Neutral Citation Number: [2022] EWCA Civ 36

Case No: C5/2021/0150

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Hanson
HU/03308/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2022

Before :

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and –	
KRUPALIBEN SANIKUMAR PATEL	**Appellant**

- -
- -

Zane Malik QC and Zeeshan Raza (instructed by **Law Lane Solicitors**) for the **Appellant**
Nicholas Chapman (instructed by **Government Legal Department)** for the **Respondent**

Hearing date: 15 December 2022

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on 21 January 2022

Lord Justice William Davis

Introduction

1. The appellant appeals against the decision of Judge Hanson of the Upper Tribunal (the "UT") promulgated on 28 October 2020 allowing the appeal of the Secretary of State for the Home Department (the "SSHD") from the decision of Judge Cockrill of the First-tier Tribunal (the "FTT"). Judge Cockrill had allowed the appellant's appeal against the refusal of the SSHD to grant her leave to remain in the UK.

2. In allowing the appellant's appeal Judge Cockrill had concluded that in the circumstances of the case he should follow the factual findings of a different FTT judge, Judge Hodgkinson, made at an earlier hearing involving an appeal by the appellant's husband. At the earlier hearing the SSHD had relied on alleged deception by the appellant as justifying a revocation of the appellant's husband's leave to remain. Judge Hodgkinson had concluded that the alleged deception had not been established.

3. Judge Hanson determined that Judge Cockrill had made an error of law in following the findings of Judge Hodgkinson. The appellant's case is that Judge Hanson made the error of law. She argues that Judge Cockrill adopted the correct approach in relation to the earlier factual findings. Thus, Judge Cockrill's decision should be restored.

4. The SSHD supports the reasoning and the decision of Judge Hanson. She submits that Judge Cockrill adopted an impermissible approach to the earlier factual findings which were made in proceedings involving a different party.

Background

5. The appellant first arrived in the UK in March 2010 with entry clearance as a student. This was valid until February 2012. In June 2010 the appellant married Sanikumar Patel in India. He had been in the UK since 2007 with entry clearance and subsequently leave to remain as a student. The appellant and her new husband returned to the UK shortly after their marriage, each with leave to enter as a student valid until 2 April 2012.

6. In September 2011 the appellant applied for leave to remain as a student. Her husband was included as a dependent in that application. In October 2011 leave to remain was granted to the appellant and her husband valid until 31 May 2012.

7. On 17 April 2012 the appellant purported to have taken an Educational Testing Service ("ETS") English speaking and writing test. On 20 April 2012 she claimed to have taken the reading and listening tests. She relied on the results of those tests when in May 2012 she applied for leave to remain as a student. As before her husband was included as a dependent in this application. On 1 August 2012 leave to remain was granted to the appellant and her husband valid until 10 April 2015.

8. On 26 March 2015 the appellant's husband applied for leave to remain as a Tier 2 skilled worker. The appellant was included in that application as a dependent of her husband i.e. the position as it had been hitherto was reversed. However, before any

decision on that application was made, the appellant and her husband on 1 April 2015 were served with a notice in form IS151A. This notified them of their liability to removal by reason of alleged deception by the appellant in relation to the ETS test. It was said that she had used a proxy to take the tests. The effect of the notice inter alia was to revoke any pre-existing leave.

9. On 19 May 2016 the application made in March 2015 was refused. There was a right for administrative review of that refusal. No such review was sought whether by the appellant or her husband.

10. At some point shortly after this refusal, the precise date not being clear from the material I have seen, the appellant and her husband made an application for leave to remain outside the Immigration Rules. Early in 2017 the appellant's husband varied his application to one based on 10 years' residence pursuant to Rule 276B. On 19 June 2018 that application was refused. The SSHD found that he was not entitled to leave under this Rule because he had no valid leave when his application was made. That was due to the service of form IS151A. The SSHD concluded that there were no exceptional grounds warranting a grant of leave to remain outside the Rules by reference to Article 8. The appellant's husband appealed against that refusal. The hearing of the appeal was on 8 January 2019. The decision was promulgated on 17 January 2019.

11. The appellant also varied her application early in 2017. She applied for leave to remain via the Family and Private Life route. She relied on her family life with her partner and their child who was born in January 2013. Her application was refused on 11 February 2019. The SSHD considered the application only under the private life route since her husband was not British and had no leave to remain. The application so limited was refused on grounds of suitability because the SSHD was satisfied that the appellant had "made false representations for the purpose of obtaining a previous variation of leave". The decision letter set out in some detail the evidence on which the SSHD relied in relation to the false representations. The SSHD went on to consider whether there were exceptional circumstances justifying leave to remain outside the Rules. None was found to exist. The appellant's appeal against that refusal was heard on 6 August 2019. The decision was promulgated on 23 August 2019.

The hearing before Judge Hodgkinson

12. At the core of the appellant's husband's appeal was the proposition that the appellant had not exercised any deception. Although I have not seen the grounds of appeal, it is clear from the decision of Judge Hodgkinson that the issue of the alleged deception was central to the appeal. The SSHD relied on the deception to justify the refusal on grounds of suitability. Thus, Judge Hodgkinson considered that he had to make findings in relation to the alleged deception. That was plainly the correct course.

13. The appellant had made a detailed witness statement for the purposes of her husband's appeal. It dealt with the circumstances of the ETS tests which she said that she took in a proper fashion without any proxy being used. It set out her various educational achievements which she said demonstrated a strong command of English. The appellant attended the hearing. She gave evidence. However, she was not cross-

examined by the presenting officer acting on behalf of the SSHD. She simply adopted her witness statement.

14. The SSHD had filed no evidence relating to the ETS tests taken by the appellant. At the start of the hearing the presenting officer had applied for an adjournment of the hearing of the appeal. This was said to be justified because the appellant's application for leave to remain had yet to be determined by the SSHD. The argument was that it would be sensible for the appeals of the appellant and her husband to be heard together. However, no indication was given as to when a decision in relation to the appellant's application would be made. Though not mentioned by Judge Hodgkinson, it might be said that the application for an adjournment appeared to prejudge the outcome of the appellant's application. There could hardly be an appeal unless the application for leave were refused. In any event, Judge Hodgkinson noted that the SSHD had not served what he referred to as the "usual bundle of documents" to be expected in any case where deception in relation to ETS tests was in issue. The response of the presenting officer was that the absence of this evidence was a further reason to adjourn the hearing and that the evidence had not been served because the deception alleged was exercised by the appellant i.e. not the party whose appeal was to be considered by Judge Hodgkinson. Judge Hodgkinson was unimpressed by this proposition. The husband's leave had been terminated by reason of the appellant's alleged deception. It was incumbent on the SSHD to produce the relevant evidence at the hearing. There was no good reason for the failure to do so. Therefore, the application for an adjournment was refused.

15. Given that the SSHD had adduced no evidence to support the allegation that the appellant had used a proxy to take the ETS tests and/or that deception had been used, Judge Hodgkinson concluded that the SSHD had not discharged the burden of proving deception. His finding was that "the alleged deception has not been established". The consequence of that finding was a conclusion that the notices in form IS151A had been served wrongly. However, Judge Hodgkinson said that the notices remained valid. No attempt had been made to appeal against the notices. The leave of both the husband (whose case he was considering) and the appellant had been revoked notwithstanding the fact that the notices should not have been served.

16. In the light of the revocation of leave Judge Hodgkinson went on to consider whether the husband's appeal could succeed under Article 8 outside the Immigration Rules. He concluded that there were no exceptional or compelling circumstances warranting a grant of leave to remain under Article 8 outside the Rules. He reached this conclusion after a careful review of the husband's family and private life and of the interests of the child of the marriage.

17. Self-evidently the SSHD could not appeal against the decision of Judge Hodgkinson. Whatever finding had been made in relation to the alleged deception, the husband's appeal had been dismissed. There may well have been good grounds for the husband to appeal. In *Ahsan v SSHD* [2017] EWCA Civ 2009 (to which I shall return) it was suggested that, where it has not been established that the deception relied on in fact occurred, the person concerned should be put back into the position they would have been in had leave not been invalidated. However, the husband did not appeal. Any appeal now would be out of time by many months.

The hearing before Judge Cockrill

18. Prior to the hearing of the appellant's appeal to the FTT the SSHD filed the evidential bundle relating to the ETS tests taken by the appellant. This consisted of specific evidence relating to the appellant's tests, general evidence about the test centre at which those tests had been taken and the analytical tools used to assess the reliability of the tests, evidence concerning the statistical significance of that general evidence and expert evidence from Professor French about the likelihood of the analytical tools providing inaccurate results. It was what Judge Hodgkinson had referred to as "the usual bundle". On the face of it the initial evidential burden which lay on the SSHD to show deception was satisfied by the evidence filed. In the ordinary case it would then be for the appellant to adduce sufficient evidence raising an innocent explanation. The final stage would require the SSHD to discharge the legal burden. Judge Cockrill was provided with a bundle running to 374 pages by the appellant's solicitors. I do not know precisely what the bundle contained. I infer that it included a witness statement from the appellant in the same terms as the statement adduced before Judge Hodgkinson and documents substantiating the appellant's educational history.

19. Judge Cockrill did not engage in any substantive consideration of the evidence filed by the parties in relation to the ETS tests or the appellant's actual command of English. That is because it was submitted on behalf of the appellant that the issue of whether the appellant had engaged in deception had been determined by Judge Hodgkinson. The appellant cited *Mubu* [2012] UKUT 00398 (in which reference was made to *Devaseelan* [2002] UKIAT 00702) and *BK (Afghanistan) v SSHD* [2019] EWCA Civ 1358 to support the general proposition that, where the relevant evidence was available at the time of the first appeal, the SSHD should not be permitted to rely on that evidence at the second appeal. Rather, in the circumstances facing Judge Cockrill, the determination of Judge Hodgkinson should be taken as having settled the issue of deception.

20. The SSHD was represented by counsel. It may be that his contribution was not fully reflected in the decision of Judge Cockrill. However, he is not clearly recorded as challenging the premise of the submission made on behalf of the appellant. There is no indication that he drew the judge's attention to any other authority or that he made submissions based on the full meaning and import of the authorities cited by the appellant. The decision records counsel as relying on the refusal letter, emphasising that the decision of Judge Hodgkinson was "not allowed" and drawing attention to the report of Professor French. What is meant by the phrase "not allowed" is not clear. It may be that it reflected a submission that Judge Hodgkinson's decision could not be determinative. I infer that the reference to Professor French's report is shorthand for reliance on the entirety of the evidential bundle filed by the SSHD. The report of Professor French was only of significance when read in the context of all of the evidence filed.

21. In response to what was put on behalf of the SSHD the appellant pointed out that the report of Professor French substantially pre-dated the date of the hearing before Judge Hodgkinson. The same applied to all of the other evidence filed by the SSHD. It was argued that no proper explanation had been provided as to why the evidence was not adduced before that judge.

22. Judge Cockrill's core reasoning is at [30] of his decision:

> "The conclusion that I reach is that those findings of fact made by (Judge Hodgkinson) in relation to this appellant are a suitable and proper starting point for me on conventional *Devaseelan* principles. **What is also important to stress is that nothing has really been added before me which would enable a different conclusion to be reached properly**." (My emphasis added.)

He referred to *Mubu* and *BK (Afghanistan)* and said that, in the light of those authorities, he had to maintain the factual findings of Judge Hodgkinson. He concluded by saying that he had been provided with no explanation as to why the report of Professor French (and by implication the other evidence filed by the SSHD before him) had not been available to Judge Hodgkinson.

23. Having determined that the SSHD had failed to establish deception, Judge Cockrill concluded that the appellant's appeal was allowed on human rights grounds. He did not set out his reasons for doing so. The inference must be that the judge followed the suggested guidance in *Ahsan* as set out above.

The appeal to the UT

24. The decision of Judge Hanson set out in full the written submissions of the SSHD and the appellant. The submissions of the SSHD were fuller and more wide-ranging than the arguments raised by counsel before Judge Cockrill. It is unnecessary to rehearse them at this point since they formed the basis of the SSHD's argument in this appeal.

25. Judge Hanson began his consideration of whether there had been any error of law by stepping back to the decision of Judge Hodgkinson. Whether this was an appropriate exercise at all is doubtful. The error relied on by the SSHD was that perpetrated by Judge Cockrill. Judge Hanson first criticised Judge Hodgkinson for claiming that the SSHD "did not provide any reasons" for providing the evidence supporting the allegation of deception. In fact, no such claim was made by Judge Hodgkinson. Rather, he said that there was "no good reason" for the failure to file the evidence. The SSHD now accepts that Judge Hodgkinson was correct to make that judgment. Judge Hanson further criticised that judge for his failure to give consideration to the developing jurisprudence in relation to ETS cases which might have impacted on an application made in 2017. The changing landscape arguably supported the delay in making a decision in the appellant's case. There is no reason why Judge Hodgkinson should have given any such consideration. The issue was whether there was any reason for the failure to file evidence in relation to the ETS tests, all of which had been available for many months. Moreover, a decision had been made in June 2018 in the case of the appellant's husband based on the alleged deception. The developing jurisprudence was irrelevant.

26. However, Judge Hanson thereafter focused on the position as faced by Judge Cockrill. Having reviewed the authorities, Judge Hanson concluded that a judge in the position of Judge Cockrill had to ensure that they did not place undue restrictions on their consideration of why there should be departure from a previous finding of fact. The second tribunal could not be restricted to material post-dating that previous finding.

To do so would be inconsistent with the core principle that every tribunal must conscientiously and fairly decide the case placed before it. Where the first tribunal's determination related to a different party but arising out of the same factual matrix, the earlier findings of fact should be the starting point for the second tribunal. But evidence contradicting a core aspect of an appellant's claim would be a good reason for departing from the earlier findings.

27. Applying those principles Judge Hanson concluded that fairness required Judge Cockrill to consider the evidential bundle filed by the SSHD. Had he done so he would have concluded that the evidence discharged the initial evidential burden resting on the SSHD. Moreover, it apparently contradicted the factual findings of Judge Hodgkinson. Judge Cockrill's failure to consider the evidence was an error of law. Judge Hanson went on to say that Judge Cockrill erred in not examining the substance of the Article 8 claim. I observe that there was no reference to *Ahsan* by Judge Hanson. However, this aspect of his decision was secondary. Once he had concluded that Judge Cockrill had fallen into error in relation to the previous findings by Judge Hodgkinson, Judge Hanson was bound to allow the appeal. He remitted the case to the FTT for hearing by a different judge. He made no preserved findings.

Discussion

28. It is not necessary for the purposes of this appeal to rehearse the background of ETS English tests and the history of the litigation surrounding the test. It is set out in detail in *Ahsan* at [2] to [33]. Although Judge Hanson considered that the litigation was relevant at the time of the hearing before Judge Hodgkinson, for the reasons I have already given it was not. I simply need to note that, in any case where deception in relation to ETS tests is in issue, the FTT is required to engage in the three stage process as set out at [18] above.

29. The appellant's argument is that Judge Hodgkinson at the first appeal engaged in that process insofar as he could. The failure of the SSHD to file any evidence meant that the exercise was one-sided but the judge reached proper findings on the issue of deception. When the appellant's case was before Judge Cockrill, the SSHD sought to rely on evidence that could and should have been placed before Judge Hodgkinson. The appellant's submission is that this was impermissible for the reasons explained by this court in *Sultana v SSHD* [2021] EWCA Civ 1876. Judge Cockrill was correct in his conclusion that, in the circumstances of this case, the findings of Judge Hodgkinson were determinative of the issue of deception. Thus, Judge Hanson was wrong in law to allow the appeal from the decision of Judge Cockrill.

30. The SSHD submits that the appellant's approach focuses purely on the question of whether evidence of deception was available at the time of the hearing before Judge Hodgkinson and whether there was a good reason for the failure to adduce it at that hearing. That is but one consideration for a FTT judge faced with findings made at an earlier hearing which appear to be at odds with the evidence available to that judge. The fundamental aim of the tribunal process is to achieve justice in the case before the tribunal, namely justice for all parties. In this case, that aim could only be served by Judge Cockrill considering the entirety of the evidence before him on its merits.

31. I begin my assessment of the merits of the competing arguments with consideration of the effect of *Sultana*. *Sultana* did not establish any new principles. It was a decision

on its own facts which applied existing authority, in particular *BK (Afghanistan)*. I make these observations about *Sultana* and its relevance to this appeal. First, the appeal in *Sultana* was disposed of by reference to the findings of fact made by the FTT and UT judges. Any observations in relation to the approach to be taken when evidence is sought to be adduced at a second appeal which was available at a first appeal were obiter. Second, *Sultana* was a case where the first and second appeals involved the same parties. That provided prima facie justification for drawing a parallel with principles to be drawn from *Ladd v Marshall* [1954] 1 WLR 1489. In *Ladd v Marshall* the court was concerned with the circumstances in which fresh evidence could be admitted on appeal to justify a new trial. By definition the parties were the same throughout. There is no logic in seeking to apply those principles where the parties to the two appeals are different. Third, the observations at [51] of *Sultana* were directed to a case where a FTT judge had made findings of fact in relation to whether particular documents were fraudulent and had then referred the case back to the SSHD for further consideration. If the SSHD in those circumstances were to make a decision based on a view of the documents directly contrary to the findings of fact of the FTT, the person affected by the decision would be entitled to challenge the decision on public law grounds. This was the approach taken in *Ullah v SSHD* [2019] EWCA Civ 550 as cited in *Sultana*. What is said at [51] of *Sultana* goes no further than that. Fourth, the proper approach to be taken by a FTT judge faced with a decision made in an earlier appeal was set out fully at [45] to [50] of *Sultana*. It would not be helpful to repeat the analysis other than in the following very summary form. The essential position is that the second FTT judge cannot be subject to any principles of estoppel in relation to an earlier finding. Rather, the judge must conscientiously decide the case in front of them applying principles of fairness. Those principles include the potential unfairness of requiring a party to re-litigate a point on which they have previously succeeded. These propositions were drawn from *Devaseelan*, *Djebbar v SSHD* [2004] EWCA Civ 804 and *BK (Afghanistan)*.

32. In any event, this appeal concerns what is commonly called a different party case. Though the appellant participated in the hearing before Judge Hodgkinson, she was not a party to the appeal before him. There was a material overlap of evidence, namely the alleged deception involved in the taking of the ETS tests. The approach to be adopted in such cases was set out in *Ocampo v SSHD* [2006] EWCA Civ 1276 (subsequently approved by the majority in *AA (Somalia) v SSHD* [2007] EWCA Civ 1040) and more recently in *AL (Albania) v SSHD* [2019] EWCA Civ 950.

33. The core principle in *Ocampo* was expressed at [25]:

> "In my view, the *Deevaseelan guidelines* are as relevant to cases like the present where the parties involved are not the same but there is a material overlap of evidence, as the Immigration Appeal Tribunal observed in *TK Georgia*, at paragraph 21 of their determination. Clearly, the guidance may need adaptation according to the nature of the new evidence, the circumstances in which it was given or not given in the earlier proceeding and its materiality to securing a just outcome in the second appeal along with consistency in the maintenance of firm immigration control. It should also be borne in mind, as Hooper LJ pointed out in the course of counsel's submissions,

> that admission of new evidence may, as a matter of fairness, operate for, as well as against, a claimant for asylum. In immigration matters, as in other areas of public law affecting individuals, public policy interests of firmness, consistency and due process may have to be tempered with considerations of fairness in particular circumstances."

34. In *AL (Albania)* the brother of the appellant had claimed asylum on the basis that he was the member of a family that had been targeted in a blood feud in Albania dating from 2012. The feud supposedly arose from the unlawful killing of a man by an uncle of the family. The SSHD had refused the claim. On the brother's appeal (heard in May 2013) the FTT judge accepted that he and his family were the target of a blood feud. The appeal was allowed. The appellant in *AL* arrived in the UK at the end of 2014. He claimed asylum on the same basis as his brother. The SSHD refused his claim. At his appeal disclosure was given of material on which the SSHD had relied. This included evidence that between 2011 and 2013 the uncle of the family had travelled regularly into and out of Albania. The second FTT judge regarded this evidence as highly significant. It was inconsistent with the proposition that there was a blood feud with the uncle at its heart. For that and other reasons the second FTT judge dismissed the appeal.

35. In her judgment in *AL (Albania)* Nicola Davies LJ observed that the appellant's case was that the FTT should have approached the earlier determination as something stronger than a starting point when making findings of fact in relation to the appellant. She said that this was inconsistent with the guidance in *Devaseelan* as upheld by the Court of Appeal in *Ocampo* and *AA (Somalia).* She went on to say at [25]:

> "….following the *Devaseelan guidelines*, not only is the earlier determination the starting point, it should be followed unless there is a very good reason not to do so. The FTT treated the determination in R's appeal as the starting point but departed from the findings of fact because of the evidence of the uncle's travels. In my judgment that evidence did constitute a very good reason for departing from the determination in R's case as it contradicted a core aspect of the appellant's claim, namely that his uncle had fled from Albania because of the blood feud, was fearful of being killed and could not safely return. The FTT's reliance on that evidence in order to depart from the findings made in R's determination demonstrates no material error of law…."

36. The issue of whether the evidence adduced before the second FTT judge in *AL (Albania)* could with reasonable diligence have been obtained at the time of the hearing before the first FTT judge was not specifically addressed at any stage of the proceedings whether in the FTT, the UT or this court. Arguably it could have been since the evidence relating to the uncle's travels was provided without difficulty once the UK authorities asked for it. The request was not made until after the brother's appeal. There is no reason to suppose that it could not have been made earlier. The reality is that this court in *AL (Albania)* properly applied the principle set out in *Ocampo* i.e. it concentrated on the nature of the new evidence and its materiality to securing a just outcome.

37. In her submissions in this appeal the SSHD submits that the guiding principles can be expressed as follows:

    (i) Where there are different parties but with a material overlap of evidence, the *Devaseelan* principles of fairness apply with appropriate modification.
    (ii) What fairness requires will depend on the particular facts of the case. The findings at an earlier FTT hearing will be an important starting point but the second FTT judge cannot avoid the obligation to address the merits of the case on the evidence then available.
    (iii) The second FTT judge necessarily will look for a very good reason to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the new evidence is so cogent and compelling as to justify a different finding.

38. I agree that those principles accurately reflect the approach in *Ocampo* and *AL (Albania)*. Applying them to this case, I am satisfied that Judge Cockrill erred. He found that there was no proper explanation for the failure to adduce the evidence of deception at the hearing before Judge Hodgkinson. That constituted his reason for not departing from Judge Hodgkinson's findings. He did not consider the substance of the evidential bundle concerning the ETS tests taken by the appellant. Without doing that he was not in a position properly to determine whether there was a very good reason for departing from the previous findings. When Judge Cockrill said that "nothing has been added before me which would enable a different conclusion to be reached properly", that was a clear error. He now had the evidential bundle which had not been before Judge Hodgkinson. I do not know whether an overall assessment of fairness would have led Judge Cockrill nonetheless to maintain the findings of Judge Hodgkinson. What can be said is that Judge Cockrill did not engage in any assessment of the substance of the new evidence when such an assessment was essential in assessing whether there was "a very good reason" to depart from the previous findings.

Conclusion

39. That is sufficient to dispose of this appeal. Judge Hanson's reasoning was in line with *Ocampo* and *AL (Albania)*. He was wholly correct in his conclusion that Judge Cockrill had failed to adopt the correct approach to the *Devaseelan* guidelines on the facts of the case before him. The appeal must be dismissed. The appellant's case now will be considered afresh by a different FTT judge. What that judge's conclusion will be is not for me to say. All that the new judge will glean from this judgment is the principled approach to be adopted.

40. In the course of argument I raised the issue of fraud. This was a question which was discussed in *Sultana*. In that case the observations were obiter. The same would apply to any observations I might make in the context of this case. What can properly be said is that, as part of the consideration of the cogency of the new evidence, clear evidence of fraud may be relevant to the issue of "a very good reason to depart from the earlier findings".

Lord Justice Moylan:

41. I agree.

Lady Justice King:

42. I also agree.