Neutral Citation Number: [2022] EWCA Civ 1654

Case No: CA-2022-000947

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Immigration and Asylum) Chamber (Upper Tribunal Judge Kebede)
Case No: JR/1081/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 December 2022

Before:

LORD JUSTICE LEWIS
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between:

ABDULLAH KHAN	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Jay Gajjar and Muhammad Zahab Jamali (instructed by **SAJ Legal solicitors**) for the **Appellant**
Katherine Apps (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 30 November 2022

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Approved Judgment

This judgment was handed down remotely at 11 am on 15 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant ('A') appeals against a judgment of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') dismissing his application for judicial review after a substantive hearing. A had applied for judicial review of a decision of the Secretary of State dated 17 April 2021 ('the decision'). The Secretary of State refused A's application for indefinite leave to remain ('ILR') and maintained an earlier decision to give A limited leave to remain. The Secretary of State relied on paragraphs 276B and 322(5) of the Immigration Rules (HC 395 as amended) ('the Rules'). The Secretary of State decided, in short, that A had given false information about his income to the United Kingdom Government in a previous application for leave to remain in the United Kingdom as a Tier 1 migrant. The basis for that view, in short, was that A had given a much bigger figure for his income in a Tier 1 application than the figure he had declared to HMRC as his income for the relevant tax year.

2. The decision was the Secretary of State's third decision to refuse A's application for ILR, on the same grounds. She had twice agreed to reconsider earlier refusals, and on two occasions, before making a further decision, had written 'minded to refuse' letters ('MTRs') to A, alerting him to her views, and asking him to give her information which might displace those views. Ground 1 of the appeal argues that, nevertheless, her approach was procedurally unfair.

3. Stuart-Smith LJ gave A permission to appeal on four grounds.
    i. The UT's conclusion that the Secretary of State had acted fairly was perverse. Neither the two MTR letters nor the interview gave A sufficient notice of a new issue which was raised in the decision; nor could A have anticipated the Secretary of State's specific concerns.
    ii. The UT's approach arguably reverses burden of proof.
    iii. The UT's view that the Secretary of State's conclusions on dishonesty were not irrational was, itself, irrational, as was the UT's view that the letters from Sab & Sab Accountants (see paragraphs 32 and 38, below) were not clear on the question of responsibility.
    iv. The UT erred in concluding that the Secretary of State had balanced the factors which were relevant under paragraph 276B(ii) as the decision only considered one factor.

4. Stuart-Smith LJ's reasons for giving permission to appeal on ground i. suggest that this was a case in which this Court might give general guidance. The decision of this Court in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA 673; [2019] 1 WLR 4647 shows that there is a large group of cases with facts which are generally similar to the facts of this case. I say more about *Balajigari* in paragraphs 13- 22, below. Despite that indication, I do not consider that it is possible or appropriate for this Court to give general guidance. I will, instead, consider this appeal by reference to its facts, and to the parties' arguments, in so far as I consider that they are relevant to the issues raised by the grounds of appeal.

5. Ground ii. is an aspect of ground i. I will refer to them both together as ground 1 and to grounds iii. and iv. as grounds 2 and 3, respectively.

6. On this appeal, A has been represented by Mr Gajjar and Mr Jamali. Miss Apps represented the Secretary of State. I thank counsel for their written and oral submissions.

7. Unless I say otherwise, paragraph references in this judgment are to the judgment of the UT, or, if I am considering an authority, to that authority, as the case may be.

8. For the reasons I give in this judgment, I would dismiss this appeal. I do not consider that the decision was in any way unfair, or irrational, and the Secretary of State took all relevant factors into account.

The relevant provisions of the Rules

9. It should be easier to understand the decisions of the Secretary of State, and the arguments, if I summarise the relevant provisions of the Rules as they were at the relevant time.

10. As at April 2013, an applicant for leave to remain as a Tier 1 migrant had to meet the requirements listed in paragraph 245CA of the Rules. One requirement was that he had 80 points under paragraphs 7-34 of Appendix A to the Rules, which related to his income. Paragraph 19(a) required applicants in all cases to provide at least two different types of specified document from two or more separate sources 'as evidence' for each source of previous earnings. 'Each piece of supporting evidence' was required 'to support all the other evidence and, where appropriate' to be accompanied 'by any information or explanation of the documents submitted, including further documents such as a letter of explanation from an accountant, so that together the documents clearly prove the earnings claimed' (paragraph 19(c)). Paragraph 19(f) listed requirements about bank statements which were used 'as evidence'. Paragraph 19(g) provided that any accountant's letter or accountancy evidence must be from either a 'fully qualified chartered accountant or a certified accountant who is a member of a registered body'.

11. Paragraph 276B of the Rules provided for the requirements for a grant of ILR on the grounds of long residence. The applicant must have lived lawfully and continuously in the United Kingdom for at least ten years. 'Having regard to the public interest' there must have been 'no reasons why it would be undesirable' to give him ILR on that ground, taking into account the various factors listed in sub-paragraph (ii). Those included, at sub-paragraph (ii)(c), his 'personal history, including character, conduct, associations and employment record'. Paragraph 276B(iii) also required that 'the applicant does not fall for refusal under the general grounds for refusal'.

12. The general grounds for refusal were in paragraph 322. Some grounds were mandatory. Others were grounds on which leave 'should normally be refused'. Those included, at paragraph 322(2), '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…' and at paragraph 322(5), 'the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including [some] convictions…), character or associations…'

The decision in R (Balajigari) v Secretary of State for the Home Department

13. It should also be easier to understand the appeal if I now summarise the decision in *Balajigari*, to which I have already referred. There were four appeals. All the appellants had applied for ILR after five years' residence as Tier 1 migrants. Paragraph 245CD of the Rules required them to show a minimum level of earnings in the previous year. The Secretary of State refused their applications because they had claimed in their applications to the Secretary of State to have earned much bigger incomes than the incomes which they declared to HMRC in the relevant tax years.

14. This Court explained that the Home Office became concerned that many applicants for leave to remain had claimed falsely inflated earnings in order to meet the minimum in the Rules. From 2015, it had asked HMRC to tell it what income the applicants had declared in the relevant tax years. This information showed big differences in a large number of cases. It also showed that there was a pattern of applicants who had pending applications, and who had declared small incomes to HMRC in earlier returns, asking to correct those returns so as to show incomes above the minimum figure in the Rules. There was a similar pattern of Tier 1 migrants who were applying for ILR under the ten-year route also asking HMRC to correct tax returns in respect of years when they had applied for leave to remain as Tier 1 migrants (paragraph 4).

15. There were, in such cases, 625 appeals to the First-tier Tribunal between January 2015 and May 2018, and 388 applications to the UT for judicial review. The Secretary of State's case was that his policy was only to rely on paragraph 322(5) where he believed that the applicant had been dishonest, either to HMRC or to the Secretary of State (paragraph 6). The Secretary of State had refused three of the applications in *Balajigari* under paragraph 322(5) alone, and the fourth under paragraph 322(2) and 322(5). All four appellants had brought applications for judicial review in the UT (paragraph 7).

16. The Secretary of State had refused the applications under the 'general grounds for refusal' in Part 9 of the Rules. This Court observed (paragraphs 25 and 26) that some of the general grounds of refusal are mandatory and that paragraph 322(2)-(13) contained discretionary grounds of refusal, while nevertheless creating a presumption that leave would be refused in such cases.

17. This Court accepted that a decision maker had to decide, first, whether paragraph 322(5) applied, that is, whether it was undesirable to grant leave in the light of the factors listed in paragraph 322, and second, whether, in the light of that, leave should be refused on the facts (paragraph 33). In deciding whether paragraph 322(5) applied the Secretary of State should consider whether there was (i) reliable evidence of (ii) sufficiently reprehensible conduct and then decide, taking account of all relevant circumstances (including any positive factors), whether the applicant's presence was undesirable (paragraph 34).

18. In paragraph 35, this Court recorded that the appellants accepted that if an applicant claimed to the Secretary of State to have an income which did not match what he had declared to HMRC, that could amount to conduct which was 'reprehensible' for the purposes of paragraph 322(5), but only if the applicant had been dishonest. This Court also recorded 'That was not disputed on behalf of the Secretary of State', and added, 'in our view, it is correct'. I suggest that that position is unsurprising, in the light of the policy which this Court described at paragraph 6 (see paragraph 15, above).

19. This Court observed that the recognition of the need for dishonesty was consistent with a decision about the phrase 'false representations' in paragraph 322(2) (*Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773; [2011] 1 WLR 564) (paragraph 36). This Court added, in paragraph 37(2), '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 the Home Office' would not amount to dishonest conduct which was serious enough to merit refusal.

20. In paragraph 42, this Court rejected the proposition that a discrepancy entitled the Secretary of State to draw an inference of dishonesty. It entitled the Secretary of State, instead, to call for an explanation. If there was no explanation, or it was 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.' In making such decision, the standard of proof was on the balance of probabilities, but the Secretary of State had to bear in mind the serious nature of the allegation and the serious consequences which follow such a finding (paragraph 43).

21. This Court accepted (paragraph 38) that it would be good practice for the Secretary of State expressly to balance all the relevant factors, in order to decide whether an applicant's presence in the United Kingdom was undesirable. It declined, however, to say that 'it would always be an error of law for a decision-maker to fail to conduct the balancing exercise explicitly'. In paragraph 39 this Court considered the exercise of the discretion conferred by paragraph 322. It was 'in principle correct' that, that stage, the Secretary of State should consider such factors as the welfare of minor children. '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' (original emphasis).

22. This Court then considered what procedure fairness required the Secretary of State to adopt in such cases. It concluded that if the Secretary of State was minded to refuse leave on the basis that an applicant had been dishonest, he was required to tell the applicant clearly that that was his suspicion, to give the applicant an opportunity to respond, both about the conduct, and about other factors relevant to 'undesirability' and relevant to the exercise of the discretion, and to take that response into account before making a decision (paragraph 55). An interview was not necessary in all cases. 'A written procedure may well suffice in most cases' (paragraph 56). In one of the appeals, the appellant had been interviewed. This Court held that the procedure in that case was nevertheless unfair, because although that appellant had been told enough to make it clear that he was being accused of dishonesty, it was not fair to expect him 'to give detailed and definitive answers to an accusation of dishonesty without any prior notice' (paragraphs 159 and 160).

The facts

2011-2016

23. A made applications for leave as Tier 1 migrant on 17 March 2011 ('application 1') and on 4 April 2013 ('application 2'). In application 1, he claimed to have earned £40,233 in the relevant year. His tax return, however, only declared £26,344 for that year. In application 2, he claimed to have earned £42,252.65 in the relevant year. He had originally declared £12,870 to HMRC as his earnings for that tax year in a tax return submitted on 12 January 2014. He did not declare £3,651.64 of PAYE income in his tax return for that year; nor did he refer to it in application 2. Both applications were granted.

24. Application 2 was supported by a letter dated 25 March 2013 ('letter A') from Hayers Chartered Certified Accountants ('Hayers'). Letter A said that Hayers had been asked to confirm A's annual income from self-employment in the current year. The business was 'AD Services'. The reader was asked to note that Hayers had not done an audit, and that they did not express an opinion on the information provided. They had relied, instead, on information and explanations provided by A, and did not accept any liability for the information in letter A. A's gross income was £47,982.65. 'The services were provided to a small number of customers only. All receipts were banked during the period'. The costs were mostly administrative (£5,730) and were shown in the enclosed profit and loss account. That showed that £3,000 of the expenses were 'motor expenses'.

25. On 6 January 2016, A wrote to HMRC correcting his tax return for the year ending April 2013. He corrected the tax return to bring his declared earnings for that year into line with the amount which, in application 2, he had told the Secretary of State that he had earned in that year.

26. On 25 April 2016, he applied for ILR as a Tier 1 migrant ('application 3'). That application is not in the documents I have seen. In support of that application, I infer that he would have claimed an income above the relevant threshold in the Rules in the relevant year. For the purposes of that application, he needed, also, among other things, to show that he had had 5 years' leave to remain as a Tier 1 migrant.

27. Application 3 seems to have been supported by a further letter from Hayers dated 15 April 2016 ('letter B'). Again, the business was 'AD Services'. Letter B had caveats which were similar to those in letter A. A's gross income was said to be over £28,000. Again, 'The services were provided to a small number of customers only. All receipts were banked during the period'. There was a similarly worded passage about expenses. They amounted to £4,425. 'Travel and motor expenses' were put at £4,425.

2017

28. A was interviewed on 7 February 2017, and asked, among other things, about discrepancies between the income he had claimed in support of applications 1 and 2, and the income he declared to HMRC in the tax years 2010-2011 and 2012-2013.

29. Marks & Marks Solicitors wrote to the Secretary of State on 16 February 2017, enclosing an HMRC tax calculation for 2012-13, statements from Lloyd's Bank 'which show that money is coming from Mr Ali (our client has not paid money to Mr Ali as asserted in the interview on 07/02/2017'. Marks & Marks Solicitors sent a further letter on 30 March 2017 with more documents. They repeated a request for a copy of

the notes of the interview, asserting that it would be unlawful for the Secretary of State to decide application 3 without sending the notes to them.

2018

30. On 6 February 2018, A varied this application for ILR as a Tier 1 migrant to an application for ILR on the grounds of long residence ('application 3A'). For application 3A to succeed, he did not have to show that he had earned any level of income. One criterion was that he had ten years' lawful residence in the United Kingdom. Marks & Marks Solicitors wrote again on 22 February 2018, apparently in response to a letter from the Secretary of State dated 6 February 2018. Marks & Marks Solicitors also sent further documents.

31. The Secretary of State wrote to Marks & Marks Solicitors on 24 May 2018 raising questions about applications 1 and 2 and asking for documents, including a completed questionnaire. The Secretary of State said that, among other things, she had to be satisfied with the evidence which A had supplied with his previous applications. Marks & Marks Solicitors were warned that if they did not send the relevant documents, the Secretary of State would decide application 3A on the documents she already had.

Letter 1

32. Marks & Marks Solicitors (who were representing A at that stage) obtained a letter from Sab & Sab Accountants dated 12 June 2018 ('letter 1'), which they sent to the Secretary of State on 20 June 2018 (see the next paragraph). Letter 1 said that Sab & Sab Accountants 'act' as A's accountants. A's tax return for the year ending April 2013 'initially was filed incorrectly due to an internal error. The formula within the spreadsheet used to prepare [A's] return contained an error which effected [sic] the calculation'. Letter 1 added that the return 'was rectified later' and that 'This reference is being issued on the specific request of our client and we do not accept any responsibility for it'.

Marks & Marks Solicitors' letter to the Secretary of State dated 20 June 2018

33. On 20 June 2018 Marks & Marks Solicitors wrote to the Secretary of State. They enclosed a 'Declaration of not making any false representation/Deception to any Government Department' dated 19 June 2018 and signed by A. He said that he 'underst[ood] that an error occurred in the past whilst calculating or declaring my income to HMRC by my accountant. Please see accountant letter attached herewith. I apologized on unintentional error'. The reference to 'accountant letter' was a reference to letter 1 (see the previous paragraph).

34. They further enclosed tax calculations for the years 2011-2012 – 2015-2016. They also enclosed a completed questionnaire. This was expressed to contain questions about A's previous Tier 1 applications. He and his accountant had used invoices and bank statements to prepare his tax return. Question 12 asked whether he had reviewed, checked and signed each relevant tax return. His reply was that he had not; the tax returns in the relevant period had been submitted by his accountant. In answer to one question, A accepted that he was not satisfied that he had submitted accurate tax returns (apparently in any of the years since 2012) and that he had had to correct tax returns he had previously submitted. He explained apparent variations in income by saying 'I

was/am self-employed during the relevant period and I work some time more and some time less according to my personal and business needs'. He answered seven questions simply by referring to letter 1. He answered a question about how he was paid as follows: 'Yes, online, cash, cheque etc'.

Decision 1 (14 February 2019)

35. The Secretary of State wrote to A on 14 February 2019, refusing his application for ILR, but granting him leave to remain for 30 months on the basis of exceptional circumstances ('decision 1'). The decision maker relied on paragraph 276B(ii) and (iii) and on paragraph 322(5) of the Rules. The decision maker noted the earnings which A had claimed in support of application 2, the amount declared in the 2014 tax return, the later correction, and A's failure to declare £3,651.64 of PAYE income. If A's income had been as declared to HMRC, he would have scored no points.

36. The decision maker had reviewed the answers to the question and letter 1. Sab & Sab Accountants had not supported application 2, or declared A's earnings to the Home Office. The relevant letter was written by Hayers Chartered Accountants. It was not clear why A had used two different accountants. The Secretary of State did not find it credible that an accountant could submit such an inaccurate tax return if A had supplied accurate information to him. Nor was it credible that A did not check his tax return before submitting it, or that neither he nor the accountant noticed a mistake when he received a much lower tax bill than they would have expected given the 'true' figures. It was A's responsibility to submit accurate tax returns. The Secretary of State took into account the amendment to the tax return three months before application 3 was made. Taking all those matters into account, the Secretary of State found that the error in the tax return was not a genuine error. The Secretary of State acknowledged that she had a discretion whether or not to refuse A's application. A would have benefitted either from under-declaring his income to HMRC, or by falsely representing his income to the Secretary of State. She decided to refuse application 3A.

A's challenge to decision 1

37. A challenged decision 1 by sending a pre-action protocol letter. He claimed that decision 1 was procedurally unfair. The Secretary of State had 'gleefully jumped to the conclusion' that A's explanation was incredible, without realising that A had used two firms of accountants. Decision 1 was also said to be irrational because while refusing ILR, the Secretary of State had nevertheless given A 30 months' leave to remain. The Secretary of State responded by asking several times for an extension of time in which to consider the challenge. Eventually, in a letter dated 25 November 2019, the Secretary of State replied, repeating an explanation that she had not been able sooner to respond substantively because A's case was part of 'a wider cohort of cases' in which she was reviewing her position, and agreeing to reconsider A's application.

Letter 2 (3 January 2020)

38. Letter 2 is dated 3 January 2020. It is also from Sab & Sab Accountants. It is longer than letter 1. It says that the income was understated in the return: 'The reason was due to an internal spreadsheet error. We did not prepare the bank analysis to conduct a final check on the total income as we do not do this work for all self-assessments. The bank analysis would have picked up this error at that time. However neither us nor our client

did this intentionally'. A contacted Sab & Sab Accountants 'stating that in the accounts for the year ended 05 April 2013 has got a discrepancy in it, as he got this confirmation from HMRC'. Sab & Sab Accountants then told A that they would investigate. They agreed to revise the tax return and contact HMRC. They arranged a payment plan with HMRC. They charged no fee for that work. They based their opinion on 'the information, explanations and records' provided by the client. 'The reference is being issued on our client specific request and we do not accept any responsibility for it other than towards our client'. The reference was solely for A's information and could not be used for any other purposes by anyone else.

The Secretary of State's letter of 23 January 2020 ('MTR1')

39. On 23 January 2020, the Secretary of State wrote a 'minded to refuse' letter ('MTR1') to A's solicitors. The purpose of the letter was to tell A why the decision maker believed that A had used false representations and to give him an opportunity to respond before any further decision. The Secretary of State believed A had provided false information about his income to the government. The discrepancy between his tax return for the year ending April 2013 and the amount claimed in application 2, and his 2016 amendment were described. The decision maker said that he believed that A had acted dishonestly. The Secretary of State referred to the material described in decision 1. The Secretary of State listed some of the points which she had found incredible in decision 1. It was not credible that A would use a second firm for his tax return, after his accounts had been prepared by a first firm. A was asked to explain the discrepancy, with any relevant documents, how he had discovered the error in his tax return, why he did not correct it until just before his application for ILR, why he used different accountants to declare his income to the Home Office and to HMRC, and why he varied his application for ILR. He was asked to give a full and detailed response. He was asked, if he was saying that his accountant had made a mistake, for a letter from his accountant 'giving a full and detailed account of how the error arose', and whether and when it had been corrected, and whether he had complained to the accountant's professional body.

40. He was also asked, in case the Secretary of State found that he had made false representations, whether there were any other grounds which were relevant to whether he should be allowed to stay in the United Kingdom.

A's response to MTR 1

41. A's response, drafted by his counsel, was dated 22 February 2020. It said that A's then solicitors, Marks & Marks Solicitors, had advised him to check his tax returns, among other things, before he made application 3. In November 2015, he had asked HMRC for all his tax declarations. He had realised that his declaration for 2012/13 was incorrect. He contacted Hayers Accountants who said that 'they had prepared his accounts and no error was to be found in those accounts'. He then contacted Sab & Sab Accountants, the firm responsible for preparing his tax return. A's counsel then quoted a 'new' letter from Sab & Sab Accountants, dated '3 February 2019' (this may be an error for 3 January 2020; I have assumed that they intended to refer to 'letter 2': see paragraph 32, above). Any error was at the accountants' end due to a problem with the spreadsheet and they had 'negligently failed to conduct an analysis of [A's bank account]'. It was not implausible that an accountant would have been 'lazy or negligent' as January is a very busy time for them. A had amended the tax return as

soon as he realised what had happened and set up a payment plan for the underpaid tax. The accountants had admitted the error and had agreed to give A a discount on further work. A had paid Sab & Sab Accountants 'in cash' so that they could pay the tax and take their fee. There was no point making a complaint against Sab & Sab Accountants. A's education was not such as to equip him to spot the error. It was A's 'prerogative' which accountants he chose to instruct. The Rules require information to be submitted from a chartered accountant. They are more expensive than other accountants. In counsel's experience, many applicants 'use different accountant for different purposes as it is far more efficient to do so'. The two tasks are, in any event, different. The decision to grant limited leave was an irrational exercise of discretion.

Decision 2 (22 July 2020)

42. On 22 July 2020, the Secretary of State refused application 3 ('decision 2'). In short, the Secretary of State believed that A had acted dishonestly. She continued to find incredible the things which she had previously said were incredible; for example, that A did not notice that he had understated the income in his tax return by almost £30,000, and that he had not checked it in order to approve it. If he had correctly declared his income in application 2, he would have had that information available when he made his tax return, and could have provided it to both accountants. She took into account the timing of the correction of the tax return. She concluded that the error in the tax return was not a genuine error. The timing of the correction suggested an attempt to hide the discrepancy. She could identify no plausible reason for the discrepancy. Deliberately dishonest submission to HMRC or to the Home Office was sufficiently reprehensible conduct to engage a refusal of leave under paragraph 322(5). She had a discretion. The evidence did not suggest the error was genuine. As A did not meet the fundamental requirements of the Rules, an exercise of discretion was not appropriate.

43. The decision maker again relied on paragraph 276B(ii) and (iii) and on paragraph 322(5) of the Rules.

A's challenge to decision 2

44. A challenged decision 2 with a further pre-action protocol letter. The Secretary of State sent an ambiguous reply. A applied for judicial review of decision 2. That application led to a consent order. The Secretary of State agreed to reconsider decision 2.

The Secretary of State's letter of 11 March 2021 ('MTR2')

45. On 11 March 2021, the Secretary of State sent a further MTR ('MTR 2'). Its stated purpose was to tell A why the Secretary of State believed he had used false representations and to give A an opportunity to respond. The Secretary of State referred to paragraph 4 of *Balajigari*, which describes a widespread pattern of applicants for leave who claimed a bigger income in immigration applications than they declared to HMRC. A's case was in that group.

46. The Secretary of State had reviewed all A's Tier 1 applications. The Secretary of State described the background and her concern, as expressed in earlier letters. She again said that she believed that A had acted dishonestly, and that he had made false representations about his previous earnings which were not an error. His explanation that his qualifications did not equip him to spot errors in his tax return was rejected as

his case was that, when eventually prompted by Marks & Marks Solicitors, he had spotted an error in his tax return. Letter 2 was not an adequate explanation. The Secretary of State was minded to conclude that the timing of A's amendment of his tax return was an attempt to hide the discrepancy.

47. In short, the Secretary of State still considered that A's position was incredible, and described the ways in which she still found it incredible. The Secretary of State asked A to produce invoices to support the earnings claimed in applications 1 and 2, business bank statements to show that he had been paid for the work which was the subject of the invoices, a breakdown of his clients during the relevant period, the names of their businesses and a detailed explanation of what A had done for them, his business address, evidence supporting any business travel, an account of his day-to-day work in his business, accounts for each year, including a profit and loss account, evidence of any expenses payments, and a description of his qualifications and experience and how they helped him in his work. He was also asked when he started work for SR Security Service, and how he got that work.

48. A was also asked to explain annual variations in his income, with evidence, and how he supported his family when his earnings were lower. He was asked what positive contributions he had made to society. Finally, as in MTR 1, he was also asked, in case the Secretary of State found that he had made false representations, whether there were any other grounds which were relevant to whether he should be allowed to stay in the United Kingdom.

49. Again, the decision maker relied on paragraph 276B(ii) and (iii) and on paragraph 322(5) of the Rules.

A's response to MTR 2

50. On 24 March 2021, A's counsel replied to MTR 2. The Secretary of State was invited, if she had concerns after this letter, to write to A and to give him a further opportunity to provide evidence. The Secretary of State was also invited to accept the response as part of his 'innocent explanation'. The Secretary of State was said to have shown 'impermissible bias' by associating his case with other similar cases: she should approach it on its own facts. A's counsel repeated much of the account of the background and many of the responses which he had given in his response to MTR 1. He expressed surprise that the Secretary of State had not accepted the explanations which he had already given.

51. A's education did not equip him to spot the accountants' error. It was unreasonable to ask him to produce invoices which were nearly a decade old. The Secretary of State had previously been satisfied with A's evidence. A had been subjected to years of allegations of deception when the Secretary of State did not have evidence to support them. The breakdown of A's clients was in the invoices. A conducted his business from his home address. A could not reasonably be expected to hold onto evidence of payments and receipts for nearly a decade. The Secretary of State was unreasonable. A did not have those documents.

52. A was a sole trader. He was a business management consultant. It was 'of concern' that the Secretary of State was still asking 'questions to information she has already

been furnished with'. How was the Secretary of State 'able to conclude that [A] had been dishonest when she lack[ed] knowledge of even the most elementary aspects of [A's] case?' A had the qualifications which were necessary to provide the services which he did provide. He did not have a website and got business by word of mouth. This was natural 'in the world of small business'. A attached such invoices as he was able. He had attached them to application 3. His expenses were in the profit and loss accounts previously submitted. A started work for SR Security Services in 2015, having applied in response to an advertisement. He worked for SR because he knew that 'his business was capable of fluctuating'. He was 'mostly required to sit in an empty office' and could work on his consultancy business 'whilst on shift with SR Security Services'. There were no significant changes in his annual income; 'each business will have its ups and downs'. He relied on help from family and friends when his income was lower. He had contributed to society by having a clean record and he considered 'himself to be embedded in the fabric of British society'. A was concerned that, '2 years on, the Secretary of State has now embarked on a fishing expedition which has done nothing but to show that [the Secretary of State] lacked the requisite information to conclude that [A] has been dishonest and continues to lack the same'.

53. A repeated that it was irrational to grant him limited leave and to refuse him ILR. His counsel attached letter 2 (described on this occasion as a letter dated '30' January 2020), the ACCA guidance on complaints, a letter from Marks & Marks Solicitors and three diploma certificates. It also appears that he attached some 90 pages of documents including bank statements and invoices. He also included letters A and B (see paragraphs 30, and 33, above).

The decision

54. The Secretary of State wrote a letter dated 17 April 2021 enclosing a notice of reasons for the decision. The letter told A that the Secretary of State had considered his application and had refused it. It reminded him that he had been given leave to remain on 15 March 2019 on the basis of his exceptional circumstances, and that the conditions of that leave would continue until 14 September 2021. Before that leave expired, A must either leave the United Kingdom or make a new application for leave to remain.

55. The notice of the reasons for the decision recited the relevant provisions of the Rules and summarised A's immigration history.

56. The Secretary of State had first decided to refuse A's application for ILR on 15 March 2019. On 27 July 2020, the Secretary of State had agreed to reconsider that refusal. The Secretary of State had sent A MTR1 and MTR2. The Secretary of State summarised the concerns which had been described in MTR2.

57. The Rules had been amended in 2013 to say that the Secretary of State would check with other government departments the figures which applicants for leave to remain claimed for their earnings. HMRC had then received 'high volumes of tax amendment requests from Tier 1 (General) migrants from 2015 onwards, particularly the tax years that were part of initial Tier 1 applications…'. The Secretary of State had reviewed both of A's tier 1 applications, taking into account his responses to the MTRs and his supporting documentary evidence. The Secretary of State's view was that 'in doing so,

serious concerns have been raised regarding self-employment earnings declared to HMRC and the Home Office'.

58. In the light of all the evidence, the Secretary of State believed that A would have failed to score points for previous earnings and for UK experience to meet the relevant requirements of the Tier 1 scheme. The decision maker 'believe[d] that [A] ha[d] provided false information about [his] income to the UK Government'.

59. The decision maker analysed application 1. A claimed earnings of £42,252.65 between 1 May 2012 and 25 March 2013. He had one source of income, his self-employment. A supported application 1 with letter A (see paragraph 24, above). On the basis of those earnings, A was given 25 points, and leave to remain as a Tier 1 migrant. Checks with HMRC showed that, in a tax return submitted on 12 January 2014, A had declared, for the tax year ending April 2013, a profit from self-employment of £12,870. A amended that return on 6 January 2016 to declare a profit of £42,252. The first figure was 'significantly lower' than the earnings claimed in A's Tier 1 application. If that figure had been used for the Tier 1 application, A would not have been given leave to remain.

60. A had applied for ILR as a Tier 1 migrant on 25 April 2016. He was invited to an interview on 25 April 2015. On 26 February 2018 A varied that application to an application for ILR on the basis of long residence.

61. As part of his application for ILR, A had been sent a tax questionnaire (see paragraph 34, above) which he had returned on 20 June 2018, with further information about his earnings. At question 12, A was asked whether he had reviewed and checked his tax returns. His answer was that no, his returns had been submitted by his accountant. Question 13 and 14 asked whether he was satisfied that his tax returns were submitted correctly and whether he had ever had to correct his tax returns. A answered both questions 'Please see my accountant letter'.

62. Letter 1 (see paragraph 32, above) said that it had been issued at A's specific request, and that they did not hold any responsibility for it. It added that the return for the year ending April 2013 'was filed incorrectly due to an internal error, due to formulas in a spreadsheet'. Sab and Sab had not supported application 1 nor the earnings which A had declared to the Home Office. Application 1 was supported by letter A (see paragraph 24, above). It was unclear why A would use two firms of accountants. It was not credible that A would use two firms of accountants.

63. A's response was that a firm of chartered accountants had to support application 1, but was not required for his tax return, and Sab and Sab charged less. It was not credible that an accountant could submit a tax return which differed so greatly from A's actual earnings. The accountant could only submit figures which A had given. Nor was it credible that A would not have checked his tax return before it was submitted, that neither A nor his accountant had noticed the error when A got his tax bill, which would have been lower than expected, given his earnings. It was A's responsibility to submit an accurate return. Sab and Sab had issued a letter at A' request but had taken no responsibility for any mistake.

64. The decision maker also took into account the timing of the amendment to the tax return, some three months before A had applied for ILR. On the balance of

probabilities the Secretary of State believed that A had amended his tax return in order to enable application 2 to succeed.

65. The decision maker then listed the materials which A had sent in in response to MTR1 and MTR2. A's responses had been considered. The decision maker had concluded, on the balance of probabilities, that A had made false representations, and not 'merely an error'. A's explanation of the timing of his amendment to his tax return was that his representative for application 2 had advised him to check various things (A had provided their letter confirming that). A had obtained his declaration from HMRC in 2015, and had realised that it was incorrect. A had added that his qualifications did not equip him to spot the accountant's error. That explanation was rejected as incredible. After all, A's case was that he had spotted the errors in 2015, which had prompted the amendment of his tax return before he applied for ILR. In any event, it was his responsibility to check that his returns were made on time and were accurate.

66. The 'internal spreadsheet error' had not been explained; there was no evidence about it. The accountants, it was said, had charged A very little for the extra work which was why he had not complained to the relevant professional body. It was not clear how A's net profit was shown as just £12,000, rather than £42,000. A's tax bill would have been about £6,000 less than what should have been paid, which was a significant figure and should have been noticed at the time. The decision maker was not persuaded by the explanation that the tax return had been submitted close to the relevant deadline at a busy time for accountants. It was considered that A would have had available to him the information he had submitted with application 1, and that he would have provided the same information to both accountants for application 1 and for his tax return. A had confirmed that his accounts were completed correctly for the purposes of application 1.

67. The Home Office had identified a trend in applications for leave to remain as Tier 1 migrants. The fact that A had amended his tax return just before making application 2 'call[ed] into question [A's] character and conduct in view of [his] inconsistent declarations to two government departments'. The Secretary of State was minded to conclude that 'the timing of the action to amend your tax declarations was an attempt to hide the discrepancies in [his] previous earnings claimed'.

68. A's MTR response had said that A did not have a website for his business but relied on word of mouth. The decision maker accepted that small businesses do rely on that method, but it was 'unusual that [A] never advertised or promoted [his] business and [was] able to turn over about £47,000 in [his] first year of trading without advertising'.

69. The decision maker then considered, in detail, over ten pages, the earnings which A had reported from 11 clients, by reference to bank statements and invoices. A reported that his most significant earnings (invoices to the value of over £34,000) came from a group of companies which was listed at Companies House and in open sources. A said in his MTR response that he was 'a sole trader who had full conduct of his business as a business management consultant'. These invoices, however, were for security work, such as site patrols, out-of-hours security, alarm response, scheduled site rota and site visits. The invoices to A1 Techsol Limited seemed to be monthly invoices for the same work, but the amounts charged varied from month to month. It was not clear why the number of days worked each month did not appear on the invoices. The site visits were

inconsistent with A's claim in his MTR response that he worked from home. A had not, despite having been asked to, submitted any evidence of travel. A's case was that Your Security and Resources paid him in cash. The Secretary of State did not find it credible that a security company would pay invoices in cash, particularly since the payment options listed on the invoices were cheque and bank transfer. The alleged cash payments could not be corroborated. Secretary of State for the Home Department found on the balance of probabilities that the earnings which A declared from these companies were not genuine. If that claimed income was discounted, A would have scored 0 points for earnings and would not have been given leave to remain as a Tier 1 migrant.

70. A had raised two invoices for Q3 Paralegal and Business Services. He claimed to have been paid in cash. It was not credible that such a business would pay in cash, particularly since the payment options listed on the invoices were cheque and bank transfer. No trace of the business could be found in open sources. Google maps showed that KB Bargains operated from the relevant address. A had given no details of the work he had done for this business in his MTR response. Secretary of State for the Home Department found on the balance of probabilities that the earnings which A declared from this business was not genuine. If that claimed income was discounted, A would have scored 0 points for earnings and would not have been give leave to remain as a Tier 1 migrant.

71. The Secretary of State made similar points about the eight other customers A had relied on. The Secretary of State also observed that A had charged different clients different amounts for apparently identical services. A claimed that the majority of these customers had paid in cash for his services.

72. The decision maker also considered the amounts of business expenses which A had claimed. A had been asked specifically to substantiate those. His answer was that he no longer had the relevant documents. The Secretary of State acknowledged that time had passed, but also noted that A had nevertheless been able to provide invoices and bank statements from the same period.

73. The decision-maker then considered application 2. A had claimed to have earned a total of some £40,700 between 7 April 2015 and 6 April 2016. He had two claimed sources of income: self-employment (£23,703.95) and PAYE income from SR Security Services (£17,050). In his MTR response, A had submitted banks statements and invoices for 7 clients totalling £28,128.95.

74. The Secretary of State noticed several anomalies. It appeared that A had re-cycled part of the money paid by one client, Farah's Consultancy, back to the client. Several businesses, including Farah's Consultancy, could not be found in open sources and their addresses appeared from Google maps to be residential addresses, with no signs suggesting that businesses were based at them. Despite having been asked to, A had, in his MTR response, given no details of the work he had done for many of his claimed clients. 50 Cemetery Road played several roles in A's materials. A claimed to have invoiced clients with different names at this address in the material supporting applications 1 and 2 (that is Seema Khan and Muhammad Ishaq), and this address was also listed as the address for A's business bank statements. Despite the payment methods which were listed on his invoices, he again claimed to have received some

payments in cash. In many cases, A had given the names of people, and no business names, despite the fact that services listed on the relevant invoices appeared to be business services. The Secretary of State could not corroborate those. The conclusion was that A had not shown that the work invoiced was genuine, and the Secretary of State discounted the relevant amounts from A's declared earnings. That left his PAYE income, which was not enough by itself to satisfy the Tier 1 requirements.

75. The Secretary of State then considered the pattern of earnings which A had declared to HMRC in the relevant years. Secretary of State for the Home Department showed, by reference to a table, that A's income dropped significantly in the years when he did not make applications for leave to remain. A was not able to explain this pattern in his MTR response. A said there were no changes to his business model in the relevant years. The Secretary of State did not find that A's case about the increases in his income in the years in which he made those applications was credible. The decision maker did not find A's account that, in the lean years, he relied on help from friends and family credible as there were no documents to support those claims. There were serious concerns about the genuineness of A's self-employment and the earnings he declared in applications 2 and 3.

76. When clients paid by cheque or bank transfer, A's bank statements often shown similar amounts being withdrawn or transferred from A's account. This was a trend in A's bank statements between 2012 and 2016. The Secretary of State believed that this showed that money was being re-paid to clients. The decision contained a two-page table illustrating that trend.

77. The decision maker then considered paragraph 322(5) of the Rules. There were two tests.

    i. Could the discrepancies between A's account of his business and tax affairs be attributed to an innocent mistake, or was there an intention to deceive?
    ii. Was the dishonesty serious enough to warrant refusal under the rubric of character and conduct?

78. The Secretary of State's view was that 'there [was] substantial evidence to conclude, on the balance of probabilities, that the discrepancies in the accounts given by [A] [could not] be explained by innocent mistakes'. The Secretary of State explained why, relying on the reasoning already described in the decision. The Secretary of State was not satisfied that the earnings which A declared were from a genuine business, but 'were dishonestly claimed to meet the requirements for [application 3]'. The Secretary of State also considered that A re-submitted his tax return 'to cover the lack of original declarations at the right level'.

79. The Secretary of State noted that applications 1 and 2 had succeeded. She referred to changes to Appendix A, introduced in October 2013. She explained why she did not consider that A's claimed earnings were supported by credible evidence showing that they were genuine.

80. The Secretary of State took account of all the factors which would weigh in favour of an application. They did not 'outweigh the adverse impact on the public interest of allowing an application that relies on residence gained in part through dishonest

conduct'. The Secretary of State was 'committed to upholding high standards of conduct in the provision of evidence in support of immigration applications as this is essential to the integrity of the system and overall fairness of results between applicants'. This Court had confirmed in *Balajigari* that such dishonesty would justify refusal under paragraph 322(5) of the Rules, 'notwithstanding the potential adverse consequences of such a refusal to the individual interest'.

81. Under the heading '276B(ii)(c) - Character and Conduct' the decision maker said that, in the view of the Secretary of State, there was 'substantial evidence to conclude, on the balance of probability, that the discrepancies in the accounts given by [A could not] be explained by innocent mistakes'. Further, A had not shown that he had genuinely earned his income from self-employment. It was considered that A had falsely inflated his income in the years when he was applying for leave to remain. For the purposes of an application for ILR, character and conduct went beyond criminal convictions. It was considered, taking into account A's personal history, that it would be 'undesirable on public interest grounds to grant [ILR], and the benefits that this status would bring'.

82. The decision maker then summarised the Secretary of State's reasoning. It was recognised that a decision under paragraph 322(5) was not mandatory. A's actions in declaring different incomes to HMRC and to the Home Office meant that 'a refusal under Paragraph 322(5) [was] appropriate and proportionate'. The evidence which A had provided to show that he had made a positive contribution to society during his stay in the United Kingdom had been considered: A had said in his application that he had a clean record and was 'embedded into the fabric of UK society'. The Secretary of State had also considered the time A had spent in the United Kingdom, including his 'economic and social contributions' and the education and skills he had obtained in the United Kingdom. When these were weighed against 'the lack of probity and care in [A's] dealings' with two government departments, and A's dishonesty in the information he had given to the Secretary of State, 'the public interest [fell] firmly against granting [A's] application for further leave to remain'. The Secretary of State had considered whether refusal was appropriate under paragraph 276B(ii)(c) and (iii), 'when weighing negative behaviour against the positive…the dishonest behaviour outweigh[ed] the positive evidence…' The Secretary of State accepted that A's employment with SR Security was genuine. The fact that A had only managed to show more than ten years' residence 'due to dishonest behaviour' meant that the Secretary of State was satisfied that refusal was appropriate and proportionate. The Secretary of State was not prepared to exercise any discretion in A's favour. The Secretary of State was accordingly not satisfied that A met the requirements of paragraph 276D by reference to paragraph 276B(ii)(c) and (iii) and paragraph 322(5).

A's challenge to the decision

83. A applied for judicial review of the decision in a claim form filed on 16 July 2021. There were three grounds.

84. The first was that the Secretary of State had acted unfairly, having raised limited concerns in MTR 1 and 2: the decision was 'a wholly different animal'. A had been ambushed by the allegation that he had been circulating money. The Secretary of State had engaged, for the first time, in a forensic and irrational analysis of A's invoices.

The Secretary of State had seen them before, as part of the applications. The Secretary of State should have issued a third MTR.

85. The second ground was that the Secretary of State had reached irrational conclusions. A had referred in his pre-action protocol letter to errors which 'jump[ed] off of the page'. In his grounds for judicial review, he argued that the Secretary of State's views about the link between changes to the Rules and the submission of applications to correct tax returns were speculative. The change was in 2013, yet A submitted an incorrect tax return on 12 January 2014: 'surely if he had been acting dishonestly he would have been aware of the need for accuracy at the time when the return was submitted?'. The Secretary of State's conclusion that it was not clear why A had used two firms of accountants was 'perplexing'. A repeated his earlier explanation. It was wrong in law to suggest that accountants could not be held responsible for mistakes. Carelessness was not the same as dishonesty. It was not rational to draw conclusions from comparisons between the different amounts A had charged clients.

86. The Secretary of State's complaint that businesses could not be found on Companies House was odd. The Secretary of State had overlooked the fact that these were self-employed individuals. A's counsel was his current representative. The Secretary of State's reference to A's current representative having advised him to contact HMRC was wrong. Marks & Marks Solicitors were his representatives then. It was the Secretary of State's responsibility to make her decisions accurate. 'It cannot be right that when [A] makes a mistake it is deception but when the Secretary of State makes a mistake it is just a mistake'. Open source checks should be done with care. People and businesses move. It was no surprise that KB Bargains were now linked to an address previously linked to A's client. The point about Seema Khan and Muhammad Khan was 'misconceived'. They are husband and wife and had lived at 50 Cemetery Road before A, who began leasing the property with his family in 2019. A had paid the outstanding tax for 2012/13, 'which is indicative of a lack of dishonesty'.

87. A's third ground was that it was irrational for the Secretary of State to decide to exercise a discretion in A's favour, on the ground that it would be unreasonable to require his children to leave the United Kingdom, but to refuse to exercise the discretion to grant him ILR.

The UT's decisions in 2021

88. The UT refused permission to apply for judicial review on the papers (on 20 September 2021) but granted it after an oral renewal hearing (on 9 November 2021). The Secretary of State did not appear at that hearing.

The judgment of the UT

89. The UT summarised the background, the decision and the procedural history (paragraphs 4-12, 14-17 and 19-21). The UT said that there were four issues; those raised in the three grounds, and materiality for the purposes of section 31(2A) of the Senior Courts Act 1981. The UT summarised the parties' submissions in paragraphs 23-26 and 27-29. The UT then quoted paragraphs 276B and 322 of the Rules, and page 11 of the Secretary of State's policy guidance on false representations (paragraphs 30 and 31).

90. The UT quoted paragraph 4 of *Balajigari*. There had been a widespread practice of applicants for leave as Tier 1 migrants claiming falsely inflated earnings, particularly from self-employment, to appear to meet the requirements of the Rules. From 2015, the Home Office used its powers to ask HMRC for information about what earnings applicants had declared in their tax returns for the relevant periods. This showed 'significant discrepancies' in 'a large number of cases'. It also showed what seemed to be a pattern of taxpayers who had submitted returns showing small incomes later submitting amended returns showing much higher incomes, above the required minimum, 'which suggested that they were aware that the previous under-declaration might jeopardise a pending application for leave to remain'. That was the context for the Secretary of State's review of applications 1 and 2 (paragraph 32).

91. It was settled law that an applicant had to be given the 'gist' of the case against him, and that there is no requirement to give detailed reasons (paragraph 14 of *Doody v Secretary of State for the Home Department* [1994] 1 AC 531). The UT agreed with the Secretary of State's counsel that A had been given more than the gist of the case against him in MTR2. The Secretary of State had explained the Secretary of State's concerns and why his response was not credible. It was plain that the Secretary of State was concerned that A had inflated his income in order to get leave to remain. A was invited to submit documentary evidence that he had genuinely earned the income he claimed. The findings in the decision did not have to be put to A by way of a third MTR, and were not failings of the kind identified in *Balajigari*. The adverse conclusions on the documents had to be seen in the context of the Secretary of State's previously expressed concerns about the genuineness of the income which A had declared (paragraphs 34-37).

92. The UT then summarised those findings in paragraph 38. The UT accepted the submission that most of those concerns could reasonably have been anticipated by A, because MTR 2 told him that the Secretary of State doubted whether the income claimed had genuinely been earned. The Secretary of State was not required to put each and every concern to A (paragraph 39). There was no inconsistency with the approach suggested in paragraph 55 of *Balajigari* (paragraph 40). A was given 'ample notice', in MTR 2, of the Secretary of State's concerns about the genuineness of his income, yet he had failed to provide 'full and proper explanations'. He had, instead, given as series of one-line answers with no supporting detail. The documents he submitted 'raised more questions than they answered'. The UT dismissed ground 1 (paragraph 41).

93. The UT accepted the Secretary of State's submission, on ground 2, that the factors on which the Secretary of State relied had to be looked at in the round. In the context of the trend described in *Balajigari*, the Secretary of State was rationally entitled to conclude both that the discrepancy between the incomes stated to the Secretary of State and declared to HMRC was 'particularly significant' and that such a significant discrepancy could not have been overlooked either by A's accountants, or by him, particularly given that he had produced a schedule of his earnings for his applications only a few months before submitting his tax returns. The Secretary of State was, in that context, 'perfectly entitled to have concerns about [A's] use of two different accountancy firms to prepare' the two sets of accounts, and to reject A's explanations of the error and of the timing of his amendment request. The letters from Sab & Sab Accountants were unclear, and did not explain the 'spreadsheet error'. The advice from

Marks & Marks Solicitors was not decisive. The Secretary of State's conclusion that there had been no genuine error and that A had deliberately intended to deceive were rationally open to her (paragraph 42).

94. The Secretary of State gave many reasons for her concerns about the genuineness of A's claimed income. The UT summarised those. While 'some of the peripheral matters taken against [A] …such as the disparity in charges for the same work …may arguably have lacked merit, the overall conclusion reached by [the Secretary of State] on a holistic assessment of all factors was plainly a reasonable and rational one' (paragraph 43). The UT dismissed ground 2.

95. The UT dismissed ground 3 (paragraphs 44-48). This ground had evolved significantly. As originally pleaded, it was an argument that it was irrational not to exercise the discretion to grant ILR when the Secretary of State had exercised a discretion to grant limited leave to remain. That argument had been rejected by the UT in *Mansoor v Secretary of State for the Home Department* [2020] UKUT 126. The UT saw no reason to depart from that decision. It was consistent with the relevant Home Office policy and with paragraph 39 of *Balajigari*. Moreover, *Balajigari* only concerned paragraph 322(5), whereas, as A's counsel accepted, the test in paragraph 276B(ii) was different. A's counsel submitted at the UT hearing that the Secretary of State had failed to balance the relevant factors when considering the discretion conferred by those paragraphs. That was clear from pages 21-24 of the decision. The focus of A's submission to the contrary was the GCID notes. The UT said that page 12 of the GCID notes did show a balancing exercise. A submitted that by the time his children were adults, he would have been in the United Kingdom for 29 years and would be 'irremovable'. The Secretary of State, however, was entitled to review the decision on the current circumstances and to review it in the future, in the light of A's future conduct. The UT rejected the submission that the exercise of discretion was irrational.

96. In paragraph 49, the UT said that A's argument based on section 31(2A) fell away. The UT considered the outcome 'would be no different' even if the Secretary of State produced a further MTR, and given A another opportunity to make representations. Nothing in the grounds undermined the Secretary of State's adverse conclusions. There was no suggestion of any further matters which could have materially changed the outcome.

The grounds of appeal

97. I have summarised the grounds of appeal in paragraph 3, above.

The Respondent's Notice ('RN')

98. The Secretary of State argued in a Respondent's Notice ('RN') there were additional reasons for upholding the UT's judgment so that none of the errors of law on which A had been granted permission to appeal was material.

A's submissions

99. A's skeleton argument for this Court more or less repeats, in more or less identical words, his skeleton argument for the UT hearing. A's main complaint is that MTR 1 and 2 were 'basic and limited in nature' and that the Secretary of State had added

'wholly new reasons' (original emphasis) in the decision, which was unfair. The Secretary of State did not put to him 'the forensic (and flawed) analysis' of the 'new evidence' and made 'serious allegations on the same without giving [A] an opportunity to respond'. The MTRs were 'a de facto replacement of cross-examination'. The Secretary of State had realistically conceded that not every point had been put to A. A had been given 'snippets' of the Secretary of State's concerns and denied the opportunity to respond to the rest of her concerns. It was the equivalent of making new allegations and adducing new evidence to the jury once it had started its deliberations.

100. A argues that what was not put to him includes the forensic analysis of his various invoices, including the conclusions that he charged different fees to different clients for the same work, most of the clients could not be found by checking Companies House or other open sources, the addresses of some of his clients, the way he was paid, where his clients were and how he could make a profit of £47,000 in his first year of trading, despite not advertising, and given where his clients were based.

101. Whether a decision maker has acted fairly is a question of substance, not form. A relies on 'a wealth of authorities' to that effect (skeleton argument, paragraph 13.2). A accepts that an outline of the case an applicant has to meet, rather than 'chapter and verse' will 'usually' be enough. In this case, the MTRs were not detailed enough to enable A to give effective instructions. Much of the reasoning in the decision was 'an afterthought'. 'The refusal letter in this case was an effective ambush in many parts'. A could not make worthwhile representations because 'he was not made aware of the factors that weighed against him'.

102. The UT's approach of expecting A to anticipate the Secretary of State's concerns effectively reversed the burden of proof.

103. A then makes a series of detailed points which largely repeat what he argued in his grounds for judicial review (see paragraphs 85-86, above). For example, A repeats his argument that the Secretary of State's concerns about the pattern of applications, tax returns, and later applications to amend those returns were speculative. There was no evidence that A was aware of any of this. He submitted an incorrect tax return after the change to the Rules. He makes much of the point that he had earned £3,651.64 from PAYE employment which he did not declare to the Home Office or to HMRC. It was irrelevant because it was taxed at source. Moreover the fact that he earned that amount 'shows that he did not fabricate his self-employed income'.

104. A repeats that he is perplexed by the conclusion that his need for two sets of accountants was not clear. He repeats, again, that chartered accountants' accounts are required for immigration applications and that other accountants are cheaper. It was misconceived to think that the accounts used for applications could also be submitted to HMRC. The dates did not tally. The exercises are different. It was 'emphatically not correct' that two firms were not needed.

105. Accountants can be held responsible for mistakes. The position on 'page 6' was 'wrong in law'. Regardless of the words they used, Sab & Sab Accountants have admitted 'that the error originated from their work'. Carelessness by A is not the same as dishonesty. A worked from home but it was obvious he would sometimes visit clients, 'such as the security work which he has never hidden from' the Secretary of

State. Comparisons between charges for different clients 'bear…no rational basis', as charges will vary depending on the size of the client's business. It was odd to be surprised that clients were not found in Companies House. The clients were individuals, not companies. Page 22 of the decision wrongly refers to Marks & Marks Solicitors as A's 'current representatives'. A's counsel is his current representative. A repeats the point made in his grounds for judicial review that the Secretary of State is responsible for getting her decisions right.

106. Open source checks should have been careful. People and businesses move. It is no surprise if KB Bargains now operate from an address previously linked to A. A repeats his point about Seema Khan and Muhammad Ishaq. The fact that A had paid the outstanding tax and interest indicated that he was honest. The size of the discrepancy did not, on its own, warrant a conclusion that A had been dishonest. A concession by the Secretary of State in paragraph 25 of the detailed grounds 'should be the end of the matter'. The Secretary of State had erred in law in her explanation of her open source checks. It was not surprising that A's clients could not be found on the internet, given their size and characteristics. The UT did not grapple 'properly' with those arguments.

107. The Secretary of State had erred in law in confining her assessment to paragraph 276B(ii)(c) of the Rules, and not addressing the matters listed in sub-paragraphs (a), (b), (d), (e) and (f). The Secretary of State had already decided to exercise discretion in A's favour by giving him limited leave to remain, because it would be unreasonable to require his children to leave the United Kingdom. It is 'emphatically incorrect' that paragraphs 322(5), 276B(iii) and/or 276B(ii) are 'capable of applying' to A's case. Paragraph 322(5) cannot apply if discretion has been exercised in A's favour. There is no distinction in the Rules between leave to remain and ILR, either under paragraph 322(5) or under paragraph 276B(ii). 'As such the only question is the balance between whether the alleged conduct is so bad that he or she should be expelled from the United Kingdom or not'. If, as the Secretary of State recognised, there are reasons to exercise discretion notwithstanding the alleged conduct, 'the only lawful course of action is to grant ILR'.

108. A also relied on the decision of the UT in *Gornovskiy v Secretary of State for the Home Department* [2021] UKUT 00321 (IAC). I summarise that decision in paragraphs 113-118, below. It is not foreseeable that A is removable. It will be many years before his minor children are adults. He has accrued a long period of lawful residence. 'It cannot be right that he is required to apply for limited leave to remain in perpetuity'. The Secretary of State was obliged to have regard to this fact when she refused to grant him ILR. She did not do so, and her decision should be quashed on that ground.

The Secretary of State's submissions

109. Miss Apps sought to uphold the judgment of the UT. Perhaps encouraged by the terms of the grant of permission to appeal on ground 1, Miss Apps also made several general submissions about the approach which should be adopted in cases such as these. She suggested that *Balajigari* does not decide that if the Secretary of State relies on paragraph 322(5) she must show that an applicant has been dishonest, because the Secretary of State conceded as much in that appeal (see paragraph 18, above). She argued that 'blind-eye' dishonesty would be enough, and made written submissions on that issue. Ms Apps made further submissions on whether dishonesty or blind-eyed

dishonesty was a necessary requirement for a refusal under paragraph 322(5) of the Immigration Rules. The Court indicated, during the hearing, that it did not need those written submissions to be amplified in oral argument. She also made submissions based on *Taj v Secretary of State for the Home Department* [2021] EWCA Civ 19; [2021] 1 WLR 1850, which is a case about procedural fairness in relation to applications for leave to remain as a Tier 1 migrant. Finally, she made submissions, based on other cases, about how much detail (or gist) of the case against him an applicant must be given.

110. The first two points do not arise on the facts of this case, as it is clear that the Secretary of State did consider that A had in fact been dishonest. *Taj* is not directly relevant, as the leading authority on procedural fairness in discrepancy cases is *Balajigari*, and *Taj* does not concern allegations of dishonesty. Nor do I consider that it is helpful to refer to any cases other than *Balajigari* for guidance about how much an applicant needs to be told about the case against him.

111. As I understood Miss Apps' submissions, she eventually accepted that the Secretary of State had not considered, in relation to the discretion conferred by paragraph 322(5), whether or not A was irremovable, other than by implication. She also submitted that if the UT had erred in law in any way, any such error was immaterial, because it was highly likely that the outcome would not have been substantially different for A in the absence of any error (section 31(2A) of the Senior Courts Act 1981).

Gornovskiy v Secretary of State for the Home Department

112. It is convenient now for me to summarise the determination of the UT in *Gornovskiy*, on which, as I have said, A relied in support of his submissions on ground 3.

113. The applicant was a Russian national. He arrived in the United Kingdom in 2003. He claimed asylum in 2008. He admitted embezzling $6m from a company for himself and for others, including a leading figure in Russia, but said that he had then fallen out with the regime. His claim for asylum was refused on the grounds that he was excluded from the protection of the Refugee Convention ('the RC'), because there were significant reasons for considering that he had committed serious non-political crime.

114. He was given discretionary leave to remain for 6 months, because the Secretary of State accepted that article 3 of the European Convention on Human Rights ('the ECHR') prevented his removal from the United Kingdom. He was later given successive periods of six months' Restricted Leave ('RL'), on the basis that the Secretary of State anticipated that conditions in Russia would change and would then permit his safe return there. The last grant of RL was for 12 months. The applicant had made three applications for ILR and/or for a longer period of RL. When the Secretary of State refused the third such application, the applicant applied to the UT for judicial review of that decision, on five grounds, which the UT summarised in paragraph 21. The applicant only relied on two grounds at the hearing (paragraph 26): the decision to grant 12 months' RL was irrational because there was no prospect that A would ever be removed to Russia, and the Secretary of State had paid insufficient attention to the facts of the appellant's case and to the authorities on RL.

115. The applicant submitted that he could not be removed to Russia because that would breach the Extradition Act 2003, as he had been discharged from extradition by a court in England and Wales. The applicant did not submit that he should be granted ILR simply because he was irremovable. What was at issue was whether the Secretary of State had rationally considered whether or not to grant ILR (paragraph 41).

116. The UT quoted a summary of the RL policy in paragraph 43. The policy applied to people who were excluded from the protection of the RC but whose removal from the United Kingdom was prevented by the ECHR. The policy expressly stated that it was only in exceptional circumstances that people to whom the RL policy applied would ever be able to qualify for ILR, and that such circumstances were 'likely to be rare' (paragraph 45 [51]). The UT summarised the authorities on the RL policy in paragraphs 44-49. The effect of those is, in short, that the decision whether to grant ILR under the RL policy would depend on a range of factors, and, by implication, that the factors which were relevant would vary, depending on the facts.

117. The focus of the applicant's challenge was the Secretary of State's conclusion that she anticipated that conditions in Russia would change in the future. The applicant did not submit that he should be given ILR if he could not be removed. He submitted, rather, that the Secretary of State had erred in concluding that he might be removed in the foreseeable future, that that error had tainted the holistic assessment of whether he should be given ILR (paragraph 51).

118. The UT rejected the submission that the applicant's discharge from the extradition proceedings meant that the Secretary of State erred in law in concluding that he could ever be removed to Russia (paragraph 73). The UT then considered the submission that, in the light of his expert evidence, the prospect of removing the applicant to Russia was remote or non-existent, and that the Secretary of State was bound to consider that argument, and the other factors on which the applicant relied, in her holistic assessment of whether or not to grant ILR. The UT held, in the light of the authorities on the RL policy, that the likelihood of removal becoming possible was a relevant factor in the assessment of whether ILR should be given to a person was excluded from the protection of the RC and was irremovable (paragraph 79). The Secretary of State had failed to engage with the appellant's clear case, supported by expert evidence, that there was no foreseeable prospect of his removal to Russia. She cited no evidence which contradicted the expert's report (paragraph 80). The Secretary of State had, in that respect, erred in law (paragraph 81). That error was material (paragraphs 87-93). The UT quashed the decision (paragraph 101).

Discussion

119. I have described the facts and A's submissions at great length, in order to be able to consider the grounds of appeal succinctly.

120. Mr Gajjar rightly accepted orally that the history of this case is relevant. I, in turn, accept a submission Miss Apps made about the starting point in this class of case. The requirements of Appendix A when A made applications 2 and 3 were clear. He had to produce a detailed body of evidence which supported his claim that he had earned the necessary income to get leave as a Tier 1 migrant. A had to have, and to marshall, that material. He, of all people, knew exactly what was in that material and what was

missing. Although the relevant provisions of Appendix A did not, at the relevant time, say so in terms, it was necessarily implicit in those provisions that the documents and the claimed income had to be genuine. That implication is a necessary corollary of the general grounds of refusal in the Rules. That part of the background is relevant to how much the Secretary of State had to tell A about her allegation of dishonesty.

121. *Balajigari*, which binds this court, establishes what procedural fairness requires in this class of case. The requirements are not onerous or complicated. If the Secretary of State considers that the discrepancy is the result of dishonesty, she should clearly tell the applicant that, and give him an opportunity to respond, both about his conduct and about any other factors which are relevant. She must then take that response into account before she can conclude that an applicant has been dishonest. I need say no more than that I consider that the long history of this case shows that, on the facts, those requirements were amply met. The UT was not irrational in reaching that conclusion.

122. I did not understand Mr Gajjar to submit that the Secretary of State had failed clearly to say that she considered that A had acted dishonestly. The core allegations against A have been the same throughout the long history of this case, and they have been clear. I reject A's submission that the Secretary of State relied on new matters in the decision, on which he had not had an opportunity to comment, and that that was unfair. The material which the Secretary of State considered in the decision was A's material, which he had created for the purposes of applications 2 and 3, and on which he had relied as his response to MTR 2. It is not a valid criticism that she should have looked at that material more carefully when A first submitted it to her. What the decision actually shows is that the Secretary of State considered A's explanations with exemplary care. It is not a valid criticism of the Secretary of State that she subjected A's invoices to 'forensic analysis', that she checked open sources to see what they might show about A's claimed customers, or that, on occasion, she observed that the A's material, far from answering the case against A, raised further questions. That forensic analysis, the checks and the observations were appropriate. They show that she was taking A's explanations seriously, engaging with their substance (to use Mr Gajjar's phrase) and examining them with anxious scrutiny. She did, indeed, take A's explanations into account, as the law required.

123. A cannot claim, for example, to be taken by surprise by the Secretary of State's observations on the significant amount of cash payments on which he relied, nor can he complain that it is a new allegation. He told the Secretary of State that he accepted payments in cash in one of his answers to the questionnaire which he signed on 19 June 2018 (see paragraph 34, above). The Secretary of State's case was that the income he claimed was not genuine. That case is reinforced, not undermined, by A's assertion that many of his payments were in cash. That assertion is not a new allegation against A, but part of his unsatisfactory explanation, on which the Secretary of State was entitled to comment adversely. I also reject the submission that this appeal resembles one of the cases considered in *Balajigari* (see paragraph 22, above). This is not a case in which unexpectedly detailed allegations were suddenly sprung on A to which he was expected to respond instantly.

124. I also reject the related submission that the Secretary of State's approach reverses the burden of proof. First, it was for A to persuade the Secretary of State, in applications

2 and 3, that he had genuinely earned the income which he claimed to have earned. Second, if, in accordance with *Balajigari*, he was asked for an explanation, and he wished to displace the inference of dishonesty which the Secretary of State would have been able to draw in the absence of an explanation, it was up to him, if asked, to provide an explanation. It was then for the Secretary of State to evaluate that explanation, which she duly did. Fairness did not then require the Secretary of State to give A a third opportunity to elaborate his explanation which she had, after careful examination, and on several reasonable grounds, found wanting. I explain in the next paragraph why those grounds were reasonable.

125. I also reject the submission that the Secretary of State's view that A's conduct was dishonest was irrational, and the related submission that the UT was irrational to reject A's arguments on this issue. It is obvious from the decision (and from decisions 1 and 2, and from MTR1 and MTR2) that there were many factors which, when viewed as a whole (as the UT rightly appreciated), would have entitled a reasonable decision maker, and did entitle the Secretary of State in this case, to conclude that A had not made a genuine mistake. The Secretary of State was entitled to conclude that the thin material submitted by A, which included letters A and B and letters 1 and 2, invoices and some bank statements, but which did not respond to the detailed questions asked in MTR2, was wholly inadequate, either as proof that his claimed income was genuine, or as an explanation of the discrepancy. Mr Gajjar's submissions to the contrary were no more than attempts to re-argue the case. They did not begin to show that the Secretary of State's view, or that the UT's conclusions on this point, were irrational. It does not matter if some of the factors were stronger than others. The picture as a whole was overwhelming.

126. I reject A's argument that *Gornovskiy* shows that whether an applicant for ILR will be removed in the future is a factor which the Secretary of State must always take into account in a case such as A's. There are two reasons why *Gornovskiy* does not help A.

127. First, in *Gornovskiy* the UT was considering a different case altogether. The appellant could not be removed to Russia because that would breach article 3, and he had lost the protection of the RC. The Secretary of State considered his case under a policy designed for that type of case. The premise for the application of that policy was that article 3 of the ECHR prevented the removal of the appellant.

128. Second, Mr Gornovskiy raised the question of whether or not he could be removed in his representations, and he relied on evidence that he could not be. The UT held that the Secretary of State had erred in law because she had not explained, in the light of that evidence, her view that conditions might change so that the appellant could be removed to Russia in the future. In MTR2, the Secretary of State specifically asked A to draw to her attention any factors which he wished her to take into account. In the decision, the Secretary of State expressly took into account the factors which A, in his response to MTR 2, had asked her to take into account. He did not ask her to take into account the contention he now makes, which is that, because of his children and their ages, the Secretary of State would not be able to remove him for many years. Having issued that express invitation, the Secretary of State was not required to take into account any other factor which A did not mention.

129. If anything had turned on this point (and it does not) I would have rejected Miss Apps's submission that the Secretary of State took into account, in the decision, whether, and if so when, it was likely that A would be removed. The decision is long and comprehensive. The point is not mentioned. Nor is it legitimate, in this case, in which there is a long and detailed decision, to seek to supplement that reasoning by referring to an undated GCID note. For completeness, I would also have rejected the submission that the GCID note considered this issue by implication.

Conclusion

130. For those reasons, I would dismiss this appeal. The Secretary of State did not act unfairly. Neither the Secretary of State nor the UT erred in law. That conclusion means that it is not necessary for me to lengthen this long judgment any further by considering whether or not any errors of law by the Secretary of State or by the UT were material.

Lord Justice Warby

131. I agree.

Lord Justice Lewis

132. I also agree.