Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number HU/12747/2019**
HU/14799/2019

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 27th October 2021	**On the 19th November 2021**

Before

UT JUDGE MACLEMAN

Between

MANIKYAM SANDHA RANI & SREENU KOMMUKA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellants: *Mr L Kennedy, Advocate, instructed by Kothala & Co, Solicitors, Wembley*
For the Respondent: *Mr M Diwnycz, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. On 31 October 2019, the first appellant applied for indefinite leave to remain based on long residence and on family and private life. The second appellant's case stands or falls with hers. Their case centres on the fact that they have a son born in the UK on 7 September 2014, who has now lived here for over 7 years.

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2. The respondent refused the first appellant's application on 12 July 2019 on grounds of character and conduct. She had made substantially inconsistent declarations of income to HMRC and to UKVI. The SSHD considered that she had been "deceitful or dishonest" in her dealings with either, or with both.

3. FtT Judge Handley dismissed the appellants' appeals by a decision promulgated on 23 January 2020. They appealed to the UT.

4. This determination should be read as incorporating the decision of UT Judge Stephen Smith, promulgated on 22 March 2021, setting aside the decision of the FtT to the extent explained, and retaining the decision to be remade in the UT "in light of the preserved facts and the scope of the remaining judicial consideration".

5. A transfer order has been made to enable the UT's decision-making to be completed by another judge.

6. The appellants tendered a supplementary witness statement by the first appellant, and additional materials, including an independent social work report. These all focus on the circumstances of the appellants' son.

7. The respondent did not seek to cross-examine, and the hearing proceeded to submissions.

8. The respondent relied upon the refusal letter and had little to add. Mr Diwnycz accepted that the independent report was uncontradicted, and carried some weight, the extent of which was a matter for the tribunal. He submitted that although matters had moved on somewhat, the exercise of discretion did not favour the appellants, and the proportionality balance still fell in favour of maintaining effective immigration control.

9. Mr Kennedy spoke further to his written submissions, the essential points being these:

   (i) The case fell for further decision because the FtT failed to carry out the balancing exercise addressed at [38] of *Balajigari* [2019] EWCA Civ 673. Paragraph 322(5) of the immigration rules required an analysis at stage one not only of (i) reliable evidence of (ii) sufficiently reprehensible conduct, but (iii) an assessment of all relevant circumstances about the appellant, including positive features of their character, and stage two concerned the exercise of discretion; *"Even if an individual's presence is undesirable, there may be other factors outweighing the presumption that leave should be refused"*.

   (ii) The most important aspect of private and family life in the UK was the appellants' son. He has never visited India, does not speak any language fluently other than English, and would be at immediate disadvantage, particularly educationally. He is thriving in the UK. The author of the report finds that he is sensitive to the prospect of change and, although his traits are not unusual, he is *"at risk of*

emotional disturbance" through the disruption of moving to India, which *"would be harmful and not in his best interests"*.

(iii) In terms of section 117B(6) of the 2002 Act, it would not be reasonable to expect the child to leave the UK.

(iv) The welfare of a minor child is a factor in the analysis of "undesirability".

(v) The first appellant applied on the basis of 10 years continuous residence and has now spent 14 years in the UK.

(vi) Weight should be given to the fact the "relevant misconduct" took place some years ago, the appellant notified HMRC and "was taking positive steps to rectify the tax errors (suitably evidenced)"; absence of any criminal record; hitherto good character and reputation; and her [previous] secure employment with the DWP.

(vii) Discretion should be exercised in the appellant's favour.

(viii) Refusal of leave would be a disproportionate interference with the first appellant's right to respect for her private and family life.

10. I reserved my decision.

11. The starting point is that sufficiently reprehensible conduct has been established, but the extent of that conduct needs to be considered in the balancing exercise.

12. The framework may be taken from *Balajigari* at [37]:

> (2) Mr Biggs submitted that even dishonest conduct may not be sufficiently reprehensible to justify use of paragraph 322 (5) in all cases and that it would depend on the circumstances, the guiding principle being that the threshold for sufficiently reprehensible conduct is very high. We do not find it helpful to generalise about the height of the threshold, though it is obvious that the rule is only concerned with conduct of a serious character. We would accept 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 how the deliberate and dishonest submission of false earnings figures, whether to HMRC or to the Home Office, would not do so.
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> (3) Mr Biggs submitted that dishonest conduct would only be sufficiently reprehensible if it were criminal. We do not accept that that is so as a matter of principle, although it is not easy to think of examples of dishonest conduct that reached the necessary threshold which would not also be criminal. The point is, however, academic in the context of earnings discrepancy cases since the dishonest submission of false earnings figures to either HMRC or the Home Office would be an offence.

13. As to the second stage, discretion, *Balajigari* at [39] says this:

> Mr Biggs submitted that at this second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted that it is at this stage that

> the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise. That seems to us in principle correct. 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.

14. I also note what was said in the last paragraph, at [223]:

> … we have expressed the view … above that if the applicant enjoys a private or family life in the UK which is protected by article 8 of the European Convention on Human Rights – which is likely to be so in the typical case – the notice of liability to removal which is the consequence of refusal of ILR will constitute an interference with those rights which the Secretary of State will have to justify. If the earnings discrepancies relied on were in fact the result of dishonesty that will normally be sufficient justification, but his decision on that question will be reviewable as a matter of fact, whether in the context of a "human rights appeal" or, where no such appeal is available, in judicial review proceedings.

15. The appellant has not supplemented her evidence to the FtT that she has done anything to rectify underpayment of tax. Although the respondent did not seek to counter the submission that some steps had been taken, there is no evidence of full accounting to HMRC, for which there has been ample time, or of any arrangements for payment.

16. The extent to which the appellant was dishonest to HMRC and to UKVI respectively remains unclear; but it is plain that on honest disclosure of her circumstances to UKVI, she would not have obtained leave.

17. In principle, the appellant should not be permitted to derive further leave from periods dishonestly obtained, unless there are strong considerations on the other side.

18. I note that in her decision, at page 6 of 9, the SSHD *"is not satisfied that yours is a case in which discretion is deemed applicable"*. That follows immediately after the findings of dishonesty, before turning to family life and private life in terms of the rules, and to the interests of the child, then aged 4, in terms of article 8, exceptional circumstances, and his best interests. While decisions are to be read as a whole, that approach does not suggest that a balancing exercise was carried out as required. It fails to explain why discretion was not to be exercised in the appellant's favour.

19. I have no doubt that to decline to exercise discretion in favour of the appellant was within the range of reasonable responses, on the information before the SSHD; but maters had moved on by the time the case came before the FtT, and it was for the tribunal to come to its own view. That omission is why the decision falls to be remade by the UT; and matters have moved on again.

20. The one factor in the case which might conceivably lead to an outcome in favour of the appellants is the best interests of the child. That was effectively recognised in the submissions on their behalf.

21. The independent social work report is thorough and conscientious. The respondent fairly accepted that it carries some weight. While I note that the author is not an expert on India, and that the description of the difficulties the child would face is derived from information provided by the appellants, I have no difficulty in finding that moving to India would involve the child in a period of considerable adjustment which, to some extent, would not be in his best interests.

22. The issue is one of fact and degree. The report identifies no consequences which are significantly more than to be expected when any child moves to an unfamiliar country. Parents make such decisions on their children's behalf all the time, involving their children in a range of consequences, some for the better and some for the worse.

23. To put the matter another way, if this family were to choose to move to India, that would be a private decision provoking no public concern over the child's welfare.

24. I find nothing in the interests of the child of such force that it would be wrong to refuse leave to remain to the first appellant, even although her presence is otherwise undesirable.

25. On the assumption that the appellants are to leave, it is reasonable to expect their child to accompany them. There is no adverse effect on him of such significance as to confer on all three a right to remain.

26. Everything that might properly have been advanced for the appellants has been advanced by Mr Kennedy, but nothing of such force either that discretion should be exercised on their behalf, notwithstanding the dishonest conduct of the first appellant, or that tips the proportionality balance in their favour.

27. The decision of the First-tier Tribunal has been set aside. The decision substituted is that the appeal, as brought to the FtT, is dismissed.

28. No anonymity direction has been requested or made.

29 October 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application.

The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.