Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/01712/2019
HU/00356/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 August 2019	**On 02 September 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHASHIDAR MANDALOZU
MRS JHANSI RANI CHALOJU
(ANONYMITY DIRECTION NOT MADE)

Respondents/Claimants

Representation:
For the Appellants: Ms N Wilocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr N Gajjar of Counsel, instructed on a Direct Access basis

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the Appellant in these proceedings as the Secretary of State and to Mr Mandalozu and his wife Mrs Chaloju as the Claimants.

2. This is a challenge by the Secretary of State to the decision of First-tier Tribunal Judge Housego ("the judge"), promulgated on 14 June 2019, by which he allowed the Claimant's appeals against the Secretary of State's decisions of 11 January 2019, which had refused human rights claims made on 27 December 2017.

3. The basis of the Secretary of State's decisions had been the assertion that the first Claimant had acted dishonestly in respect of his tax affairs. In particular that he had dishonestly underdeclared income from self-employment to the HMRC and had subsequently failed to provide any tax returns whatsoever. Amendments to these omissions were only made in the run up to an application for indefinite leave to remain. The Secretary of State concluded that paragraph 322(5) of the Immigration Rules applied.

The judge's decision

4. The judge ultimately reached the conclusion that the first Claimant had not been dishonest in respect of his conduct towards either HMRC or the Secretary of State. Whilst it is implicit in his decision that he accepted that the Secretary of State had met the evidential burden, the judge went on to conclude that the first Payment had provided an innocent explanation and that the Secretary of State had not discharged the legal burden of showing dishonesty. The crux of the first Claimants explanation was that he had been careless in respect of his tax affairs, whether in respect of the under declaration in the tax year 2010/2011 or in respect of the failure to file returns at all in the years 2011/2012 and 2012/2013.

The grounds of appeal and grant of permission

5. The Secretary of State's grounds of appeal assert that the judge had misdirected himself in respect of the Court of Appeal's guidance set out in Balijigari WLR(D) 232, and that this misdirection was material to the outcome of the appeal. In addition, the Secretary of State asserts that the judge had unduly speculated in respect of the first Claimants explanation and had taken what were effectively irrelevant matters into account.

6. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 19 July 2019.

The hearing

7. Ms Wilocks-Briscoe relied on the grounds of appeal. She submitted that the judge had been wrong to rely in any way on the "minded to refuse" point set out in Balajigari. This process related to judicial reviews and not

to statutory appeals. In any event, the Secretary of State had undertaken such a procedure in the present appeal in respect of a decision made in 2017. The judge had been wrong to take into account the fact that HMRC had decided not to take any specific action against the first Claimant. He was wrong to have taken account of the absence of a "reminder" system from HMRC in respect of the non-payment of tax. He was also wrong to have speculated about poor internet connections in India and that the HMRC system was apparently notoriously difficult to navigate. There was a failure to have taken proper account of the timing of the amended declarations, and on a cumulative basis the judge's errors rendered his decision as a whole unsafe.

8. Mr Gajjar relied on his rule 24 response. In essence he submitted that there were no errors, that the judge had accepted the evidence put forward by the first Claimant as he was entitled to do, and that the Secretary of State's challenges failed to have proper regard to the judge's reasoning as a whole.

9. In reply Ms Wilocks-Briscoe pointed that out in respect of paragraph 24 of the decision, a previous declaration made by the first Claimant for the tax year 2010/2011 had in fact been incorrect.

Decision on error of law

10. Whilst the judge's decision cannot be said to be exemplary in all respects, I conclude that there are no material errors of law.

11. The judge was clearly fully aware of the crucial question to be answered, namely whether, given the fact that the Secretary of State had discharged the evidential burden, the first Claimant could provide an innocent explanation for his conduct. In this case, as in all others, answering that question involves an intensely fact-specific approach.

12. The judge was entitled to rely on the relevant parts of Balajigari (as they relate to statutory appeals). It is correct that in paragraph 72 he makes reference to the "minded to refuse" procedure and states that this should have been used in the present case. I would agree with Ms Wilocks-Briscoe that such a procedure would not be mandatory in the context of a statutory appeal. However, it is clear from what the judge then goes on to say that this had no material bearing on his overall approach. Indeed, the final sentence of that paragraph is entirely unobjectionable. It reads: "I revisit it [the decision under appeal] from the beginning." This was saying nothing more than that the judge was conducting a merits-based appeal, which of course he was.

13. The grounds also suggest that the judge was "distracted" from the issue of dishonesty and discrepancies in earnings by what is said in paragraph 71 of his decision. It is right that the judge makes reference to national

security and criminal convictions, is but the grounds fail to have proper regard to that paragraph as a whole. The judge has clearly accepted that conduct relating to tax affairs can potentially come within the ambit of paragraph 322(5). There is no error here.

14. In respect of paragraph 73, it may be the case that the judge was wrong to have attributed relevance to the fact that HMRC had not sought to impose any penalty upon the first Claimant. Having said that, I have been referred to a letter from HMRC at page 12 of the Claimants' supplementary bundle which indicates that they regarded the amendment to the tax return for 2010/2011 as being a "failure to take reasonable care". In any event, I do not regard the judge's position as constituting a material error. I agree with the submission made by Mr Gajjar that the observation really had the effect of not undermining the nature of the first Claimant's explanation as a whole and nothing more than that.

15. Paragraph 74 has not been specifically challenged by the Secretary of State. I make reference to it because the judge therein relies on what was said by Lord Justice Underhill at paragraph 179 of Balajigari to the effect that the failure to have filed any tax return at all may carry less evidential value in respect of an allegation of dishonesty than an under declaration. Whilst every case is of course fact-specific, this was a consideration that the judge was entitled to take into account. Further on in the same paragraph the judge states that the first Claimant had not always hidden self-employed income from HMRC having declared it previously. Ms Wilocks-Briscoe makes the valid point that one of the declarations was said by the Secretary of State to have been not simply wrong, but dishonest. However, I also take into account the fact, as I find it to be, that prior to that particular tax return, the first Claimant had made an accurate declaration to HMRC in respect of self-employed earnings.

16. I turn to paragraph 75, which is of central importance. The Secretary of State's grounds assert that the judge engaged in impermissible speculation about the quality of internet connections in internet cafes in India. Reading the judge's decision sensibly, in my view this rather misses the point. It is clear from the second sentence of that paragraph that the judge was accepting the evidence provided by the first Claimant. This evidence was contained in the witness statement in the supplementary bundle and made specific reference to internet connection problems when he was attempting to file tax return. Thus, whilst the judge in the next sentence goes on to comment on poor internet connections in that country in general terms, the fact is that he was in truth accepting specific evidence given by the Appellant, and was not simply basing his finding on some unknown source of evidence known only to himself. The reference later on in paragraph 75 to people having experienced problems with what is described as a "big system" website, in this case relating to HMRC, may indeed be speculative, but in my view it cannot be said to be material to the judge's decision when it is read holistically.

17. In respect of paragraph 76, the judge would have been wrong if he was relying on the absence of an HMRC "reminder system" to, as it were, bolster the first Claimant's explanation. However, on a proper reading of this passage, that is not the case. The judge was simply stating that as a matter of fact no such system existed and that this did not go to materially undermine the explanation put forward.

18. I note that at paragraphs 77 and then 80, which have not been specifically challenged, the judge makes additional positive findings in respect of the credibility of the first and second Claimants, both in respect of their marriage, the first Claimants needs to return to India and look after his unwell mother, and also in respect of their jobs. These were matters that the judge was entitled to take into account as part of the overall picture with which he was concerned.

19. In terms of paragraph 79, the judge took account of the Secretary of State's submission but was cognisant of the difference in respect of a collection of tax as between PAYE and self-employed earnings. That was a distinction that the judge was entitled to have regard to as it went to the question of dishonesty. In my view the judge was well-aware of the Respondent's case against the first Appellant. There is nothing to suggest that he was either ignorant or dismissive of the particulars set out in the reasons for refusal letter, or indeed the timings of the amendments and/or submissions of tax returns in respect of the making of the application for indefinite leave to remain.

20. Whilst it may be that another judge would have reached a different conclusion, in light of the fact that these cases turn very much on their own particular circumstances and on the assessment of evidence by the fact-finding tribunal, the judge's findings and conclusions were open to him and the Secretary of State's appeal must be dismissed.

21. The decision of the First-tier Tribunal shall therefore stand.

Notice of Decision

The decision of the First-tier Tribunal does not contain errors of law.

The decision of the First-tier Tribunal shall stand.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed ..... Date: 21 August 2019

Upper Tribunal Judge Norton-Taylor