Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02909/2019

THE IMMIGRATION ACTS

Heard at Field House
On 27 August 2019

Decision & Reasons Promulgated
On 4 September 2019

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

DHINESH KUMAR MANOHARAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson
For the Respondent: Mr T Lindsay

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Taylor promulgated on 9 May 2019 dismissing on human rights grounds the appeal against

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the decision of the Secretary of State dated 30 January 2019 to refuse the application made on 8 February 2018 for indefinite leave to remain on the basis of long residence.

2. First-tier Tribunal Judge Fisher granted permission to appeal on 11 June 2019 on the basis that the First-tier Tribunal Judge failed to determine how the discretion under paragraph 322(5) should be exercised and that in turn infected the judge's approach to Article 8. The judge granting permission also considered it arguable that the judge's conclusions on Article 8 at paragraph 28 of the impugned decision was inadequate. With respect to Judge Fisher, I disagree.

3. At the outset, I have to decide whether or not there was an error of law in the making of the decision of the First-tier Tribunal, such that the decision of Judge Taylor should be set aside. That requires me to determine whether there was an error of law and, if so, whether it was material.

4. It is common ground that the appellant came to the UK in 2007 as a student. His leave was later extended to June of 2016 as a Tier 1 General Migrant. In June of 2016 he made an application for further leave to remain refused in December 2017 with no right of appeal but a right of administrative review which was exercised. The decision was maintained after the administrative review on 28 January 2018, on the basis of the appellant's alleged dishonesty between declarations as to HMRC and UKVI, either/or. All that relates back to an application made in April 2011. It is submitted that on the basis of admission provided in that application there were discrepancies between what the appellant had declared to HMRC as his income and the income which he declared to UKVI in that application. The respondent's position is either the appellant under-declared his income to HMRC or over-inflated his income for the purposes of making an application. The respondent considered all of that in 2017 and refused the application on that basis and maintained that refusal after administrative review.

5. As a result of, whilst the appellant had valid leave between October 2007 and January 2018, a period of just over ten years, the respondent refused the application on the basis of 276B(iii) and paragraph 322(5), the general grounds for refusal, because of his dishonesty in either business and tax affairs or in the declarations made to UKVI and on the basis of the undesirability of permitting the person to remain in the UK in the light of his conduct, character or associations.

6. The grounds cover three aspects:-

   (1) whether the discretion was properly exercised, either by the Secretary of State or by the judge in considering the matter on appeal in the impugned decision;

   (2) whether Article 8 was properly considered; and

   (3) whether the judge had properly decided whether the first stage had been reached at all.

7. The decision of the First-tier Tribunal was promulgated on 9 May 2019 which was before the decision of the Court of Appeal in Balajigari [2019] EWCA Civ 673. In that case it was held that before making a decision based on dishonesty in such cases as a discrepancy between HMRC and UKVI the respondent has to provide the appellant the opportunity to put his innocent explanation forward for the discrepancy, and it was also held that administrative review was not a sufficient remedy for that. Very fairly, Mr Richardson anticipated Mr Lindsay's submission that on the facts of this case that issue does not arise because at the time he made his application on 8 February 2018 the appellant was fully aware of the allegation of discrepancy and therefore, as Mr Richardson concedes, had the full opportunity to put his explanation for any discrepancy to the respondent in the application to which this appeal relates, and of course that could also have been considered by the First-tier Tribunal Judge.

8. Mr Richardson puts the appellant's case in a different way, not relying on that matter but relying on a suggestion that the judge had to make a decision, one way or the other, as to what it was that the appellant had done, whether he had been dishonest with HMRC or he had over-inflated his income to UKVI. With respect to Mr Richardson, I do not accept that argument, and as appears from the Balajigari case it seems that the Secretary of State is entitled to say that it is one or the other and it is not necessary for the respondent or the Tribunal judge to make a definitive determination whether it was an over-inflation or an under-declaration; either the appellant was dishonest with HMRC, or he over-inflated his income to UKVI. Either way, and it must be one of the two, the respondent was entitled to conclude that he had been dishonest and therefore that brought him within the ambit of the application of paragraph 322(5) and, of course, 276B. I thus reject as not sustainable the argument that the judge erred in failing to make such a decision between HMRC and UKVI. At paragraph 21 of the decision the judge made clear that there has been a significant difference between the income declared to HMRC and the declarations to UKVI. The discrepancy amounted to over £29,000. The judge gave cogent reasons for concluding that this was no coincidence, that the income figure submitted for the immigration application would have scored sufficient points under the Immigration Rules, whereas the tax return figure would not have. The judge considered the appellant's explanations and rejected them giving cogent reasons for doing so.

9. I have been referred by both representatives to paragraph 37(2) of the Balajigari case in which the Court of Appeal considered three points about the issue of dishonesty in the context of an earnings discrepancy case. In that paragraph it was submitted that even dishonest conduct may not be sufficiently reprehensible to justify the use of paragraph 322(5) in all cases and it was said that that would depend on the circumstances. The Court of Appeal accepted that as a matter of principle dishonest conduct will not always and in every case reach a sufficient level of seriousness, but in the context of an earnings discrepancy case it is very hard to see, they said, how the deliberate and dishonest submission of false earning figures, whether to HMRC or to the Home Office, would not do so.

10. Mr Lindsay relies on that extract from the Balajigari case to suggest that it is not necessary for the Secretary of State to make a separate discretion exercise, but I

accept Mr Richardson's argument that paragraph 37(2) relates to whether to apply paragraph 322(5) at all, which is how Mr Richardson explained the two stages that had to be considered. First, whether 322(5) applies at all and, if it does, the second stage, because it is a presumption and there is discretion to be exercised whether to apply 322(5) to refuse the application. He rightly points out that the second stage is referred to in paragraph 38 and also in paragraph 39 of the Balajigari case. In the circumstances, I must reject Mr Richardson's argument that it is all encompassed in 37(2). In paragraph 38 the Court of Appeal said:-

> "While we would not say that it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly, we agree that it would be good practice for the Secretary of State to incorporate it in his formal decision-making process".

In other words, a failure of good practice does not necessarily amount to an error of law, as is clear the Court of Appeal was saying.

11. The argument put forward on behalf of the appellant in the Court of Appeal case was that the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the appellant to have leave to remain that there were factors outweighing the presumption that leave should, for that reason, be refused. It was submitted that at this stage the Secretary of State must consider such factors as the welfare of any minor child who may be affected adversely by the decision, and any human rights issue which arise. However, the Court of Appeal whilst stating that that seemed correct in principle, stated:-

> "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".

This case was of course an application for indefinite leave to remain on the basis of long residence. I read that part of the decision of Balajigari as stating that only really where there were factors exceptionally which would justify granting leave to remain could the decision refusing leave on the basis of paragraph 322(5) be challenged and they doubted whether it could be challenged in relation to a decision to refuse indefinite leave to remain.

12. In this regard I note that at paragraph 28 the judge recorded that there were no submissions by the appellant's representative at the First-tier Tribunal in relation to human rights outside the Rules, obviously, and within the Rules in relation to long residence. The judge said it was not submitted, nor is it clear, that there are any exceptional circumstances in this case, and indeed any compassionate factors which should be taken into account. It follows from that that no such factors were advanced by the appellant or on the appellant's behalf.

13. This takes me to the third point of Mr Richardson's argument. He claims the judge erred in failing to conduct an adequate Article 8 assessment, however where there

were no submissions in relation to Article 8, I do not see that that point can be pursued. The judge is not obliged to decide Article 8 where a represented appellant did not pursue Article 8 ECHR outside the Rules at all. That brings me back to the second stage, the exercise of discretion. There was nothing on the facts of this case advanced on the appellant's behalf to justify exercising the discretion to grant leave to remain indefinitely outside of, or in the light of, application of paragraph 322(5).

14. In the circumstances I am not satisfied that there was an error of law by the First-tier Tribunal, but if there was an error of law, in the light of the post-decision Court of Appeal decision of Balajigari, then I am satisfied it was not material to the outcome of the case, in other words, the decision would have been exactly the same; namely a dismissal of the appeal.

Notice of Decision

15. The making of the decision the First-tier Tribunal did not involve the making of a material error of law, such that the decision should be set aside.

I do not set aside the decision and the appeal will remain dismissed.

No anonymity direction is made.

Signed

Upper Tribunal Judge Pickup

Dated 2 September 2019

To the Respondent
Fee Award

The appeal is dismissed therefore there can be no fee award.

Signed

Upper Tribunal Judge Pickup

Dated 2 September 2019