided nevertheless to grant indefinite leave to remain, bearing in mind the terms in particular of paragraph 276B(ii).

36. Nor do I see any merit in the argument concerning the initial inclusion of this case in the Balajigari cohort and what was said in the Acknowledgement of Service and in the accompanying submissions. It was fully open to the respondent to decide ultimately that this was not a case that would fall to be treated like the Balajigari cases because of its particular facts and there having been a finding of fraud by the judge. There is no public law unlawfulness in the respondent's change of position in this regard. It was open to the respondent to change her mind and decide to determine the matter in the way in which she did.

37. In case the above conclusions are wrong, I agree with Mr Malik that this is a case where section 31(2A) of the Senior Courts Act applies. The outcome for the applicant would not have been substantially different even if there were any error in the Secretary of State's decision. I note the points made by Ms Jones in this regard. The time when the dishonesty took place, the applicant's family circumstances and time in the United Kingdom, the fact that his wife and children are British and the respondent's section 55 duties are all relevant, but none of those matters in my view whether taken individually or cumulatively is such that they could conceivably lead the Secretary of State to come to any different decision other than to grant the limited leave that was granted in this case.

38. No error of law in the decision or the process adopted has been identified by the applicant, and as a consequence this application for judicial review is refused.~~~~0~~~~

UTIJR6

JR/3178/2019.

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Adil Mansoor

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Allen

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms A Jones, instructed by Farani Taylor Solicitors, on behalf of the Applicant and Mr Z Malik, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 14 February 2020.

Decision: the application for judicial review is refused

(1) For the reasons set out in the judgment, I order that the judicial review application be dismissed.

(2) The Applicant is to pay the Respondent's costs, to be assessed on the standard basis if not agreed. I have taken into account the submissions of both parties in coming to this conclusion. There was no merit in the argument concerning the initial inclusion of this case in the Balajigari cohort (see paragraph 36 of the judgment) and I bear in mind also the fact that, as decided at paragraph 37, section 31(2A) of the Senior Courts Act 1981 is applicable, and hence even if the decision under challenge had been flawed the outcome would still have been the same. Given the finding of dishonesty, there was never any possibility that a grant of indefinite leave to remain would have been made. There is no good reason to depart from the usual principle that the unsuccessful party must pay the costs of the successful party.

Order

(3) I order, therefore, that the judicial review application be dismissed.

Permission to appeal to the Court of Appeal

(4) I refuse permission to appeal to the Court of Appeal.

Signed: _____

Upper Tribunal Judge Allen

Dated: **27/4/20**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).