Neutral Citation Number: [2021] EWCA Civ 1876

Case No: C7/2021/0440

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Frances
IA/02542/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NUGEE
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

ZAKIA SULTANA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Zane Malik QC and Ahmad Badar (instructed by **Norma & Co Solicitors**) for the **Appellant**
Julie Anderson (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 25 November 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am 9 December 2021

Lord Justice William Davis:

Introduction

1. The appellant appeals against the decision of Judge Frances of the Upper Tribunal (the "UT") promulgated on 10 August 2020 dismissing her appeal from the decision of Judge White of the First-tier Tribunal (the "FTT"). Judge White had upheld the refusal of the Secretary of State for the Home Department (the "SSHD") to grant the appellant leave to remain.

2. The appellant's case is that the UT should have found that Judge White made an error of law in his decision, namely that he departed wrongly from an earlier decision of the FTT in relation to leave to remain. The earlier decision had been in the appellant's favour. The appellant argues that the UT thereby erred in law.

3. The SSHD argues that there was no error of law. Rather, on the facts of the case there was no re-litigation of the earlier decision of the FTT.

Background

4. The appellant is a Bangladeshi national. On 15 August 2009 she was granted leave to enter the UK as a Tier 4 (General) Student. That leave expired on 15 January 2013. Before the expiry of that leave the appellant applied for leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the Points Based System.

5. The Points Based System required the appellant to score 25 points under three separate attributes as set out in the Immigration Rules as then applied. These attributes were: access to funds as required; funds held in regulated financial institutions; funds disposable in the UK.

6. In order to satisfy those attributes the appellant with her application submitted bank statements and similar documents from BRAC Bank in Dhaka. The documents purported to show that she had access to two funds on deposit at that bank. Each fund was in the sum of £100,000. One fund was held in the name Momtaz Begum. The other fund was in the name of Ram Chandra Das.

7. The SSHD sought to verify those documents with BRAC Bank. No verification was forthcoming. The SSHD concluded that the documents were false. On 22 April 2015 the appellant was informed that the SSHD had decided to refuse her leave to remain and to issue removal directions.

8. The decision read as follows:

> "General Grounds Reasons for Refusal
> In your application you submitted Brac Bank documents.
> I am satisfied that the documents were false because we sought to verify them. As false documents have been submitted in relation to your application it is refused under paragraph 322(1A) of the Immigration Rules. For the above reasons I am also satisfied that you have used deception in this application."

The decision went on to deal with the points to be awarded under the three attributes. In each case no points were awarded. The decision then stated:

> "Therefore you do not satisfy the requirements of the Immigration Rules for this category and it has been decided to refuse your application for Leave to Remain as a Tier 1 (Entrepreneur) Migrant under paragraphs 322(1A) and 245DD of the Immigration Rules as you do not satisfy the requirement at paragraph 245DD(a)."

The reference to paragraph 245DD(a) made explicit that the refusal was solely on the basis of the general grounds for refusal, namely the use of false documents. The SSHD further stated in the decision that she had not made the wider assessment of the appellant's proposed business as required by the Rules and that she reserved the right to carry out the assessment in the event of any challenge to her decision.

9. The appellant appealed to the FTT against the decisions of the SSHD.

The First Appeal before the FTT

10. The appeal was heard on 11 December 2015 before Judge Randall. The appellant challenged the conclusion of the SSHD that she had provided false documents. Thus, the burden was on the SSHD to prove the alleged fraud. The appellant's case was that, at the very least, the SSHD could not satisfy that burden.

11. In part, the appellant relied on what she said was the inadequacy of the verification process conducted by the SSHD. She pointed to inconsistencies and anomalies in the documents produced by the SSHD in relation to that process.

12. The appellant also relied on post decision material, namely two letters dated 24 November 2015. The letters were in identical form and were signed by Anwar Sidat who described himself as the branch manager of BRAC Bank. One letter related to the account in the name Momtaz Begum. The other was in respect of the account in the name Ram Chandra Das. Each stated that the e-mail traffic relied on by the SSHD as demonstrating that the documents provided by the appellant at the time of her application for leave to remain were false was not genuine. It had not emanated from the branch of the bank of which Anwar Sidat was the manager. Each letter went on to state that the documents provided by the appellant in 2012 were genuine.

13. There is no clear evidence as to when these letters first were in the hands of the SSHD. There is an obvious and overwhelming inference that it was not prior to 24 November 2015. The letters certainly were before Judge Randall on 11 December 2015 at which point the SSHD had notice of them. On behalf of the appellant it was said that the procedure rules applicable at the relevant time would have provided the following timetable: notice of appeal within 10 working days of the decision; SSHD to provide a bundle of documents within 28 days of the notice of appeal; appellant to provide bundle to the FTT no later than 5 days prior to the hearing of the appeal. The SSHD agreed that this would have been the relevant timetable as applicable to the appellant's case. There is no evidence as to whether the appellant's hearing bundle (which must have included the 24 November 2015 letters) was served within time. If it was the SSHD first was aware of the letters by 4 December 2015. All that can be said with any certainty is that the very earliest date on which the SSHD had sight of those letters was 12 working days prior to the hearing i.e. the date of the letters.

14. The appellant did not attend the hearing on 11 December 2015. She was represented by a solicitor who applied for an adjournment on the basis that the appellant was

recovering from surgery. No or no sufficient material was provided to support the submission that the appellant was unfit to attend the hearing. The application for an adjournment was refused. Although the solicitor remained at the hearing, he took no further active part in the hearing of the appeal.

15. Judge Randall concluded that the documents relied on by the SSHD were "concerning". Three matters in particular gave rise to his concern. First, there were inconsistent references to the number of documents provided to the bank for verification. Second, there was reference to a specific document within the e-mail traffic which appeared to be of significance. No copy had been produced of this document. Third, the e-mails had been redacted so as to leave it unclear by whom they had been received at the bank.

16. In consequence Judge Randall was not satisfied as to which documents had been provided by the SSHD for consideration. This threw substantial doubt on the verification process. In contrast Judge Randall described the letters of 24 November 2015 as produced by the appellant as "considerably more sophisticated" than the documents relied on by the SSHD. He concluded as follows:

> "Bearing in mind the quality of the new evidence provided that goes to genuineness and the high standard of proof required to demonstrate the falsity of a document I have concluded that, in the light of the new evidence, the Respondent has not satisfied the high standard of proof and discharged the burden on her in respect of this allegation."

17. Judge Randall allowed the appeal in respect of the general grounds of refusal. He said that it would be for the SSHD to "decide on the substantive Points Based System application". He referred to the fact that the SSHD had reserved the right to carry out a full assessment of the appellant's application.

Further decision of the SSHD

18. In the light of the decision of Judge Randall the SSHD reconsidered the application by the appellant for leave to remain as a Tier 1 (Entrepreneur) Migrant. On 4 August 2016 the SSHD reached the same decision as before. Under the heading "General Grounds Reasons for Refusal" the wording of the general grounds for refusal was almost identical to that used in the decision of April 2015. The difference was that the decision stated that verification had been sought "on two occasions". The decision itself did not make it clear to which occasions reference was being made. Nor did it identify the documents of which verification was sought. This was clarified in the course of the appeal against this second decision. The evidence at that stage was of attempted verification in April 2016 and July 2016. The documents submitted for verification were both the bank statements and other material submitted with the original application and the letters dated 24 November 2015.

19. The decision dealt with the points to be awarded under each attribute. No points were awarded. The decision then stated:

> "The SSHD…refuses your application for Leave to Remain as a Tier 1 (Entrepreneur) Migrant under paragraph 245DD of the Immigration Rules as you do not meet the requirement at paragraph 245DD(b) and under Appendix A."

These words were not the same as in the first decision. Paragraph 245DD(b) was concerned with the access to funds as required by the attributes and the Points Based System.

20. The appellant appealed against this decision to the FTT. In her grounds she argued that, following the decision of Judge Randall, the SSHD either should have given the appellant leave to remain or should have appealed against that decision. It was not open to the SSHD to re-visit the decision.

The Second Appeal before the FTT

21. The second appeal was heard on 22 May 2019 before Judge White. The appeal had been listed on three dates prior to that, namely 29 November 2017, 19 April 2018 and 5 December 2018. For varying reasons each of those hearing dates had been adjourned.

22. Prior to the hearing date in November 2017 the appellant provided a bundle of documents which essentially replicated the material provided at the hearing before Judge Randall. For the later adjourned hearings the appellant provided further bundles which included new and more recent material. These included further letters said to have been written by an official of BRAC Bank. There were two letters dated 12 October 2017 over the name Ariful Islam who was said to be the new branch manager of the relevant branch of the bank. The substance of these letters was identical to the letters dated 24 November 2015 signed in the name of Anwar Sidat. There were two further letters dated 5 February 2018 over the signature of Ariful Islam. These letters were in almost identical terms to those dated 12 October 2017.

23. The documents initially submitted for the purposes of the second appeal by the SSHD included the material resulting from the request to BRAC Bank for verification of the letters of 24 November 2015. This included a communication of 14 July 2016 from an employee of BRAC Bank stating that those letters were false.

24. Following the provision of the further letters dated October 2017 and February 2018 the SSHD conducted a verification exercise with BRAC Bank in relation to those letters. In June 2018 the bank stated that those letters also were fraudulent.

25. In his written decision promulgated on 13 July 2019 Judge White reviewed and discussed in some detail all of the documents with which he had been provided. He noted various reasons over and above the results of the verification exercises to doubt the veracity of the material provided by the appellant. It is unnecessary to rehearse the matters considered by Judge White given the nature of the challenge to the eventual decision in the case.

26. Judge White set out his approach to the earlier decision of Judge Randall at paragraph 8 of his decision:

> "I note that neither representative made submissions to me about the precise effect of Judge Randall's decision. Certainly it was not submitted that this was determinative of the question whether false documents had been submitted. On the principles set out in *Devaseelan* that would be correct. Judge Randall's decision must be the starting point and in the absence of cogent further evidence I should

> not allow a decided issue to be relitigated, but evidence not before Judge Randall is capable of justifying a different conclusion".

27. Judge White dismissed the appeal. His core reasoning was set out at paragraph 17 of his decision:

> "The position therefore is that on three separate occasions the respondent has requested verification of the documents provided by the appellant. Each time the reply received has been that they were not genuine. It is clearly possible to find reasons for concern in at least some cases but I am satisfied that the probability of getting the same wrong answer every time is vanishingly low. When I add to that the reasons for concern about the letters from Mr Islam and, if to a lesser extent, Mr Anwar, I am satisfied that the respondent has discharged the burden of proving that the letters of February 2018 and November 2015 are false. I am further satisfied that the new evidence, both in terms of the second verification of the original bank statements and documents, and in terms of providing other false documents, justifies me in revisiting Judge Randall's conclusions and reaching my own decision, that the respondent has also proved that the original documents submitted with the application were false".

Appeal to the UT

28. The appellant appealed with leave of the UT against the decision of Judge White. The sole ground of appeal was that Judge White had erred in law in departing from the decision and findings of Judge Randall. Judge White had applied the wrong test in permitting re-litigation of the issue of whether the appellant had relied on false BRAC Bank documents.

29. The appeal was heard on 20 July 2020 before UT Judge Frances. The appellant argued that Judge White applied the wrong test when considering the proper approach to the earlier decision of Judge Randall. Judge White ought to have asked whether there was some very good reason why the SSHD had not provided all of the evidence now relied on at the earlier hearing before Judge Randall. Since he did not do so, his conclusion inevitably was flawed.

30. The appellant further submitted that the SSHD could only rely on fresh evidence to persuade Judge White to depart from Judge Randall's findings if it were shown that the fresh evidence could not have been obtained with reasonable diligence for the hearing before Judge Randall. It was said that this proposition flowed from the principles in *Ladd v Marshall* [1954] 1 WLR 1489. Finality of litigation meant that the SSHD was prevented from gathering further evidence to justify a refusal of the appellant's application for leave to remain when the FTT had allowed her appeal on the merits.

31. The appellant accepted that these arguments had not been deployed before Judge White, a concession that was bound to be made in the light of what Judge White said at paragraph 8 of his decision. However, it was submitted that did not prevent their use to impugn the decision of Judge White. The arguments relied on authorities of which Judge White, as a judge of a specialist tribunal, should have been aware.

32. The SSHD argued that, the submissions now being made not having been raised before Judge White, they could not be relied upon to justify overturning his decision. In any event, Judge White had not fallen into error. The SSHD had had no reasonable opportunity to investigate the letters dated 24 November 2015 prior to the hearing before Judge Randall. Thus, the evidence in relation to those letters could not have been obtained with reasonable diligence given the point at which they first were provided to the SSHD. In addition, prior to the hearing before Judge White, further documents had been provided by the appellant. This was entirely new evidence which the SSHD was entitled to address.

33. Judge Frances reviewed the authorities cited to her by the appellant, in particular *Mubu and others* [2012] UKUT 00398 (IAC) and *Ullah v SSHD* [2019] EWCA Civ 550. She concluded that Judge White was not bound by the decision of Judge Randall. She found that Judge White's self-direction at paragraph 8 of his decision was a correct statement of the legal position.

34. In dismissing the appeal, Judge Frances considered the position at the hearing before Judge Randall in relation to the letters of 24 November 2015. Her finding was:

> "…the appellant relied on letters dated 24 November 2015 at the appeal before Judge Randall which had not been put before the respondent. The respondent had no opportunity to verify these letters".

She then set out the core of her reasoning at paragraphs 28 to 31 of her decision:

> "28. In this case the appellant was not entitled to a grant of leave following Judge Randall's decision to allow her appeal. The appellant's application remained outstanding. This was not a case where the Respondent was attempting to circumvent the decision of Judge Randall. The principles in *Ladd v Marshall* did not apply and did not prevent the respondent from obtaining further evidence in response to that produced by the appellant.
> 29. Alternatively, the principles in *Ladd v Marshall* are satisfied. It was not in dispute that the SSHD can impugn a previous decision on the basis of fresh evidence of fraud which was not available at the hearing before Judge Randall. The respondent verified the letters of 24 November 2015 as false. The appellant submitted post-decision evidence, letters dated October 2017 and February 2018, which were also verified as false by the respondent. The new evidence relied on by the respondent was not available at the appeal before Judge Randall. Contrary to Mr Malik's submission, the respondent…submitted that the *Ladd v Marshall* test was met.
> 30. I am of the view, on the facts of this case, the respondent has not sought to re-litigate an earlier decision favourable to the appellant. Judge Randall found that the respondent had failed to provide sufficient evidence to show that the documents submitted with the application were false. Judge Randall relied on a document which was not submitted with the application. The respondent had no opportunity to verify this document. The evidence produced by the respondent after the decision of Judge Randall was new evidence which was not available prior to the appeal. It was not the case that the respondent could with reasonable diligence have discovered it earlier.

> 31. Any failure by Judge White to refer to the test in *Ladd v Marshall* was not material because it was quite clear on the facts that the new evidence relied on by the respondent was not available prior to the hearing before Judge Randall."

Submissions on the appeal

35. Mr Zane Malik QC on behalf of the appellant in his written submissions raised the issue of cause of action estoppel and its application to immigration appeals. He conceded that there is authority of this court to the effect that cause of action estoppel does not operate in immigration appeals: *SSHD v BK (Afghanistan)* [2019] 4 WLR 111. As a result he accepted that the SSHD was not barred by cause of action estoppel from issuing a new decision refusing the application for leave to remain on the ground that the appellant had relied on false documents. Though Mr Malik reserved his position as to the correctness of previous authority, he made no submissions on this issue. I do not consider that this is an issue requiring any further consideration. It has not been raised in this appeal.

36. Mr Malik did argue that the fact that cause of action estoppel cannot arise does not mean that, in the circumstances of this case, the SSHD and any FTT judge considering the SSHD's second decision had free rein. Mr Malik drew attention to the fact that in *BK (Afghanistan)* this court approved the approach taken by the UT in *Mubu and others*, in particular what was said at paragraph 66 of *Mubu and others*:

> "We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require. We bear in mind, however, that the nature of the issue now in dispute between the parties was the same issue that was determinative of the appeal before Judge Tipping. We also bear in mind the failure of the Secretary of State to produce all of the relevant evidence to Judge Tipping that ought to have been, or could have been with reasonable diligence, made available to him. In the light of these considerations we conclude that the determination of Judge Tipping should be treated as settling the issue (which arose in that case)".

Mr Malik argued that Judge White did not consider whether there was some very good reason for the SSHD not having provided all of the evidence in the first appeal. Had he done so, he would have been left with no explanation as to why the evidence before him could not have been adduced before Judge Randall. In those circumstances Judge White should have declined to enter into a fresh fact finding exercise.

37. Mr Malik submitted that Judge Frances fell into similar error. She gave no explanation for her conclusion that the appellant was not entitled without more to a grant of leave to remain following the decision of Judge Randall. Further, she misapplied the test in *Ladd v Marshall*. Mr Malik relied on *Ullah* at [25] to [26] where a first instance decision of Moses J (as he then was) in *Saribal v SSHD* [2002] EWHC 1542 (Admin) was approved by this court. The approach in *Saribal* was that, where the SSHD wished to take a decision to refuse leave to remain after a decision of the FTT importing a right to leave to remain, the SSHD would have to apply by analogy the principles for the admission of fresh evidence on appeals in legal proceedings. If on proper application of those principles the decision should not have been made, it would be open to challenge on public law grounds. The same point was made in *R(Abidoye) v SSHD* [2020] EWCA Civ 1425.

38. The final point made on behalf of the appellant was that the approach taken by Judge Frances failed to give proper weight to the public interest in the finality of litigation. That is of especial importance in the context of immigration appeals. The legislative scheme is for a single or one-stop appeal.

39. Responding for the SSHD Ms Julie Anderson argued that the appellant failed to raise any of the arguments now relied on at the hearing before Judge White. No submission was made to him in relation to any form of estoppel or any suggestion that the SSHD could not rely on the evidence placed before him by the parties. The letters of October 2017 and February 2018 had been produced by the appellant on the basis that they supported her case. It could not be said that the SSHD was obliged to accept them at face value or that Judge White should not have had regard to the apparent falsity of that material. It was the appellant who was treating the case as if all issues were open.

40. In any event Judge Frances at paragraph 30 of her decision fully justified the conclusion that Judge White was entitled to consider the further evidence provided by the SSHD when applying the test in *Ladd v Marshall*. If the position had not changed between the first decision of the SSHD and the decision made after the hearing before Judge Randall, it might follow that the SSHD had made a public law error. In that event the remedy was as suggested in *Ullah* and *Abidoye*, namely application for judicial review of the SSHD's decision.

41. As to the submission that the approach taken by Judge Frances failed to take account of the need for finality in litigation, Ms Anderson said that this ignores the approach in fact taken by Judge White and Judge Frances. Both were mindful that any new decision required justification. Finality in litigation does not mean that those in the position of the appellant can be incentivised to withhold evidence until the last minute so as to avoid verification of it in the hope that the SSHD will be fixed with the adverse decision given in the absence of any response to that evidence. Moreover, the appellant was relying on equitable principles to support his case. Given the findings of fraud by Judge White, any such reliance was misplaced.

Discussion

42. The challenge to the decision of Judge Frances is that she made an error of law when she found that Judge White had not erred in law when permitting re-litigation of the issue as to whether the appellant had relied on false bank documents in her application for leave to remain. There is no challenge – nor could there be – to any finding of fact made by Judge Frances or Judge White. Judge White found that the letters of 24 November 2015 produced for the purposes of the appeal before Judge Randall and the letters of October 2017 and February 2018 produced at the hearing before him were fraudulent. He made those findings of fact having heard evidence from and submissions on behalf of the appellant. Judge Frances found as a fact that the SSHD had no opportunity to verify the letters of 24 November 2015 prior to the appeal hearing on 11 December 2015. This finding flowed from the undoubted fact that those letters had been provided to the SSHD only a matter of days before the appeal hearing.

43. I consider that those findings of fact are sufficient to dispose of this appeal. Assuming at this stage that the test in *Ladd v Marshall* applied to these proceedings, the UT found as a fact that the SSHD "had no opportunity" to verify the letters of 24 November 2015. That fact means that, exercising reasonable diligence, the SSHD could not have put

before Judge Randall the evidence of falsity which later became available. Even if Judge White applied the wrong test when he considered the evidence concerning the letters, the finding of fact made by Judge Frances meant that Judge White would have taken the same course applying the correct test. In my view we have no evidential basis to go behind the finding of Judge Frances. For instance, we had no evidence of the letters being provided by the appellant to the SSHD on the date shown on the letters with an invitation urgently to seek verification of them and/or of the SSHD taking a positive decision not to seek verification of the letters even though urgent verification might have been possible. There is nothing to undermine the proper inference drawn by Judge Frances.

44. On that analysis, the SSHD was entitled to carry out a verification exercise in relation to letters on which the appellant had relied at the hearing before Judge Randall and, when that exercise showed that the letters were fraudulent, to decide that the appellant had used deception in her application. Moreover, the SSHD was entitled to use the evidence of false documents in support of the decision made on 4 August 2016, namely that the appellant did not meet the financial requirements to satisfy the Points Based System.

45. It is nonetheless appropriate to go on to consider the approach which should be taken by a FTT judge in the position of Judge White. He referred to the principles in *Devaseelan* when explaining his approach to the earlier decision of Judge Randall. These were explained and approved by Rose LJ (as she then was) in *BK (Afghanistan)*. That case concerned the hearing of an appeal by an Afghan national (BK) against cancellation by the SSHD of indefinite leave to remain. The SSHD had cancelled leave to remain on the grounds of deception. The deception was said to arise as a result of contradictory accounts given by BK i.e. in an earlier tribunal hearing considering his appeal against refusal of asylum and in subsequent interviews with the Home Office in relation to his application for leave to remain. In the tribunal hearing BK was found to have accepted that he had been a member of the Taliban and that, in that capacity, he had tortured and killed people. The decision of the Adjudicator made a finding of fact in those terms. In his Home Office interviews, BK had denied engaging in any terrorist activity. Thus, in the later appeal, the status of the Adjudicator's finding of fact was in issue.

46. Rose LJ set out the relevant legal principles at [31] to [39] of her judgment. She set out the guidance given in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702. She summarised it by reference to 8 factors as follows.

> (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle, issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
> (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
> (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
> (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.

> (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
> (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
> (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.

47. *Devaseelan* was decided when immigration appeals were heard by adjudicators rather than judges of the FTT. Rose LJ confirmed that the principles apply equally to the FTT. The *Devaseelan* principles are expressed by reference to an individual appellant who is seeking to overturn a decision of the SSHD. They apply with equal force to the SSHD as a party to a second appeal. Thus, the guidance set out in principles (6) and (7) means that, where in relation to a particular issue the SSHD seeks to rely on facts not materially different to those on which she relied in the first appeal, the FTT judge hearing should regard the issue as having been settled in the decision reached at the first appeal.

48. Rose LJ noted that this guidance had been approved by this court in *Djebbar v SSHD* [2004] EWCA Civ 804. In *Djebbar* Judge LJ said at [40]: "… The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."

49. As noted by Mr Malik, Rose LJ cited with approval paragraph 66 of the UT decision in *Mubu*. This was an example of the flexible approach enjoined in *Djebbar*. She concluded her review of the principles to be applied at [39]:

> "There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in *Djebbar* referred to the need for consistency of approach. The Court of Appeal in *AA(Somalia) v SSHD* [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently."

50. I see no basis on which to depart from those principles which have been applied consistently in immigration appeals. Rose LJ went on to say at [44]:

> "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either

post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal."

That was the approach adopted by Judge White in the second appeal. It was approved by Judge Frances. It was the correct approach. It did not lead to any unfairness. In *Devaseelan* there is reference to "some very good reason" for not adducing the evidence in the earlier hearing. The finding of fact of Judge Frances to which I already have referred established that there was "some very good reason". Thus, Judge White was entitled to take the approach he did. In any event, whilst the language he used was not the same as the guidance in *Devaseelan*, Judge White clearly was aware of the guidance. When he said that "in the absence of cogent further evidence I should not allow a decided issue to be re-litigated but evidence not before Judge Randall is capable of justifying a different conclusion", he did not depart from the guidance. He required the further evidence to be "cogent" and he said that evidence not before Judge Randall was "capable" of justifying a different decision. Taken as a whole, the test Judge White applied to the question of evidence not before Judge Randall was in substance correct.

51. Mr Malik argued that the test in *Ladd v Marshall* which relates to appeals in legal proceedings should apply to the SSHD in the circumstances as they were here. For fresh evidence to be admitted in an appeal in civil proceedings it must not have been available to the party seeking to rely upon it and it must be evidence which that party could not with reasonable diligence have obtained in time for the original hearing. He submitted that the SSHD, when making a second decision in a case already the subject of a finding by the FTT, should apply the same test. This proposition is based on *Ullah* at [43]:

> "*In Saribal* however, Moses J decided that if the SSHD wanted to take a decision of that character, after a decision of a Tribunal importing a right to ILR, his decision making process would have to apply by analogy the principles for the admission of fresh evidence on appeals in legal proceedings (essentially applying the principles in *Ladd v Marshall*). Otherwise, the SSHD's decision would be open to challenge on public law grounds. That decision has the approval of this court in *TB* and, in my judgment, we should follow it."

I consider that the *Devaseelan* test, namely there must be "some very good reason" for not adducing the relevant evidence at the first appeal, essentially mirrors the *Ladd v Marshall* test. The approach of the court in *Ullah* was wholly consistent with *BK (Afgahnistan)*. It follows that Mr Malik's submission is well-made. The SSHD, when making a decision consequent upon a decision of the FTT, will be subject to principles analogous to those found in *Ladd v Marshall*. However, where the SSHD is said to have departed from those principles, there must be a challenge to her decision on public law grounds. That may be by way of a second appeal with the appellant arguing an abuse on the part of the SSHD or by an application for judicial review of the decision: see *SSHD v TB (Jamaica)* [2008] EWCA Civ 977 cited in *Ullah.*

52. As I have said, if an applicant for leave to remain took the route of a second appeal to the FTT, they would have to raise the issue of abuse of process. That would allow the FTT to consider fully whether the decision of the SSHD could be impugned on public law grounds. Here the appellant did not raise the issue at all. Thus, Judge White applied the principles of *Devaleesan* as I already have described. His decision cannot now be criticised within this appeal for failing to deal with an issue not raised by the appellant. Indeed, the appellant expressly invited Judge White to consider a body of new evidence. In the grounds of appeal submitted to the Upper Tribunal Mr Malik acknowledged that Judge White "did not receive the assistance from the parties as he should have received at the appeal hearing". He referred to the fact that *Mubu* and *Ullah* were not drawn to Judge White's attention. However, the position adopted at the hearing before Judge White went beyond a simple failure to refer to relevant authorities. The appellant served further evidence which was investigated by the SSHD. All of the resulting material was put before Judge White for his consideration. Nothing at all was said about the lawfulness of the SSHD's decision of 4 August 2016.

53. Mr Malik complained that the course adopted by the SSHD in this case could lead to a never-ending cycle of appeals in a jurisdiction intended to be a one-stop shop. Such a cycle will not arise if the SSHD is demonstrated to have acted unlawfully. An applicant faced with a decision open to challenge on public law grounds will be able to break any such cycle, assuming that challenge succeeds.

54. For any one of the reasons I have set out thus far this appeal must fail. There is a further issue to which I propose to refer although it is not strictly necessary for the determination of the appeal.

55. Judge Randall decided that the SSHD had failed to overcome the burden of proving that the documents submitted by the appellant were fraudulent because of "the new evidence", namely the letters of 24 November 2015 produced at the hearing before him. At that point the letters had not been investigated or verified. When they were investigated, it was discovered that they were fraudulent. That was the finding made by Judge White on all of the evidence before him. Thus, Judge Randall's decision was procured by fraud.

56. The consequence of a judgment in civil proceedings having been obtained by fraud was considered by the Supreme Court in *Takhar v Gracefields Development* [2019] UKSC 13. Mrs Takhar claimed that she had transferred her interest in some properties to Gracefields as a result of undue influence and unconscionable conduct on the part of those involved in the management of Gracefields. Her claim was dismissed by the trial judge. The judge relied substantially on a document which on the face of it she had signed and for which she had no clear explanation. Following the trial Mrs Takhar obtained handwriting evidence which established that the signature on the document had been transposed from a quite different document signed by Mrs Takhar. This evidence could have been obtained prior to the trial since all of the relevant documents had been available for some 12 months prior to the trial.

57. Mrs Takhar applied to have the judgment at trial set aside on the ground that it was obtained by fraud. Gracefields argued that this was an abuse of process because the documents on which the handwriting evidence was based had been available 12 months prior to the trial. In granting Mrs Takhar's application Newey J (as he then was) held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud

did not have to demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence.

58. The Court of Appeal overturned the judgment of Newey J but it was restored by the Supreme Court. No rehearsal of the reasoning of the Supreme Court is required. It is sufficient to say that the court agreed with the reasoning of Newey J. Lord Sumption said at [61]:

> "…There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 21 (Viscount Dilhorne). If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment. It follows that res judicata cannot therefore arise in either of its classic forms."

59. The Supreme Court was concerned with setting aside a judgment in civil proceedings. The applicability of the principle set out in *Takhar* has been considered by the President of the Upper Tribunal (Immigration and Asylum Chamber) in *SSHD v Abbassi* [2020] UKUT 27 (IAC). At [44] the President said:

> "It is, of course, important to recognise that *Takhar* involved a civil action between individuals, rather than public law proceedings, such as an appeal under the Nationality, Immigration and Asylum Act 2002. It is, nevertheless, doubtful whether the "reasonable diligence" requirement in *Ladd v Marshall* should now be held to apply, in a case where the Secretary of State has lost an appeal under the 2002 Act, in circumstances where she has not raised the issue of fraud, but where it later transpires that fraud has been employed, such as occurred in *Ullah*."

I consider that the President was right to express doubts about the continued applicability of *Ladd v Marshall* principles where fraud has been employed. In this case the SSHD did not allege in the hearing before Judge Randall that the letters of 24 November 2015 were fraudulent because she had no basis on which to do so. Even if she had had a reasonable opportunity to verify the letters, the fact that they were in fact fraudulent renders it doubtful whether that would have prevented her from relying on their falsity when she came to reconsider the application.

Conclusion

60. I would dismiss the appeal. Permission to appeal was granted because it was considered that the grounds of appeal raised an important point as to the consequences of the SSHD choosing not to appeal an adverse conclusion of the FTT but subsequently relying on further evidence to reach the same decision as the one overturned by the FTT. On closer examination of the facts it is clear that no point of principle arises. The SSHD acted entirely in accordance with her duty under the Immigration Rules and was entitled to consider the further evidence which had not been available hitherto.

61. Moreover, the appeal is against the decision of UT Judge Frances. For the reasons I have given there is no basis at all for concluding that her decision was wrong. In my view it was entirely correct.

Lord Justice Nugee: I agree.

Lord Justice Peter Jackson: I also agree.