Neutral Citation Number: [2020] EWCA Civ 1072

Case No: C6/2016/4424

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPEPR TRIBUNAL JUDGE KEBEDE
Claim No JR/6628/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/20

Before :

LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE CARR

- -

Between :

THE QUEEN ON THE APPLICATION OF SAUD AKRAM

Applicant

- and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Jay Gajjar (instructed by **Ashton Ross Law**) for the **Applicant**
Zane Malik (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 12 August 2020

- -

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. In this appeal, the Applicant sought to challenge the decision of Upper Tribunal Judge Kebede dated 16 November 2016 refusing his application for permission to proceed with a judicial review of the Secretary of State's decision of 28 April 2016 (maintained on administrative review on 31 May 2016) to refuse his application for indefinite leave to remain. On 18 June 2017, I refused permission to appeal. The Applicant now seeks permission to reopen the appeal under CPR rule 52.30.

2. The refusal of permission to appeal was a final determination of the appeal for the purposes of CPR rule 52.30(1), which provides that:

> "The Court of Appeal… will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

Therefore, unless each of these criteria is satisfied, the court has no power to reopen an appeal. If they are each satisfied, then the court has a discretion to do so; although it may be difficult to envisage, in practice, circumstances in which the three criteria are satisfied and the court's discretion exercised not to reopen the appeal.

3. The reopening of an appeal is approached in the same way as the reopening of a final judgment after full argument, in accordance with the principles set out in Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528 and, more recently, in Lawal v Circle 33 Housing Trust [2014] EWCA Civ 1514; [2015] HLR 9 at [65], R (Goring-on-Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 1860; [2018] 1 WLR 5161 at [10]-[11] and [15] and Singh v Secretary of State for the Home Department [2019] EWCA Civ 1504 at [3]. It is an exceptional jurisdiction, to be exercised rarely. It will not be exercised simply because an earlier determination was (let alone, may have been) wrong, but only where there is a "powerful probability" that the decision in question would have been different if the integrity of the earlier proceedings has not been critically undermined. The injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation.

4. Before us, Jay Gajjar of Counsel has appeared for the Applicant, and Zane Malik of Counsel for the Secretary of State. At the outset, I thank them both for their helpful submissions.

The Facts

5. The Applicant is a Pakistan national born on 1 August 1984.

6. He arrived in the United Kingdom on 21 January 2009 with leave to enter as a student until 30 September 2010 which was later extended to 29 April 2012.

7. On 1 April 2011, he applied for further leave to remain as a Points-Based System Tier 1 (General) Migrant. In that application, he declared that, for the period 16 March 2010 to 15 March 2011, he had total earnings of £38,267.58, namely £14,212.58 salaried earnings from Medina Processing Limited and £24,055 self-employed earnings trading as SA Party Decorators & Catering. Those earnings were supported by bank statements, accounts and an accountants' letter. For that aggregate level of earnings, he was awarded 20 points, sufficient for the purposes of obtaining his further leave to remain. However, in his tax return for the year 2010-11, he declared only £734 earnings from self-employment, a matter to which I shall return.

8. The Applicant's application for leave to remain was granted; and was later extended to 11 May 2016.

9. On 27 April 2016, he applied for indefinite leave to remain on the basis of five years residence. No separate article 8 claim for leave was made. With that application, he submitted documents concerning a revised tax calculation for the year 2010-11 dated 21 April 2016 following a declaration by the Applicant to HM Revenue & Customs ("HMRC") of further self-employed income for that year taking that income from the £734 originally declared to £24,055, i.e. in line with the income he had earlier declared to the Secretary of State for that year. That resulted in an additional tax payment of about £5,000. The Applicant also submitted confirmation from HMRC of his declared income for tax purposes and tax paid for the period 2008-9 to 2016-7. In completing the questionnaire which accompanied his application, the Applicant explained the discrepancy in his declared income for 2010-11 and its recent correction: he said that the tax return for that one year was found to have typing error and "got amended & updated & tax paid".

10. The application was refused the following day under paragraph 245CD(b) read with paragraph 322(5) of the Immigration Rules. Paragraph 245CD(b) provides that an applicant must not fall for refusal under the general grounds for refusal, which include as paragraph 322(5), as a ground upon which leave to remain "should normally be refused":

> "the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions…, character or associations or the fact that he represents a threat to national security."

11. In refusing the 2016 application for indefinite leave to remain, having referred to the declaration of income for 2010-11 in the 1 April 2011 application, the decision-maker on behalf of the Secretary of State said:

> "Information held on your earnings declared to [HMRC] for the tax year 2010-11 confirmed the following:
>
> [HMRC] data confirmed for the tax year ending April 2011 your total income from all employment was £19,969, of which profitable income from self-employment was £0.00.

> At your appointment on 28 April 2016 at Sheffield Premium Service Centre you were asked to complete a questionnaire regarding your economic activities and your earnings from your employment. Question 9 of the questionnaire asked:
>
> Q – Are you satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income?
>
> A – You ticked 'Yes' to indicate you are satisfied that the self-assessment tax returns submitted to HMRC accurately reflect your self-employed income.
>
> Were it accepted that the figure declared to the Home Office was an accurate representation of your earnings between March 2010 to March 2011, 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.
>
> It is noted that you have attempted to retrospectively declare claimed earnings to [HMRC]. The fact that you made an amended return to HMRC on 21 April 2016 is not sufficient to satisfy the Secretary of State that you have not previously been deceitful or dishonest in your dealings with [HMRC].
>
> It is acknowledged that a refusal under paragraph 322(5) would not be mandatory, it is noted that there would have been a clear benefit to yourself either by failing to declare your full earnings to [HMRC] 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.
>
> Accordingly, I am satisfied that your presence in the United Kingdom is not conducive to the public good because your conduct makes it undesirable to allow you to remain in the United Kingdom".

12. The Applicant sought an administrative review of that decision. Without lodging any further evidence, the Applicant submitted that, for the year 2010-11, he had declared some self-employed income (£734) which showed that he had the intention of declaring such income; he had corrected the 2010-11 declaration of income made to HMRC and paid the outstanding tax prior to making the 2016 application; and he had made a full declaration of income and paid the relevant tax in all of the years when he had no application for an extension of his leave, all of which showed (the Applicant submitted) that the error in 2010-11 was a single, genuine and honest error. He relied upon his general good character: in addition to paying his tax, he had never been in

trouble with the police, had no criminal convictions and had maintained himself without recourse to public funds.

13. However, on 31 May 2016, on the administrative review, the Secretary of State maintained her refusal decision. In doing so, the decision-maker said: "We have carefully considered the points that you raised in your administrative review"; and she expressly took into account his otherwise good character. In a separate letter of the same date, written in similar terms to the original refusal, the self-employed income as originally declared to HMRC was corrected from nil to £734.

14. That refusal on the administrative review brought to an end the continued leave to remain the Applicant had enjoyed under section 3C of the Immigration Act 1971 during the pendency of his application; and meant that the Applicant was subject to the so-called "compliant environment" or "hostile environment" provisions of the Immigration Act 2014, so that the Applicant did not (e.g.) have access to employment, rented accommodation or full NHS services.

15. The Applicant applied for judicial review of the refusal of leave to remain. He was acting in person, and therefore the narrative and broad nature of his grounds of challenge can perhaps be forgiven. He submitted that the decision was "unreasonable, unfair and unlawful", on essentially three bases.

    i) The Secretary of State had failed properly to take into account the circumstances of the under-declaration to HMRC, namely that it was a single isolated error which had now been corrected, a matter which had been emphasised in the Applicant's submissions on the administrative review. The only inference to be drawn from those circumstances (it was said) was that the income was genuine and the under-declaration to HMRC a mere innocent error. This was in effect a submission that the Secretary of State's conclusion that the Applicant had been dishonest had been Wednesbury unreasonable.

    ii) The Secretary of State erred in not checking earlier the income which had been declared to HMRC.

    iii) The decision that the Applicant had been dishonest was an abuse of power because, in another case in which an under-declaration of income had been made to HMRC, the Secretary of State had simply invited the applicant to amend her tax returns and, following such amendment, granted her leave to remain.

16. On 13 September 2016, Upper Tribunal Judge Gleeson refused permission to proceed on the papers, saying (at paragraph 3):

> "The Applicant's grounds are unarguable. The [Secretary of State] was entitled to take the view which she did of his admitted under-declaration of income in the tax year 2010-11."

17. On 20 September 2016, the Applicant renewed his application for permission to proceed, simply relying upon his original grounds. That application came before Judge Kebede on 16 November 2016. She refused it. In doing so, the judge referred to the Applicant's explanation for the under-declaration of income to HMRC (i.e. he

had simply made a "typing" error which had been corrected), but she found that the Secretary of State unarguably took into account that explanation and considered the fact that the Applicant had subsequently filed tax returns (see [18]), but considered that that was not sufficient to satisfy her that he had not been dishonest with his dealings with HMRC and/or UK Visas and Immigration (see [6]). She also found that, having concluded that the Applicant had been dishonest, it was clear that the discretion within paragraph 322(5) had been exercised; and, in concluding that the discretion should not be exercised in the Applicant's favour, all relevant matters had been considered (see [20]).

18. The Applicant appealed to this court. On 18 July 2017, I refused permission to appeal in these terms:

> "The Applicant contends that (i) the original decision was procedurally unfair as the Secretary of State did not give him an adequate opportunity to explain why he had underdeclared his income; (ii) in the light of his explanation, the Secretary of State's conclusion that the under-declaration was dishonest was Wednesbury unreasonable; and (iii) that conclusion was contrary to the Secretary of State's own policy which requires 'reliable evidence' that calls into question an individual's character and/or conduct.
>
> Leaving aside the fact that not all these matters were taken below, they are unarguable. The Applicant accepted that, for the year 2010-11, he earned about twice as much as he declared to HMRC. He did not seek to correct that error until a week before he made his immigration application in 2016. The Secretary of State was fully entitled to conclude that the tax return was dishonest; and that that dishonesty was sufficient to render the Applicant's presence in the UK undesirable. The Applicant had every opportunity to indicate that he had underdeclared his income and why; in his immigration application, he confirmed that his tax returns accurately reflected his income.
>
> No strand of these grounds stands any prospect of succeeding on an appeal."

19. It is that appeal ("the first appeal") which the Applicant now seeks to reinstate.

20. However, to complete the chronology, following my Order of 18 July 2017, on 22 August 2017 the Applicant made a further application for indefinite leave to remain. That application was refused on 19 December 2017, on two grounds, namely (i) under paragraphs 19(i) and (j) of Appendix A to the Immigration Rules, the Secretary of State was not satisfied that the self-employed earnings claimed in the 2017 application and previous applications for leave were genuine, and (ii) under paragraph 322(5) on the basis of the same dishonesty in declarations of income to HMRC and the Secretary of State for the year 2010-11 as identified in the 2016 refusal. The decision-maker clearly did not simply refuse the application on the basis that the

issues in it had been determined in refusing the 2016 application: the application was considered afresh. That decision was upheld on review on 30 January 2018.

21. The Applicant commenced judicial review proceedings of that refusal. On 30 November 2018, Upper Tribunal Judge Blum refused permission to proceed on the papers; and, on 14 February 2019, Upper Tribunal Judge Finch refused the renewed application following an oral hearing. I pause to note that Judge Finch's determination was about two months before this court gave judgement in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673, which concerned the application of paragraph 322(5) in cases where an applicant for leave to remain had made declarations of different income for immigration and revenue purposes.

22. The Applicant lodged an appeal in this court ("the second appeal"). However, following Balajigari, the second appeal was compromised by a Consent Order dated 24 January 2020 on the basis that permission to appeal was granted, the appeal allowed, the Secretary of State's decision dated 19 December 2017 to refuse the Applicant's application for leave to remain was quashed and the Secretary of State would remake the decision in accordance with the requirements as set out in Balajigari, the order expressly including provision for a "minded to refuse" procedure if the Secretary of State, on reflection, was minded to refuse the application on the basis of the Applicant's dishonesty. Whilst not accepting any particular defect in the decision-making process, in the Statement of Reasons accompanying the Consent Order there was specific reference to the requirement emphasised in Balajigari that, where the Secretary of State was minded to refuse an application under paragraph 322(5), an applicant for leave should be given a proper opportunity to respond in respect of both the suspicion of dishonesty and the second stage test of undesirability/discretion. The Secretary of State agreed to pay the costs of the judicial review from 20 March 2019 and of the appeal.

23. As I understand it, that application for leave has not yet been (re-)determined.

The Application to Re-open

24. In the meantime, on 20 November 2019, the Applicant (now represented by solicitors) applied to reopen the first appeal, on the basis that this court's judgment in Balajigari had "arguably fatally undermined the [Secretary of State's] position and displayed systemic failures in dealing with cases of this nature". It is contended that the way in which the Secretary of State dealt with the Applicant's application for indefinite leave to remain was wrong in two essential ways, each identified in Balajigari. No other defect in the decision-making process identified in Balajigari is alleged or relied upon.

25. First, it is submitted that the Applicant's application was not dealt with by the Secretary of State with due procedural fairness. Notably, the Secretary of State having come to the view that she was minded to refuse the application for indefinite leave to remain on the basis of the Applicant's dishonesty, ought to have indicated that suspicion clearly to the Applicant and given him an opportunity to respond either in an interview or otherwise (Grounds 1 and 3 of the application to reinstate, relying on Balajigari at [54]-[55] and [221]).

26. Second, having found the Applicant to have been dishonest, it is said that the Secretary of State erred by not going on to consider the further steps required by

paragraph 322(5), namely whether his presence in the UK was undesirable and, even if it was, whether her residual discretion should be exercised in favour of granting the Applicant leave (Grounds 2 and 4, relying on Balajigari at [33]-[34] and [37]-[39]).

27. However, as to the first, although this requirement was subsequently emphasised in Balajigari, it was an original ground of appeal that the Secretary of State did not give the Applicant a proper opportunity to respond to the alleged dishonesty before a conclusion of dishonesty was reached. I dealt with that ground in my refusal of permission: the Applicant in fact had had every opportunity to indicate that he had underdeclared his income and why.

28. The Applicant's evidence in rebuttal of the suggestion that the discrepancy in declared income was anything less than honest was submitted with the 2017 application for leave: none has been submitted subsequently, and Mr Gajjar confirmed that there is no more evidence on which the Applicant would wish to rely. In terms of an explanation, as I have described, in the questionnaire that accompanied the application, he said that the under-declaration to HMRC was the result of a simple "typing" error on his part and was for one tax year only. He had submitted documentary support for that submission, e.g. in the form of his further declaration of income for the year 2010-11 which had been acknowledged by HMRC a week before the application for leave. However, importantly, as I have described, in his application for an administrative review of the 2016 refusal, the Applicant relied on the fact that he had made full declarations of income to HMRC in all other relevant years and had duly paid the tax on that income; and, in all the circumstances, submitting that the only proper inference that could be drawn is that the 2010-11 under-declaration was an honest error. Again, Mr Gajjar did not suggest that there were any other submissions that could have been made. As I have indicated, although he was not bound to take into account any material subsequent to the original application, the decision-maker on the administrative review expressly said that he had taken into account the submissions made in the application for the review; and it is clear from his correction of the declared self-employed income for 2010-11 (from nil to £734), which was an issue raised in those submissions, that he did so. It was not incumbent upon the Secretary of State to interview the Applicant, so long as she gave him a proper opportunity to explain the discrepancy in declared income.

29. Therefore, in this case, the Applicant not only had an opportunity to put forward his case on dishonesty prior to the administrative review decision, he availed himself of that opportunity; and the decision-maker duly took into account all of the material submitted. It is clear that the Applicant has suffered no possible injustice by virtue of the fact that the Secretary of state did not adopt a "minded to refuse" procedure before making the initial decision of 28 April 2016.

30. As to the second way in which it is contended the Secretary of State erred – having found the Applicant dishonest, she failed to go on to consider whether his presence in the UK was undesirable and whether he should in any event be granted leave – this was not put forward by the Applicant as either a ground of challenge in the judicial review or a ground of appeal. But, in any event, the decision-maker in both the 28 April and 31 May 2020 refusals expressly found that the Applicant's dishonest conduct "makes it undesirable to allow [him] to remain in the United Kingdom"; and he (the decision-maker) acknowledged that "a refusal under paragraph 322(5) would not be mandatory", only to find that, given the clear benefit of the dishonesty to the

Applicant, "refusal [of leave] under paragraph 322(5)… is justified". Those are clear conclusions.

31. However, Mr Gajjar submits that there are three factors of arguable relevance to the exercise of discretion which the decision-maker did not expressly take into account in drawing such conclusions. Two factors are linked, namely that the under-declaration was confined to a single tax year and the Applicant had positively engaged that HMRC in other tax years. However, as I have indicated, the original application included confirmation from HMRC that tax had been received on all income in all other years; and, importantly, the application for administrative review expressly pressed these matters, which the decision-maker on that review clearly took into account. He expressly took into account the Applicant's otherwise good character, of which this effectively was a part. In my view, there is no force in the contention that the administrative review decision-maker did not take this into account when considering undesirability and general discretion. In concluding that the discretion should not be exercised in the Applicant's favour, it is inconceivable that the decision-maker did not have this in mind.

32. Similarly, with the third factor, namely the Applicant's length of residence in the UK, i.e. since January 2009. The decision letter refers to further leave to remain being granted to the Applicant in 2011, indicating that he had earlier leave to remain; and, again, it is inconceivable that the decision maker did not have that length of time resident in the UK in mind when considering undesirability and exercising the discretion inherent in paragraph 322(5).

33. For those reasons, in relation to the two proposed grounds of appeal which the Applicant now wishes to pursue in relation to the 2016 refusal, I do not see how Balajigari assists him; nor do I consider that either is arguable.

34. It does not assist the Applicant's challenge to the 2016 refusal of indefinite leave to remain that decision that the Secretary of State has accepted that the 2017 decision to refuse was unlawful; because that letter was in very different terms, in which, amongst other things, the decision-maker then does not appear to have separately considered undesirability. Nor are we aware of the full circumstances behind the agreement of the Secretary of State (who did not accept any specific defect in her decision-making) to reconsider the 2017 application.

35. For those reasons, I do not consider that the Applicant would suffer any arguable injustice by the first appeal remaining closed, nor do I consider that the circumstances of this case are exceptional such that it would be appropriate to reopen the appeal. Therefore, the conditions set out in CPR rule 52.30(1)(a) and (b) are not satisfied, and this application must be refused. Indeed, in my view, this case falls considerably short of the high hurdle inherent in CPR rule 52.30 of a truly exceptional case where the principle of finality of litigation must be displaced.

36. Two final points. First, despite the fact that during its pendency the Applicant has been and is still subject to the hostile environment provisions, and has had to pay the court fees for two separate legal challenges, Mr Malik's submission that there is an alternative remedy in the form of the further application for indefinite leave to remain made in 2017 which is currently being (re-)considered by the Secretary of State seems to me to have some force – and, even if (as Mr Gajjar submits) it is not an effective

alternative remedy for the purposes of CPR rule 52.30(1)(c), then, even if the other matters to which I have referred were not fatal to the application, that would in any event be a factor to be taken into account against the Applicant in assessing whether the criteria in (a) and/or (b) are met and in the exercise of discretion.

37. Second, the Applicant has on any view been guilty of some delay in making this application to reopen. Judgment in Balajigari was handed down on 16 April 2019; the application to reopen was not made until six months later, on 23 October 2019. Mr Gajjar submitted that that delay is reasonably explicable because the Secretary of State applied to the Supreme Court for permission to appeal in Balajigari, and that court did not formally accept the withdrawal of the appeal until July or perhaps even August 2019. However, as Mr Malik submitted, the time frame has to be considered against the backdrop of CPR rule 52.9, which requires an appeal against a decision by the Upper Tribunal to refuse permission to bring judicial review proceedings, as in this case, to be made within seven days. In my view, the delay which has occurred, whilst of course not in itself being determinative, would also have militated against conclusion in favour of the Applicant in respect of the criteria set out in CPR rule 52.30(1)(a) and (b) and in the exercise of any discretion to reopen the appeal in this case.

Conclusion

38. For those reasons, I do not consider that the conditions for reopening the appeal are made out. Subject to my Lady, Carr LJ, I would refuse this application.

Lady Justice Carr :

39. I agree.