



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02542/2016 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House
On 20th July 2020

Decision & Reasons Promulgated
On 10th August 2020

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ZAKIA SULTANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik, instructed by Norma & Co Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born on 1 January 1988. She appeals against the decision of First-tier Tribunal Judge P-J S White promulgated on 16 July 2019 dismissing her appeal against the refusal of leave to remain as a Tier 1 (Entrepreneur) Migrant.
2. The Appellant entered the UK as a student in August 2009 valid until January 2013. On 12 December 2012, she applied for leave to remain as a Tier 1 (Entrepreneur) Migrant under paragraph 245DD of the Immigration Rules. Her application was refused on 22 April 2015, under paragraph 322(1A), on the ground that she had submitted false documents.
3. First-tier Tribunal Judge Randall allowed her appeal on 26 January 2016 under the general grounds of refusal. The Respondent had not considered the application under paragraph 245DD and had indicated in the refusal letter that she 'reserved the right to carry out' the assessment in paragraph 245DD(b). The parties made no submissions on the point. The appeal was allowed to the limited extent that the Respondent had not shown the bank documents were false.
4. The Appellant did not attend her appeal before Judge Randall because she had recently had surgery following a car accident. The application for an adjournment was refused because there was insufficient evidence to show that she was not fit to attend court. Her representative did not make submissions.
5. In support of her appeal before Judge Randall, the Appellant submitted two letters [the new evidence] from Brac Bank signed by Anwar Sadat (Branch Manager) dated 24 November 2015 confirming the availability of the funds held in the bank accounts relied on by the Appellant, (Momtaz Begum and Ram Chandra Das). The letters stated that the email from the bank stating otherwise was not genuine. The Respondent relied on an email dated 22 February 2015 which stated that the attached certificates and statements were not issued by Brac Bank.
6. Judge Randall stated at paragraph 30 of his decision: "Having considered the evidence in this matter, I remain concerned about the defects in the Respondent's evidence and about the absence of a clear paper trail as to what documents were in fact originally submitted to BRAC Bank for consideration, and of a clear indication as to who originally responded for BRAC, and what was being responded to. Bearing in mind the quality of the new evidence provided [by the Appellant] that goes to genuineness, and the high standard of proof required to demonstrate the falsity of a document, I have concluded that, in 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."
7. The Respondent did not appeal Judge Randall's decision, but re-considered the Appellant's application. On 4 August 2016, the Respondent refused the application under paragraph 322(1A) and under 245DD(b) of the Immigration Rules. The Respondent stated; "I am satisfied that the [Brac Bank] documents were false because we sought to verify them on two occasions." The Appellant was awarded no points

in relation to access to funds because the documents were verified twice and both times were verified as false.

8. The Appellant gave evidence at her appeal before First-tier Tribunal Judge White and relied on three bundles of documents including the letters dated November 2015, October 2017 and February 2018. The Respondent also relied on three bundles of documents including Document Verification Reports [DVR's] (dated 14 July 2016, 12 June 2018 and 27 June 2018), emails dated 29 April 2016 and 30 May 2018 from the Temporary Migration Enrichment Unit [TMEU] (identifying the documents submitted for verification) and further emails from Brac Bank stating that the documents were not issued by Brac Bank Natun Bazar Branch.
9. At paragraph 8 Judge White stated: "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 questions of whether false documents had been submitted. On the principles set out in Devaseelan that would be correct. Judge Randall's decision must be my starting point and in the absence of cogent further evidence I should not allow a decided issue to be re-litigated, but evidence which was not before Judge Randall is capable of justifying a different conclusion."
10. Judge White noted that he had further evidence on both sides. He considered this evidence and concluded that the Respondent had discharged the burden of proving that the letters of November 2015, October 2017 and February 2018, submitted by the Appellant, were false. He was also satisfied that the original documents submitted with the application were false. Judge White concluded that the new evidence justified the revisiting of Judge Randall's conclusions and he found that the refusal under paragraph 322(1A) was made out.
11. The Appellant applied for permission to appeal on the sole ground that the judge erred in law in departing from Judge Randall's decision and applying the wrong test in permitting the re-litigation of the issue of whether the Appellant had relied on a false Brac Bank documents.
12. Permission to appeal was granted by Upper Tribunal Judge Grubb on 7 February 2020 on the ground that the Respondent had in effect re-litigated an earlier appeal decision favourable to the Appellant. He stated "It was arguable the judge erred in law in relying on the 'new evidence' (DVR's) in reaching his finding contrary to the earlier appeal decision in 2016 without applying the Ladd v Marshall test consistently with Devaseelan, Mubu (immigration appeals - res judicata) [2012] UKUT 00398 (IAC) and Ullah v SSHD [2019] EWCA Civ 550."

Submissions

13. The grounds submit that Judge White applied the wrong test at paragraph 8. The correct test was set out in Mubu and Ullah. It was submitted that the nature of the issue was the same and the Respondent had failed to produce relevant evidence before Judge Randall which could have been produced with reasonable diligence. It

was submitted that Judge White was obliged to consider whether there was some very good reason why the Respondent had not provided all the evidence in the earlier appeal before Judge Randall.

14. Further, following Ullah, the Respondent could only rely on fresh evidence and seek to depart from earlier judicial findings if the Ladd v Marshall test was met. Judge White erred in law in failing to consider whether the Respondent's new evidence could not have been obtained with reasonable diligence for use at the hearing before Judge Randall. Judge White's decision was inconsistent with the principles in Mubu and Ullah. It was immaterial that this point was not raised before Judge White.
15. Mr Malik submitted that Judge White could not depart from the earlier findings of Judge Randall and he applied the wrong test. Mr Malik relied on paragraphs 62, 63 and 66 of Mubu and submitted the Respondent had not shown that the evidence now adduced could not have been produced before Judge Randall, whose decision settled the issue between the parties. Finality of litigation prevented the Respondent from gathering further evidence and refusing an application which had previously been allowed on its merits.
16. Mr Malik relied on paragraph 25 and 43 of Ullah and submitted the Respondent was bound by a decision which is not appealed. The Respondent could impugn the decision with fresh evidence of fraud only where it was not previously available with due diligence. Judge White failed to apply the test in Ladd v Marshall.
17. Mr Clarke relied on the skeleton argument, dated 28 April 2020, submitted in response to Covid 19 directions. It was submitted therein that there was a failure to raise Mubu and Ullah at the hearing before Judge White and no submissions were made on the basis that the decision of Judge Randall was determinative. The judge properly applied Devaseelan. The Respondent did not have an opportunity to respond to the letters dated 24 November 2015 submitted at the hearing before Judge Randall and therefore the Ladd v Marshall test was satisfied. The hearing before Judge White was more extensive than that before Judge Randall. The Respondent produced evidence addressing the Appellant's new evidence and the Judge White's findings were open to him on the evidence before him.
18. In oral submissions, Mr Clarke submitted Devaseelan should not be read as excluding post decision evidence unless Ladd v Marshall applied. The case of Ullah was specific to the duties of the Secretary of State and did not assist the Appellant. There were no submissions made before Judge White about the effect of Judge Randall's decision. Mubu was not concerned with post-decision evidence and *res judicata* did not apply. The Tribunal in Mubu considered the new evidence and found that it was not probative. Judge White applied paragraph 49 of Mubu at paragraph 8 of his decision.
19. Following Devaseelan, facts occurring after the first decision could always be placed before the First-tier Tribunal. Mubu was not authority for stating that an earlier decision of the First-tier Tribunal is binding. There was significantly more evidence

before Judge White sufficient to displace the finding of Judge Randall. In Mubu the Secretary of State relied on evidence which pre-dated the hearing in the First-tier Tribunal and there was no explanation for why it was not produced. The post-decision evidence did not take the matters any further. Judge White's direction at paragraph 8 was not inconsistent with Mubu.

20. In response, Mr Malik accepted the authorities of Mubu and Ullah were not before Judge White. He submitted this was not material as a specialist Tribunal should be aware of them and should follow them. In Ullah, the court considered the duties of the Secretary of State to implement a Tribunal decision and the implications of an appeal decision. Mr Malik submitted that paragraphs 25 and 43 applied. He relied on paragraph 66 of Mubu and submitted that the conditions referred to therein applied in this case and the nature of the dispute was the same. If the Respondent's submission was correct, no decision would ever be final. The Ladd v Marshall test was not met. If the Appellant's submission was correct then the appeal Appellant's appeal should be allowed outright.

Relevant law

21. Paragraph 66 of Mubu states: "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 light of these considerations, we conclude that the determination of Judge Tipping should be treated as settling the issue of the relationship between the first claimant and Mr Ernest Alleston."
22. Paragraph 43 of Ullah states: "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."

Conclusions and reasons

23. It is clear from the decision in Mubu that *res judicata* does not operate in immigration appeals. In that case, the Upper Tribunal set aside the decision of the First-tier Tribunal because the judge treated the earlier decision as binding and failed to apply Devaseelan. I conclude that Judge White was not bound by the decision of Judge Randall and he properly applied Devaseelan.
24. I find that Judge White's self direction at paragraph 8 was consistent with Mubu. Judge White considered whether there was a good reason to depart from the decision

of Judge Randall. This was the approach adopted in AS &AA (Effect of previous linked determination) Somalia [2006] UKAIT 00052 and endorsed by the Upper Tribunal in Mubu at paragraph 52.

25. In Mubu, the Secretary of State was given ample opportunity to verify the birth certificates, prior to the first appeal, but failed to do so. The material before the judge at the second appeal was not materially different. In this case, there was substantial further evidence on both sides.
26. The present case is not 'on all fours' with Mubu as submitted by Mr Malik. In this case, 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. Judge Randall found the letters to be persuasive and, given the lack of continuity in the Respondent's evidence, he concluded that the Respondent had failed to prove the bank documents were false. The judge allowed the Appellant's appeal under paragraph 322(1A). The Appellant was not entitled to a grant of leave following the decision because the Respondent had not considered the application under the substantive Immigration Rule. The Respondent then went on to reconsider the application.
27. In Ullah the applicant was granted indefinite leave to remain following a decision by the Tribunal allowing the applicant's appeal. The Secretary of State later discovered evidence of fraud and made a decision cancelling the applicant's leave. In reviewing that decision, the Upper Tribunal Judge applied Ladd v Marshall to the fresh evidence and concluded the Secretary of State could rely on the new evidence and revoke the applicant's leave. The Court of Appeal concluded the Ladd v Marshall criteria were not inconsistent with paragraph 35 of TB and upheld the decision of the Upper Tribunal in dismissing the applicant's appeal.
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 despite that the Secretary of State can impugn a previous decision on the basis of fresh evidence of fraud which was not previously available. In this case, there was new evidence 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, in the skeleton argument relied on by Mr Clarke, submitted that the Ladd v Marshall test was met.

30. I am of the view that, 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 the 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 hearing before Judge Randall. This point was not argued before Judge White.
32. Accordingly, there was no error of law in the decision of Judge White and the Appellant's appeal is dismissed.

Notice of decision

Appeal dismissed

No anonymity direction made.

J Frances

Signed

Date: 31 July 2020

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 31 July 2020

Upper Tribunal Judge Frances