



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number No: UI-2023-004277

First-tier Tribunal No: HU/54243/2022

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 08/11/2023

24th November 2023

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**OLATUNJI ADISA OGUNBAMBI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms H Gilmour, Home Office Presenting Officer

For the Respondent: Ms S Ferguson, instructed by Blackfields Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission granted by First-tier Tribunal Judge LK Gibbs, against the decision of First-tier Tribunal Judge Joshi (the judge), that was promulgated on 7 August 2023.

Procedural matters

2. The Secretary of State failed to provide a bundle in compliance with the standard directions. Ms Gilmour apologised and said she was getting used to the new directions. She said the bundle was on CCD but agreed she had not uploaded it onto CE File. She said she could arrange that to happen during the hearing.
3. I did not take up Ms Gilmour's offer. Both representatives agreed that I did not need to see all the documents that were before the First-tier Tribunal and that having the judge's decision and reasons, the grant of leave, the grounds, and the rule 24 response meant I was able to deal with the error of law issues.
4. As the failure did not cause the hearing to be delayed, I see no prejudice arising from the failure to comply with directions and hopefully this will serve as a reminder and warning to the Secretary of State to ensure compliance with directions in the future.

Grounds of appeal

5. The Secretary of State has been given permission on both grounds raised in the application.
6. First, that the judge failed to give adequate reasons why Mr Ogunbambi's private and family life rights outweighed the public interest, especially given the adverse findings about his character.
7. Second, that the judge failed to give adequate reasons why the public interest in maintaining effective immigration controls was outweighed in this case where there was nothing to show that the relationships involved do not go beyond what would be expected between adult relatives or why they could not be continued from overseas.
8. The Secretary of State relies on the Court of Appeal's judgments in Chanda v SSHD [2018] EWCA Civ 2424 and JK (India) v SSHD [2013] EWCA Civ 1080.
9. Ms Gilmour amplified these grounds, arguing that the approach the judge's approach to the balancing exercise in article 8 ECHR was flawed in that inappropriate or no weight was given to various factors that should have weighed heavily on the public interest side of the balance. Ms Gilmour took me to the findings of financial dishonesty, the finding that Mr Ogunbambi has been a party to a marriage of convenience, and the finding that Mr Ogunbambi would not face very significant obstacles to his integration on return to Nigeria. Ms Gilmour said these were very clear findings in support of the Secretary of State's position.

10. Ms Gilmour submitted that the judge had given weight to immaterial matters, or too much weight to them. She pointed to Mr Ogunbambi's work in the UK, the fact he had paid £15,000 in taxes to the satisfaction of HMRC who had taken no further action, and his relationships with his adult children. It was unclear why these outweighed the public interest, either individually or combined.
11. Ms Gilmour argued that the fact two of Mr Ogunbambi's adult children attended the hearing and all three children had provided supporting statements, was not sufficient to outweigh the usual considerations of family life not being easily established between parents and adult children. In this case, Ms Gilmour also reminded me that at the relevant date, none of the children had settled status in the UK.

Grounds in response and cross appeal

12. In his rule 24 response, Mr Ogunbambi's primary argument is that the grounds of appeal are mere disagreement with the findings made and that as the findings were balanced and reasoned, there is no reason for the Upper Tribunal to interfere on appeal.
13. On this aspect, Mr Ogunbambi relied on the Court of Appeals' judgment in Volpi & another v Volpi [2022] EWCA Civ 464.
14. The remainder of Mr Ogunbambi's rule 24 response was devoted to a cross appeal on the basis that if the Secretary of State's appeal is allowed, nothing of the judge's decision should be preserved because there are potential legal errors in the findings relating to the assessment of his character.
15. Mr Ogunbambi relied on the decision in Smith (appealable decisions; PTA requirements; anonymity: Belgium) [2019] UKUT 216 (IAC) to support the procedure by which he could make the cross appeal. With regard to the substance of his cross appeal, he relied on the Court of Appeal's judgment in Balajigari v SSHD [2019] EWCA Civ 673 about the correct approach in the immigration rules, the decision of this Tribunal in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) about the burden of proof, and the Supreme Court's judgment in Ivy v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67 about the correct test for dishonesty.
16. The arguments presented by Mr Ogunbambi in his cross appeal allege the judge failed to apply the relevant law and failed to make findings on material aspects including past financial dishonesty and the marriage of convenience.
17. Ms Ferguson submitted that if the judge had correctly applied the relevant law, he would not have been able to make the findings regarding dishonesty or the marriage of convenience and therefore those aspects would lose the weight the Secretary of State argues they have. As such,

although perhaps in the wrong order, the judge reached the right decision when undertaking the balancing exercise.

18. Ms Ferguson submitted that as a result the balancing exercise was not one-sided as argued by the Secretary of State. The judge correctly identified the private and family life issues in the appeal and came to a reasonable conclusion. For example, it was not irrational that the judge inferred that Mr Ogunbambi's children would secure settlement in the UK, nor was it inappropriate for the judge to give weight to the work Mr Ogunbambi does with vulnerable and disabled people.

Response to the cross appeal

19. Ms Gilmour responded to the cross appeal by reminding me that the Court of Appeal in Balajigari upheld the fact that dishonesty weighs against granting leave. The key issue is that a person accused of dishonesty must be given an opportunity to explain. Ms Gilmour submitted that the judge found at paragraph 54 of the decision that the Secretary of State had adduced sufficient evidence regarding dishonesty and rejected Mr Ogunbambi's explanation in the following paragraph.
20. As to relying on a previous decision, Ms Gilmour reminded me that it was open to the judge to rely on Judge Fox's earlier decision as the starting point regarding dishonesty. That was an application of *Devaseelan*, which has stood the test of time.

The Secretary of State's case

21. I start by considering the Secretary of State's appeal for which permission was granted.

The findings made by the judge

22. I examine the judge's decision to identify what findings were made by the judge. They are substantial. When examining the findings, I identify those that are positive findings and those that are negative findings, as well as any that would be neutral in the balancing exercise. I do so because it helps me understand that the judge was providing reasons throughout the decision about where each finding would sit in the balancing exercise.
23. At paragraph 51, the judge finds that Mr Ogunbambi does not satisfy the immigration rules and that he is caught by the strictures of paragraph 322(5). That rule makes provision for refusing leave where it would be undesirable for a person to remain because of their conduct, character or associations. This is a negative finding.
24. At paragraph 53, the judge finds that Mr Ogunbambi's has never been arrested, charged or faced a conviction relating to his character or financial matters. In the same paragraph, the judge recognises that Mr Ogunbambi has had 3C leave throughout. These are positive findings.

25. At paragraphs 54 to 59, the judge examines the evidence about dishonesty and gives reasons why he accepts the Secretary of State's position. At paragraph 60, the judge finds that Mr Ogunbambi was a party to a marriage of convenience. Taken together, these paragraphs are the reasons why the judge finds paragraph 322(5) is engaged. These are negative findings.
26. At paragraph 61, the judge finds there are no significant obstacles to Mr Ogunbambi integrating into Nigeria. This is a negative finding.
27. From paragraph 64, the judge turns his attention from the immigration rules to article 8. At paragraph 66, the judge is aware that Mr Ogunbambi's leave from 2012 to 2015 was based on dishonesty. This is a negative finding. The judge recognises that Mr Ogunbambi had been living in the UK lawfully for 13 years, and that he speaks English and has been self-supporting from his earnings. These are positive findings.
28. At paragraph 67, the judge finds that Mr Ogunbambi accumulated eight years of lawful residence from 2015 to 2023 because the Secretary of State failed to make a lawful decision in that period. At paragraph 68, the judge finds that it was during this period of eight years that Mr Ogunbambi continued to develop his private and family life rights in the UK. These are positive findings.
29. At paragraph 69, the judge considered the family circumstances Mr Ogunbambi would return to in Nigeria. This is neither positive or negative, particularly when taken with the findings at paragraph 61 and is merely recognition that that Mr Ogunbambi's ties to Nigeria are not particularly strong.
30. At paragraph 70, the judge finds that Mr Ogunbambi's work with vulnerable disabled people in the UK is a benefit to society and therefore is a positive factor. At paragraph 71, the judge found that Mr Ogunbambi's health concerns arising from a heart attack in 2016 was not material. This is a neutral finding.

The balancing exercise

31. There is no allegation that the judge failed to make findings on all relevant factors. Even if that had been alleged, I would not have found it was a sustainable argument because of the comprehensive and detailed findings made. I have no reason to disturb the factual matrix found by the judge.
32. Although I have added to the findings whether each weighed positively or negatively in the balancing exercise, taking the traditional approach that something is positive if it points to Mr Ogunbambi being permitted to remain in the UK, I have done so merely to spell out what each finding means. This is not to suggest the judge's findings lack clarity. His findings clearly show where each would fit in the balancing exercise. I spell them

out for my own benefit to ensure I properly understand the approach the judge has taken.

33. The findings in paragraphs 51 to 71 are, therefore, part and parcel of the judge's balancing exercise and form part of his reasoned approach.
34. The judge focuses more intensely on how he approaches the article 8 balancing exercise from paragraph 66. He begins by importing his earlier findings regarding Mr Ogunbambi's past dishonesty and character and places this within section 117B of the 2002 Act. It is clear that the judge has regard to the fact that the maintenance of effective immigration control is in the public interest.
35. Thereafter, the judge considers whether the public interest is outweighed. The judge considers the circumstances in which Mr Ogunbambi remained in the UK and finds that the Secretary of State ineffectiveness in maintaining immigration control for a period of eight years weakened the public interest not to permit Mr Ogunbambi to remain. The judge also finds that Mr Ogunbambi had put right his past failings. His financial dishonesty was wholly in the past as he had resolved his tax position and was contributing to society. Again, it is clear to me that at this juncture the judge was assessing how strong the public interest remained and concluded that it was not as strong as argued by the Secretary of State.
36. The judge found that Mr Ogunbambi's relationships with his adult children and his grandchild had developed during the last eight years and that they were stronger than would usually be expected between a parent and adult children. The judge considered that the future lives of Mr Ogunbambi's children lay in the UK. The finding that family life has been strengthened over time is a reasonable conclusion on the evidence and provides a solid foundation for outweighing the reduced public interest.
37. I appreciate that the judge could have expressed his findings differently and perhaps more clearly for the Secretary of State but that is not sufficient to establish legal error. I am well aware of the time pressures judges work under and focus on whether the judge's findings were open to him and adequately reasoned. I conclude that they are. They may be more generous than the Secretary of State would like but again that does not identify legal error. In fact, the Secretary of State's position in this case is driven by disagreement with the findings and outcome. It is trite law that disagreement with the findings made, if those findings are sustainable which they are, does not identify legal error.
38. It follows that I reject the Secretary of State's case and uphold the judge's decision.

The cross appeal

39. Because I conclude that the Secretary of State's appeal fails, I have no need to consider the cross appeal. I mention, for completeness, that I

would probably not have found in favour of the cross appeal for the following reasons.

40. The strongest element of the cross appeal is whether the judge applied the approach set out in Balajigari when determining if Mr Ogunbambi had been financially dishonest, and what bearing that should have on the public interest given it was part of the general grounds for refusing leave.
41. Although not raised in the cross appeal, I recall that the Upper Tribunal's decision, Ashfaq (Balajigari: appeals) [2020] UKUT 226 (IAC), which is summarised in the head note in the following way:
 1. If the decision of the Secretary of State carries a right of appeal, the availability of the appeal process corrects the defects of justice identified in Balajigari.
 2. In an earnings discrepancy case there is no a priori reason to suppose that any of the declared figures is or was accurate. In particular, the fact that a person is now prepared to pay a sum of money to HMRC does not of itself prove past income at the level claimed.
 3. The explanation by any accountant said to have made or contributed to an error is essential because the allegation of error goes to the accountant's professional standing. Without evidence from the accountant, the Tribunal may consider that the facts laid by the Secretary of State establish the appellant's dishonesty.
42. I am satisfied these points summarise the approach in Balajigari insofar as they apply to statutory appeals. I am satisfied the judge has applied these principles in paragraphs 54 to 59. At 54, the judge finds the Secretary of State has adduced sufficient evidence to establish a prima facie case of dishonesty. Thereafter, the judge considers the explanation given about the discrepancies and the involvement of Mr Ogunbambi's then accountant, and it was open to the judge to reject the evidence given.
43. I conclude that I do not find there is legal error in the judge's finding that Mr Ogunbambi had been financially dishonest.
44. The concerns raised about the finding that Mr Ogunbambi had been a party to a marriage of convenience is a weak argument because the principles in *Devaseelan* are so well established. The judge was required to treat the decision of Judge Fox as the starting point, which the judge did. There was no fresh evidence to consider. In light of the established legal principles, it was not reasonable for Mr Ogunbambi to expect the Tribunal to revisit that question without fresh evidence; and even with fresh evidence, the limits set out in *Devaseelan* are strict. This is not, therefore, a reversal of the burden of proof.
45. However, these observations are provided for completeness and they do not disturb my conclusions regarding the Secretary of State's case.

Notice of Decision

The Secretary of State's appeal is dismissed.

I uphold the decision of First-tier Tribunal Judge Joshi.

Judge John McCarthy
Deputy Upper Tribunal Judge

Date: