Neutral Citation Number: [2019] EWCA Civ 673

Case No: C6/2017/1214
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C7/2018/0290

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
UTJ Gleeson in *Balajigari*
UTJ Kamara in *Kawos*
UTJ Frances in *Majumder*
UTJ Coker in *Albert*

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE SINGH

- -

Between:

ASHISH BALAJIGARI	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
AVAIS KAWOS and others	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
SOMNATH MAJUMDER and another	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
AMOR ALBERT	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
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Mr Michael Biggs (instructed by **Sri Venkateshwara Solicitors**) for the **Appellant** in *Balajigari*

Mr Alexis Slatter (instructed by **Richmond Chambers LLP**) for the **Appellant** in *Kawos*

Mr Shahadoth Karim (instructed by **PGA Solicitors LLP**) for the **Appellant** in *Majumder*

Mr Parminder Saini (instructed by **Vision Solicitors**) for the **Appellant** in *Albert*

Ms Julie Anderson (instructed by the **Treasury Solicitor**) for the **Respondent** in *Balajigari*

Ms Julie Anderson and **Mr Zane Malik** (instructed by the **Treasury Solicitor**) for the **Respondent** in *Kawos, Majumder and Albert*

Hearing dates: 23rd & 24th January 2019

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This is the judgment of the Court, to which all its members have substantially contributed.

2. These four appeals have been heard together because they all arise out of the same Home Office practice, which has attracted considerable controversy. The background was set out in a recent Home Office publication, *Review of Applications by Tier 1 (General) Migrants Refused under Paragraph 322 (5) of the Immigration Rules* ("the Review"), and can be sufficiently summarised as follows.

3. At the times relevant to this appeal migrants who had been given leave to enter or remain under the Points-Based System ("PBS") provided for by Part 6A of the Immigration Rules as "Tier 1 (General) Migrants" ("T1GMs") were entitled to apply for indefinite leave to remain ("ILR", otherwise known as "settlement") after five years.[1] It was a condition of any such application that they demonstrate a minimum level of earnings in the previous year. Such an applicant will already have had one or more finite periods of "further" leave to remain, for the purpose of which he or she will also have had to declare earnings at a required minimum level.

4. The Home Office became concerned that there was a widespread practice of applicants for leave to remain as a T1GM claiming falsely inflated earnings, particularly from self-employment, in order to appear to meet the required minimum; and from 2015 it began to make use of its powers under section 40 of the UK Borders and Immigration Act 2007 to obtain information from Her Majesty's Revenue and Customs ("HMRC") about the earnings declared by applicants in their tax returns covering the equivalent period. This information disclosed significant discrepancies in a large number of cases. It also revealed what appeared to be a pattern of taxpayers who had in earlier years submitted tax returns showing earnings that attracted little or no liability to tax subsequently submitting amended returns showing much higher levels of earnings, over the required minimum, in circumstances which suggested that they were aware that the previous under-declaration might jeopardise a pending application for leave to remain. There were also instances of returns being submitted belatedly where none had been submitted at the time and where an application for leave was pending. (A similar pattern was detected in the case of T1GM migrants applying for ILR after ten years under the long-residence provisions of the Rules; but we are not directly concerned with those in these appeals.)

5. It has been Home Office practice to refuse applications for ILR in all, or in any event the great majority of, cases where there are substantial discrepancies between the earnings originally declared to HMRC by a T1GM applicant (even if subsequently amended) and the earnings declared in the application for ILR or a previous application for leave to remain ("earnings discrepancy cases"), relying on the "General Grounds for Refusal" in Part 9 of the Immigration Rules. Initially it relied specifically on paragraph 322 (2), which applies in cases where an applicant has made a false representation in relation to a previous application. Latterly, however, it has relied,

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[1] The category was closed to initial applications in 2011, but rights for those already in it to apply for extensions and for ILR were preserved until April 2018.

either additionally or instead, on paragraph 322 (5), which embraces more general misconduct: para. 3.2 of the Review explains that it decided to shift to relying on sub-paragraph (5) in order "to capture the possibility that the applicant had misled HMRC rather than [the Home Office]". We set out the full text of the relevant Rules at paras. 27 and 28 below. We will refer to refusals of ILR on these grounds as "paragraph 322 refusals".

6. It is the Secretary of State's case that his policy and practice is only to rely on paragraph 322 (5) where he believes that an earnings discrepancy is the result of deliberate misrepresentation either to HMRC or to the Home Office, in other words only where it is the result of dishonesty. But a large number of migrants have claimed that in their cases errors which were the result only of carelessness or ignorance have wrongly been treated as dishonest, and that the Home Office has been too ready to find dishonesty without an adequate evidential basis or a fair procedure. Many have mounted legal challenges. In respect of paragraph 322 refusals between January 2015 and May 2018 there were 625 appeals to the First-tier Tribunal ("the FTT")[2] and 388 applications to the Upper Tribunal ("the UT") for judicial review. The majority have not come to a hearing, but as at September 2018 65% of the appeals that had done so had been successful, and a smaller but still substantial proportion of the judicial review claims had either succeeded in the UT or (more often) been conceded by the Home Office.

7. The Appellants before us are T1GM applicants for ILR whose claims were refused under paragraph 322 (5) on the basis of earnings discrepancies; in one case the Secretary of State relied also on paragraph 322 (2). They have (with, in two of the cases, members of their families) brought proceedings in the UT for judicial review of those refusals. We will give details of the cases later, but in bare outline:

- Mr Ashish Balajigari, who is an Indian national, has been in the UK since August 2007. In June 2016 he applied for ILR as a T1GM. His claim was refused under paragraph 322 (5) on 9 June 2016. The Reasons enclosed with the decision letter relied on a discrepancy between his earnings as declared to HMRC for 2010/11 of £33,646 and earnings for the same period of £42,185 declared in an earlier application for leave to remain. His application for an administrative review of that decision was rejected on 20 July 2016. His application for permission to apply for judicial review was refused by UTJ Gleeson at a hearing on 19 April 2017.

- Mr Avais Kawos, who is also an Indian national, has been in the UK since January 2007. His wife and elder child joined him in 2010; their second child was born here. On 3 February 2016 he applied for ILR as a T1GM. His claim was refused under paragraph 322 (2) and (5) on the same day. The Reasons enclosed with the decision letter relied on a discrepancy between his earnings as declared to HMRC for 2011/12 and 2012/13 totalling £20,000 and earnings for a shorter period spanning both years of £37,402 declared for the purpose of an earlier application. His application for an administrative review of that decision was rejected on 16 March 2016. He was granted permission to apply for judicial review, but the substantive application was refused by UTJ Kamara at a hearing on 6 March 2017.

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[2] There is no right of appeal as such against a refusal of ILR under the PBS but if the decision falls to be treated as the refusal of a human rights claim an appeal will lie. We return to this in Part C below.

- Mr Somnath Majumder, who is another Indian national, has been in the UK since October 2006. His wife joined him. In July 2016 he applied for ILR as a T1GM. His claim was refused under paragraph 322 (5) on the same day. The Reasons enclosed with the decision letter relied on the fact that, while he had in a previous application in 2013 declared earnings of about £40,000 for a year straddling the 2012/13 and 2013/14 tax years, he had filed no tax return for either year. His application for an administrative review of that decision was rejected on 22 August 2016. He was granted permission to apply for judicial review, but the substantive application was refused by UTJ Frances at a hearing on 25 September 2017.

- Mr Amor Albert, who is a Pakistani national, has been in the UK since October 2006. In April 2016 he applied for ILR as a T1GM. His claim was refused but following the initiation of judicial review proceedings the Secretary of State agreed to reconsider it. It was again refused, under paragraph 322 (5), on 2 March 2017. The Reasons enclosed with the decision letter relied on discrepancies between his earnings as declared for the purpose of two earlier applications for leave to remain and the earnings declared to HMRC for the corresponding periods. His application for an administrative review of that decision was rejected on 6 April 2017. His application for permission to apply for judicial review was refused by UTJ Coker at a hearing on 30 January 2018.

8. Each of the Appellants appeals against the dismissal of the refusal of permission to apply for judicial review or of their substantive claim, as the case may be.

9. There are over 70 other appeals or applications for permission to appeal pending before the Court and an unknown number of challenges pending in the FTT or UT. The intention is that our decision in these appeals will determine the various issues of principle raised in at least most of the pending legal challenges to T1GM ILR decisions based on earnings discrepancies and either will enable the claims to be disposed of by agreement or, where that is not possible, to be determined on the basis of clear principles. With that in mind we cover one or two points which are not directly raised by these particular appeals but are closely related to them and on which we heard argument.

10. The Appellants are each separately represented – Mr Balajigari by Mr Michael Biggs; Mr Kawos and his family by Mr Alexis Slatter; Mr Majumder and his wife by Mr Shahadoth Karim; and Mr Albert by Mr Parminder Saini. The Secretary of State was represented in *Balajigari* by Ms Julie Anderson and in the remaining cases by both her and Mr Zane Malik.

11. In case management directions Hickinbottom LJ encouraged the Appellants to co-ordinate their submissions. Mr Biggs, Mr Karim and Mr Slatter helpfully produced a consolidated skeleton argument, though we have to say that it was too long and produced very late. For no evident good reason Mr Saini produced a separate skeleton argument in Mr Albert's case: this was even longer (no fewer than 68 pages, almost three times the permitted maximum) even though it was dealing with a single case. For the Secretary of State, Ms Anderson and Mr Malik produced a joint skeleton argument in the cases of *Majumder, Kawos* and *Albert*; but, inconveniently, there was a separate skeleton argument from Ms Anderson in *Balajigari*. Both of the Secretary of State's skeleton arguments were also lengthy and very late. There is an excuse for the lateness because it was necessary to respond to the Appellants' late consolidated skeleton, but

the response could have been sooner if skeleton arguments had already been filed in the individual cases, which was only done in *Kawos*. These failures made the Court's task in pre-reading a good deal more difficult.

12. As regards oral submissions, Mr Biggs by agreement with the other Appellants' counsel addressed all but one of the general issues raised by the appeals, Mr Saini taking responsibility for the other. Mr Biggs' submissions were admirably clear, well-organised and succinct. All four counsel dealt, albeit briefly, with the issues peculiar to their particular clients. For the Secretary of State Ms Anderson led on the general issues, though we also had some helpful supplementary submissions from Mr Malik. Time did not, however, permit for oral submissions to be made on behalf of the Secretary of the Secretary of State as regards the individual cases, and they were covered by written submissions following the hearing.

13. Very shortly before the appeal a pressure group called Migrant Rights Network ("MRN"), which represents a large number of other T1GM ILR applicants whose applications have been refused under paragraph 322, applied to intervene in the appeal. The application was adjourned to the hearing, and MRN was directed to lodge the written submissions and evidence on which it wished to rely. Ms Sonali Naik QC and Ms Maha Sardar attended the hearing, and at the conclusion of the Secretary of State's submissions Ms Naik was invited to identify the issues on which MRN's evidence or submissions could assist the Court. The time for any oral submissions – which would have had to include a response on behalf of the Secretary of State, who opposed the intervention – was very short, and we were not persuaded that it would be right to allow the intervention. However, we had read the submissions (though not the evidence) in advance on a provisional basis, and we are confident that all the admissible points which MRN wished to make are covered by the submissions and materials relied on by the parties.

14. In particular, MRN was anxious that the Court should appreciate the gravity of the difficulties, practical and emotional, caused to applicants for ILR and their families, who will by definition have been resident in this country for many years, by a refusal on paragraph 322 grounds, particularly since the intensification of the disabilities to which migrants without leave to remain are subject as a result of the Immigration Act 2014 (see para. 81 below). That is something that we fully appreciate. If applicants are in fact guilty of conduct that brings them within the reach of paragraph 322, they have of course only themselves to blame for the consequences. But if they are not, then a serious injustice will have been done.

OVERVIEW OF THE ISSUES

15. The issues canvassed before us fall broadly into three groups.

16. First, there is a challenge to the refusals on domestic public law grounds. These include issues both as to the circumstances in which earnings discrepancy cases fall within the scope of paragraph 322 (5) and as to the procedural and evidential requirements for a decision of this kind.

17. Secondly, the Appellants contend that the refusals interfere with their rights under article 8 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998. If that is so, they would be entitled to have the Secretary of State's

decision reviewed on a different basis than by way of ordinary rationality review; and there may also be procedural consequences. It is right to say that this contention was raised for the first time in the Appellants' skeleton arguments in this Court and the Secretary of State initially objected to it being considered. However, even if it cannot be used as a basis for impugning the decisions made by the UT, it may arise in the present cases if the appeals are allowed and the cases remitted; and Ms Anderson and Mr Malik sensibly did address it in their skeleton argument. In those circumstances we indicated that we wished to hear submissions about the general issues raised by the article 8 point, and both parties dealt with it fully.

18. Thirdly, there is an issue as to the suitability of judicial review as the means by which paragraph 322 refusals can be challenged where article 8 is engaged. The Appellants contend that the better route, albeit not the one taken in these cases, is by way of a human rights appeal in the FTT, and they invite the Court to give guidance as to a procedural mechanism by which that route can be made available. This issue overlaps with the second, but it is nevertheless important to keep distinct the questions of, on the one hand, whether the article 8 rights of the subjects of paragraph 322 refusals are engaged and, on the other, how procedurally any such rights can be vindicated. Again, the point does not directly arise in these cases, which are all brought by way of judicial review, but we think it right to consider it.

19. We will address those general issues under heads (A)-(C) below and then turn under head (D) to the individual appeals.

(A) THE DOMESTIC PUBLIC LAW CHALLENGES

20. For the purpose of this section of the judgment we put to one side any issue which may arise under the 1998 Act. Here we address simply what principles of "domestic" public law apply to the decision-making process that was involved in cases such as these.

21. The broad issues which need to be addressed are:

(1) the correct interpretation of paragraph 322 (5) of the Immigration Rules;

(2) the approach which needs to be taken to the application of paragraph 322 (5) in an earnings discrepancy case;

(3) the requirements of procedural fairness;

(4) whether the Secretary of State is subject to any "*Tameside* duty".

22. Since issues (1) and (2) are closely connected, we will address both together. We will then address issues (3) and (4) in turn.

(1)/(2): THE INTERPRETATION OF PARAGRAPH 322 (5) AND THE CORRECT APPROACH IN EARNINGS DISCREPANCY CASES

23. All the applications in the present cases were made under Part 6A of the Immigration Rules, and specifically under paragraph 245CD, which sets out the "requirements for indefinite leave to remain" for T1GM migrants. One of those requirements, at sub-paragraph (b) is that (subject to an immaterial exception) "the applicant must not fall

for refusal under the general grounds for refusal".[3] The only issue in these cases is whether the Appellants satisfied that requirement: it is accepted by the Secretary of State that each would otherwise have been entitled to ILR.

Paragraph 322

24. Those "general grounds for refusal" are set out in Part 9 of the Immigration Rules. Paragraph 322 is the principal operative provision. It starts by providing that it applies not only to refusal of leave to remain but also to variation of leave to enter or remain and curtailment of leave. It then sets out a series of numbered grounds. These fall into two sections.

25. The first section sets out grounds, comprising sub-paragraphs (1)-(1E), on which leave to remain and variation of leave to enter or remain "are to be refused" – in other words mandatory grounds of refusal. These include, by sub-paragraph (1C), cases where a person has been convicted of criminal offences satisfying various criteria relating to length of sentence and/or recency.

26. The second section, comprising sub-paragraphs (2)-(13) sets out grounds on which leave to remain and variation of leave to enter or remain "should normally be refused". It is common ground that this is not a mandatory ground for refusal but that it does create a presumption of refusal.

27. The particular ground under paragraph 322 with which this Court is concerned is that in sub-paragraph (5) (i.e. in the second, "non-mandatory", section), which reads:

> "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))[4], character or associations or the fact that he represents a threat to national security."

28. The ground set out in sub-paragraph (2) is:

> "the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave or in order to obtain documents from the Secretary of State or a third party required in support of the application for leave to enter or a previous variation of leave."

Other Provisions of Part 9

29. Paragraph 323 expressly deals with the grounds on which leave to enter or remain may be curtailed and cross-refers to paragraph 322 (2)-(5A). However, it is unnecessary for present purposes to dwell on those provisions because the present cases do not involve curtailment of leave.

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[3] We quote from the Rules in the versions supplied to us, which were those current at the date of the impugned decisions.

[4] We have supplied the closing bracket after "(1C)", which is missing in the rule itself.

30. Our attention was also drawn to paragraph 320 of the Immigration Rules which sets out grounds for the refusal of entry clearance or leave to enter, and in particular to sub-paragraph (19), because it is submitted on behalf of the Appellants that that to some extent uses similar language to the provision which we have to construe here. That makes it a ground for refusal that:

> "the immigration officer deems the exclusion of the person from the United Kingdom to be conducive to the public good. For example, because the person's conduct (including convictions which do not fall within paragraph 320(2)), character, associations, or other reasons, make it undesirable to grant them leave to enter."

Guidance

31. The Secretary of State has issued guidance for Home Office staff on the general grounds for refusal ("the Guidance"). We were shown a version dated 19 April 2016. So far as it relates to paragraph 322 (5), the Guidance states as follows:

> "… The main types of cases you need to consider for refusal under paragraph 322 (5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans."

It continues:

> "A person does not need to have been convicted of a criminal offence for this provision to apply. When deciding whether to refuse under this category, a key thing to consider is if there is reliable evidence to support a decision that the person's behaviour calls into question their character and/or conduct and/or their associations to the extent that it is undesirable to allow them to enter or remain in the UK. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control. …"

32. The Guidance does not purport to, nor could it, restrict the meaning of paragraph 322 (5). We did not understand it to be contended otherwise on behalf of the Appellants. Although the examples given include cases involving criminality, a threat to national security, war crimes or travel bans, it is clear both from the Guidance itself and from the terms of the rule that it is not restricted to such types of case. We are aware that there has been concern expressed both in Parliament and elsewhere that paragraph 322 (5) may be being used for a purpose for which it was not intended. In particular, there have been suggestions that it may have been intended to apply only to cases where there is a threat to national security. In our view, it is clear from its terms that that is not so.

The Correct Approach

33. Against that background, Mr Biggs submitted that, properly interpreted, paragraph 322 (5) involves a two-stage analysis. The first stage is to decide whether paragraph 322 (5) applies at all – that is, that it is "undesirable" to grant leave in the light of the

specified matters. If it does, the second stage – since such undesirability is a presumptive rather than mandatory ground of refusal – is to decide as a matter of discretion whether leave should be refused on the basis of it. That analysis seems to us correct in principle.

The First Stage: "Undesirability"

34. As to the first stage, Mr Biggs submitted that there are three limbs to the analysis. There must be: (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character). Again, that seems to us a correct and helpful analysis of the exercise required at the first stage, but it will be useful to say something more about the elements in it, especially as they apply to an earnings discrepancy case.

35. As to the first two limbs, Mr Biggs' position was that an earnings discrepancy case could constitute sufficiently reprehensible conduct for the purpose of paragraph 322 (5) if but only if the discrepancy was the result of dishonesty on the part of the applicant. That was not disputed on behalf of the Secretary of State, and in our view it is correct. The provision of inaccurate earnings figures either to HMRC or to the Home Office in support of an application for leave under Part 6A as a result of mere carelessness or ignorance or poor advice cannot constitute conduct rendering it undesirable for the applicant to remain in the UK. Errors so caused are, however regrettable, "genuine" or "innocent" in the sense that they are honest, and do not meet the necessary threshold. This is the approach already taken by the UT: see *R (Samant) v Secretary of State for the Home Department* (JR/6546/2016, judgment of 26 April 2017), at para. 10, per Collins J, and *R (Shahbaz Khan) v Secretary of State for the Home Department* [2018] UKUT 00384 (IAC), at paras. 32-37, per Martin Spencer J (we shall have to return to *Shahbaz Khan* in more detail below).

36. The recognition of dishonesty as a touchstone in the context of the general grounds of refusal, albeit a different ground relating to "false representations", is consonant with the approach of Rix LJ in *Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773, [2011] 1 WLR 564, at paras. 76-79. At para. 77 he said:

> "If it were otherwise, then an applicant whose false representation was in no way dishonest would not only suffer mandatory refusal but would also be barred from re-entry for ten years if he was removed or deported. That might not in itself be so very severe a rule, if only because the applicant always has the option of voluntary departure. If, however, he has to be assisted at the expense of the Secretary of State, then the ban is for five years. Most seriously of all, however, is the possibility … that an applicant for entry clearance … who had made an entirely innocent representation, innocent not only so far as his personal honesty is concerned but also in its origins, would be barred from re-entry under paragraph 320(7B)(ii) for ten years, even if he left the UK voluntarily."

He continued, at para. 78:

> "In any event, it would be most unfortunate if, merely because of an entirely innocent misrepresentation, an applicant had to leave the UK under a decision of the Secretary of State which stated … that 'you have used deception in this application'. That would presumably always be an impediment to such an applicant's return, even if not a mandatory bar."

37. We should make three other points about dishonesty in the context of an earnings discrepancy case:

(1) We were referred to the recent decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC, [2018] AC 391, considering the correct approach to what constitutes dishonesty. The principles summarised by Lord Hughes at para. 74 of his judgment in that case will apply in this context, but we cannot think that in practice either the Secretary of State or a tribunal will need specifically to refer to them.

(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.

(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.[5]

38. As for the third limb of the first stage of the analysis, Mr Biggs submitted that the assessment of undesirability requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. That would include such matters as any substantial positive contribution to the UK made by the applicant and also circumstances relating to the (mis)conduct in question, e.g. that it occurred a long time ago. In support of that proposition he relied on the judgment of Foskett J in *R (Ngouh) v Secretary of State for the Home Department* [2010] EWHC 2218 (Admin), which also concerned the application of paragraph 322 (5), albeit in relation to a different kind of

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[5] We were not referred to any particular offences concerning the dishonest making of false tax returns, but such cases would appear to fall within section 2 of the Fraud Act 2006 in the absence of any more specific provision. Section 24A of the Immigration Act 1971 makes it an offence to use deception in order to seek to obtain leave to remain.

conduct: see paras. 110, 120 and 121. 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 so far as Lord Tyre may be thought to have suggested otherwise in *Oji v Secretary of State for the Home Department* [2018] CSOH 127 (see para. 28) and *Dadzie v Secretary of State for the Home Department* [2018] CSOH 128 (para. 28) we would respectfully disagree.

The Second Stage: Discretion

39. 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.

Shabaz Khan

40. We have referred earlier to the decision of the Upper Tribunal in *Shahbaz Khan*, which was itself an earnings discrepancy case. At paras. 32-36 of his judgment Martin Spencer J carefully discussed the approach which the Secretary of State should take to such a case, and at para. 37 he set out eight points by way of general guidance. Ms Anderson, while noting that the Secretary of State had issues with the emphasis of one or two of Martin Spencer J's points, nevertheless encouraged us to endorse his guidance overall. We are prepared to do so, since most of what he says is in line with what we have said above, subject, however, to the important qualification discussed below.

41. Martin Spencer J begins para. 32 of his judgment by saying:

> "The starting point seems to me to be that, where the Secretary of State discovers a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC (as here) she is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322 (5) of the Immigration Rules."

That starting-point is reflected in points (i) and (ii) of the guidance given in para. 37, which read:

> "(i) Where there has been a significant difference between the income claimed in a previous application for leave to remain and the income declared to HMRC, the Secretary of State is entitled to draw an inference that the Applicant has been deceitful or dishonest and therefore he should be refused ILR within paragraph 322 (5) of the Immigration Rules. I would expect the

> Secretary of State to draw that inference where there is no plausible explanation for the discrepancy."
>
> "(ii) However, where an Applicant has presented evidence to show that, despite the prima facie inference, he was not in fact dishonest but only careless, then the Secretary of State is presented with a fact-finding task: she must decide whether the explanation and evidence is sufficient, in her view, to displace the prima facie inference of deceit/dishonesty."

42. Although Martin Spencer J clearly makes the point that the Secretary of State must carefully consider any case advanced that the discrepancy is the result of carelessness rather than dishonesty, there is in our view a danger that his "starting-point" mis-states the position. A discrepancy between the earnings declared to HMRC and to the Home Office may justifiably give rise to a *suspicion* that it is the result of dishonesty but it does not by itself justify a conclusion to that effect. What it does is to call for an explanation. If an explanation once sought is not forthcoming, or is unconvincing, it may at that point be legitimate for the Secretary of State to infer dishonesty; but even in that case the position is not that there is a legal burden on the applicant to disprove dishonesty. The Secretary of State must simply decide, considering the discrepancy in the light of the explanation (or lack of it), whether he is satisfied that the applicant has been dishonest.

43. At para. 37 (iii) Martin Spencer J said:

> "In approaching that fact-finding task, the Secretary of State should remind herself that, although the standard of proof is the 'balance of probability', a finding that a person has been deceitful and dishonest in relation to his tax affairs with the consequence that he is denied settlement in this country is a very serious finding with serious consequences."

We would respectfully agree with that passage. In particular, despite the valiant attempts made by Ms Anderson on behalf of the Secretary of State before us to argue the contrary, we consider (as Martin Spencer J did) that the concept of standard of proof is not inappropriate in the present context. This is because what is being asserted by the Secretary of State is that an applicant for ILR has been dishonest. That is a serious allegation, carrying with it serious consequences. Accordingly, we agree with Martin Spencer J that the Secretary of State must be satisfied that dishonesty has occurred, the standard of proof being the balance of probabilities but bearing in mind the serious nature of the allegation and the serious consequences which follow from such a finding of dishonesty.

44. Martin Spencer J proceeded on the basis that there would be an opportunity for the applicant to present evidence which could displace the *prima facie* inference of dishonesty. In fact the procedure adopted by the Secretary of State did not allow for that possibility. It is true that an applicant has the opportunity to ask for an administrative review of the refusal of ILR but the procedure would not permit the applicant to adduce fresh evidence at the review stage (as to this, see para. 61 below). Furthermore, and crucially, there is no notification given to an applicant of any concerns that the Secretary of State has that the applicant may have been dishonest nor an

opportunity to make representations in response to those concerns before the decision to refuse ILR is made. We turn therefore to address the fundamental question of what procedural fairness requires in the context of this decision-making process.

(3): THE REQUIREMENTS OF PROCEDURAL FAIRNESS

45. This Court recently had occasion to summarise the relevant principles by reference to the leading authorities in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123. The main judgment was given by Singh LJ, with whom Hickinbottom and Asplin LJJ agreed. At paras. 68-71 he said:

> "68. That the common law will 'supply the omission of the legislature' has not been in doubt since *Cooper v Wandsworth Board of Works* (1863) 4 CB (NS) 180 (Byles J); see also the more recent decision of the House of Lords in *Lloyd v McMahon* [1987] AC 625. Accordingly, the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed.
>
> 69. The requirements of procedural fairness were summarised in the following well known passage in the opinion of Lord Mustill in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560 in which he summarised the effect of earlier authorities:
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> > 'From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

> 70. In *R v Hackney London Borough Council, ex p Decordova* (1995) 27 HLR 108, 113, Laws J said, in the context of a housing decision but by reference to immigration law as well:
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> > 'In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer accommodation in a particular area, they are bound to put to the applicant in interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matter of this kind. It applies in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it.'
>
> 71. The origins of the duty to act fairly in the context of an immigration decision can be traced back to the decision of the Divisional Court in *In re HK (An Infant)* [1967] 2 QB 617, 630 (Lord Parker CJ)."

46. Furthermore, Singh LJ observed at paras. 75 and 81 (by reference to well-known authority from the House of Lords and the Supreme Court) that the question of whether there has been procedural fairness or not is an objective question for the court to decide for itself. The question is not whether the decision-maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned.

47. Singh LJ set out the underlying rationales for why fairness is important at para. 82, by reference to the decision of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, in particular at paras. 67-68.

48. Finally in this context, Singh LJ referred to the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763. That was a case in which the Secretary of State refused applications for naturalisation by two brothers settled in the UK on the basis of concerns about their good character which were not raised with them or indeed even disclosed at the time of the decisions. The decisions were quashed. Singh LJ said:

> "73. Ms Kilroy is further entitled to place reliance on the decision of the Court of Appeal in *R v Secretary of State for the Home Department, Ex parte Fayed* [1998] 1 WLR 763, in particular at p 777, where Lord Woolf MR said:
>
> > 'I appreciate there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness but I would emphasise that my remarks are limited to cases

> where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayeds the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position notice may well not be required. However, in the case of the Fayeds this is not the position because the extensive range of circumstances which could cause the Secretary of State concern mean that it is impractical for them to identify the target at which their representations should be aimed.'

74. At p 786, Phillips LJ said, after referring to the decision of the Court of Appeal in *R v Gaming Board for Great Britain, Ex p Benaim* [1970] 2 QB 417 that:

> 'That decision demonstrates two matters. (1) The duty to disclose the case that is adverse to an applicant for the exercise of a discretion does not depend upon the pre-existence of any right in the applicant. (2) The nature and degree of disclosure required depends upon the particular circumstances.'"

49. The decision in *Fayed* is instructive, in our view, for several reasons.

50. First, that was a context in which the relevant individuals had no legal entitlement to a favourable decision. Nor did they have any pre-existing right which was adversely affected by a public decision. All that happened was that they had applied for a discretionary benefit to be conferred upon them (in that case naturalisation as a British citizen). However, as the case demonstrates, the reason why the application has been refused may be because the Secretary of State has concerns about a person's good character. The fact that the legislation (section 6 of the British Nationality Act 1981) required a person to be of good character before the discretion to confer naturalisation could be exercised meant that, in one sense, everyone concerned knew that the question of character had to be addressed in the initial application. However, that did not prevent the Court of Appeal from holding that, where the Secretary of State has concerns about a person's character, those concerns may need to be put to the applicant before a concluded decision is taken to refuse the application.

51. Secondly, that consideration is, in our view, further reinforced in the present context because the Secretary of State is minded to conclude that the applicant has acted in a way which was dishonest. That is a particularly serious allegation going to a person's character.

52. A third consideration is this. Unlike refusal of naturalisation, refusal of ILR on the grounds set out in paragraph 322 (5) is to the effect that a person's very presence in the UK is undesirable.

53. Finally, as Mr Biggs emphasised on behalf of the Appellants, the consequences of refusal of ILR (at least in the typical case, where any extant leave to remain will expire upon that refusal) can be very serious indeed. The statutory consequences include those

set out in the Immigration Act 2014 and are sometimes known as "the hostile environment": we give more details of these at para. 81 below.

54. We understand that following the decision in *Fayed* the Secretary of State introduced a "minded to refuse" procedure in naturalisation cases, under which applicants were given the opportunity to address any concerns that he might have before a decision was taken.

55. For all of those reasons, we have come to the conclusion that where the Secretary of State is minded to refuse ILR on the basis of paragraph 322 (5) on the basis of the applicant's dishonesty, or other reprehensible conduct, he is required as a matter of procedural fairness to indicate clearly to the applicant that he has that suspicion; to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability" and the exercise of the second-stage assessment; and then to take that response into account before drawing the conclusion that there has been such conduct.

56. We do not consider that an interview is necessary in all cases. The Secretary of State's own rules give a discretion to him to hold such an interview. However, the duty to act fairly does not, in our view, require that discretion to be exercised in all cases. A written procedure may well suffice in most cases.

57. Ms Anderson drew our attention to *R (Mehmood) v Secretary of State for the Home Department* [2015] EWCA Civ 744, [2016] 1 WLR 461, in which this Court rejected a submission based on the fact that the appellant had been served with a notice of removal under section 10 of the Immigration and Asylum Act 1999 (as it then stood) without being given prior notice of the facts on which it was based: see para. 72 of the judgment of Beatson LJ. But that was not a case about paragraph 322 (5) and there was no issue about the requirements of public law fairness.

58. Ms Anderson also submitted that a "minded to" procedure was unnecessary in the present context (unlike in naturalisation cases following *Fayed*) because under paragraphs 34L-34Y and Appendix AR of the Immigration Rules there is now available a procedure for administrative review following an initial refusal of ILR. We do not accept that the availability of that procedure satisfies the requirements of procedural fairness, for the following reasons.

59. In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in *Doody* which we have quoted earlier), fairness will usually require that to be done where that is feasible for practical and other reasons. In *Bank Mellat v HM Treasury (no. 2)* [2013] UKSC 39, [2014] AC 700, Lord Neuberger (after having cited at para. 178 the above passage from *Doody*) said, at para. 179:

> "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an

> opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

60. This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only *after* a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch. 550, at p. 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said:

> "any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals - before the mind of the executive becomes unduly fixed."

61. More fundamentally, it is a central feature of the administrative review procedure, stated at paragraph AR2.4 of Appendix AR, that the reviewer will not consider any evidence that was not before the original decision-maker except in certain specified cases (broadly described as the correction of case-working errors). That means that the applicant would normally only be able to assert that he or she had not been dishonest but would not be permitted to adduce evidence in support of that assertion. That limited type of legal review is clearly inadequate here. It is precisely because the applicant had no notice of the Secretary of State's concerns that he or she had no opportunity to put evidence before the original decision-maker.

(4): THE SUGGESTED *TAMESIDE* DUTY

62. On behalf of the Appellants the lead was taken by Mr Parminder Saini in making oral submissions about the suggested *Tameside* duty. This duty is said to stem from the well-known speech of Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, at 1065.

63. Mr Saini submitted that the Secretary of State is under a *Tameside* duty to "take reasonable steps to acquaint himself with the relevant information" to enable him to answer the question which he has to under paragraph 322 (5), namely whether an applicant was dishonest in filing his tax return to HMRC.

64. In that regard Mr Saini reminded the Court that the Secretary of State has a power to conduct enquiries of HMRC pursuant to section 40 of the UK Borders Act 2007.

65. Mr Saini also drew our attention to relevant tax legislation, in particular Schedule 24 to the Finance Act 2007, which concerns penalties for errors. Mr Saini submitted that it is clear from that statutory scheme that HMRC itself draws a distinction between "careless" inaccuracies and "deliberate" inaccuracies when documents are submitted to it. Further, Mr Saini submitted, HMRC has the power to impose different rates of penalty depending on whether it makes a finding that an inaccuracy was careless as opposed to deliberate. Of course some innocent inaccuracies may not even be careless.

66. In his most bold submission Mr Saini submitted that, when paragraph 1 of Schedule 24 to the Finance Act 2007 provides that, in the circumstances to which it applies, a penalty "is payable", that means that there is always an obligation to pay a penalty and therefore one would always be imposed. On that basis, he submitted that if the Secretary of State made enquiries of HMRC and discovered that a penalty had not been imposed in a given case that would mean that HMRC had believed that a penalty was not payable and thus that it had believed that the error was innocent: otherwise a penalty would have been imposed.

67. We reject that submission. The statutory language ("is payable") simply means that a *liability* to pay a penalty arises if the statutory criteria are satisfied. It does not mean there is a duty on HMRC to impose a penalty in every case where it might in principle be imposed. We are conscious that we did not hear detailed submissions on this issue, and in particular that we have not heard anything that might be said on behalf of HMRC. We shall therefore say no more about the issue here.

68. At one stage, at least in his written submissions, Mr Saini appeared to suggest that it is legally impermissible for the Secretary of State to take a different view from HMRC in relation to the same matter. He referred to this in his skeleton argument as the "dichotomous views" of HMRC as distinct from the Home Office. We did not understand him to press that submission. In any event, in our judgment, the submission is a bad one. The Secretary of State has the legal power to decide the questions which arise under paragraph 322 (5) for himself and is certainly not bound to take the same view as HMRC. The two public authorities are performing different functions and have different statutory powers.

69. Returning to Mr Saini's central submission, that the *Tameside* duty applies in this context to require the Secretary of State to make enquiries of HMRC about how they have dealt with relevant errors, we do not accept that submission either.

70. The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before

the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it.

71. Applying those principles to the present context, it seems to us quite impossible to accept the submissions made by Mr Saini.

72. The Secretary of State would certainly have power to make enquiries of HMRC but he had no obligation to exercise that power. It is impossible to say that no reasonable Secretary of State could have done anything other than to make the enquiries which Mr Saini submits had to be made of HMRC.

73. We bear in mind that there may be many reasons why HMRC does or does not investigate a particular tax return. HMRC may quite properly take the view that, if a tax return has been amended, it is content to collect the tax which is due and which the applicant taxpayer accepts is due. It may or may not wish to expend the resources which would be required to enquire into a past tax return to see whether it was dishonestly or carelessly made and, if necessary, defend an appeal. In this regard we note the obvious good sense of what was said by Lane J in *Kayani v Secretary of State for the Home Department* (JR/9552/2017, judgment of 10 May 2018), at para. 27.

74. We further bear in mind that there would be nothing to prevent the applicant from drawing attention to the fact that HMRC had enquired into a matter and had decided not to impose a penalty or had decided to impose a penalty at a lower rate, which signified that there had been carelessness rather than dishonesty. That would be information which was within an applicant's own knowledge and they could draw this to the attention of the Secretary of State.

75. We are fortified in that view by the conclusion we have reached above on the need for procedural fairness in this context. If the Secretary of State adopts the "minded to refuse" procedure which we consider is necessary in this context, that will afford an applicant the opportunity to draw attention to anything relevant, for example what action HMRC decided to take or not to take in respect of an inaccurate tax return.

76. For all those reasons, we do not think it necessary to impose a separate *Tameside* duty in the present context. Certainly it is not irrational for the Secretary of State to have proceeded in the way that he did in these cases without making such enquiries of HMRC.

(B) THE ENGAGEMENT OF ARTICLE 8

77. It is the Appellants' case that a decision to refuse leave to remain under paragraph 322 (5) on the basis that they have dishonestly misrepresented their earnings, whether to HMRC or to the Home Office, necessarily engages their rights under article 8 of the European Convention on Human Rights: that is, that the first and second stages of "the

Razgar test" are satisfied (see *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, at para. 17 of the opinion of Lord Bingham (p. 389)).

78. The reason why the issue is significant is not so much because the engagement of article 8 would give the Appellants any greater substantive rights or additional procedural protection: as to this, see para. 92 below. Rather, it goes to the basis on which a T1GM applicant who is refused ILR on paragraph 322 (5) grounds can challenge the decision in law. It might also mean that it is open to them to bring a challenge by way of appeal rather than by judicial review. We address these points more fully under head C below.

79. Mr Biggs submitted that a decision to refuse T1GM ILR on paragraph 322 (5) grounds engaged article 8 for three distinct reasons.

80. His first reason focused on liability for removal from the UK. A T1GM applicant for ILR would by definition have been in the UK for several years and would almost certainly have developed a sufficient private life for his or her removal to engage article 8. He submitted that although a refusal under paragraph 322 (5) was not as such a removal decision it was "functionally" equivalent to such a decision. In the majority of cases, although the application will have been made prior to the expiry of the applicant's existing leave, that leave will have expired by the time that the refusal decision is made and the applicant will be reliant only on leave under section 3C of the Immigration Act 1971: that leave would expire following the refusal – to be precise, at the end of the 14-day period allowed for seeking an administrative review or at the conclusion of the review if sought. The applicant would have, from that moment, no right to be in the UK and would be liable to removal at any time. The decision letter in each of the cases before us attached an "Enforcement Warning", one of the headings in which was "Liability for Removal". This read:

> "Persons who require, but no longer have, leave to enter or remain may be liable to removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014).
>
> You may be detained or placed on reporting conditions.
>
> You do not have to leave the United Kingdom during the time period in which you may apply for administrative review. If you apply for administrative review you do not need to leave the United Kingdom until we decide your application. If you do not apply for administrative review, or extend your leave to remain on another basis, you will soon be giving further notice that you must leave the United Kingdom."

Mr Biggs acknowledged that, as the final sentence of that passage makes clear, if the applicant did not leave voluntarily further formal steps would be taken to enforce removal: specifically, current Home Office practice is to notify a person liable to removal of a "removal window" during which enforcement action will be taken. But he submitted that those steps were simply administrative consequences – which it is said would occur "soon" – of the substantive decision to refuse ILR, which is what terminates the applicant's leave to remain.

81. Secondly, Mr Biggs relied on the legal consequences for an applicant who remained in the UK without leave, which have been rendered more severe by the so-called "hostile environment" provisions introduced by the Immigration Act 2014.[6] It is, in the first place, a criminal offence to be in the UK without leave to remain: see section 24 of the Immigration Act 1971. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the Road Traffic Act 1988); nor will they be entitled to free treatment from the NHS (section 175 of the National Health Service Act 2006). He submitted that those consequences are bound to have a serious impact on a migrant's private life irrespective of any removal action.

82. Thirdly, Mr Biggs submitted that a formal allegation of dishonesty made by an organ of the state is bound to have an adverse impact on the reputation of the person about whom it is made. He submitted that it is well-established that article 8 protects a person's right to their reputation: he referred to the decision of the Supreme Court in *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697.

83. We start with the first of the bases on which Mr Biggs says that article 8 is engaged. Ms Anderson, reinforced on some aspects by Mr Malik, advanced various arguments in response, which we take in turn.

84. First, Ms Anderson referred to an observation at para. 124 of the judgment of Underhill LJ in *MS (India) v Secretary of State for the Home Department* [2017] EWCA Civ 1190, [2018] 1 WLR 389, to the effect that the refusal of ILR does not "as such" engage article 8 (p. 429 C-D). With respect, that does not meet Mr Biggs' point. He was not complaining of the refusal of ILR as such but of what he said was its necessary consequence in cases of the present kind, namely liability to removal. In *MS*, untypically, the refusal of ILR did not entail liability to removal: the applicant was in practice irremovable and had indeed been granted (limited) leave to remain.

85. Secondly, she referred to the recent decision of the Supreme Court in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, [2018] 1 WLR 5536, that a migrant's immigration status is to be regarded as "precarious" within the meaning of section 117B (5) of the Nationality, Immigration and Asylum Act 2002 at all times up to the point at which they are granted ILR. That too is directed to a different issue. The fact that a migrant's status may be precarious for the purpose of section 117B does not prevent them developing a private life in the UK in the period prior to settlement: its relevance is to the weight to be accorded to that private life in any assessment of the proportionality of removal.

86. Pausing there, once those arguments are disposed of it is seems to us inescapable that, as Mr Biggs submitted, in the generality of cases a T1GM ILR applicant is likely to have built up a sufficient private life for his or her removal to engage article 8; and we will proceed on that basis. But that must be subject to the caveat that the engagement of article 8 is of its nature a question of fact to be determined on the facts of the

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6 Aspects of the provisions in question have recently been made the subject of a declaration of incompatibility under section 4 of the Human Rights Act 1998 – see *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin) – but it is not necessary for us to consider that decision.

particular case, and there may be cases in which for particular reasons that general conclusion does not apply.

87. Ms Anderson's third point, on which we were also helpfully addressed by Mr Malik, was of a different character, namely that, even if the removal of a T1GM ILR applicant following a refusal under paragraph 322 (5) would engage their article 8 rights, the decision to refuse ILR cannot be equated with a decision to remove. The two decisions were distinct, both in theory and in practice. In the first place, some applicants might still have unexpired leave from the previous grant. It was true that the Secretary of State's decision under paragraph 322 (5) meant that he would be entitled to curtail that leave under paragraph 323, which cross-refers to the same grounds; but that would nevertheless be a distinct decision which he might or might not choose to take. Further, even if the previous leave had expired, the Enforcement Warning informed applicants that if they claimed that they were entitled to leave on a different basis they could make a separate application. And even if there was no such basis the Secretary of State would not proceed to removal without service of the "removal window" notice. Ms Anderson and Mr Malik sought to reinforce this point by reference to the decision of the Supreme Court in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] 1 AC 651, which confirmed the distinction between a decision to refuse leave to remain and a decision to remove.

88. This argument has more force than the first two, but we have come to the conclusion that it too does not meet the Appellants' case. We park for the moment the case where an applicant for ILR still has unexpired leave and focus on the case, which is likely to be the more typical, where the previous leave has expired and the applicant only has "3C leave". In our view the making of a decision which (subject only to a suspension pending administrative review if sought) both deprives the applicant of leave to remain and, as the necessary corollary, renders him or her liable to immediate removal, as set out in the Enforcement Warning, is in itself an interference with their article 8 rights. We do not think that that analysis is affected by the fact that if the applicant does not, as he or she is invited and expected to do, leave forthwith further enforcement steps will have to be taken. It cannot be the case that a migrant's article 8 rights are not engaged until the moment of the knock on the door: what matters is the point of legal decision.

89. Nor is the analysis affected by *Patel*. In that case the statutory regime then in force provided for distinct decisions as to (a) the grant or refusal of further leave to remain and (b) removal. The issue was whether, on the true construction of the statutory scheme, the Secretary of State was under a duty when making a decision to refuse leave to remain to proceed forthwith to a removal decision, which could be appealed as such. The Supreme Court held that there was no such duty. That is wholly different from the issue before us. The Court in *Patel* was concerned simply with the relationship of the elements in the statutory regime (which are in any event now different). It was immaterial whether the decision to refuse leave to remain engaged article 8. In fact, to the extent that article 8 was mentioned at all, the references would appear to support Mr Biggs rather than Ms Anderson. In his judgment in the Court of Appeal ([2012] EWCA Civ 741, [2013] 1 WLR 63), which was approved by the Supreme Court, Lord Neuberger MR seems to have contemplated that there were circumstances in which "human rights norms" might be engaged by a decision to refuse leave to remain – see para. 47 of his judgment (p. 74 G-H). And in the Supreme Court Lord Carnwath quoted

with approval observations by the UT to the effect that "human rights [do not] only arise on removal decisions" – see para. 27 of his judgment (p. 667 A-B). But we need not put particular weight on those references. What matters is that *Patel* was concerned with a different question.

90. We return to the case where the effect of the refusal of the application for T1GM ILR does not in itself render the applicant liable to removal forthwith (subject to suspension pending administrative review), either because a period of limited leave granted previously has not yet expired or because the applicant is entitled to leave on some other basis. This is less straightforward, but we do not believe that the position is fundamentally different. The Secretary of State's decision that the applicant's case falls within paragraph 322 (5) necessarily means that any existing leave can be curtailed under paragraph 323 and that any application for leave to remain on a different basis would fall to be refused: Part 9 applies of course to leave to remain (or enter) on any ground. Indeed logically the Secretary of State *ought* to curtail any existing leave to remain in such a case, since the basis of ground (5) is that the migrant's presence in the UK is undesirable (and that there are no discretionary grounds why he or she should be granted leave nonetheless). That being so, it seems to us that an applicant in this category is, in substance, equally "liable to removal" with an applicant who at the moment of refusal only enjoyed section 3C leave. Any other result would inevitably lead to cases with arbitrarily different results. In the nature of things any period of unexpired limited leave for T1GM ILR applicants is likely to be short, and it would be unsatisfactory to say that article 8 was engaged in a case where a refusal rendered the applicant liable to removal forthwith but not where he or she still had a few days limited leave to run.

91. We would therefore accept that article 8 is engaged for the first of the reasons advanced by Mr Biggs. That means that it is unnecessary for us to consider the other two reasons, and we prefer not to do so. As regards the second, it is not difficult to see that in some cases some of the legal consequences of being present in the UK without leave – for example, the inhibitions on renting accommodation – may engage article 8; but their impact will vary from case to case and, further, in the generality of cases if the refusal of leave is itself justified the interference caused by the legal consequences of such refusal are very likely to be justified too. As regards Mr Biggs' third reason, whether an allegation of dishonesty which is not published to anyone save the migrant himself or herself engages the article 8 right to reputation raises a question which may not be straightforward and which is best left to a case in which it matters.

92. The principal substantive consequence of our finding that the refusal of T1GM ILR on paragraph 322 grounds will (typically) engage article 8 is that in any legal challenge the tribunal will be obliged to reach its own conclusion on whether the interference is justified, rather than conducting a rationality review: as to this, see para. 104 below. In an earnings discrepancy case that means, principally, that it will have to decide for itself whether the discrepancy was the result of dishonest conduct by the applicant in the supplying of figures to either HMRC or the Home Office. If it was, in the generality of cases such a finding will be sufficient, for the purposes of the final *Razgar* question, to justify the applicant being refused leave to remain and in consequence, which is the relevant interference, becoming liable to removal. The situation is analogous to that in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, where the claimants' article 8 rights were in practice dependent on whether they had cheated

in their TOEIC tests (see paras. 76 and 88 of the judgment of Underhill LJ) and this Court held that they were entitled to have that question determined by the tribunal as a matter of fact. There may be exceptional cases in which it can be argued that removal would be disproportionate despite the applicant's past dishonesty, and that issue too would in principle have to be judged by the tribunal for itself, while giving due weight to Secretary of State's assessment of the public interest. But paragraph 322 (5) itself likewise allows for the possibility of such exceptional cases (see para. 39 above), and there need be no difference in the nature of the exercise whether it is expressed as the exercise of a public law discretion or as a proportionality assessment under article 8.

93. It is also of course the case that article 8 requires public authorities to act with procedural fairness in cases involving interference with the substantive rights accorded by it. But we can see no basis for arguing that in cases of this kind those requirements go beyond what we have held above would be required in any event as a matter of domestic law. And, unlike in *Ahsan* (or *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 67, [2018] AC 391), there is no issue as to the fairness of the available procedures for a legal challenge.

94. Our conclusions in this part are concerned with whether article 8 is engaged by the refusal of ILR. Their implications for the working of the provisions of the legislation applying to the making of a human rights claim and the bringing of an appeal against the refusal of such a claim are considered in the following part.

(C) PROCEDURE

95. Having concluded that article 8 is (generally) engaged by the refusal of ILR in these cases, where does that leave the procedural position with regard to a challenge to that refusal ? In principle it seems to us, as it did to the Court considering an analogous issue in *Ahsan* (see para. 115 of the judgment of Underhill LJ), that the appropriate route of challenge is by way of appeal to the FTT rather than by way of a claim for judicial review in the UT. Although the UT can, if it has to, determine disputed issues of primary fact, that is not its usual role, and doing so is not a good use of its limited resources. But the procedural route to an appeal is not straightforward.

96. The starting-point is that a refusal of ILR is not in itself an appealable decision under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. However, by section 82 (1) (b), a right of appeal is provided in these terms:

> "A person ('P') may appeal to the [First-tier] Tribunal where… the Secretary of State has decided to refuse a human rights claim made by P…".

97. For these purposes, "human rights claim" is defined in section 113 (1) of the 2002 Act (as amended by paragraph 53 (2) (a) of Schedule 9 (4) to the Immigration Act 2014) as follows:

> "… a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section

> 6 of the Human Rights Act 1998 (public authority not to act contrary to the [ECHR])".

98. The procedural requirements for making such a claim were recently reviewed by this Court in *R (Shrestha) v Secretary of State for the Home Department* [2018] EWCA Civ 2810. In short, section 50 of the Immigration, Asylum and Nationality Act 2006 enables the Secretary of State to require a particular procedure to be followed, including the form to be used and the fee to be paid; and paragraph 34 of the Immigration Rules, made under that provision, sets out mandatory requirements for an application for leave to remain (which includes an application made on human rights grounds). Where an application fails to comply with those requirements (including by not referring to a claim for leave on human rights grounds at all), there is no "human rights claim" refusal of which would give rise to a right of appeal. The Secretary of State has, however, conceded that in the context of an imminent removal an appeal will lie to the FTT against a refusal of a human rights claim even if not made in proper form: see paras. 31-33 of the judgment of Hickinbottom LJ in *Shrestha*. The basis of the concession (which originated in *Ahsan*: see para. 14 of the judgment of Underhill LJ) is not articulated, but it would appear to be justified on the basis that the Secretary of State can waive the formal requirements in the Rules.[7]

99. Against that background, the most straightforward situation will be where the applicant has included a human rights claim in his or her original T1GM ILR application. The relevant form includes a box in which an applicant can rely on matters other than the relevant Part 6A grounds, and (although this was not a matter on which we were addressed) we can see no reason in principle why an applicant should not complete that box in the alternative so as to raise a human rights claim; the point may also be capable of being raised in the covering letter. If they have done so the refusal of the application will constitute a refusal of that claim and can be appealed as such. Having said that, it is in the nature of things unlikely that an applicant for T1GM ILR will have thought it necessary to make an alternative article 8 claim of this kind: typically they will regard their application as standing or falling on whether they satisfy the requirements of the relevant PBS category. We would thus assume that cases of this kind are uncommon.

100. In the usual case where the applicant has not included a human rights claim in their original ILR application it follows from *Shrestha* that if they wish to generate a right to an appeal on human rights grounds following its refusal they will need to make a fresh application, using the proper form (again, we were not addressed on which that would be), the gist of which will be that they have been rendered liable to removal, in breach of their article 8 rights and in circumstances where they were otherwise entitled to ILR, on the basis only of a wrong and/or unfair finding of dishonesty. Such an application might be prompted by the Secretary of State serving a "one-stop" notice under section 120 of the 2002 Act. If, as presumably would be the case except in rare circumstances[8],

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[7] Ms Anderson said that the concession in *Ahsan* was made in the context of the pre-2014 Act scheme of appeal rights, which is no longer in force. We are not sure that that is correct, but in any event it appears to have been maintained in *Shrestha*, which concerned the current scheme.

[8] We assume for these purposes that the Secretary of State would have followed a fair procedure first time round, and so considered any explanation proffered for the earnings discrepancy; but there might occasionally be cases where the applicant adduced convincing evidence of honest error for the first time in support of his or her fresh application.

the Secretary of State maintained his original decision and refused the application, the applicant would then be entitled to an in-country appeal, subject to the possibility of it being certified as "clearly unfounded" under section 94 (1) of the 2002 Act.

101. The alternative course to secure an appeal would be for the applicant to wait until steps are taken to enforce removal. It appears from the concession referred to at para. 98 above that if at that stage he or she makes a human rights claim in order to resist removal the Secretary of State will not insist on a formal application being made and will proceed to a decision against which they can appeal (subject, again, to certification under section 94 (1)).

102. Neither of those routes to an appeal is very satisfactory. The first requires the applicant to go through the formality of making, and paying for, a further application in order to decide substantially the same question, with no certainty as to how soon the decision will be made. The second requires him or her to wait for an indefinite and possibly lengthy period before being able to obtain an appealable decision. It would be open to the Secretary of State to waive the formal requirements, treat the initial claim as including a human rights claim which he had refused and thus, subject to the applicant having an appropriate opportunity to put that human rights claim in order, afford the applicant a right of appeal to the FTT. Ms Anderson made it clear, however, that the Secretary of State was not minded to waive the formal requirements generally so as to facilitate appeals (as opposed to applications for judicial review) in all cases. As the legislation now stands, that appears to be a stance that he is entitled to take.

103. The foregoing discussion is at a general level and is primarily relevant to cases where proceedings have not yet been started. How does it apply to the present appeals, which are in the context of judicial review proceedings, and other such cases in the pipeline ? In the present appeals at least, none of the Appellants sought to rely below on their Convention rights, and the UT accordingly did not consider whether article 8 was engaged in their cases or, if so, whether the interference with those rights effected by the refusal was justified because they had acted dishonestly. We are accordingly not in a position to consider those issues. However, if these or any of the pending appeals succeed, and result in a remittal to the UT, the question may arise at that point whether the Appellants can amend so as to rely on their article 8 rights. Ms Anderson and Mr Malik point out in their skeleton argument, and repeat in their post-hearing written submissions, that judicial review is a remedy of last resort and that, as explained above, a remedy by way of statutory appeal is available. It remains to be seen whether the Secretary of State chooses to object on that basis to any application for permission to amend in the present cases (without prejudice, it may be, to his position in other such cases). If he does not, we can see no reason why the UT should not permit the amendment, particularly given that these proceedings have been now been on foot for some time and it is in everyone's interests to achieve finality as soon as possible. If, however, he does object, the UT would have to consider whether a human rights appeal was indeed an available alternative remedy in the particular circumstances of the case. A relevant question might be whether the Secretary of State was willing to proceed on the basis that a human rights claim had in fact been made and refused, or at least to undertake to decide any such claim promptly (cf. point (C) at para. 116 in the judgment of Underhill LJ in *Ahsan*). It would not be right for us to issue any general prescription because the circumstances of particular cases are bound to affect the proper exercise of the Tribunal's discretion.

104. If such an article 8 challenge does proceed by way of judicial review in the UT, and the claimant's article 8 rights are found to have been engaged, the Tribunal will, as already noted, have to consider for itself whether the alleged dishonesty on the part of the claimant has been proved and whether removal is proportionate, which in most cases is likely to be determined by the question of dishonesty. It will not be confined, as would usually be the case and as in these proceedings thus far, to reviewing the facts only on the ground of irrationality. This is because, where a claim for judicial review includes a pleaded ground that the Secretary of State's decision either does or would violate article 8, that amounts to an allegation that there has been or will be unlawful conduct contrary to section 6 of the 1998 Act. That allegation has to be adjudicated by the tribunal on its merits: it is an argument based on illegality and not simply irrationality. For a recent summary of the law in this regard see *R (Caroopen) v Secretary of State for the Home Department* [2016] EWCA Civ 1307, [2017] 1 WLR 2339, *per* Underhill LJ at paras. 68-83 (pp. 2366-2372).

105. The tribunal, as well as the Secretary of State, of course has an obligation to act with procedural fairness. Where the Secretary of State has alleged dishonesty, that will normally require the tribunal – whether the FTT on an appeal, or the UT on a claim for judicial review – to give the claimant an opportunity to adduce evidence in rebuttal; and, given that credibility will be in issue, that will normally include an opportunity to give oral evidence himself or herself and/or call relevant witnesses (e.g. their accountant) to give oral evidence.

106. Each case will depend on its own facts, but, where an earnings discrepancy is relied on (and without changing the burden of proof, which remains on the Secretary of State so far as an allegation that an applicant was dishonest is concerned), it is unlikely that a tribunal will be prepared to accept a mere assertion from an applicant or their accountant that the discrepancy on was simply "a mistake" without a full and particularised explanation of what the mistake was and how it arose.

D. THE INDIVIDUAL CASES

BALAJIGARI

Immigration History

107. Mr Balajigari is a national of India and was born on 14 June 1987. He had leave to enter the UK as a student from 2 August 2007 and entered the UK on 16 August 2007.

108. On 29 October 2008 Mr Balajigari applied for leave to remain as a Tier 1 (Post Study Work) migrant. He was given such leave from 18 November 2008 to 18 November 2011. On 15 July 2010 he applied for further leave to remain as a T1GM. That application was refused on 25 August 2011.

109. On 24 March 2011 Mr Balajigari again applied for leave to remain as a T1GM. This time the application was granted and he was given leave to remain from 6 June 2011 to 6 June 2012. On 16 May 2013 he applied for further leave to remain as a T1GM and was given further leave until 6 June 2016.

110. On 1 June 2016 Mr Balajigari applied for ILR pursuant to paragraph 245CD of the Immigration Rules. That application was refused on 9 June 2016 on the basis that his

presence in the UK was undesirable under paragraph 322 (5) of the Rules. This was based on a discrepancy between the earnings declared by him to HMRC for 2010/11 tax year (£33,646.39) and the earnings for a shorter period falling within that tax year as stated by him in his application for leave to remain dated 24 March 2011 (£42,185.24). It should be noted that in April 2016, shortly before he made his application for ILR, Mr Balajigari's accountants had written to HMRC seeking to correct the under-declaration for the 2010/11 tax year.

The Decision

111. The Reasons for the Secretary of State's decision sent with the decision letter begin by setting out Mr Balajigari's immigration history and setting out the terms of paragraphs 245CD and 322 (5). They then identify the earnings discrepancy and refer to the fact that when the application was submitted he was asked to sign a questionnaire, which asked, as question 9, "Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflected your Self-Employed income?", to which he had answered "Yes". They then note that his representatives had referred in the covering letter to the fact that he had recently corrected his return for 2010/11. They continue:

> "The Secretary of State has further noted that you have amended your tax returns ahead of making an application for settlement in the United Kingdom and you have not submitted any justification for such amendments from a qualified accountant or a qualified tax consultant explaining the errors, if any, made in previous tax returns and what transpired to identify those errors in April 2016. The Secretary of State is therefore not satisfied that you have demonstrated the desired level of good conduct and character due to a substantial variation in your earnings claims to Home Office in immigration applications and your earnings declared to HMRC for personal income tax purpose and later amending the tax returns without having a valid justification to do so.
>
> The fact that you have retrospectively declared these claimed earnings to HMRC is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with HMRC and/ UK Visas & Immigrations.
>
> Having considered the fact that your declared earnings to the Home Office compared to what you declared to HMRC for a similar period differ significantly, the Secretary of State is satisfied that your earnings claims made in your Tier 1 application are not consistent with your declarations made to HMRC in the relevant tax period/s. The discrepancy between your declarations to both the government bodies casts doubts over your declared earnings in your previous applications and your conduct and character in doing so.
>
> It is acknowledged that Paragraph 322(5) of the Immigration Rules is not a mandatory refusal, however the evidence submitted does not satisfactorily demonstrate that the failure to

> declare to HMRC at the time any of the self-employed earnings declared on your previous application for leave to remain in the United Kingdom as a Tier 1 General Migrant was a genuine error. It is noted that there would have been a clear benefit to yourself either by falsely representing your earnings to HMRC with respect to reducing your tax liability or by falsely representing your earnings to UK Visas & Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 General Migrant.
>
> The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom based on the fact that you have been deceitful or dishonest in your dealings with HMRC and/or UK Visas & Immigration by failing to declare your claimed self-employed earnings to HMRC at the time and/or by falsely representing your self-employed income to obtain leave to remain in the United Kingdom. Your application for indefinite leave to remain in the United Kingdom as a Tier 1 General Migrant is therefore refused under Paragraph 245CD (b) with reference 322 (5) of the Immigration Rules."

112. The Reasons are not very well-constructed. The core basis for invoking paragraph 322 (5) appears to be in the second passage quoted, i.e. the decision that Mr Balajigari had dishonestly under-declared his earnings to HMRC or over-declared them to the Home Office, but in the earlier passage they appear to rely in addition on his subsequent amendment of his tax returns without a valid justification.

113. Mr Balajigari applied for an administrative review of that decision, but that was rejected on 20 July 2016. It is unnecessary for us to give details.

Procedural History

114. On 8 September 2016 an application for permission to bring a claim for judicial review was issued in the Upper Tribunal. UTJ Gill refused permission on the papers on 22 December 2016.

115. Mr Balajigari applied to renew the application at an oral hearing. On 27 January 2017, for the purposes of that application, his solicitors submitted to the Upper Tribunal a witness statement from him purporting to explain the discrepancy. It included various supporting documents, including a letter from his accountant taking responsibility for the mistake, which they described as "human error".

116. On 22 March 2017 Mr Balajigari applied to amend the grounds of claim in terms drafted by Mr Biggs. Permission to amend was granted by UTJ Kopieczek on 29 March. We note that Mr Biggs did not plead any breach of Mr Balajigari's rights under article 8.

117. The renewal hearing occurred before UTJ Gleeson on 19 April 2017. In the absence of any claim under article 8, the case was argued on the basis of a rationality review. Mr Biggs applied to adduce in evidence the witness statement and documents filed on 27 January 2018, but the Judge refused the application.

118. UTJ Gleeson refused the renewed application for permission to apply for judicial review.

The Judgment of the UT

119. At para. 22 UTJ Gleeson said that there is a duty to pay income tax on income earned, and there is a duty to make truthful disclosure of income when applying under the Immigration Rules. She said that it was plain that in 2011 the Applicant had failed in either one or the other of those and no explanation, other than blaming his previous accountants, had ever been advanced. She said that the provision of an accurate declaration to HMRC in 2010/2011 was the responsibility of the Applicant himself, and not that of his accountant, and the same was true of the figure that he gave for his income which enabled him to claim Tier 1 leave to remain. She concluded at the end of paragraph 22:

> "… The Respondent was fully entitled to regard that as reliable evidence of reprehensible behaviour."

120. At para. 25 UTJ Gleeson rejected the argument that the Respondent had acted in a manner inconsistent with published policy. She observed that the reprehensible behaviour in question does not have to be criminal. She also observed that non-payment of tax is a serious matter and that exaggeration of income for immigration purposes is also a serious matter.

121. At para. 26 UTJ Gleeson said that it was

> "… unarguably open to the Respondent to conclude that he could not have done so inadvertently. The difference in figures is not a typographical error, it is not a mathematical error: it is quite clearly either an over- or under-declaration of a substantial part of his self-employment income."

122. At para. 27 UTJ Gleeson turned to the argument based on procedural fairness. She rejected that argument on the basis that there was nothing stopping Mr Balajigari making further submissions but none had been made. Furthermore, he had not produced evidence or provided a satisfactory explanation of his conflicting income declarations to HMRC and the Secretary of State.

123. Finally, at para. 28, UTJ Gleeson said this:

> "I am not persuaded, having looked at the covering letter but not the documents from 27th January 2017, that an examination of the enclosed documents by the respondent was likely to have taken matters any further at all. To the extent that there was any procedural and fairness by her, I am satisfied it would have made no difference to the outcome of the application."

124. Accordingly, at paragraph 29, she declined to grant permission, observing that judicial review "is a discretionary remedy".

The Appeal

125. Mr Balajigari's grounds of appeal (as amended by order of Hickinbottom LJ dated 9 August 2018) cover the points addressed in Part A of this judgment[9], together with a challenge to UTJ Gleeson's refusal to admit the further documents on which he sought to rely (ground 2) and two points dependent on the fact that the Secretary of State's decision engaged his article 8 rights (grounds 3A and 3B). It will be apparent from Part A that, subject to the point discussed at paras. 132-9 below, the Secretary of State's decision was legally flawed and that not only should the Upper Tribunal have granted permission to apply for judicial review but the substantive application should have succeeded. The essential points are as follows.

126. First, Mr Balajigari did not have put to him, in a "minded to" letter or otherwise, the allegation that he had acted dishonestly, nor was he given an opportunity to make representations in response to that allegation before the decision to refuse ILR was finally made. This was a serious procedural unfairness: see paras. 45-61 above.

127. Ms Anderson and Mr Malik argue that fairness did not require such notice because Mr Balajigari was aware of the discrepancy, since his representatives had referred in their covering letter accompanying the application to the tax return having been recently corrected, and he should have appreciated that his conduct would be regarded as potentially dishonest and a full explanation proffered: a similar point is implicitly made in the Reasons (see para. 111 above). We do not accept this. If this was in fact a belated correction of an innocent (albeit careless) error Mr Balajigari might genuinely not appreciate that it would look suspicious to the Secretary of State; and even if he did it cannot be for him to volunteer in advance a defence to an allegation of dishonesty that had not been made – that might indeed be thought positively to invite suspicion. We can of course easily see why the Secretary of State regarded the situation as suspicious, but, as we have held in Part A, that means that it was for him[10] to put his suspicions to Mr Balajigari.

128. Ms Anderson also argues that question 9 in the application questionnaire, about the accuracy of his previous returns, represented a fair opportunity for Mr Balajigari to own up to the discrepancy and explain with full particularity why it was not dishonest. But the answer is essentially the same: question 9 makes no accusation of dishonesty and it cannot be treated as a prompt to answer an accusation not made. In fact in Mr Balajigari's case his accountants had in their covering letter drawn attention to the fact that they had recently corrected the previous under-declaration to the HMRC. We do not accept that they should, without being asked, have volunteered reasons why it had not been dishonest.

129. Secondly, though relatedly, the Reasons proceed directly from the conclusion that the discrepancy "casts doubts over your declared earnings in your previous applications

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[9] We should note that Ms Anderson points out in her skeleton argument that the Amended Grounds of Appeal do not explicitly allege procedural unfairness; but she fairly acknowledges that the point had been argued in the UT and was developed in the skeleton argument covering the cases of the other Appellants, and she addresses it accordingly.

[10] It is convenient throughout this judgment to refer to the Secretary of State as "he", the current incumbent being a man, although that was not so at the time of the decisions under challenge.

and your conduct and character in doing so" to a conclusion that Mr Balajigari had in fact been "deceitful and dishonest". As explained at para. 42 above, that is the wrong approach. It is not sufficient that there is evidence which "casts doubt" on a person's honesty: that doubt has to be resolved. The Secretary of State must be satisfied, on the balance of probabilities, that the applicant was in fact dishonest, and that can only occur if he has called for an explanation and considered any explanation provided.

130. Thirdly, the Reasons do not contain any balancing exercise of the kind discussed at para. 38 above. They simply proceed from a finding of dishonesty to the conclusion that Mr Balajigari's presence in the UK is undesirable. For the reasons which we have given, that omits an essential step in the process, albeit that in most cases it will be a step easily taken. This defect is related to the first, because the process gave Mr Balajigari no opportunity to advance any reasons why, even if his conduct was dishonest, his presence in the UK was not undesirable.

131. Fourthly, although the penultimate paragraph of the passage from the Reasons quoted acknowledges that "paragraph 322 (5) … is not a mandatory [ground for] refusal", and thus appears to recognise the need for the exercise of discretion as a second stage, it goes on to rely simply on the fact that Mr Balajigari has acted dishonestly. That is not what the second stage is about: see para. 39 above. Of course, since there is a presumption in favour of refusal if the first stage is satisfied, it must be for the applicant to advance reasons why his or her application should not be refused; but this brings us back again to the first defect, since the process gives no opportunity to do so.

132. However, the foregoing is subject to one important further issue. In the part of the Secretary of State's consolidated argument dealing with the cases of Mr Kawos, Mr Majumder and Mr Albert it was contended that "it is highly likely that the outcome for [him] would not have been substantially different if the conduct complained of had not occurred" and that accordingly relief should be refused by virtue of section 31 (2A) of the Senior Courts Act 1981. It was not, however, developed in any way in relation to the individual cases, and it was not made in the separate skeleton argument in Mr Balajigari's case. Accordingly our post-hearing request for written submissions on the individual cases (see para. 12 above) included the following:

> "[The Secretary of State] is asked … to confirm whether in all or any of the cases he intends to argue that, even if he acted unfairly in not giving the appellant in question any, or any sufficient, opportunity to respond to the allegation of dishonesty (or acted unlawfully in any of the other ways alleged), relief should be refused on the basis that the only possible conclusion is that he had in fact acted dishonestly. If such a case is being advanced, the Secretary of State should state succinctly the legal basis for it and the evidence particularly relied on."

133. Ms Anderson's post-hearing submissions in Mr Balajigari's case confirm that the Secretary of State is advancing the argument referred to in that request. They contend that his "evidence and explanation to this Court" – which we take to be a reference to the evidence submitted to the UT – "was not such as to remove cause for concern but rather compounded the grounds for dishonesty"; and various specific points are made in support of that contention. Apparently on the basis of those passages, the

submissions in their concluding paragraph (which appears in identical terms, *mutatis mutandis*, in her and Mr Malik's post-hearing submissions in the other cases) say:

> "Further, and in any event, any procedural issues were immaterial to the outcome given that the explanation provided was considered but found to be unsatisfactory for legally sustainable reasons. Since relief in judicial review (and in this Court) is discretionary, interference will not be justified where any alleged breach of natural justice was not material to the outcome (see *Spahiu v Secretary of State for the Home Department* [2018] EWCA Civ 2604, at [66] to [71]). Where yet a further reconsideration of AB's explanation for the accepted discrepant personal declarations is highly unlikely to yield the contrary outcome, the procedural unfairness allegations do not provide a sound basis to allow AB's appeal."

That passage appears – although the first sentence is not quite in line with what follows – to constitute a submission that any procedural breaches were not "material" because it was "highly unlikely" that the decision would be any different if properly taken. It is necessary to say a little more about the legal basis for that submission.

134. The starting-point is that it is a long-established common law principle that a legally flawed decision will not be quashed where the errors are "immaterial" because the result would "inevitably" have been the same. That principle was applied in *Spahiu*, to which the submissions refer. We have to say that that is not the most apt reference, since it was not necessary in *Spahiu* for the Court to discuss the underlying principle, and the circumstances in which it fell to be applied are rather untypical, but the best-known authorities are helpfully summarised in chapter P4 ("Materiality") of Fordham's *Judicial Review Handbook* (7th ed).

135. It is well-established that the Court should observe great caution in refusing relief on the basis of immateriality, and that is reflected by expressing the relevant threshold in terms of inevitability. This is emphasised in particular in cases where the person affected by a finding of misconduct has been denied an opportunity to put their case. Mr Biggs in his written submissions in response refers to *R v Chief Constable of Thames Valley Police ex p Cotton* [1990] IRLR 344 (as do Mr Slatter and Mr Saini): see paras. 58-60 of the judgment of Bingham LJ (pp. 351-2). At para. 60 he says:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at p.402, experience shows that that which is

> confidently expected is by no means always that which happens.
>
> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> 5. This is a field in which appearances are generally thought to matter.
>
> 6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

That passage was approved by the Privy Council in *Permanent Secretary, Ministry of Foreign Affairs v Ramjohn* [2011] UKPC 20 (see para. 39 of the judgment of the Board delivered by Lord Brown). A more recent authority to the same effect is ***R (Shoesmith) v Ofsted*** [2011] EWCA Civ 642, [2011] ICR 1195: see per Maurice Kay LJ at paras. 69-74 (pp. 1215-7), who emphasises at para. 70 that the test is one of inevitability and that "probability is not enough".

136. With effect from 13 April 2015 a new sub-section (2A) was introduced (by section 84 of the Criminal Justice and Courts Act 2015) into section 31 of the Senior Courts Act 1981. Sub-section (2A) (a) requires the High Court to refuse relief in a judicial review application

> "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

Sub-section (3B) provides that the Court may disregard sub-section (2A) (a) "if it considers that it is appropriate to do so for reasons of exceptional public interest", though by sub-section (2C) it must formally certify that that is the case. Section 15 (5A) of the Tribunals, Courts and Enforcement Act 2007 provides that section 31 (2A) should apply also to the UT in the exercise of its judicial review jurisdiction and section 16 (3F), (3G) and (6B) provide for an exception to substantially the same effect as sub-sections (2B) and (2C). There are provisions applying the same test as sub-section (2A) (a) to applications for permission to apply for judicial review, as well as to the substantive claims: see section 31 (3C) and (3D) of the 1981 Act and section 16 (3C) – (3E) of the 2007 Act.

137. Section 31 (2A) is a provision which attracted some controversy at the time of its enactment. It was evidently intended to modify, at least to some extent and at least in

some circumstances, the common law test of materiality, and specifically the threshold of "inevitability". Some aspects of its effect were considered in *R (Goring-on-Thames Parish Council) v South Oxfordshire District Council* [2018] EWCA Civ 860, [2018] 1 WLR 5161; but we are not aware of any discussion in the authorities of the extent of the change effected by it, and in particular of what difference, if any, it would make in a case of the *Cotton* or *Shoesmith* type where the unlawfulness in question consists of the making of a finding of serious misconduct without giving the party affected the chance to state their case. For the present we will ignore any possible difference and simply refer to the "materiality" question; but see para. 141 below.

138. As Ms Anderson points out, UTJ Gleeson did in fact address the question of materiality: see para. 123 above. But, with all respect to the Judge (who, to be fair, was treating the point as a makeweight, having already held that there was no procedural unfairness), her finding that any procedural unfairness was immaterial cannot stand. It consists of a single unreasoned sentence, after she had declined to admit Mr Balajigari's explanation in evidence and made it clear that she had only read the covering letter.

139. That being so, we should only dismiss the appeal if we were satisfied that a Judge at the substantive judicial review hearing, having reviewed Mr Balajigari's explanation and the documents offered in support of it, would be bound to refuse relief on the basis that, even if he had had an opportunity (a) to give an innocent explanation of the discrepancies and/or (b) to advance any points relevant to the "undesirability" or "discretion" issues, it was inevitable, or highly likely, that the Secretary of State would (properly) have found that they were dishonest and decided to refuse leave. Element (b) is probably not significant in this case since Mr Biggs did not draw our attention to any factors likely to lead the Secretary of State to take the exceptional course of granting Mr Balajigari ILR even if he had acted dishonestly in the way found. The real question relates to element (a). As to that, we need only say that we are not satisfied that the Judge would have accepted the immateriality argument. In any event the issue is one that is properly determined by the UT, as the expert tribunal, with the benefit of oral argument and a fuller examination of the materials than has been possible before us.

140. Accordingly the correct course for us is to allow the appeal against the refusal of permission, grant permission, and remit the case to the UT to consider materiality, which is, on the basis of our earlier conclusions, the only outstanding issue.

141. It is possible that when the materiality issue is being considered by the UT the question noted at paras. 132-7 may arise – that is, of the extent of any difference in the threshold of materiality effected by section 31 (2A) in a case of this kind. Ideally it would be useful for us to consider that issue in this judgment. However, in circumstances where neither party has addressed any submissions to us about it we do not think it would be right to do so. We are in fact far from sure whether the issue will be of real importance on remittal in these cases. In the first place, the UT may well conclude that on the particular case the answer will be the same whichever test is applied. Even if there will in theory be cases where a "highly likely" test would produce a different result from an "inevitable" test, neither is truly hard-edged, and there might be thought to be room for a flexible approach depending on the nature of the unlawfulness alleged, so that the factors identified by Bingham LJ in *Cotton* remain relevant to the assessment. A different reason is that Mr Balajigari – and other claimants in similar positions – may now seek to rely on their article 8 rights, as discussed in Part B of this judgment, whether by amendment in these proceedings (if permitted) or in the context of a human

rights appeal. If that occurs, then the focus will shift from procedural fairness to the question whether Mr Balajigari did indeed act dishonestly, and the issue of materiality will fall away.

142. We have not so far dealt with Mr Balajigari's other grounds of appeal – see para. 125 above. As regards the two grounds which depend on article 8 being engaged by the Secretary of State's decision, it will be apparent from Part B of this judgment that we would agree that that is very likely to have been the case. But, as we have pointed out, no case based on article 8 was pleaded in the UT, and it cannot have been an error for UTJ Gleeson to proceed on the basis simply of "domestic" principles. That being so, it seems to us that she was right to refuse to admit the further documents which Mr Biggs sought to introduce, to the extent that they were relied on in support of his challenge to the decision itself; but they would in principle have been admissible on the issue of materiality had she found any procedural unfairness on the part of the Secretary of State.

KAWOS

Immigration History and Decision

143. The Appellants are Indian nationals. The First and Second Appellants are husband and wife. The Third and Fourth Appellants are their children, the former being born in India and the latter in the UK. The claims of Mrs Drabu and the children are dependent upon the claim of Mr Kawos.

144. Mr Kawos was born on 9 July 1981, and he first arrived in the UK on 24 January 2007, with entry clearance as a student valid until 31 October 2008. His wife and their first child joined him in October 2010. He was granted leave to remain until 8 November 2010 as a Tier 1 (Post-Study Work) Migrant; and then until 21 January 2013 as a T1GM.

145. On 17 January 2013, Mr Kawos applied for further leave to remain as a T1GM, supported by a letter from his accountants which confirmed that he had earned and been paid £37,042 in dividends in the year 25 December 2011 to 24 December 2012. He was granted further leave to remain until 9 February 2016.

146. On 3 February 2016, Mr Kawos attended the Solihull Premium Service Centre and made a further application for ILR. He brought with him a number of documents, including accounting information and a letter from his accountants. He was interviewed that day[11]. The interview lasted 18 minutes. At the start he signed a declaration that:

> "I have been informed that the purpose of the interview was to obtain further details on the information which I provided in my application for further leave to remain in the UK."

147. A handwritten note of the interview was kept by the immigration officer. The relevant questions and answers were as follows:

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[11] As we understand it, it is not standard to interview ILR applicants, whether they are using the premium service or otherwise, but an interview will be conducted if the immigration officer decides to do so.

> "Q5: Our records show that you declared to HMRC a figure of £12,000 from dividends, for the tax year 2012/2013. Yet, you have produced a SA302 for the tax year 2013 showing a figure of £29,555.00. Can you explain the discrepancy.
>
> A: Initially that was the amount declared to HMRC (£12,000). Later we discovered that it was wrong (by we, accountant). The accountant in the same week in October we applied for an amendment. I can provide you with the proof of what we have declared to HMRC. Only when the amendments were made by HMRC in Dec.15/Jan.16 we were provided with the SA302's.
>
> Q6: When did you realise this mistake?
>
> A: October 2015.
>
> Q7: How did it come about?
>
> A: Before preparing this application I was sorting through the documents from my 2013 extension. I gave this document to my accountant and it's at that point the error came to light.
>
> Q8: Is this same accountant used today?
>
> A: Yes.
>
> …
>
> Q10: So, as far as you're concerned all relevant earnings have now been declared to HMRC?
>
> A: Yes. Everything. Honestly.
>
> Q11: Can you provide evidence to show the error was picked up in October 2015 ?
>
> A: Yes. I should have the documents in my car. Give me 10 mins."

Despite that last question and answer it was Mr Kawos's evidence in the proceedings that he was not asked to obtain the documents to which he referred and was instead given a letter telling him that further enquiries needed to be made.

148. It seems unlikely that any further enquiries were in fact made because the Respondent's decision letter refusing the application was sent the same day. The refusal was under paragraph 322 (2) and (5) and also on the basis that the earnings declared were not "genuine" as required by paragraph 19 of Appendix A. The Reasons accompanying the decision letter (also dated the same day) refer to the declared earnings of £37,402 and continue:

> "However, 'HMRC' records show that you earned/declared and paid tax on dividends of £8,000 for the financial year of 2011/12 and dividends of £12,000 for the financial year 2012/13.
>
> You were interviewed at Solihull Premium Service Centre … on 3 February 2016. At the interview, you were asked to explain, at question 5, the reasons for discrepancies in 'HRMC' records in respect of your claimed earnings for 2012/13 (a copy of which you were provided with on the same day). You stated that your accountant discovered in October 2015 that the incorrect amount had been submitted and you subsequently made amendments. You provided HMRC returns at this interview to confirm that dividends of £8,888.00 were received for 2011/12 and dividends for £29,555.00 for 2012/13.
>
> It is apparent that you have mislead 'UKVI' by declaring the amount of £37,402 as a Self-Employed person in support of your [T1GM] leave to remain application on 17 January 2013, which you claimed to have earned during the period 25 December 2011 to 24 December 2012. However, according to 'HMRC' records you only declared £8,000 for 2011/12 and £12,000 for 2012/13 as Dividends.
>
> The fact that you have retrospectively declared part of these claimed earnings to HMRC is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with HMRC and/or UK Visas & Immigration.
>
> As the 'HMRC' records show considerable discrepancies in the amounts of Self-Employed earnings you have declared/paid tax on over the financial years, 2011/12 and 2012/13, it is apparent that you deliberately and wilfully mislead both the 'UKVI' and the 'HMRC' in order to inflate your earnings as part of the requirements to score points for previous earnings whilst pursuing your [T1GM] leave to remain applications."

The Reasons conclude with three standard-form paragraphs in identical terms to those which conclude the Reasons in Mr Balajigari's case (see para. 111 above.)

149. Mr Kawos applied for administrative review. He asked to be allowed to supply a letter from his accountant explaining the initial under-declaration. By letter dated 16 March 2016 the Secretary of State maintained his decision to refuse ILR. He was not prepared to accept the fresh evidence proffered, relying on paragraph AR.24 of Appendix AR of the Immigration Rules (see para. 61 above). An Enforcement Warning of the kind referred to at para. 80 above accompanied the administrative review decision. It included a section 120 notice requiring any additional reasons for wishing to remain to be made by submitting another application using the relevant form. As we understand it, no response was made to that notice, whether to raise an article 8 case or otherwise.

The Proceedings

150. After pre-action protocol correspondence, Mr Kawos[12] issued a judicial review claim challenging the decisions of 3 February and 16 March 2016. The grounds were somewhat diffuse but were summarised by UTJ Kamara in the decision to which we refer below as follows:

> "16. Firstly, it was argued that the respondents' refusal under paragraph 245 CD (b) with reference to paragraph 322 (2) was *Wednesbury* unreasonable; illegal (in that the respondent misdirected herself in law); procedurally unfair and failed to take into account relevant considerations. The applicant's amended tax return was accepted as a genuine error by HMRC; did not result in any additional tax liability and was consistent with his previous earnings. It was contended that the respondent was required to show that the applicant deliberately and dishonestly made false representations as to his previous earnings, *AA (Nigeria) v SSHD* 2010 EWCA Civ 77 applied.
>
> 17. Secondly, it was further argued that the Secretary of State's decision on the paragraph 322 (5) contained the same flaws. The point was made that the serious nature of the allegation and consequences for the applicant meant that the requirements of fairness were exacting in his case. It was contended that no allegation of dishonesty was put to the applicant during his interview with the respondent; the respondent failed to make adequate enquiries with HMRC and the response to the pre-action protocol incorrectly stated that a late payment was made.
>
> 18. Thirdly, the respondent was alleged to have misdirected herself in law in relation to Appendix AR 2.4 in rejecting the evidence from the applicant's accountant. The said letter was submitted to demonstrate a case working error as defined in paragraph 2.11 (a) (i) of Appendix AR. It was said that AR 2.4 (a) and (b) were met.
>
> 19. Fourthly, and lastly, it was said that in assessing whether the applicant's earnings were from genuine employment, the respondent misdirected herself in law in relation to paragraph 19 (j) of Appendix A and failed to take into account relevant considerations."

No claim was advanced under article 8.

151. In his witness statement filed with the proceedings Mr Kawos gave an explanation of how the mistake in his tax return for 2012/2013 came to be made. He also filed a letter from his accountant dated 18 February 2016 recording that HMRC had not treated the

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[12] In fact the proceedings, and this appeal, were brought by all the members of the family, but for convenience we will refer only to Mr Kawos.

error as a case of careless or deliberate conduct, though it gives no specific explanation of how the error arose.

152. Permission to proceed was granted by UTJ Peter Lane (as he then was) at a hearing on 14 October 2016.

153. The substantive application was heard before UTJ Kamara on 6 March 2017. Mr Slatter appeared for Mr Kawos. By a decision sent to the parties on 4 May she dismissed the application. She emphasised that the question for her was not whether Mr Kawos had in fact acted dishonestly but whether it was *Wednesbury*-unreasonable for the Secretary of State to conclude, on the material before him, that he had: she referred to *R (Giri) v Secretary of State for the Home Department* [2015] EWCA Civ 784, [2016] 1 WLR 4418, which confirms that that is the correct approach where the tribunal is not concerned with an issue of precedent fact (or a human rights claim[13]). For our purposes her reasons can be sufficiently summarised as follows.

154. At paras. 51-59 she considered the first two grounds together. She examined the nature of the original under-declaration and its correction, together with what she regarded as Mr Kawos's inadequate explanation in interview. She held that that material was such that it was not *Wednesbury*-unreasonable for the Secretary of State to conclude that the applicant made false representations or that it was undesirable to permit him to remain in the United Kingdom owing to his conduct. As regards the interview, she said, at para. 56:

> "The questions posed during the interview regarding the mismatch between the sums declared to UKVI and HMRC could not have come as a surprise to the applicant. Furthermore, the interviewing officer, after asking for an explanation, probed further by asking how the mistake had come about. The applicant, unarguably, had every opportunity to provide an explanation. … The respondent was not required to go further and put an allegation of fraud to the applicant during the interview."

155. At paras. 60-61 she considered the fourth ground and held that the Secretary of State had not been obliged to consider fresh evidence on the administrative review because there had been no case-working error.

156. At para. 62 she rejected the fourth ground on the basis (to paraphrase) that even though it might not have been established that Mr Kawos's declared current earnings were not genuine the point went nowhere because the refusal was justified under paragraph 322.

The Appeal

157. Mr Kawos appealed to this court on three grounds, namely:

> "1. The UTJ misdirected herself in law when judicially reviewing the Respondent's decisions and alternatively, misapplied the law following the case of *R (Giri) v SSHD* [2015] EWCA Civ 784;

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[13] As to the inapplicability of *Giri* where an article 8 claim has been raised, see *Ahsan*, para. 118 (and n. 11).

> 2. The UTJ was wrong to find that the Respondent's decisions were not vitiated by procedural unfairness;
>
> 3. The UTJ erred in upholding the Respondent's decision under para. 245CD (g) of the Immigration Rules ..."

158. With permission granted by McCombe LJ on 16 February 2018, Mr Kawos now pursues those grounds before us.

159. It is convenient to take the second ground first, and more specifically the complaint of procedural unfairness which forms part of it. This case is unlike *Balajigari* because of the interview which took place prior to the decision. Ms Anderson and Mr Malik submit that UTJ Kamara was right to find that that satisfied the requirements of procedural fairness by giving Mr Kawos the opportunity to explain the earnings discrepancy. There is obvious force in that submission. At first sight the Secretary of State did exactly what was required of him, by putting to Mr Kawos in interview the very discrepancy on which he based his subsequent decision. We agree with the Judge that it is not essential that he be told in terms that he was being accused of fraud: it would have been better if it had been put to him explicitly that the Secretary of State was minded to take the view that he had deliberately produced false figures either to HMRC in order to reduce his tax liability or to the Home Office in order to meet the minimum earnings requirement, but we accept that what was said was enough to put him on notice that that was the issue.

160. On balance, however, and not without hesitation, we do not agree with the Judge's conclusion. Specifically, we do not believe that it was fair that Mr Kawos should have been expected to give detailed and definitive answers to an accusation of dishonesty without any prior notice. The contrary view seems to us to depend on the assumption that he must have known what the Secretary of State had in mind and should therefore have come prepared to face an interview in which he would have to give a detailed explanation of the original error in order to rebut an allegation of dishonesty; but if he was in fact innocent – which is the very question which the Secretary of State had to decide – why should he have anticipated any such thing ? A small but telling detail is that when he was asked to explain how the error was detected he said that he did not have the documents with him but could get them from his car – which he was not then given the opportunity to do.

161. Once that point is reached, the case becomes indistinguishable from *Balajigari*. The decision was vitiated by procedural irregularity. In those circumstances we need not consider the other aspects of ground 1 or the other two grounds. We should say, however, out of deference to the Judge's careful judgment that, as regards ground 1, in the absence of any reliance on Convention rights she was right to proceed on the basis of a rationality review; and that we regard her conclusion on ground 3 as plainly correct.

162. There remains the question of materiality. The issue was not addressed as such by Judge Kamara but the material relevant to such a submission was fully before her, and Mr Slatter has not in his response taken any point on the absence of a Respondent's Notice. We have reviewed the points raised in counsel's submissions. As in *Balajigari*, we do not feel able ourselves fairly to decide the point, and the case will accordingly have to be remitted to the UT to decide the materiality issue. Our observations at paras. 141 apply equally in this case.

163. We would add, though this is not one of the pleaded grounds of appeal, that the Secretary of State's Reasons were also formally vitiated by a failure to consider explicitly whether the dishonest conduct which he had found rendered Mr Kawos's continued presence in the UK undesirable and the exercise of discretion at the second stage. But if these were the only errors it is hard to see how they could have been material unless some special circumstances had been relied on by Mr Kawos.

MAJUMDER

Immigration History and the Decision

164. The Applicants are Indian nationals, and are husband and wife. Mrs Majumder's claim for leave is dependent upon that of her husband.

165. Mr Majumder was born on 15 February 1987, and he first arrived in the UK on 27 October 2006, with an entry clearance as a student valid until 31 December 2009. He was granted leave to remain until October 2008 as a Tier 1 (Post-Study Work) Migrant; and then until March 2013 as a T1GM.

166. On 21 February 2013, he applied for further leave to remain as a T1GM, on the basis that in the year 20 January 2012 to 19 January 2013 he had earnings of about £40,000, including self-employed earnings of £12,761 as an IT consultant. That level of earnings gave him sufficient points for leave under the points-based scheme. He was granted further leave to remain until 27 September 2016.

167. On 19 July 2016, Mr Majumder attended the Sheffield Premium Service Centre and applied for ILR. In the questionnaire he completed, he answered "Yes" to question 9, which we have set out at para. 111 above. His application was refused that same day.

168. The Reasons accompanying the decision letter (again dated that same day) recited details of the income declared in the 2013 application for leave, and the response to question 9 of the questionnaire. They said that, however, information obtained from HMRC showed "No figures" for self-employment net income for the years 2011-12, 2012-13 and 2013-14. They continued:

> "Were it accepted that the figures declared to the Home Office were an accurate representation of your self-employed earnings between 20 January 2012 and 19 January 2013, your actions in failing to declare your earnings in full to [HMRC] would lead your application to be refused under Paragraph 322(5) of the Immigration Rules based on your character and conduct.
>
> The Secretary of State considers that it would be undesirable for you to remain in the United Kingdom based on the fact that you have been deceitful or dishonest in your dealings with HMRC and/or UK Visas & Immigration by failing to declare your claimed self-employed earnings to HMRC at the time and/or falsely representing your self-employed income to obtain leave to remain in the United Kingdom. Your application for indefinite leave to remain in the United Kingdom as a [T1GM] is therefore refused under Paragraph 322(5) of the Immigration Rules."

It will be noted that the Secretary of State's conclusion was based not on a declaration of false earnings but on a failure to submit tax returns at all.

169. Mr Majumder sought administrative review of that decision, saying that he had not sought to deceive anyone. He submitted online tax submissions and other documents from HMRC which showed that, on 26 March 2015, he had submitted a tax return for the year 2012-13 – the first time a tax return had been filed for that year – declaring his self-employed income of £12,761. The tax on that, together with a penalty of £450 and interest of £108.34, had been paid the following month. He also submitted a letter from his accountants, confirming the submission of the tax return and explaining its lateness as "due to some miscommunication".

170. However, in a further decision letter dated 22 August 2016 the Secretary of State maintained the earlier decision. The Reasons said:

> "We have checked the HMRC records we hold for yourself and they have confirmed that at the time of your application the total self-employed earnings declared for the tax years 2012/3 was £0. It is noted you submitted a tax calculation from HMRC with your application, which was printed on the 17/02/2016. However, the fact that you may have retrospectively amended your earnings is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with UKVI, HMRC or both organisations.
>
> It is noted that you have submitted further documentation with your administrative review. However, we are unable to accept this as we deem it to be fresh evidence. Your application was considered and decided on the basis of the evidence submitted before the date on which the application was decided. We will not consider new evidence or information when reconsidering a decision that was provided after that decision has been taken, unless it meets the requirements specified in paragraph AR2.4 of Appendix AR of the Immigration Rules. It is your responsibility to ensure that all appropriate evidence is submitted with the application for leave to remain.
>
> The evidence that you have provided with this application was not sent with the original application. It is not eligible for consideration because it is not evidence that:
>
> - was supplied previously but was not considered or considered incorrectly
> - proves that documents we assessed to be false were in fact genuine
> - proves the date of the previous application.
>
> We are satisfied that the records we hold from HMRC are accurate and reflect your declarations to them. As a result, we

> maintain that it is not acceptable to submit earnings to UKVI and then subsequently not declare your full earnings to HMRC. We maintain that you had a personal responsibility to ensure that earnings submitted to UKVI to gain leave to remain corresponded with those declared to HMRC.
>
> You claim in your administrative review that the UKVI has failed to exercise discretion when considering your case. You claim that as your application was refused under 322(5), the caseworker was obliged to seek an explanation or information from yourself before refusing your application. However, it is noted that during your appointment at Sheffield Premium Centre on the 19 July 2016 you completed a questionnaire in relation to your previous earnings. Question 9 asked: Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflected your self-employed income? to which you answered 'yes'. We therefore maintain that you were given an opportunity to provide reasons as to why your tax returns were submitted late which you failed to do. We therefore maintain that your application has been considered fairly and in line with the Immigration Rules.
>
> … You claim that the Secretary of State has asserted that from the evidence your actions were deliberate which you claim 'is irrational'. Careful consideration has been given to this point. However, our response is that the refusal under paragraph 322(5) is appropriate due to your conduct in declaring inconsistent earnings to UKVI and HRMC. Moreover, we are satisfied that a decision has been reached on your application fairly and in line with the Immigration Rules.
>
> Further in your administrative review, you claim that we should [have] exercised evidential flexibility under paragraph 245AA of the Immigration Rules and requested an explanation from yourself for the discrepancy. However, as outlined above we maintain that you were provided with an opportunity to provide an explanation in the questionnaire you completed at Sheffield Premium Centre which you failed to do so. Moreover, it is noted that in your administrative review you have not provided an explanation as to why your tax returns were submitted significantly late."

The Proceedings

171. After the usual pre-action correspondence, which bore no fruit, Mr Majumder sought judicial review of those decisions to refuse his application, and maintain that refusal, on three grounds:

    (1) The Secretary of State acted unfairly in failing to afford Mr Majumder an opportunity to put forward an explanation as to why his tax return was submitted late, to rebut the allegation that he had been dishonest, prior to making the decision.

(2) The Secretary of State had acted irrationally in concluding that the Applicant fell within paragraph 322 (5).

(3) The Secretary of State had erred in exercising his discretion to refuse the application under paragraph 322 (5).

No reliance was placed on Mr and Mrs Majumder's article 8 rights.

172. Permission to proceed was granted by UTJ Finch following a hearing on 25 May 2017. However, on 25 September 2017 UTJ Frances refused the substantive claim. His essential reasoning was:

(1) There was no duty on the Secretary of State to seek further information from Mr Majumder nor to offer him an opportunity to put forward an explanation for his failure to declare his income to HMRC and pay his tax on time, particularly as the 2016 questionnaire and the administrative review gave him such an opportunity which he failed to take (see paras. 18 and 22 of his determination). He was well aware of the situation at the time he made his 2016 application for ILR, and he failed to put the relevant information before the Secretary of State (para. 23).

(2) In the absence of any explanation at the time that the application was refused, the Secretary of State had not acted irrationally in finding Mr Majumder dishonest in failing to declare his income to HMRC at a time when he was relying on that income for the purposes of his application for leave to remain.

The Judge consequently refused the application for judicial review and ordered Mr and Mrs Majumder to pay the Secretary of State's costs of the claim in the sum of £4,079.

Subsequent Events

173. On 23 September 2016 Mr Majumder made a further application for ILR on the basis of long residence rather than under the PBS. We have not seen that application. It was refused on 5 February 2018 on the basis of paragraph 322 (5). He had a right of appeal against that decision on the basis that it constituted the refusal of a human rights claim.

174. On 13 November 2018, the FTT (FTTJ Wyman) allowed Mr Majumder's appeal. The main issue on the appeal was whether the Secretary of State had satisfied the burden upon him to show that Mr Majumder had been dishonest. The Judge found that his failure to submit his tax return on time was "an innocent mistake" (para. 55); and that "there is no suggestion that [his] behaviour calls into question his character and/or conduct to the extent that it is undesirable to allow him to enter or remain in the United Kingdom" (para. 52). Since the Secretary of State relied exclusively on the failure to submit the tax return on time as behaviour falling within the scope of paragraph 322 (5), that conclusion inevitably followed the Judge's finding of fact.

175. Mr and Mrs Majumder are thus now expected to be granted ILR. It was suggested by Ms Anderson that in those circumstances the appeal before us has become academic; but we do not agree. Mr Majumder through Mr Karim maintains that the UT's determination is wrong, and he is entitled to at least a declaration to that effect; but in any event there are practical consequences of allowing it to stand, because Mr and Mrs

Majumder have a costs order against them for over £4,000. That is not simply a debt – if they do not pay it, it may have adverse consequences for their immigration status in the future. Indeed, although there has been a subsequent tribunal finding that Mr Majumder was not dishonest, the earlier finding that he had been dishonest may also be unhelpful in any further consideration of his immigration status. There is therefore some real practical purpose to determining this appeal.

The Appeal

176. The decision taken in Mr Majumder's case was plainly flawed for essentially the same reasons as in *Balajigari*, but we will summarise the points for completeness and in order to deal with one or two particular features of his case.

177. First, there was a clear breach of the duty of procedural fairness by the Secretary of State in determining the application on the basis of a finding that Mr Majumder was dishonest without giving him a proper opportunity to rebut that allegation. The administrative review did not give him an opportunity to rebut the assertion, because he was not allowed to rely on any further evidence.

178. Ms Anderson and Mr Malik submit that Mr Majumder was aware of the failures in question (here, the late filing of tax returns) and also that question 9 in the questionnaire gave him an opportunity to acknowledge and explain that failure. We reject that submission, for the same reasons as in *Balajigari*: he cannot reasonably have been expected to defend himself against a charge of dishonesty that had not been made. And in Mr Majumder's case there is the further feature that there was and is no evidence that any tax return submitted by him was inaccurate. The only possible basis upon which dishonesty could be asserted was that he had been late in submitting his 2012-13 tax return, which was not the subject of any questions in the questionnaire.

179. Secondly, although the wording of the Reasons is opaque, the effect of the two paragraphs quoted at para. 168 above is that the fact that Mr Majumder had failed timeously to file tax returns in a year where earnings had been declared to the Home Office by itself justified the conclusion that he had been "deceitful and dishonest". That is the wrong approach, for the reasons explained at para. 42 above; but the case is *a fortiori* since Mr Majumder had not mis-declared his earnings but had simply made no tax return at all, which is a less obvious basis for suspecting dishonesty. But the essential point is the same: if the Secretary of State suspected dishonesty he could not proceed directly from that suspicion to a finding.

180. Thirdly, again the Reasons do not contain any balancing exercise of the kind discussed at para. 39 above.

181. We should also say that we see force in Mr Karim's submission that in the Reasons for the administrative review decision the Secretary of State proceeded on an incorrect factual basis in a number of respects. For example, there is reference to Mr Majumder having "retrospectively amended" his earnings (which he did not); and also that he had declared earnings to the Secretary of State and subsequently not declared them to HMRC, which, again – whether this comment was made concerning 2013 (when the tax return was not due) or 2016 (after it had been filed) – is simply incorrect. The Reasons appear to have treated this as a case where Mr Majumder had made an under-declaration of income to HMRC and later amended it upwards. It is very likely that the

case-worker was using a template for such claims, in which case it is an illustration of the perils of the unthinking use of such templates; but in any event it betrayed a failure to engage with the issue to which this particular case gave rise.

182. The post-hearing submissions challenge the cogency and credibility of Mr Majumder's explanation of his failure to file the returns in question, and raise the same immateriality point as in *Balajigari*. That argument cannot succeed in the light of the decision of the FTT that the failure to file the returns was an innocent mistake.

183. Accordingly, we would allow the appeal and quash the Secretary of State's decision.

ALBERT

Immigration History

184. Mr Albert is a national of Pakistan and was born on 4 November 1987. He entered the UK on 12 October 2006 as a student with entry clearance valid from 28 September 2006 until 31 October 2009. On 5 March 2009 he applied for further leave to remain as a Tier 1 (Post Study Work) migrant. That leave was granted until 2 April 2011. He made further successful applications for further leave to remain as a T1GM on 11 February 2011 and on 2 March 2013, the latter expiring on 24 March 2016.

185. On 29 February 2016 Mr Albert made an application for ILR. This was refused on the same day, under paragraph 322 (5). We do not have a copy of this decision, but it is apparent from the events which followed that it relied on the earnings discrepancies detailed below and concluded that they were "deceitful and dishonest". An administrative review of that decision was rejected on 6 April 2016.

186. On 25 April 2016 Mr Albert made a fresh application for ILR, supported by a letter from his solicitors, Farani Javid Taylor, dated 21 April 2016. The letter explicitly addressed the basis on which the earlier application had been refused, saying that the discrepancies were not dishonest and were the result of "genuine mistakes" about what expenses he had been entitled to deduct. It attached a good deal of supporting material including a letter from accountants whom he had recently instructed, FSL Accountancy: they had prepared corrected returns which had been sent, with a further payment, to HMRC.

187. That application was refused on the same day, again under paragraph 322 (5). An administrative review of that decision was rejected on 2 June 2016.

188. On 22 July 2016 Mr Albert applied for judicial review of the decisions dated 25 April and 2 June. On 18 August UTJ Martin granted permission. His reasons were:

> "It is arguable that the respondent may have failed to take into account relevant matters, in particular the applicant's explanation for having filed incorrect tax returns and the fact that he has since filed amended returns and paid the outstanding tax … The respondent refused an earlier application in February 2016 for the same reason and it is at least arguable that in deciding the second application she has relied too heavily on her earlier decision and

> not given proper scrutiny to the documents and submissions accompanying the current application."

189. On 19 October 2016 the Secretary of State agreed to a consent order by which Mr Albert's application for ILR would be reconsidered within six months.

190. On 2 March 2017 Mr Albert's application was again refused on paragraph 322 (5) grounds. An administrative review of that decision was rejected on 6 April 2017. It is those decisions that are challenged in the current proceedings.

The Decision Letters

191. We take in turn the original decision and the later decision taken in consequence of the consent order.

The First Decision: 25 April 2016

192. In the Reasons accompanying the refusal letter it was noted that Mr Albert's application for ILR dated 11 February 2011 included a claim that he had earnings of £43,230.55 (partly from employment and partly from self-employed income) between 1 February 2010 and 31 January 2011, for which he was awarded 25 points under the points-based system; but that information held on his declared earnings with HMRC showed that his total earned income between April 2009 and April 2011 was £31,972. Likewise it was noted that in his T1GM application dated 2 March 2013 Mr Albert claimed earnings of £40,308.82 (comprising employed income of £23,290.82 and self-employed earnings of £17,018) between 1 February 2012 and 31 January 2013, for which he was awarded 25 points; but that information on his self-employed earnings declared to HMRC for the relevant tax years confirmed that in 2011/12 no self-employed earnings were submitted to HMRC, that for the year 2012/13 gross self-employed turnover of £19,300 resulted in a net profit of £1,891 only, and that for the year 2013/14 there were no self-employed earnings submitted to HMRC.

193. The Reasons acknowledge that, "after being asked to provide an explanation for these discrepancies"[14], Mr Albert had declared the claimed self-employed earnings to HMRC. However, they continue:

> "… The fact that you have retrospectively declared these claimed earnings to HMRC is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with HMRC and/or UK Visas & Immigration."

194. The Reasons continue:

> "Were it accepted that the figures declared to the Home Office were an accurate representation of your self employed earnings between 22 December 2011 until 25 November 2012, your actions in failing to declare your earnings in full to HM Revenue & Customs would lead your application to be refused under Paragraph 322(5) of the Immigration Rules based on your

[14] The papers before us do not show any such request. We assume that the reference is to the earlier refusal.

> character and conduct, as it would be considered that you have been deceitful or dishonest in your dealings with HM Revenue & Customs.
>
> As your HM Revenue & Customs record of income is not consistent with the income you declared to the Home Office and the documents you submitted confirm the data the Home Office held in relation to your income, then it is considered you have used deception when submitting your application of 02 March 2013 as you have claimed points for earnings from self employment which were not declared to HM Revenue & Customs and are therefore deemed as fabricated.
>
> It is acknowledged that a refusal under Paragraph 322(5) would not be mandatory, however the evidence submitted does not satisfactorily demonstrate that the discrepancy between the amount of self employed earning declared to HM Revenue & Customs and the amount declared on the application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant for the tax years ending April 2012 and April 20133 were genuine errors. It is noted that there would have been a clear benefit to yourself either by failing to declare your full earnings to HM Revenue & Customs with respect to your tax liability or by falsely representing your earnings to UK Visas & Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant. Given these factors it is considered a refusal under Paragraph 322(5) of the Immigration Rules is justified.
>
> It is not considered a credible explanation that a [*sic*] you had previously submitted a self-assessment tax return with in-accuracies [*sic*] which have been corrected for the following periods; 06 April 2011 to 05 April 2012 and 06 April 2012 to 05 April 2013 and the declared earnings at the time were considerably lower that [*sic*] the actual amount you claimed on your application. Information on tax return liabilities and laws is publicly available and it is your responsibility to familiarise yourself with them before making an application. It was your responsibility to ensure that your tax return was submitted on time with the correction."

Again, the structure, and some of the detailed drafting, is rather opaque; but the overall effect is that the Secretary of State concluded that Mr Albert had been "deceitful or dishonest [*sic*]" in his tax returns for 2011/12 and 2012/13.

The Second Decision: 2 March 2017

195. The Reasons accompanying the second relevant refusal of ILR, dated 2 March 2017, noted that Mr Albert had declared to UKVI self-employed earnings of £4,511 in the period from 1 April 2010 to 31 January 2011, which straddled the two tax years 2009/10 and 2010/11. He had declared to UKVI self-employed earnings of £17,018 in the

period for 1 February 2012 to 31 January 2013, which straddled the two tax years 2011/12 and 2012/13. For the tax year 2009/10, on his initial self-assessment return to HMRC, he had declared no income from self-employment. For the tax year 2010/11 on his initial self-assessment return to HMRC, he had declared a profit from self-employment of £511 from a total turnover of £5,000. For the tax year 2011/12 on his initial self-assessment return to HMRC, he had declared no income from self-employment. For the tax year 2012/13, on his initial self-assessment return to HMRC, he had declared a profit from self-employment of £1,891 from a total turnover of £19,300. Although the figures are presented rather differently, focusing on the income from self-employment, these are essentially the same discrepancies as had been relied on in the decision of 25 April 2016.

196. The Reasons went on to refer to the fact that that Mr Albert had submitted a letter from FSL Accountancy and had submitted revised self-assessment returns to HMRC. It was said that careful consideration had been given to the information provided to UKVI and to HMRC. It was clear that the initial information that he had provided to HMRC about his earnings was significantly different from the information provided to HMRC [*sic*]. It was noted that the revised tax returns had only been submitted on 19 April 2016, after the application for settlement of 29 February 2016 had been refused.

197. The Reasons continue:

> "You state that you became aware of the errors in your tax returns after the refusal of your settlement application and contacted FSL Accountancy to review your income and expenses for the tax years 2009/10, 2010/11 and 2012/13.
>
> You state you had initially submitted your tax return without the assistance of an accountant and that you made errors on your original HMRC tax return for 2012/13 by including non-allowable expenses, and have provided a list of those expenses. You have not provided a specific explanation for the errors on your original tax return for 2010/2011, nor for your failure to initially declare income from self-employment in 2009/10.
>
> Consideration has been given to the explanation provided, and to your statement that HMRC are not pursuing any action with regard to the amended submissions. However it is clear that when applying for your Tier 1 General visa in February 2011 and again in March 2013 you were certain of the level of profit you had made from self employment and that it did not contain expenses where the payment constitutes a reimbursement for monies the applicant has previously outlaid, which are classed as unearned income and thus not considered as part of earnings when considering an application for leave to remain, but when submitting your tax returns over the same periods, you would have included such expenses. Your explanation that this was a genuine error when completing your self-assessment tax return is therefore not accepted.

> Your actions in declaring different amounts of income to HMRC and UKVI lead to the conclusion that in light of your character and conduct it would be undesirable to allow you to remain in the United Kingdom. Your character and conduct with regards to declaring your income would lead to a refusal of your application under General Grounds Paragraph 322(5) of the Immigration Rules. Whilst a refusal under Paragraph 322(5) of the Immigration Rules is not a mandatory decision, the evidence submitted does not satisfactorily demonstrate that the discrepancy between the amount of self employed earnings declared to HM Revenue and Customs and the amount declared on the application for leave to remain in the United Kingdom as a Tier 1 (General) Migrant were genuine errors. It is noted that there would have been a clear benefit to yourself either by failing to declare your full earnings to HM Revenue & Customs with respect to your tax liability or by falsely representing your earnings to UK Visas & Immigration to enable you to meet the points required to obtain leave to remain in the United Kingdom as a Tier 1 (General) Migrant. Given these factors it is considered a refusal under Paragraph 322(5) of the Immigration Rules is justified."

The Administrative Review Decision: 6 April 2017

198. The application for administrative review was made on 9 March 2017. Mr Albert's complaint was that, notwithstanding the basis on which UTJ Martin's order had been made, the caseworker had in substance again failed to take into account the materials supplied with the application of 25 April 2016. It said in terms: "I am NOT providing any new information or facts". That may not have been strictly accurate, because Mr Albert had at some point also submitted evidence that HMRC had not imposed any penalty in relation to the original under-declarations; but nothing turns on this.

199. The Secretary of State's refusal of the administrative review application begins by saying:

> "You have argued that the caseworker who produced the reconsidered decision letter has simply reproduced the same refusal reasons as included on the initial decision letter, without taking into account the findings of the JR permission hearing. However we note that Judge Martin only granted permission to proceed with the JR. No conclusive determinations were promulgated following any substantive hearing regarding the issues in dispute. The SSHD agreed to reconsider the case, but as with any reconsideration, no new evidence is introduced. It is therefore entirely unsurprising that, based on exactly the same evidence, another caseworker evaluating your case arrived at the same conclusions and refused your application for the same reasons."

200. That is not well expressed. It reads as if Mr Albert had been attempting to rely on fresh evidence produced since the original application, whereas he had said in terms that that

was not the case. The whole basis of the consent order was that the caseworker had (at least arguably) not first time round considered the materials submitted with the application of 25 April 2016, so the remark that the result was "entirely unsurprising" was inapposite.

201. However, the Reasons do go on to address the complaints made in the application for administrative review and thus the application generally. The structure involves considerable repetition, and it is unnecessary to set the reasons out in full, but it is necessary to quote some passages, as follows:

> "The caseworker has correctly identified undesirable conduct and therefore 322(5) would be an appropriate rule when considering this conduct. The initial failure of you [*sic*] to correctly provided [*sic*] accurate information to government departments cause the caseworker to question your character and conduct … As previously stated, the initial discrepancies in the income you submitted to UKVI and declared to HMRC were enough to cast doubt in the Secretary of State's mind on your character and conduct. It is deemed that due to your character and conduct it would not be conducive to the public good to allow you to remain indefinitely in the UK."

After making a particular criticism of the plausibility of one aspect of Mr Albert's explanation of the discrepancy, the Reasons continue:

> "… This casts doubt further doubt on your credibility, adding to the concerns of the Secretary of State ... Whilst all the evidence provided with your applications has been assessed accurately, the information you have provided is insufficient to relieve the Secretary of State of doubts regarding your income discrepancies declared to HMRC. The benefits of this are clear and as such, we maintain that based on your character and conduct when dealing with other government departments it is not desirable to allow you to remain in the UK."

After referring again to the information that shows the discrepancies, the Reasons continue:

> "Based on this and taking into account the clear advantage to you either by reducing your income to reduce your tax liability, or by inflating your earnings to insure a grant of leave, it is deemed that your character and conduct when dealing with government departments is questionable. This justifies a refusal under Paragraph 322 (5)."

The Proceedings

202. On 17 May 2017 Mr Albert submitted a second application for judicial review challenging the decisions of 2 March and 6 April 2017.

203. That application was refused on the papers by UTJ Frances on 8 August 2017 (in an order sealed on 19 August). The renewed application for permission to bring a claim for judicial review was refused by UTJ Coker following an oral hearing on 30 January 2018.

The Decision of the Upper Tribunal

204. The way in which the application for permission to bring a claim for judicial review was presented before UTJ Coker (Mr Albert was then acting in person) was that the "core" of the claim was "that the decision taken by the Secretary of State … [under] paragraph 322 (5) was either irrational or unreasonable": see para. 3 of her judgment. UTJ Coker came to the conclusion that that argument should be rejected. She was of the view that it was "plainly open" to the Secretary of State to reach the conclusion that she did (para. 5); that the Secretary of State had taken account of the explanation that Mr Albert had given but that, on the basis of the figures, she had "reached a reasonable decision that she did not believe it" (para. 6); and that the Secretary of State had considered the documents that were in front of her but reached a decision that was open to her (para. 7).

205. Before this Court we have had the advantage of both written and oral submissions made by Mr Saini on behalf of Mr Albert. Those submissions have been much more detailed.

Subsequent Events

206. On 19 April 2017 Mr Albert made a further application for ILR, this time under paragraph 276B of the Immigration Rules, on the basis of ten years' continuous lawful residence. That application was refused both on the basis that he did not satisfy the residence requirement, by reason of intervals in his residence in the UK when his leave had expired and by reference to paragraph 322 (5) on the same basis as his previous applications.

207. That refusal was accepted by the Secretary of State as involving the refusal of a human rights claim, with the result that Mr Albert was entitled to an appeal to the FTT. The appeal was heard by FTTJ Smith on 26 June 2018. We need not set out the totality of his reasoning, but he found both that Mr Albert did satisfy the residence requirement and that the Secretary of State had not proved that Mr Albert, whom he had heard cross-examined on the explanation for the earnings discrepancies, had acted dishonestly. He accordingly allowed the appeal.

208. The Secretary of State appealed to the UT. The appeal was heard by DUTJ Mandalia on 6 December 2018. At the time of the hearing before us it was known that he had decided that FTTJ Smith had made an error of law in relation to the continuous residence issue, but his decision on the paragraph 322 issue was not known. It was only on 8 March 2019 that he promulgated a decision allowing the appeal on both points and remitting the underlying appeal to the FTT for a fresh hearing. Since we are told that Mr Albert has now made an application for permission to appeal to this Court, it would be wrong of us to embark on any analysis of DUTJ Mandalia's decision.

209. Ms Anderson submitted that the consequence of those developments, at least as known at the time of the hearing, was that Mr Albert's appeal was academic. We are not sure whether she would have made that submission had she been aware of DUTJ Mandalia's

final decision, but we should in any event say that we do not accept it. As in Mr Majumder's case, there remains the question of the costs which UTJ Coker ordered Mr Albert to pay. Further, we accept Mr Saini's submission that since one of the issues in the now remitted appeal is whether Mr Albert satisfied the requirement of continuous lawful residence it remains important that this Court determines whether the Secretary of State's decision in the present claim should be quashed, as that may have an impact on whether Mr Albert's leave under section 3C of the Immigration Act 1971 is extant.

The Appeal

210. This appeal is unlike the others in that, because of the particular history of Mr Albert's applications, the absence of a "minded to" letter does not render the impugned decision procedurally unfair. The Secretary of State refused his earlier application, of 29 February 2016, on the explicit basis that his original returns to HMRC had been dishonest. His solicitors took the opportunity of the letter accompanying his fresh application of 25 April 2016 to explicitly address that allegation. The Secretary of State in his decision of 2 March 2017, and in the subsequent administrative review decision, had regard to the explanation which they proffered. Accordingly, even if a claim based on procedural unfairness had been advanced before UTJ Coker it could not have succeeded.

211. We are, however, very troubled by the terms of the Reasons given for both decisions. In neither set of Reasons does the Secretary of State state in terms that he has found the discrepancies to be the result of dishonesty. Instead, the Reasons for the administrative review decision repeatedly use language which suggests a lesser threshold. In the first of the passages quoted at para. 201 above they refer to "undesirable conduct", which is plainly the wrong test; the succeeding passages are couched in terms of the Secretary of State's "doubt" and "concerns"; and the final passage quoted "deems" (which is an odd word in this context) Mr Albert's conduct to have been "questionable", which is certainly short of a finding of dishonesty.

212. We fully acknowledge that some of the other passages in both sets of Reasons would appear clearly to imply a finding of dishonesty – specifically, the rejection of the explanation of "genuine error" and the observations to the effect that Mr Albert had a motive to submit "false" figures – and we have considered anxiously whether the correct view, reading the Reasons as a whole, is that it is sufficiently clear that the Secretary of State did find dishonesty and that the passages suggesting otherwise simply represent loose language: we have to say that these letters generally are poorly drafted. We have come to the conclusion, however, that it is at least seriously arguable that there was a substantive misdirection here. If, as we have held above, paragraph 322 (5) can only be relied on by the Secretary of State where he has made a positive finding of dishonesty, we regard it as important that it be quite clear that such a finding has indeed been made: there may perhaps be cases where that is indeed clear even if the words "dishonest" or "deceit" are not actually used, but the benefit of any doubt must go to the applicant. Quite apart from anything else, using the right language ensures that caseworkers face up to the seriousness of the finding that they are making. In our view there is a real doubt here about whether the caseworkers understood what they had to find.

213. We have also considered anxiously whether it would be right to allow Mr Albert's appeal on this basis when the case does not appear to have been argued this way below

and this point was not indeed pleaded by Mr Saini. But in the particular circumstances of this case we believe that it is. We heard full argument on the underlying issue of the nature of the conduct which engages paragraph 322 (5). These are in the nature of test cases and it is important that we squarely address the issues to which they give rise. It is also important to bear in mind that we are concerned with permission only and that Mr Albert was not represented below.

214. There remains the issue of materiality. In circumstances where the FTT has already found that the discrepancies were not dishonest we do not see how we could dismiss the appeal on the basis that it was inevitable, or highly likely, that the decision would have been the same if the Secretary of State had directed himself correctly. It is true that that finding was overturned on appeal, but the UT remitted the issue rather than deciding it for itself. Of course, since the appeal is only against the refusal of permission the issue of materiality can in theory be considered at the substantive hearing in the UT, but in practice it is likely to be decided one way or the other by the outcome of the separate FTT proceedings – as to this, see para. 218 below.

215. We would add, though this is not one of the pleaded grounds of appeal, that the Secretary of State's Reasons were also formally vitiated by a failure to consider explicitly whether, even if Mr Albert had been clearly, and legitimately, found to have been guilty of dishonest conduct rendering his continued presence undesirable, there were nevertheless reasons why leave to remain should have been given in the exercise of the "second stage" discretion. But we need not pursue the point further since no grounds for the exercise of this exceptional discretion have been advanced.

216. Having reached this point, we need not consider the pleaded grounds of appeal in full. To some extent they depend on the contention that the Secretary of State was obliged to ascertain from HMRC whether any penalty had been imposed on Mr Albert: that argument cannot be sustained in the light of our conclusions at paras. 72-76 above. But we should mention one other ground advanced by Mr Saini which we do not consider to be arguable. He submits that the refusal letter of 2 March 2017, which we have quoted above, accepted that points should be given to Mr Albert for various matters, which included his earnings. It would therefore appear that the Secretary of State accepted that his earnings were genuine and so, submits Mr Saini, it would not be open to him to contend that they were not genuine under paragraph 19(i) of Appendix A to the Immigration Rules. However, in our view, that submission does not meet the point made on behalf of the Secretary of State that, although Mr Albert's earnings may have been correctly declared to the Secretary of State, what had been declared in the past to HMRC was inaccurate. It was that discrepancy which was relied on by the Secretary of State to justify reliance on paragraph 322 (5) and, in principle, that course was available.

217. For the above reasons we propose to allow the appeal against the decision of UTJ Coker refusing permission to bring a claim for judicial review. That claim will have to be remitted for consideration at a substantive hearing, on the basis at least of the issue which we have identified at paras. 211-212 above. The original grounds of claim are not professionally pleaded and are unsatisfactorily discursive. Mr Albert may wish to seek permission to amend in order to raise other grounds. Plainly he cannot rely on any ground which we have held to be bad in law; but, for the avoidance of doubt, we are not to be treated as having expressed any view either way on the actual reasoning on which UTJ Coker refused permission. We are certainly not critical of her reasoning,

on the basis of the way that the case was presented to her, but things have moved on. Mr Albert may in principle wish to consider seeking permission to rely on article 8, but it is debatable what that would add given the existing FTT proceedings, to which we now turn.

218. Ms Anderson submitted that since Mr Albert is now exercising an alternative remedy through the FTT appeal route, refusal of relief would be mandatory in the judicial review proceedings. We agree that it may well be appropriate to stay further proceedings in the remitted judicial review proceedings until it is known whether the decision of DUTJ Mandalia stands and, if it does, until the outcome of the remittal hearing in the FTT. But the inter-relation of the issues in the two sets of proceedings needs to be considered with some care; and that is not an exercise which it is for us to perform. The parties will hopefully be able to agree sensible case management directions, at least once it is known whether Mr Albert has permission to appeal against DUTJ Mandalia's decision. If they cannot, appropriate directions will have to be made by the tribunals themselves.

CONCLUSION

219. The formal result is that each of these four appeals will be allowed. In all save *Majumder* the case will be remitted to the UT; in *Majumder* the decision of the Secretary of State to refuse ILR is quashed.

220. However, in broader terms the effect of our reasoning can be summarised as follows.

221. First, as discussed in Part A of this judgment, the approach taken by the Secretary of State in deciding to refuse the applications for leave to remain in each of these cases on paragraph 322 (5) grounds – which we take to have been his general approach in all earnings discrepancy cases – was legally flawed (except, for particular reasons, in *Albert*). This is principally because he proceeded directly from finding that the discrepancies occurred to a decision that they were the result of dishonesty, without giving applicants an opportunity to proffer an innocent explanation. But nor does he address the further questions of whether the dishonesty in question renders the presence of the applicant in the UK undesirable or whether there are other factors which outweigh the presumption in favour of removal, or give applicants the opportunity to raise any matters relevant to those questions: such cases will no doubt be exceptional, but the step cannot simply be ignored. The availability of administrative review is not an answer, not least because the applicant is not normally allowed to produce evidence that was not produced before the original decision. That unlawfulness can be avoided for the future by the Secretary of State adopting a "minded to" procedure, which informs applicants of his concerns and gives them the opportunity to show cause why ILR should not be refused by offering an innocent explanation of the discrepancies (which will need to be particularised and documented so far as possible) and/or drawing attention to matters relevant to the "undesirability" or "discretion" issues. In *Albert* there was (at least arguably) a distinct unlawfulness, in that the Secretary of State failed to make an explicit finding of dishonesty.

222. Secondly, those defects need not lead to a paragraph 322 (5) refusal being quashed if the UT is satisfied that they are immaterial – that is, that the result would have been the same even if the applicants had been given an opportunity to explain the discrepancies; and it is principally in order to consider that question that we have remitted three of the

cases. There may be an issue, which we have not been able to resolve on this appeal, as to the precise calibration of the test of immateriality; but it may be of limited importance in practice.

223. The two previous points are determinative of the present appeals because the Appellants have in these proceedings challenged the paragraph 322 (5) refusals only on conventional public law grounds. But we have expressed the view in Part B 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: the circumstances in which an appeal will be available are considered in Part C.