



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09401/2013

THE IMMIGRATION ACTS

Heard at Field House

On 30 April 2015

**Determination
Promulgated**

On 14 May 2015

Before

**THE HON. MRS JUSTICE MCGOWAN
UPPER TRIBUNAL JUDGE ALLEN**

Between

**M F M Z
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Seehra, instructed by Nag Law Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. We have set out the parties above as they were before the First-tier Judge although the appellant before us was the Secretary of State, as the First-tier Tribunal Judge allowed the appellant's appeal. We shall continue to refer to them as they were before the First-tier Judge.
2. That appeal was against a decision of 27 September 2013 to remove the appellant from the United Kingdom by way of directions. As we say, the judge allowed the appeal. The material issue in that case was the

appellant's claim that, having initially come to the United Kingdom in August 2010, he returned to Sri Lanka on 31 December 2011 and thereafter returned to the United Kingdom on 11 August 2013. A significant part of his claim was with regard to the arrest, detention and ill-treatment that he claimed to have experienced during the course of his time in Sri Lanka between 31 December 2011 and 11 August 2013. The judge considered evidence in this regard and with regard to other aspects of the appellant's claim, including letters from lawyers, he specifically accepted that he did return to Sri Lanka in December 2011 in the belief that it was safe to do so, that he was arrested, detained and ill-treated as he claimed and that he breached his bail conditions by leaving Sri Lanka and that an open arrest warrant was then issued against him. He was found to be at risk on return and the appeal was allowed.

3. Subsequently the Secretary of State sought and was granted permission to appeal against that decision on the basis that it was arguable that inadequate reasons were given for finding the appellant credible and the documentation produced by him reliable. There was a hearing before a panel of the Upper Tribunal which set aside the decision of the First-tier Judge and remitted the appeal for redetermination in the First-tier. However, that decision was set aside pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in that the determination had been promulgated without one member of the panel approving the draft as a consequence of administrative oversight.
4. The appeal was listed for hearing on 21 January 2015. On that date the respondent withdrew the underlying decision which gave rise to the appeal to the First-tier Tribunal on the basis that evidence had come to light demonstrating that the appellant had not returned to Sri Lanka on 31 December 2011. The hearing was adjourned to 20 February 2015 to enable the relevant evidence to be provided and for those parties to prepare submissions and skeleton arguments as to how the matter should proceed.
5. At the hearing on 20 February 2015 the matter was further adjourned to enable submissions to be made as to the applicability of Rule 15(2A) of the Tribunal Procedure) Rules. Thus the matter came before us on 30 April.

Submissions

6. Ms Seehra relied on and developed points made in her skeleton arguments, particularly the more recent skeleton argument. She argued that it was an over- simplification to say that the respondent was relying on a mistake of fact. The respondent sought to adduce new evidence i.e. a photocopy of a full UK driving licence in the appellant's name and an issue date of 18 April 2012. On behalf of the respondent it was argued that the issue date and the outcome of telephone enquiries which confirmed that the DVLA were taking three weeks to process the issue of a driving licence, were inconsistent with the appellant's claimed returned to Sri Lanka on 31 December 2011. Ms Seehra argued that the respondent's

attempt to admit the new evidence was not in a true sense a case of a mistake of fact. The driving licence did not confirm that the appellant had been in the United Kingdom when it was issued. The driving licence showed it was issued on a certain date but the only real evidence in relation to when the application was made was to be found in the recent statement provided by the appellant. The matter had not been confirmed by the DVLA. The licence did not establish that the appellant had, as the respondent claimed, never left the United Kingdom, and did not show it was issued to him at any time or when the application was made.

7. Ms Seehra did not accept that it was reasonable to infer that the appellant had put in the claim for the licence within a reasonable time of the date of issue. For that to be made out there would need to be further evidence and the evidence thus far was neutral as to when the application was made. The First-tier Judge could not properly draw any inference from when the application was made from the date of issue, as that did not show when the application had been made and it could not be inferred that it was reasonable to accept that the application had been made within a reasonable period of time proximate to the date of issue. As to whether it was therefore irrelevant whether the licence was admitted or not, Ms Seehra argued that as the respondent sought its submission as evidence of the appellant not returning to Sri Lanka and not just to show that it was a driving licence. She referred to paragraph 12 of her supplementary skeleton argument and the examples given there quoting from paragraph 29 of R (Iran) [2005] EWCA Civ 982. She placed particular reliance on R v CICB ex parte A [1999] 2AC 330, but noted that the facts there were very different. It was not the same category of case as the instant one. Also relevant was what had been said by the Court of Appeal in Shaheen [2005] EWCA Civ 1294 at paragraphs 27 to 29 about this issue, including the comment in respect of the authority relied on by the respondent in Cabo Verde [2004] EWCA Civ 1726 which, it was said, would be appropriate to revisit an appropriate occasion.
8. The Secretary of State had had the driving licence for some time and at least three Presenting Officers had not considered it to be significant. It was clearly contentious, bearing in mind the criteria in E & R [2004] EWCA Civ 49 and it was not objectively verifiable. It was the case that the existence of the driving licence and the date of issue were uncontentious but the inference that the respondent sought to have drawn from this was not. The admissibility of the document was disputed because of the underlying purpose behind and driving it.
9. As regards the third element in E & R, the question of whether or not the person was not responsible for the mistake, this was mandatory language and the respondent clearly fell foul of this. The reasons for this were set out at paragraphs 4 to 6 of the skeleton, noting that the matter had not been relied on at the original hearing before the First-tier Judge, nor at the first hearing before the Upper Tribunal where the outcome was subsequently set aside, but only in 20 January 2015.

10. On the point of materiality, the judge had had a lot of documentary evidence before him, and this could not be looked at in isolation. There had been oral and documentary evidence including court and business documents. The evidence the respondent sought to rely on would not have played a material part and for the evidence not to be admitted had to give rise to unfairness. The respondent had not been denied a fair hearing. The decision of the Upper Tribunal in MN [2014] UKUT 00105 (IAC) was very different as was the CICB case. The respondent had not been denied the opportunity to produce evidence and was seeking a second bite of the cherry. Verde could also be distinguished on the basis that the respondent had not had the police allegation until after the hearing had taken place before the IAT and the evidence post dated the hearing and was of a completely different nature. Verde was in any event not a case of mistake of fact but more a Ladd v Marshall [1954] 1WLR 1489 situation. As had been said in Shaheen at paragraph 28, there was a risk of opening appeals out where further evidence was found and attempts to challenge the factual conclusions which would lead to the flood gates being opened. She referred to the fact that in addition to the appellant's statement there was a lawyer's letter attached to it.
11. It was accepted that the appeal was not concluded in the sense that the final decision had not yet been reached. There was a public interest in finality. This was not a case for relaxing the Ladd v Marshall criteria.
12. As regards Rule 15(2A), it was unclear on its wording whether it referred to admission of evidence at the error of law state or the stage of the remaking of the decision. Ms Seehra thought the practice directions said it could be either and the point was that the application had to be made but the Rule was subject to the error of law test and admissibility requirements.
13. In his submissions Mr Walker said the driving licence had been submitted when the appellant made his first asylum application and it was only when he had prepared the case for the 20 January hearing that he had found the reference to the licence and a copy of it which had indicated that in April 2012 the appellant was in the United Kingdom. This was a reasonable inference though there was no evidence as to how long applications would have taken at the time. He accepted his conversation with the DVLA was not evidence.
14. As regards the matter remaining contentious, the appellant had submitted the documents and produced it willingly at the time and it was contentious as he said that when he left in 2011 it was for good. If so it was open to question why he had a UK driving licence. This piece of evidence could show or infer that he had not returned to Sri Lanka and it would be unfair not to take it into account in fairness to the Secretary of State and the evidence needed to be tested.
15. It did not appear that there could be any costs implications in the respondent's conduct in this case since the new regime was only

applicable to claims which had been instituted after October 2014. (We are grateful to Ms Seehra for this clarification).

16. Mr Walker went on to argue that the point was not material for the First-tier Tribunal Judge as he had found the appellant to be entirely credible and there was strong evidence in support. If the driving licence and the evidence had been before the judge it would have been a fact in play as to whether the appellant was in the United Kingdom at the time when he claimed to have returned to Sri Lanka.
17. As to the question whether the earlier hearing which was marred by procedural irregularity was to be taken into account, that, Mr Walker argued, had to be considered not to have happened and the error of law hearing had been the hearing on 20 January 2015.
18. By way of reply, Ms Seehra was able to assist with regard to a question we had about the reference at paragraph 20 in her skeleton to “exceptional circumstances”, which came from paragraph 91(iii) in E & R, as quoted at paragraph 18 in her skeleton argument. The statement by the appellant and by the lawyer were relevant to all the issues. She argued that the point about exceptional circumstances was not relaxed further by the Court of Appeal in JG at paragraph 9 when it was accepted that the Ladd v Marshall principles was irrelevant, still where the court applied them more flexibly.
19. We reserved our determination.

Discussion

20. In deciding whether or not there is an error of law in the judge’s decision, argument has focused, as set out above, on the issue of the new evidence and whether the respondent should be allowed to introduce it and what, if so, its implication are for the error of law issue.
21. It seems logical to deal with the first matter at the outset. Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 states as follows:
 - “(2A) In an asylum case or an immigration case –
 - (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –
 - (i) indicating the nature of the evidence; and
 - (ii) explaining why it was not submitted to the First-tier Tribunal; and
 - (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.”

22. Ms Seehra very fairly accepted in her supplementary skeleton argument addressing the point, that it is unclear from the wording of paragraph 15(2A) whether it applies to evidence which it is sought to employ at the error of law stage or is confined to the consideration of evidence after an error of law has been identified. Ms Seehra very fairly also drew our attention to the Practice Direction, the terms of which she did not have with her, but which she thought touched on the matter. We have checked this and find that she is entirely correct. Paragraph 4.2 of the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal and the Upper Tribunal in the context of Rule 15(2A) states as follows:
- “4.2 A party who wishes the Upper Tribunal to consider any evidence that was not before the First-tier Tribunal must indicate in the notice whether the evidence is sought to be adduced:-
- (a) In connection with the issue of whether the First-tier Tribunal made an error of law, requiring its decision to be set aside; or
 - (b) In connection with the remaking of the decision by the Upper Tribunal, in the event of the First-tier Tribunal being found to have made such an error.”
23. It is clear from the wording of the Practice Statement that evidence may properly be considered at the error of law stage, although, as Ms Seehra points out at paragraph 23 of her supplementary skeleton, the admission of such evidence is still subject to the principles to which she refers earlier in the skeleton, i.e. the points to which we now come and whether the new evidence should be admitted in light of the authorities, some of which we have referred to above, in particular E & R, R (Iran), Ladd v Marshall, Verde, MN, AG (Jamaica) [2015] EWCA Civ 215 and Shaheen.
24. In his skeleton argument Mr Walker makes the point that the appellant's driving licence was not considered by the case owner who decided the asylum application and its significance only became apparent when he was preparing the case for the error of law hearing in January 2015. Mr Walker goes on to argue, basing his argument on MN, that there has been a defect or impropriety of a procedural nature in the first instance proceedings in that the judge did not have before him this evidence which is capable of showing that the appellant's evidence that he returned to Sri Lanka was untrue. He argues that the evidence should be admitted as it reinforces the respondent's grounds of challenge to the First-tier Judge's decision and that through no fault of the judge he was not in possession of all the evidence and made a material error as to the availability of evidence on a particular matter. Ms Seehra, as we have seen, argues that the case is not fours with any of the authorities and that the Ladd v Marshall requirements, relatively flexibly though they may be applied to public law cases as opposed to private law cases, have not been met and accordingly the evidence should not be admitted, or if it is, that it does not go to show an error of law in the judge's decision.
25. It is clear from E&R, and we take this in particular from paragraph 66, that for a mistake of fact giving rise to unfairness to be a head of challenge in

an appeal on a point of law, there must first have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; secondly the fact or evidence must have been “established” in the sense that it was uncontentious and objectively verifiable, and, thirdly, the appellant or his advisors must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

26. Previously in Ladd v Marshall, the Court of Appeal set out the principles upon which fresh evidence may be admitted and said that this would occur when:

- (i) the evidence could not have been obtained with reasonable diligence
- (ii) if given, the evidence would probably have an important influence on the result of the case
- (iii) the evidence must be such as presumably to be believed.

27. It was accepted in JG, as it had been in E&R, that there was a need for some flexibility in the application of the Ladd v Marshall principles, in asylum cases as referred to in E&R, and in public law cases as referred to in JG. The court went on in JG, however, to make the point that the Ladd v Marshall principles are still relevant and there must be a limit to the flexibility. In JG itself, the respondent had always been in possession of the fresh evidence upon which she wished to rely and had neither deployed it before the First-tier Tribunal nor the Upper Tribunal but only in fact a week before the hearing in the Court of Appeal and the court considered that that was no excuse for compliance with the Rules and consequently the application was refused.

28. In Shaheen, the court reviewed the authorities but noted that the court had not purported to set out a precise code in E & R as expressing caution about the allowing of appeals on fact to re-enter through a backdoor, as referred to at paragraph 26 in Shaheen. Brooke LJ went on to say at paragraph 28:

“We seem to be in danger, in this area, of slipping from the identification of an uncontentious and objectively verifiable fact such as the prior existence of crucial and reliable documentary evidence into a willingness to reopen appeals for error of law merely because a witness had been subsequently found who could have made a witness statement challenging the factual conclusions that were reached by the original decision maker in ignorance of such evidence.”

29. Earlier he had expressed the view that it would be desirable for the court to revisit on an appropriate occasion the earlier decision in Cabo Verde where evidence had emerged subsequent to the decision of the IAT that the appellant who had been believed to have been severely ill-treated in Angola had in fact, it seemed on the evidence, been in Portugal at the relevant times.

30. Essentially it is, as was said in E & R, a matter of fairness. There will be a point beyond which evidence cannot be adduced to go to show error in the decision of the lower court, bearing in mind the criteria set out in the authorities which we have set out above. As regards the applicability of the Ladd v Marshall criteria, we accept the point made by Ms Seehra that on a strict interpretation of the Ladd v Marshall principles the evidence would not be admitted. The respondent had been aware of this piece of evidence since August 2013 and has not sought to rely upon it on several occasions. It is, however, evidence that would probably have an important influence on the result of the case. Although, we accept, the evidence about the timing of applications for driving licences and the issuing of licences is slender, nevertheless there is the fact of the licence and its date and that is a piece of evidence that was not before the judge. It is certainly capable of having a significant influence on the result of the case given that it tends to show that the appellant was in the United Kingdom at a time when he says he was in Sri Lanka and suffered significant ill-treatment. There is nothing to cause doubt as to the credibility of the fact of the licence and we do not understand that to be a matter of dispute. We bear in mind also on the one hand that the Ladd v Marshall principles are to be considered more flexibly in public law cases but also the stricture in JG that there must be a limit to that flexibility. Clearly JG, on its facts, was seen as going too far, although it can clearly be distinguished from the instant case in that as noted above, it was only a week before the matter was heard in the Court of Appeal that the fresh evidence was produced as opposed to the stage at which it appeared before the Upper Tribunal in the instant case.
31. Moving on to the application of the E&R principles, and bearing in mind that as Carnwath LJ said, he was not seeking to lay down a precise code, we consider that it is possible to characterise the situation in this case as involving a mistake as to an existing fact if this evidence is to be accepted and certainly the evidence of the licence itself must be said to be uncontentious and objectively verifiable. We do not consider it would be quite right to say that the respondent was responsible for the mistake. She had the evidence and did not realise the potential significance of it until January 2015 but that does not seem to us to be a matter of responsibility for a mistake. It is the case that Cabo Verde remains a binding authority on us although, as noted above, it was thought in Shaheen that it would be desirable on an appropriate occasion to revisit it. As was said at paragraph 18 in Cabo Verde, it is the existence of the allegations that was uncontentious and they were objectively verifiable, as opposed to the truth of the material to which they relate. At paragraph 18 the court went on to quote from Carnwath LJ in E&R agreeing with the lead judgment of May LJ and saying:

“Whatever the precise limits of this court’s power to admit new evidence in such cases as this, I have no doubt that we should do so where there is material which appears to show that the factual basis on which the Tribunal proceeded was, through no fault of its own, simply wrong.”

32. Likewise in this case as in Cabo Verde, there is material which shows that the factual basis upon which the Tribunal proceeded was, through no fault of its own, simply wrong. In that case it was the unawareness of the Tribunal of the involvement of the Portuguese authorities investigating the affairs of Mr Cabo Verde. In this case it is the unawareness of the First-tier Judge that the appellant had been issued with a driving licence on 12 April 2012 when it could be reasonably inferred that the application which led to the issuing of that licence was made at a time when the appellant claimed in fact to have been in Sri Lanka. Accordingly we conclude that in the interests of fairness, and again, agreeing with what was said at paragraph 19 in Cabo Verde, fairness to a proper and rational immigration policy, it is necessary for the full facts to be before a First-tier Judge so that they can be addressed together with the evidence that was considered by the judge in this case.
33. Accordingly we have concluded that there is an error of fact amounting to an error of law in this case, and we therefore allow the respondent's appeal against the First-tier Judge's decision, and we direct that the matter be reheard de novo before a First-tier Judge at Taylor House.

Notice of Decision

The appellant's appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Allen