



Neutral Citation Number: [2023] EWCA Civ 1298

Case No: CA-2022-000894

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Mandalia
HU/09929/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 November 2023

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ASPLIN
and
LADY JUSTICE WHIPPLE

Between :

SHAHANAS KANHIRAKANDAN

Appellant

- and -

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

**Zane Malik KC and Shahadoth Karim (instructed by Louis Kennedy Solicitors) for the
Appellant**

Émilie Pottle (instructed by Government Legal Department) for the Respondent

Hearing date: 11 October 2023

JUDGMENT

LADY JUSTICE WHIPPLE:

Introduction

1. This is an appeal with the leave of this Court against the decision of the Upper Tribunal (Immigration and Asylum Chamber) promulgated on 24 November 2021 (Judge Mandalia). The Upper Tribunal allowed the Secretary of State's appeal against the decision of the First-tier Tribunal (Immigration and Asylum Chamber) promulgated on 28 October 2019 (Judge Black). The First-tier Tribunal had allowed the appellant's appeal against the decision of the Secretary of State dated 21 May 2019, refusing the appellant's application for leave to remain in the United Kingdom on the basis of long residence in the UK and on the basis of the appellant's private life in the UK.
2. The UT remitted this appeal to the First-tier Tribunal for a fresh hearing. That remission is not challenged. Unusually, therefore, this appeal is not determinative of the appellant's case, one way or another. The issue on appeal is whether certain findings by the First-tier Tribunal should be preserved for that rehearing. The First-tier Tribunal found that the Secretary of State had failed to discharge the burden of showing that the appellant had been dishonest and that allegations of dishonesty were "unfounded". The Upper Tribunal held that those findings were based on a material mistake of fact amounting to an error of law, and for that reason should not be preserved. The appellant now appeals that aspect of the Upper Tribunal's decision, arguing that these findings should be preserved.

Background

Appellant's immigration history

3. The appellant is an Indian national born on 23 February 1984. He arrived in the UK as a student on 19 January 2007. He remained in the UK legally until 26 February 2016, first as a student and later as a Tier 1 migrant.
4. During this period of legal residence in the UK, the appellant made two applications (dated 5 November 2010 and 12 January 2013 respectively). In the first, he asserted that he had received fees from a company called Iwin Technologies for work done as a self-employed consultant. In the second, he confirmed the truth of that statement in the earlier application.
5. On 26 February 2016, the appellant applied for indefinite leave to remain (ILR). On 26 August 2016 the Secretary of State refused that application in reliance on paragraph 322(2) of the Immigration Rules, on the basis that the appellant had made a false statement to support his earlier applications in 2010 and 2013. It was the Secretary of State's view that Iwin Technologies was a sham company with no legitimate business activity and that the appellant had been dishonest in supporting his applications with evidence suggesting that he had undertaken work for that company. The refusal was maintained by the Secretary of State on 10 October 2016 following an administrative review.

The Judicial Review

6. The appellant then issued judicial review proceedings, challenging the Secretary of State's decision dated 26 August 2016. Permission was granted and the matter proceeded to a substantive hearing in the Upper Tribunal before Judge Perkins, who dismissed the judicial review on 31 July 2017.
7. In his judgment, Judge Perkins noted that he had before him evidence served by the Secretary of State relating to Iwin Technologies, including reports from a forensic accountant who commented on Iwin Technologies and on the appellant's assertion that he had earned fees from Iwin Technologies and Radiant Connect, another company connected with Iwin Technologies. Judge Perkins recorded that the Secretary of State "is now satisfied that Iwin Technologies was a sham business created for the purpose of producing false evidence to support applications for leave to remain in the United Kingdom" and noted the Secretary of State's case that the appellant had made a false statement in his 2010 application by representing that he had earned money from Iwin Technologies as a self-employed consultant ([3]). The conclusion of the forensic accountant was that Iwin Technologies was a sham and that its purpose was to "facilitate the fraudulent applications ... and the abuse of the Tier 1 process" ([9]). The judge recorded that the scam (that was the word used by the forensic accountant) involved a fake employer paying sums to the pretend consultant who could then show, allegedly, payment for work done but in each case that payment corresponded to a payment into the company's bank account before payment out to the alleged consultant. Judge Perkins said that "that pattern can be seen in the payments made to this [appellant]" ([11]). The judge concluded on the evidence before him that "the method of operation identified by the forensic accountant, at the very least, could have been happening here" although he qualified that by saying that "the documentary evidence from the bank statements supports but does not prove it conclusively" ([11]). He held that the evidence of legitimate business activity by Iwin Technologies and associated companies was "exceedingly thin" ([12]), that the Secretary of State was faced with "good evidence" that Iwin Technologies was a sham, and that there was evidence that the "method of operation of the scam could be traced to [the appellant]" ([13]). On that basis, it was "open to the Secretary of State to conclude that this was a sham business and that the appellant had been involved in dishonesty" ([13]). Judge Perkins dismissed the judicial review, concluding that the Secretary of State had acted reasonably and reached conclusions open to her on the evidence ([15]).

Subsequent Human Rights Claim

8. On 18 December 2018, the appellant applied for ILR on human rights grounds, relying on his long period of residence in the UK. The Secretary of State refused that application by letter dated 21 May 2019, on two bases: (i) that he had only spent 9 years 8 months lawfully in the UK (between January 2007 and October 2016) which fell short of the 10 year requirement in paragraph 276B(i) of the Immigration Rules; and (ii) that the appellant had dishonestly used false documents to support previous applications, which meant that the grant of leave to him would not be in the public interest, alternatively he was not a suitable person to be granted leave (applying paragraphs 276B(ii) and 276ADE(1) respectively of the Immigration Rules).

The First-tier Tribunal

9. The appellant exercised his in-country right of appeal against the Secretary of State's refusal of ILR. No evidence going to the past allegations of dishonesty or the judicial review was produced by the Secretary of State in the course of preparing for or resisting that appeal.
10. Ms Pottle, who appeared for the Secretary of State on this appeal, accepted with commendable frankness that there was no good explanation for the Secretary of State's failure to produce any evidence of dishonesty before the First-tier Tribunal. She was not instructed for the Secretary of State at that hearing but her understanding was that the Home Office Presenting Officer, who had conduct of the appeal at that stage for the Secretary of State, was asked to conduct the appeal at very short notice on the day, by which point the deadline for the Secretary of State's disclosure was long passed. Ms Pottle accepted that the Secretary of State's evidence as it was put before Judge Perkins, including the evidence of the forensic accountant, and Judge Perkins' judgment in the judicial review (this, compendiously, I shall refer to as the "JR evidence") should have been disclosed by the Secretary of State as part of her case at first instance.
11. On 21 October 2019, two days before the First-tier Tribunal hearing, the appellant provided a witness statement to the First-tier Tribunal in support of his appeal. In that statement he asserted, amongst other things, that it was "... important that I am aware of the case against me and all material documents are disclosed properly"; he also said that there was "no material evidence against me that I had acted fraudulently..." (paragraph 9, with similar points being made at paragraph 14). He said that he was a victim of the Iwin Technologies scam (paragraph 9) and that the documents provided in support of his application (in 2010, I infer) evidenced genuine earnings (paragraph 12).
12. The First-tier Tribunal (Judge Black) heard the appeal on 23 October 2019. At that hearing, Dr Chelvan represented the appellant and, as I have mentioned, a Home Office Presenting Officer represented the Secretary of State. Judge Black recorded in her decision dated 28 October 2019 that at the outset of the hearing Dr Chelvan raised an issue about the absence of any evidence from the Secretary of State relating to allegations of dishonesty and sought to strike out the part of the Secretary of State's decision letter of 21 May 2019 which refused the appellant's claim on the second ground relating to dishonesty. Judge Black refused to deal with the issue in that way and said that the failure to adduce evidence in support of allegations of dishonesty would be a matter relevant to the assessment of evidence (see [9] of the First-tier Tribunal decision).
13. In the next paragraph, [10], Judge Black recorded that the appellant had given oral evidence and there were no challenges raised in terms of his evidence or his credibility. She noted that the Secretary of State had failed to produce any documentary evidence to support the allegation that the appellant's previous application in November 2010 was based on false information. It followed, she said, that the Secretary of State's reliance on the undesirability of granting ILR to this appellant amounted to an "unsubstantiated assertion". She said that she was "...

satisfied that the [Secretary of State] failed to discharge the burden to show that the appellant had been involved in deception in a previous application”. (It is these findings, at [10] of the First-tier Tribunal’s decision, which are in issue in this appeal.)

14. Judge Black went on to consider the appellant’s appeal on article 8 grounds. She noted that there was no evidence to show that the appellant would not be able to return to India where he has a wife, parents and sibling; he could work there and support himself as he had done in the UK ([11]). He did not meet the 10 year requirement of lawful residence under the Immigration Rules ([12]). He had lived in the UK for almost 12 years in total, but since 2016 he had not been legally here because he had no leave and there was no “near miss” argument available to him; his length of residence in the UK was not a compelling circumstance ([14]). But in any event, even if he did have a private life in the UK by reason of his length of residence, there was no evidence to show interference with that private life which he could continue in India and his return to India was proportionate ([15]). The appellant’s appeal was dismissed.

The Upper Tribunal

15. The appellant appealed to the Upper Tribunal. Permission was granted, in the end, following a successful *Cart*¹ challenge in the Administrative Court to the Upper Tribunal’s refusal of permission to appeal. Mr Malik KC represented the appellant on that appeal (although he had not represented the appellant on the judicial review or before the First-tier Tribunal). The grounds of appeal were that the First-tier Tribunal had erred in law in failing to follow the guidance given by the Court of Appeal in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, [2018] HRLR 5 to the effect (as the argument was summarised by Judge Mandalia in the Upper Tribunal) that “where a finding was made by the FtT in an [Educational Testing Services] case that there had been no deception the appellant should be put back in the position he/she was in prior to the decision being made and would be able to make a fresh application” (Upper Tribunal’s decision at [8]). (I shall consider *Ahsan* in greater detail below, see paragraphs 35-40.)
16. In response to the appeal, the Secretary of State lodged a Respondent’s Notice arguing that there was a material mistake of fact in the decision of Judge Black, in that she was not aware of the fact of the judicial review proceedings, of the judgment of Judge Perkins dismissing the judicial review claim, or the evidence adduced by the Secretary of State in the course of those proceedings. The Secretary of State relied on *E v Secretary of State for the Home Department*; joined with *R v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 in support of her cross-appeal (this case I shall refer to as *E and R*).
17. Mr Malik resisted the Secretary of State’s response. He argued that it was not now open to the Secretary of State to seek to adduce evidence to impugn the findings at [10] of the First-tier Tribunal’s decision. There was no mistake of material fact; rather, the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 governed the application for late admission of evidence and those criteria were not met.
18. Judge Mandalia dealt first with the appeal. He noted that Judge Black had not had the case of *Ahsan* drawn to her attention and had not therefore considered the impact that

¹ *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, [212] 1 AC 663

her findings at [10] might have on the appellant's article 8 claim and specifically on the assessment of proportionality ([20]). Judge Mandalia allowed the appeal, holding that the decision of Judge Black was vitiated by an error of law, namely her failure to address the *Ahsan* argument, and for that reason her decision must be set aside (see [21]).

19. Judge Mandalia then turned to the cross-appeal outlined in the Respondent's Notice, noting its central attack on Judge Black's findings at [10]. He referred to *E and R* citing [92] of Carnwath LJ's judgment in that case (I will consider that case, including [92], as part of my discussion below). He concluded that:

"24. ... the right of appeal is confined to errors of law. The only way in which the findings at paragraph [10] of the decision of the First-tier Tribunal should be disturbed is on the basis of ignorance or mistake of fact giving rise to unfairness."

20. He noted that the appellant was aware of the JR evidence but had "surprisingly" not referred to it at all in his witness statement. He held that Judge Black had proceeded in ignorance of the JR evidence including the observations of Judge Perkins about the Secretary of State's evidence (Upper Tribunal at [25]). He held that a finding which had "no justifiable basis" and "is made in ignorance of the fact of material evidence that was relevant" was capable of establishing a mistake as to fact or unfairness and to amount to an error of law. He held that the First-tier Tribunal's decision was vitiated by unfairness which arose primarily because of the Secretary of State's own failure to provide the First-tier Tribunal with the evidence to support the allegation of deception, but that the appellant was well aware of the allegation against him and of the judgment of Judge Perkins against him in the judicial review ([26]). He went on in the same paragraph:

"The parties both have a duty to co-operate with the Tribunal to further the overriding objective to deal with cases fairly and justly. The parties both have a duty to ensure ... that a Tribunal reaches its decision on the correct factual basis, and that the Judge reaches a decision with the confidence that both parties have acted in accordance with their duty of candour, and with all the relevant evidence and information before the Tribunal. ... If the Tribunal's attention had been drawn to the evidence or ... the fact that the evidence had been considered in a judicial review claim, albeit in the context of a challenge on public law grounds, I am quite satisfied Judge Black could not reasonably have concluded that the basis of the refusal in terms of the appellant's undesirability amounted to an unsubstantiated assertion, and that the mistaken impression that there was no evidence, played a material part in the reasoning for the finding made."

21. He considered the Secretary of State's application to admit the evidence on appeal, noting that although there had been a delay in adducing this material, it was material with which the appellant was familiar. He said that the "*Ladd v Marshall* principles remain the starting point, but there is a discretion to depart from them in exceptional circumstances" ([28]). He again noted that this was evidence which was likely to have had an important influence on Judge Black's conclusions and was credible evidence (although not incontrovertible). He concluded at [29]:

“I am satisfied that the wider interests of justice do require the fresh evidence to be considered by me and I admit it, given the particular factual background to this appeal”.

22. He further reasoned at [30] that

“to remake the decision without having regard to all of the evidence is likely to give rise to a risk of serious injustice ... the injustice here is that the [Secretary of State] would be bound by a finding made by the First-tier Tribunal, in circumstances where the underlying material to support the allegations made had been the subject of a claim for judicial review ...”

23. He set aside the decision of Judge Black with no findings preserved and remitted the appeal to the First-tier Tribunal for a fresh hearing.

Grounds of Appeal and Respondent’s Notice

24. By his appellant’s notice, the appellant argues that the Upper Tribunal applied the wrong test in interfering with the findings of fact of the First-tier Tribunal and admitting new evidence. It is further said, that even on the erroneous approach adopted by the Upper Tribunal, its conclusion was not justified.

25. By her Respondent’s Notice, the Secretary of State argues in response to the appellant’s grounds of appeal that the Upper Tribunal’s decision was justified not only for the reasons given by Judge Mandalia, but also on the additional bases (to the extent they were not taken into account by Judge Mandalia): (i) that the appellant “would likely” obtain ILR on the basis of his “demonstrably false claims” if Judge Black’s findings were not set aside, and that the Secretary of State cannot, unlike the appellant, make a fresh claim if relevant evidence is excluded; and (ii) that the correct application of the test in *E and R* requires a finding of objective unfairness (rather than unfairness between the parties), that the mistake in question was as to the *availability* of the JR evidence (and included the findings made by Judge Perkins in that judicial review), and that the principle of finality has no application in this case.

Submissions

26. The appeal was argued with precision and economy on both sides, for which the Court was most grateful. The following summarises the parties’ arguments.

Appellant’s submissions

27. Mr Malik, appearing with Mr Karim for the appellant, argued, first, that Judge Mandalia misunderstood alternatively misapplied *E and R*. The Judge cited [92] of that case, but that paragraph related to the old Immigration Appeals Tribunal (IAT) which had a power to review its own decisions at any time (and admit evidence for that purpose); that paragraph was completely inapplicable in this case where the appeal to the Upper Tribunal lay on a point of law only and to apply the approach in that paragraph in this case amounted to a misdirection of law.

28. Mr Malik submitted that Judge Mandalia was wrong to admit the JR evidence. The *Ladd v Marshall* criteria applied with strictness and the Secretary of State could not

meet the first *Ladd v Marshall* requirement because the JR evidence was available before the First-tier Tribunal hearing. The Secretary of State was at fault in not disclosing it; she had been in breach of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2604/2014, in particular rule 24(1)(d) which required the Secretary of State to provide any document she relied on within 28 days of the receipt of the notice of appeal; although the Upper Tribunal had power to admit evidence (by rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2698/2008) that was on terms set out in rule (2A) which required the party seeking to have the evidence admitted to explain why it was not submitted to the First-tier Tribunal and for the Upper Tribunal to consider whether there had been unreasonable delay in producing that evidence; in this case, there was no explanation offered and there plainly had been unreasonable delay. If the Upper Tribunal had tested the Secretary of State's application to admit the JR evidence according to the usual *Denton v White*² criteria then the conclusion would and should have been reached that there was no reasonable explanation for the delay and the material was not admissible. To criticise the appellant for not disclosing the JR evidence was unjustified and wrong; it betrayed a misunderstanding of the rules and the adversarial nature of proceedings in the First-tier Tribunal; it was not the responsibility of the appellant to produce evidence for the Secretary of State or to make her case for her. If the Secretary of State did not produce the JR evidence as evidence she was intending to rely on in the appeal, the appellant was entitled to assume that she was no longer relying on it, see *MH (Respondent's Bundle: Documents not provided) Pakistan v Secretary of State for the Home Department* [2010] UKUT 00168 (IAC), [2010] Imm AR 658. The attack on the appellant's witness statement – as misrepresenting the true state of affairs by failing to refer to the judicial review - was also unjustified because the appellant was entitled to make the points that he did in the absence of any evidence about dishonesty served by the Secretary of State. Further, if the JR evidence was admitted on appeal, in circumstances where that evidence had always been available, that meant that in effect there would be a different rule for the Secretary of State than for an appellant, because an appellant would not be able to put in more evidence in equivalent circumstances (for an example, see *Kabir v Secretary of State for the Home Department* [2019] EWCA Civ 1162, [2020] Imm AR 49). In any event, the Secretary of State already had a remedy for the problem which had arisen which was to apply to set aside the First-tier Tribunal judgment on grounds of fraud (for an example of that, see *Abbassi v Secretary of State for the Home Department* [2020] UKUT 27 (IAC), [2020] Imm AR 678). That was what the Secretary of State should have applied to do; it was not open to her to seek to put additional evidence in for the appeal on the basis of which to allege material error of fact.

29. In any event, the JR evidence in this case did not prove dishonesty because the issue before Judge Perkins on the judicial review was not whether the appellant was dishonest, rather it was whether the Secretary of State was acting lawfully in alleging dishonesty. That meant that, in considering the guidance in *E and R*, the JR evidence was not evidence of an “uncontested” fact but of a fact, namely the appellant's honesty or lack of it, which was very much contested. It amounted to nothing more than mere assertion by the Secretary of State which had not been proved before the First-tier Tribunal. To pretend that the error of fact was as to the *existence* of the evidence was a misapplication of *E and R* and would in effect derail *Ladd v Marshall*

² *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926

because it could always be said, in a case where a party sought to adduce evidence late in the day, that the trial court had been unaware of the *existence* of that evidence.

30. In summary, this Court should set aside Judge Mandalia's decision to the extent that he had set aside Judge Black's findings of fact at [10]; alternatively, this Court should remit the issue of admissibility of the JR evidence, and the argument about error of material fact which flowed from it, to the First-tier Tribunal as part of the remitted appeal.

Secretary of State's submissions

31. Ms Pottle, for the Secretary of State (who did not appear below), sought to uphold the decision of Judge Mandalia for the reasons he gave as well as for the further or different reasons outlined in her Respondent's Notice. She submitted that there was no error of law in the decision to admit the JR evidence because there were exceptional circumstances in this case and the interests of justice required a departure from the strict formula laid down in *Ladd v Marshall*. Judge Mandalia had incorrectly referred to [92] of *E and R* and he should have referred to [91] of that judgment, which provided a closer analogy with this case, but that error was immaterial because considered overall, his approach was correct and his conclusion justified. It was relevant that the appellant was aware of the JR evidence and had chosen not to disclose it or refer to it in his witness statement; he was wrong to suggest in that statement that he was unaware of the case against him because he knew from the judicial review precisely what the Secretary of State's case was. The JR evidence was highly relevant to the issue of dishonesty, because Judge Perkins had made findings for example about the sham nature of Iwin Technologies, albeit in the context of a public law challenge. The interests of justice plainly required the admission of the JR evidence because otherwise the First-tier Tribunal on remittal would be bound by findings which were demonstrably false. The issue on remission remained the appellant's entitlement to ILR, and it was in the public interest that the First-tier Tribunal should determine that question with full information before it.
32. The appellants' argument that the Secretary of State had an alternative remedy available, in that she could simply apply to set aside the First-tier Tribunal decision, was unheralded in the appellant's grounds of appeal and not properly arguable on appeal. The mistake as to the availability of the JR evidence was a material mistake as to an incontrovertible fact which plainly came within the principle established in *E and R*. It was not necessary to consider who was at fault; the test was whether, objectively, there was unfairness. Judge Mandalia had been right to conclude that preservation of the findings at [10] would be unfair. He was right not to preserve those findings.

Discussion

33. In summary and for reasons which follow, I agree with the Secretary of State that this appeal must be dismissed. Judge Mandalia was entitled to exercise his discretion to admit the JR evidence, and having done so, he was entitled to set aside the findings of Judge Black at [10] of her judgment, on the basis that they were based on an error of material fact amounting to an error of law. The consequence of that conclusion is that the issue of the appellant's honesty or dishonesty is "live" before the First-tier

Tribunal which will rehear this appeal. I accept, as does the Secretary of State, that the JR evidence is not determinative of that issue, either way.

34. My reasons begin with a review of *Ahsan* and then *E and R*. I will then, as Judge Mandalia did, consider the combined effect of those authorities in the context of this appeal.

Ahsan

35. In *Ahsan*, the appellants were the subject of immigration decisions taken by the Secretary of State on the basis that she considered that they had cheated on Tests of English for International Communication ('TOEIC') provided by a business called Educational Testing Service ('ETS'). In three of the cases, the relevant decision was a notice that they were liable to removal under section 10 of the Immigration and Asylum Act 1999 on the basis that they had used deception in obtaining previous extensions of immigration leave by using a proxy for the spoken part of their TOEIC tests. In a fourth case, the appellant's human rights claim had been refused in part on the basis that he had cheated in his TOEIC test. The Court of Appeal considered the adequacy of the appellants' right of out of country appeal against those decisions (not an issue which arises in this case where the appellant has enjoyed an in-country right of appeal). In the course of his analysis, Underhill LJ (with whom Floyd and Irwin LJ agreed) considered what would happen if the tribunal found that an appellant had not, in fact, used deception:

"120. The starting-point is that it seems to me clear that if on a human rights appeal an appellant were found not to have cheated, which inevitably means that the s.10 decision had been wrong, the Secretary of State would be obliged to deal with him or her thereafter so far as possible as if that error had not been made, i.e. as if their leave to remain had not been invalidated. ... In a straightforward case, for example, she could and should make a fresh grant of leave to remain equivalent to that which had been invalidated. She could also, and other things being equal should, exercise any relevant future discretion, if necessary "outside the Rules", on the basis that the appellant had in fact had leave to remain in the relevant period notwithstanding that formally that leave remained invalidated. (I accept that how to exercise such a discretion would not always be easy, since it is not always possible to reconstruct the world as it would have been; but that problem would arise even if the decision were quashed on judicial review ...) If it were clear that in those ways the successful appellant could be put in substantially the same position as if the s.10 decision had been quashed, I can see no reason in principle why that should not be taken into account in deciding whether a human rights appeal would constitute an appropriate alternative remedy. ..."

36. The appellant now argues, based on this passage, and based on Judge Black's findings, that his human rights appeal should be allowed. The argument, as I understand it, goes like this: the First-tier Tribunal has found that the appellant was not dishonest ([10] of Judge Black's decision); that means that the Secretary of State should not have refused his application for an extension of leave in 2016; if the appellant had got that extension in 2016 he would have accrued 10 years' lawful

residence in the UK; in that event, he would have been eligible for ILR and his application in 2018 would have succeeded. The appellant says that the First-tier Tribunal can and should take account of this hypothesis when assessing whether the Secretary of State's 2019 decision on article 8 grounds is proportionate (or not) in the context of the current appeal.

37. The *Ahsan* argument is predicated on a finding that the appellant did not use dishonesty in his 2010 application and that the Secretary of State's conclusion to contrary effect – that he did - is wrong in fact. It is on that point that the appellant seeks to preserve Judge Black's findings at paragraph 10, arguing that they amount to a positive finding of honesty, sufficient to support the *Ahsan* argument. I am not sure that Judge Black's findings do go that far. They are findings that there was *no evidence* to support the allegation of dishonesty rather than positive credibility findings in the appellant's favour. But for present purposes, I am willing to accept, as Judge Mandalia appears to have done, that the findings would have potency, at least, in the context of the *Ahsan* argument.
38. The introduction of the *Ahsan* argument changes the landscape of this appeal. The appeal before Judge Black proceeded on the basis that there were two distinct bases for refusing the appellant's human rights claim, and that the allegation of dishonesty had nothing to do with the failure to meet the 10 years' lawful residency requirement. But in light of *Ahsan*, the two bases converge on the issue of dishonesty: if the appellant is found to be honest, he can advance his *Ahsan* argument which may be a route to securing ILR on the basis of 10 years' residency; by contrast, if the appellant is found to have been dishonest, his appeal is likely to be dismissed.
39. I agree with Judge Mandalia that if *Ahsan* had been raised before Judge Black, she would not have dealt with the allegations of dishonesty in the way that she did at [10]. The *Ahsan* argument could have been raised before her, because the judgment in that case predated the hearing before Judge Black by some years, but for reasons which are unclear, it was not raised at that time.
40. The decision to remit this appeal to the First-tier Tribunal to determine the *Ahsan* argument is not under appeal. The issue, therefore, is whether the First-tier Tribunal should be bound by the findings of Judge Black at [10] when it comes to look at the issue of honesty or dishonesty in the context of that argument.

E and R

41. In *E and R*, the Court was faced with two appeals from foreign nationals whose appeals had been dismissed on the basis of evidence put before the tribunal, but who wished to rely on evidence which had come into existence after their appeal hearings but before the judgments in their cases were promulgated. The appeals in question had been before the Immigration Appeal Tribunal (IAT) at a time when appeals in that jurisdiction were not confined to errors of law but included errors of fact. That position changed with the passage of the Nationality, Immigration and Asylum Act 2002, section 101(1) of which confined appeals to the IAT to points of law (see [17] of *E and R*). Since then, of course, the IAT has been replaced by the First-tier Tribunal and Upper Tribunal (section 3(1) and (2) of the Tribunals, Courts and Enforcement Act 2007). The right of appeal from the former to the latter is on point of law only (section 11(1) of the 2007 Act).

42. Carnwath LJ gave the judgment of the Court (the other members of which were Lord Phillips MR and Mantell LJ). His judgment warrants reading in its entirety. The key paragraphs for present purposes start at [44] with his review of the authorities about when the decision of a tribunal may be disturbed on grounds of mistake of fact. He considered *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, a judgment of the House of Lords, where there had been a failure by the police to serve relevant medical evidence in their possession, which failure led to the impression being given that there was no evidence to support the claimant's claim. In a passage from pp 344-345 of the report in *CICB*, cited at [46] of *E and R*, Lord Slynn accepted that material error of fact was a recognised ground for judicial intervention in some cases. In further passages from pp 345-347 of the report in *CICB*, cited at [47] of *E and R*, Lord Slynn said he preferred to decide the *CICB* case on the basis that there had been a breach of natural justice amounting to unfairness considered in the context of the obligation of the police to co-operate with the *CICB* in the obtaining of evidence.
43. Carnwath LJ also referred to *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, another case decided by the House of Lords, in which Lord Slynn referred to the jurisdiction to quash for "misunderstanding or ignorance of an established and relevant fact" (this is quoted at [49] of *E and R*).
44. In the paragraphs which follow, Carnwath LJ had regard to a number of other authorities and a range of academic comment. He concluded that as a matter of law, mistake of fact is available as a ground of challenge in public law and analogous cases:
- "63. In our view, the *Criminal Injuries Compensation Board* case [1999] 2 AC 330 points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors: (i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning."
45. He noted that the apparent unfairness in the *CICB* case was accentuated because the police had in their possession the relevant information and failed to produce it. But he

emphasised that fault was not essential to the reasoning in that case (see [65]).

46. He held that mistake of fact giving rise to unfairness was in principle a valid ground of challenge in an appeal on point of law, in certain contexts at least:

“66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must 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. Thirdly, the appellant (or his advisers) 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.”

47. He then turned to the question of whether fresh evidence could and should be admitted to establish that there had been a mistake of fact (starting at [68]). He said that the nature of the mistake was relevant to deciding whether the material should be admitted, even though that material might have been available before the decision or hearing. Where the complaint was of ignorance of the evidence which was all along available, the issue overlapped with the question of fairness. He reviewed a number of authorities, noting that in judicial review at least, some flexibility had been allowed in the application of the *Ladd v Marshall* principles where the interests of justice required it (see [81]). *Ladd v Marshall* principles remained the starting point in public law cases, but there was a discretion to depart from them in exceptional circumstances (see [82]).
48. Carnwath LJ drew together the threads of his discussion and identified the “resulting principles” in the following paragraphs:

“91. In summary, we have concluded in relation to the powers of this court: (i) an appeal to this court on a question of law is confined to reviewing a particular decision of the tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State; (ii) such an appeal may be made on the basis of unfairness resulting from “misunderstanding or ignorance of an established and relevant fact” (as explained by Lord Slynn in the *Criminal Injuries Compensation Board* [1992] 2 AC 330 and *Alconbury* cases [2003] 2 AC 295); (iii) the admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may

be departed from in exceptional circumstances where the interests of justice require.

92. In relation to the role of the IAT, we have concluded (i) the tribunal remained seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties; (ii) following the decision, when it was considering the applications for leave to appeal to this court, it had a discretion to direct a rehearing; this power was not dependent on its finding an arguable error of law in its original decision; (iii) however, in exercising such discretion, the principle of finality would be important. To justify reopening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors. We should emphasise that this analysis is based on the regime applicable to this case, under which the right of appeal to the IAT was not confined to issues of law (before the change made by the 2002 Act, section 101: see para 17 above).”

49. Judge Mandalia cited [92] of *E and R* in his judgment. It was common ground before this Court that it is [91] which was more relevant, because Judge Mandalia was dealing with an appeal on a point of law from the First-tier Tribunal, analogous to an appeal from a tribunal to this Court, which is the subject of [91]. I am satisfied that nothing turns on this point. There are differences between the two situations addressed in [91] and [92], but there is also much common ground. Judge Mandalia’s mistaken reference to [92] was not material.
50. Subsequent case law confirms that material mistake of fact, following *E and R*, is a rare but accepted head of challenge. For an overview, see paragraph 49.3 of the Judicial Review Handbook by The Hon Sir Michael Fordham, 7th Ed.

Admission of the JR Evidence

51. Although in *E and R* the Court considered mistake of fact first and then looked at the admission of fresh evidence, I think it is more logical, at least in the context of this case, to examine the admission of fresh evidence first and then to turn to the mistake of fact arguments. To deal first with one of Mr Malik’s arguments: Judge Mandalia was right to decide whether to admit the JR evidence himself, and not to leave it to the First-tier Tribunal, because the application to admit that evidence was before him and it formed part of the Secretary of State’s cross-appeal on grounds of material error of fact. It was for him to determine that cross-appeal. There was no question of leaving it to the First-tier Tribunal to determine.
52. It is important to note at the outset that the decision whether to admit fresh evidence was a case management decision. Judge Mandalia was exercising powers under Rule

15 of the Upper Tribunal rules. That rule is to be read with Rule 5(1) by which the Upper Tribunal may regulate its own procedure. Judge Mandalia had a broad discretion in determining his course in relation to the JR evidence. Applying ordinary principles, this Court would be slow to intervene in the exercise of such a discretion.

53. In my judgment, there is no proper basis on which this Court could or should intervene. So far as the Upper Tribunal rules are concerned, Judge Mandalia addressed the factors which are specified in Rule 15(2A): he knew that the JR evidence was not put before Judge Black because of an oversight (see [17] of his decision); and he knew there had been a long delay in producing that evidence and that the evidence had been available at the time of the hearing before Judge Black (see [25] of his decision).
54. Mr Malik emphasised the Secretary of State's breach of the First-tier Tribunal rules, rule 26 in particular, in failing to produce the evidence earlier. Ms Pottle's acceptance of her client's failings can, I think, be taken as an acceptance that her client had been in breach of the Tribunal rules. But the breach of the rules of disclosure applicable in the Tribunal, lamentable though it is, does not make much difference to the merits of the Secretary of State's case. The Secretary of State has conceded that she failed to produce evidence which was available and which she now wishes to rely on. That is why she cannot meet the *Ladd v Marshall* conditions (the first condition is her stumbling block) and that is what led to her cross-appeal and to Judge Mandalia's consideration of whether there were exceptional circumstances to justify a departure from *Ladd v Marshall*. The breach of the rules is coincident.
55. Mr Malik says that Judge Mandalia made a legal error of approach when he took *Ladd v Marshall* as a starting point only, and that he should have applied the *Ladd v Marshall* principles with greater stringency. I am unable to accept that submission. The *Ladd v Marshall* principles are so well-known as hardly to need repetition, but for clarity I recite them here ([1954] 3 All ER 745, per Lord Denning at p 748 A-B):

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.”

Judge Mandalia was entitled to treat *Ladd v Marshall* as a “starting point”, a phrase which reflected the language at [82] of *E and R*. His focus was firmly on whether there were exceptional circumstances to justify a departure from the *Ladd v Marshall* requirements, and that focus reflected precisely the statement of principle at [91] of *E and R*. There was no error of approach.

56. Mr Malik says that Judge Mandalia was wrong to find exceptional circumstances. I do not agree. The following features of this case justify Judge Mandalia's conclusion that there were exceptional circumstances in this case permitting him to depart from the strict *Ladd v Marshall* approach:

- i) This appeal was going to be remitted for a fresh hearing anyway. The principle which underpins *Ladd v Marshall*, relating to the need for finality of litigation, was not relevant here.
- ii) The JR evidence was very significant in the context of the appeal as it was now being advanced, with its changed emphasis on the *Ahsan* argument and on whether the appellant had been dishonest in his 2010 application.
- iii) The JR evidence did not take the appellant by surprise, because he had known about it all along.
- iv) If the JR evidence had been put before Judge Black, it would in all likelihood have had a substantial effect on the proceedings, because she would not have made the findings that she did at [10].
- v) There is a wider public interest at issue in this case, in ensuring that foreign nationals are not granted leave to remain on the basis of false or incomplete information. It was therefore important to consider carefully whether Judge Black's lack of knowledge about the availability of the JR evidence was, itself, a mistake of material fact which was capable of meeting the *E and R* test and it was in the interests of justice that the JR evidence was admitted for that purpose.

Error of Material Fact

57. I reject Mr Malik's submission that the Secretary of State should have applied to set aside Judge Black's decision (by analogy with cases like *Abbassi*) and, if Mr Malik goes this far, his submission that Judge Mandalia lacked jurisdiction to adjudicate the Secretary of State's cross-appeal. Those points were not raised in the grounds of appeal. They are in my view of doubtful merit anyway. The issue for this Court is whether Judge Mandalia erred in law in what he decided; that the Secretary of State might, or might not, have had an alternative way of dealing with the problem is irrelevant.
58. Mr Malik argues that Judge Mandalia was wrong to conclude that Judge Black's ignorance of the JR evidence amounted to an error of material fact, or, put in the alternative way, created objective unfairness. I do not accept that submission. Judge Mandalia plainly had in mind the factors set out at [66] of *E and R*, which, as Carnwath LJ acknowledged, do not amount to a "precise code", but which nonetheless stand as a useful checklist when the Court is considering whether there has been a mistake of material fact. All were present to some degree in this case:
 - i) There was a mistake as to an existing fact, namely the fact that the JR evidence existed and was available. A mistake as to the availability of evidence on a particular matter is capable of amounting to an error of law within the principles of *E and R*, as Carnwath LJ confirmed at [66]. Judge Black appears to have been completely unaware of the existence and availability of that evidence.
 - ii) The fact that the JR evidence existed and was available was established and is not contentious. This Court was shown that evidence. It went directly to the

issue of the appellant's honesty or lack of it. It would undoubtedly have assisted the First-tier Tribunal to see it in the first appeal. It was clearly relevant to the resolution of the *Ahsan* argument in the second appeal.

- iii) The appellant had contributed, to some extent at least, to the mistake by Judge Black. I accept that the Secretary of State bears primary responsibility for the failure to produce the JR evidence in advance of the first appeal. But it was not unreasonable, in this case, to conclude that the appellant also bore some responsibility. The appellant could, and in my judgment should, at the very least, have referred to the fact of the judicial review in his witness statement given that that litigation was on a point very closely connected to the Secretary of State's reasons for refusing his human rights appeal. The oblique references in his witness statement to "no material evidence" and "no conclusive proof" of dishonesty (at paragraph 9, for example) were drafted in full knowledge of the existence of the JR evidence without referring to it. They lack candour. There is no useful analogy to be drawn with the different facts in *MH Pakistan*. This was an appeal on human rights grounds and it was important that the tribunal had full information in order to achieve the right result (*E and R*, at [66]). The appellant did bear some responsibility for the mistake made by Judge Black. I reject Mr Malik's submissions to contrary effect.
- iv) The fact that Judge Black was not aware of the JR evidence did play a material (but not necessarily decisive) part in her reasoning at [10]. She would not have made those findings if she had been aware of that evidence.

59. In addition to these points, it is my view that the particular feature of this case which makes it unusual, and which leads irresistibly to the conclusion that the findings at [10] should be set aside, is the changed landscape of the appeal in light of the *Ahsan* argument. That change brings the issue of the appellant's honesty (or lack of it) to centre stage. In the first appeal before Judge Black, the issue of honesty/dishonesty was not centre stage because, as the appeal was presented, the appeal was destined for failure anyway. For the appellant now to retain the benefit of Judge Black's findings at [10] would be unfair, and obviously and objectively so, because it would give the appellant a windfall, the consequence of which might be unmerited success in the appeal. That would be contrary to the public interest and antipathetic to the wider interests of justice.
60. In my judgment there was no error of law in Judge Mandalia's approach or conclusion that Judge Black's findings at [10] should not be preserved. Those findings were based on a mistake of material fact amounting to an error of law.

Disposal

61. I would dismiss this appeal. I am not persuaded that Judge Mandalia erred in law. If I am wrong about that, I would have retaken the decision myself to reach precisely the same conclusion, which I consider was irresistible in the unusual circumstances of this case. It is not necessary to address the Secretary of State's Respondent's Notice separately.

LADY JUSTICE ASPLIN:

62. I agree.

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT:

63. I also agree.