IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006579
First-tier Tribunal No: HU/54428/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23 December 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GAREEB NEWAZ JALAL AHSAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr M Parvar, Senior Presenting Officer
For the Respondent: Mr Z Malik KC, instructed by Morgan Hill Solicitors

Heard at Field House on 4 December 2023 and 29 February 2024

DECISION AND REASONS

Introduction

1. The Secretary of State appeals a decision of First-tier Tribunal Judge Napier ("the Judge") allowing Mr Ahsan's human rights (article 8 ECHR) appeal. The decision was sent to the parties on 11 March 2022.

2. The Upper Tribunal has been required to consider the *Robinson* obvious principle which was addressed by the representatives at the error of law hearing. There has been a delay in the promulgation of this decision consequent to the Upper Tribunal awaiting the Court of Appeal judgment in *Secretary of State for the Home Department v George* [2024] EWCA Civ 1192, permission to appeal having been granted by Singh LJ in February 2024.

Relevant Facts

3. Mr Ahsan is a national of Bangladesh and is presently aged 47. Having previously lawfully entered and left this country, he was granted entry clearance as a Tier 4 (General) Student and re-entered the United Kingdom on 15 January 2010. He enjoyed leave to enter until 25 May 2011. On 20 May 2011 he applied for leave to remain as a student. The Secretary of State refused this application by a decision dated 8 June 2011. Mr Ahsan successfully appealed and was granted leave to remain from 13 September 2011 to 15 January 2013.

4. On 12 December 2012, Mr Ahsan applied for leave to remain as a Tier 1 (Entrepreneur). The application was made the day before changes to the Tier 1 (Entrepreneur) category came into force bringing to an end the ability of Tier 4 (General) Students to switch in-country into the category on the basis of having access to at least £200,000 in investment funds.

5. The Secretary of State refused the application by a decision dated 25 June 2015, relying on general grounds with reference to paragraph 322(1A) of the Immigration Rules as then in force. By means of her refusal decision, the Secretary of State observed:

> "With your application, you submitted a bank statement from Al-Arafah Islami Bank Ltd (Bangladesh), and a letter/bank certificate from Al-Arafah Islami Bank dated 06 December 2012. You have also submitted a bank statement from Dutch-Bangla Bank dated 06

> December 2012. Both of the bank accounts are in the name of [...], and the accompanying letter/certificates from each bank are in the name of Mr [...] Uddin, who is named as the managing director of [...], who you state as making available £200,000 for investment in your company.
>
> Although the bank statements for each bank account appear to be genuine, we are satisfied that the letters/ certificates are false because we have verified the documents with Dutch-Bangla Bank and Al-Arafah Islami Bank, in Bangladesh, who have both stated that although the bank accounts do exist, the letters/certificates have NOT been issued by the banks.
>
> As false documents have been submitted in relation to your application, it is refused under paragraph 322(1A) of the Immigration Rules."

6. We have not referenced the name of the company as we address below corporate financial information said by Mr Ahsan to be accurate. We are satisfied that "Uddin" is a common name in Bangladesh and so reference to it alone will not create the real possibility of jigsaw identification of the company.

7. Mr Ahsan's appeal against this decision (IA/24984/2015), together with the appeal of Mr Kazi Taz Uddin Ahmed (IA/24983/2015), was heard by First-tier Tribunal Judge Hodgkinson sitting at Hatton Cross on 15 March 2016. Mr Ahsan and Mr Ahmed, who this panel understands are cousins, asserted that they were an entrepreneurial team and sought leave to remain by joint applications.

8. The Secretary of State filed and served correspondence received from Al-Arafah Islami Bank and Dutch-Bangla Bank. In response to an email sent by an entry clearance assistant on 10 June 2015, a deputy manager of Dutch-Bangla Bank confirmed by an email dated 17 June 2015, "We have checked the scanned copy of the statement forwarded to you and found genuine. However, the copy of the solvency certificate provided by you was not issued by us."

9. A representative of Al-Arafah Islami Bank confirmed by email to an entry clearance assistant that the certificate provided was "not issued from our branch" and was "totally fake".

10. Mr Ahsan and Mr Ahmed filed with the First-tier Tribunal a letter from a Senior Vice-President (and branch manager) of Al-Arafah Islami Bank,

dated 10 March 2016, confirming that the bank letter and statements relied upon were issued by the bank and are "genuine and authentic". The letter detailed, *inter alia*:

> "Also, neither we, nor our branch, have received any form of verification call/ request either by telephone or in person or any other form of correspondence from any organisation or individual regarding the issuing of the above mentioned bank documents."

11. On its face, the letter references an assertion that the Secretary of State was untruthful in her evidence of an entry clearance assistant communicating with the Al-Arafah Islami Bank though such step having been undertaken is supported by the email correspondence referenced above.

12. In addition, a branch manager of the Dutch-Bangla Bank confirmed that the solvency certificate and bank statements were genuine by a letter also dated 10 March 2016. An explanation was provided as to why a deputy manager could not locate the solvency certificate when responding to the entry clearance assistant's inquiry.

13. Judge Hodgkinson dismissed the appeal by a decision promulgated on 8 April 2016. We consider it appropriate to set out, in detail, Judge Hodgkinson's conclusion as to the use of false documents with our attendant observations:

> "23. I have set out above the email evidence relied upon by the respondent together with the substantive content of the two bank letters of 10 March 2016, none of which requires repetition. It is clear, and I find as a fact, that the e-mail correspondence referred to is the correspondence which genuinely passed between an entry clearance assistant in Bangladesh and the respective banks; there is no logical reason why I should conclude otherwise."

14. On the face of the email correspondence presented this is a rational conclusion, and consequently the assertion made by the Senior Vice-President of Al-Arafah Islami Bank that no request for verification was made – with the implication that the Secretary of State was untruthful in her assertion of the same – was factually incorrect.

15. Judge Hodgkinson proceeded:

> "24. I find the said bank letters of 10 March 2016 to be documents which are unreliable, for the following reasons. First, they were produced at a very late stage; only a few days before the appeals hearing, even though the appellants and their solicitors have been aware for several month of the adverse contention raised by the respondent. I find their late production, in itself, to be damaging to the reliability of those letters, when set against the fact that the email correspondence referred to clearly indicates that the letters of 6 December 2012 are forgeries.
>
> 25. Linked to the above, and as part of Mr Hosain's adjournment application [appellants' legal representative], I asked Mr Hosain why the said letters of 10 March 2016 had not been produced at an earlier stage. Mr Hosain replied that this was because Mr Uddin had been away and difficult to contact until relatively recently. However, I noted with him that at page 18 of the appellants' bundles is an email-letter of Mr Uddin, addressed to the appellants. He attaches to that email the two bank letters of 10 March 2016, and Mr Uddin states that he apologises for the delay in providing them, but explains that in February (this logically being reference to February 2016) he was out of Bangladesh on a business trip. He confirms that the originals would be sent by post and, as I have indicated above, it is the originals of those two bank letters which Mr Hosain stated were currently awaited. However, whilst Mr Hosain indicated to me that the bank letters in question had not been produced at an earlier stage because Mr Uddin has essentially been unavailable for several months, Mr Uddin's letter actually only indicates that he was away in February. It is in these circumstances, those letters have been produced at a very late stage, that I consider their extremely late production to be damaging to their reliability."

16. We consider Judge Hodgkinson's reasoning to be entirely rational. It is implicit that the delay denied the Secretary of State an opportunity to undertake a further verification step if she so wished.

17. Concern as to the content of the letters was identified, namely their similarity despite being issued by two separate banking institutions:

> "26. Further, I reiterate that the text of the two Banks' letters of 6 December 2012 is identical, except for the amounts contained in the respective bank accounts, which factor I find to be of concern. If they were letters genuinely and independently produced by different banks in respect of different accounts, I

> entirely accept that it might be argued, although it has not been, that Mr Uddin might say that he produced the text of those letters to the Banks to sign, but I reiterate that that has not been contended on behalf of the appellants. In any event, each letter refers to £200,000 being available to the appellants, and yet each of those Banks could not have been aware of that fact, as it is only the combined funds in both bank accounts, at separate banks, as at 21 October 2012, which amounted to £200,000."

18. Judge Hodgkinson was, understandably, unaware that the Secretary of State would later accept the Dutch-Bangla Bank letter of 10 March 2016 as genuine following a further verification check. However, it is the Secretary of State's present position that the Al-Arafah Islami Bank letter is not genuine and, if this is so, consideration could properly be given to whether its contents were copied from the Dutch-Bangla Bank letter.

19. In his assessment, Judge Hodgkinson examined the paucity of evidence provided by the appellants, and the conflicting nature of their oral evidence, as to the business they wished to jointly run as entrepreneurs in this country:

> "27. Further and in any event, I have borne in mind the fact that the appellants applied for leave to remain as an entrepreneurial team. Regrettably, there is no evidence at all before me as to what sort of business they indicated they proposed to set up at the time of applying. However, in oral evidence before me, both appellants indicated that they were setting up two completely separate businesses; namely, Mr Ahmed was going to set up as carpet/flooring business, whereas Mr Ahsan proposed to set up an Indian restaurant business. Thus, the evidence before me would indicate that they are not an entrepreneurial team. "

20. That one appellant believed the joint intention was to establish a carpet/flooring business and the other an Indian restaurant business, absent knowledge of the other partner's stated intention, is striking in circumstances where the basis of the Tier 1 (Entrepreneur) application was that they were going to invest, establish and run a business together.

21. Judge Hodgkinson gave rational reasons for concluding that it was not credible that the source of funding would lend £200,000 to the appellants without the existence of some form of written agreement:

> "28. Also, in cross-examination before me, both appellants indicated that they were required to pay Mr Uddin back the money which he would lend to them, Mr Uddin being a businessman, but then both of them confirmed that there was no written agreement in terms of that obligation but rather, only an oral one. Ms Cousins-McCoy's contention [Presenting Officer] was that it was not credible that a distant cousin of the appellants would lend them £200,000, on the basis that he required to be repaid that money, without the existence of some form of written agreement. I entirely agree with Ms Cousins-McCoy's contention [in] that regard, and do not find it credible that Mr Uddin would agree to lend such a large sum to the appellants' without at least some form of written agreement, and find this also to be a factor of relevance when assessing the credibility and reliability of the appellants and their submitted documentary evidence."

22. In conclusion:

> "29. Having taken into account the totality of the available evidence, I conclude that the appellants have not established that they are an entrepreneurial team, or that the allegedly proffered funds of £200,000 are genuinely available to them, for the reasons I have indicated above. Further, and additionally, I conclude that the respondent has discharged the burden of proof upon her in establishing that the two letters of the two Bank of 6 December 2012 are not genuine documents issued by those Banks. Thus, I conclude that the respondent has discharged the burden of proof upon her in that regard.
>
> 30. For the reasons I have given, I conclude that the appellants' appeal requires to be dismissed under paragraph 322(1A) and also with reference to the requirement of paragraph 245DD and Appendix C to the Rules."

23. Upper Tribunal Judge Kekic refused to grant Mr Ahsan permission to appeal by a decision dated 17 October 2016 and he became appeal rights exhausted on 25 October 2016.

24. Mr Ahsan applied for leave to remain on human rights (article 8 ECHR) grounds by an application dated 21 November 2016. This application was varied on 7 February 2018 to seek leave outside of the Rules and again on 1 October 2019 where he sought settlement based on ten years continuous and lawful residence.

25. The Secretary of State refused the application by a decision dated 27 July 2021. She observed in respect of the settlement application that Mr Ahsan's application of November 2016 was made within twenty-eight days of his lawful leave ending, but in respect of the requirements of paragraph 276B(i) of the Rules he did not benefit from paragraph 276B(v) disregarding periods of overstaying.

26. In respect of the Al-Arafah Islami Bank letter rejected by Judge Hodgkinson the Secretary of State reasoned in her decision:

> "The content of this letter is therefore of concern to the SSHD, given we received an email from Al-Arafah Islami Bank on 04/03/15, confirming the documents were 'fake'. This therefore calls into question the authenticity of the letter you have now provided dated 10/03/16. Furthermore, there are concerns relating to the credibility of the letter given there is no account number provided. It is reasonable to expect that a genuine letter from a bank would have an indication to the account in question by providing an account number.
>
> Nevertheless, this document was sent for a verification check. The new letter was unable to be verified by Al-Arafah Islami Bank as there is no bank account on the letter. The email states "the bank will need the account number of the customer before they can provide details." Further indicating on balance of probabilities a genuine letter from a bank would contain an account number.
>
> As the letter dated 10/03/16 is unable to be verified, and the previous letter dated 06/12/12 has been verified as fake, it is considered you have provided false documents and made false representations to the Home Office in your application dated 12/12/12. You have not provided any new evidence which can be verified as genuine to confirm that the original letters were not false."

27. As to relevant Dutch-Bangla Bank documents the Secretary of State decided:

> "You have now provided a letter from Dutch-Bangla Bank dated 10/03/16 which states "it is hereby confirmed and authenticated that the bank statements and solvency certificate issued by us on 06/12/12 are genuine and authentic." The letter further states that the solvency certificate was not on Mr Uddin's generic file as it was generated as a personal request and was held in a misc. folder. This

> is why the person who originally verified the certificate as false could not locate the document.
>
> The letter has been sent for verification, and it is confirmed that the letter matches the bank documents."

28. The Secretary of State concluded in respect of the bank documents:

> "Therefore, while it is accepted that the Dutch-Bangla Bank financial documents were genuine and that approximately £41,000 was available to invest towards the points requirements of having not less than £200,000 available, the Al-Arafah Islami Bank letter could not be verified. Therefore, it is considered you have not supplied any new evidence which would change the decision relating to the claimed funds held in Al-Arafah Islami Bank. These funds cannot be accepted as genuine, and therefore you have not demonstrated you had not less than £200,000 available to invest into a UK business. Furthermore, you have not genuinely demonstrated that you still have the required amount of investment funds available to you."

29. Consequent to having made false representations during an application for leave to remain as a Tier 1 (Entrepreneur) the Secretary of State considered that it was not in the public interest for Mr Ahsan to be granted leave to remain.

30. Additionally, the Secretary of State noted that Mr Ahsan's application for leave to remain as a Tier 1 (Entrepreneur) was submitted on his behalf by Immigration4U, a firm of immigration advisors previously based in East London:

> "You submitted a Tier 1 Entrepreneur application on 12/12/12. UKVI has collated evidence as party of the investigation that supported the prosecution during the Operation Meeker court case at Southwark Crown Court in November 2018 and June 2019 and from the information you have submitted, to assess your application.
>
> During the prosecution of AKM Rezaul Karim Khan, Enamul Karim, Kazi Borkhot Ullah, Mohammed Tamij Uddin, Mohammed Jillur Rahman Khan and Jalpa Trivedi at Southwark Crown Court in November 2018 and June 2019, it was proven that these individuals had been involved in falsely creating businesses. The aim was to make them appear as legitimate entities for the benefit of migrants to generate earnings or sources of funds for the purpose of obtaining leave to remain in the UK by deception.

> The individuals identified have since been convicted for their involvement in this deception. Information identified through a witness statement and seizure of evidence during Operation Meeker, demonstrates that you have interacted with the individuals and companies concerned with the aim to falsely support the earnings and funding of the business requirements for your application."

31. The Upper Tribunal has considered several appeals where applications for leave were submitted by Immigration4U on behalf of appellants. We take judicial note that in sentencing several defendants at the conclusion of the Operation Meeker trial at Southwark Crown Court on 13 September 2019, HHJ Martin Griffith identified fraud as having been conducted on an industrial scale. The fraudsters set up a network of some fifty fake companies, as well as immigration advice businesses including Immigration4U, and created bogus documents allowing in the region of nine hundred immigrants to stay in the country. Payslips were fabricated and false information was provided in applications for entrepreneur visas. The gang charged individuals at least £700. Members of the gang included a law student, AKM Rezaul Karim Khan, who absconded during the trial and received a sentence of ten years and six months. Two immigration advisors, Enamul Karim and Kazi Borkholt Ullah, were sentenced to nine years and four months and five years and ten months respectively. Both men were sentenced in their absence, having also absconded during the trial.

32. We further note the Secretary of State's engagement with the police in Operation Meeker. As recently observed by the Court of Appeal in *Al-Azab v Secretary of State for the Home Department* [2024] EWCA Civ 407, at [14], a matter in which Mr Malik KC represented the appellant:

> "14. Meanwhile, the respondent [the Secretary of State] had been investigating various individuals who were suspected of falsely creating businesses to assist applicants wishing to obtain leave to remain as Tier 1 (Entrepreneur) Migrants as part of an operation known as Operation Meeker. In November 2018, six individuals were convicted of fraud. Five were connected with one of two firms of immigration advisers namely Immigration4U and a second firm. The sixth individual was connected with JTC Accountancy."

First-tier Tribunal Decision

33. The appeal came before the Judge sitting at Newport on 28 February 2022. Mr Ahsan was represented by Mr Malik, and the Secretary of State by a Presenting Officer, Mr Baker.

34. The Secretary of State filed a witness statement from Chief Immigration Officer Simon Freese, dated 13 October 2020, confirming that the representative section of Mr Ahsan's Tier 1 (Entrepreneur) form identified his representative as Md Tariq Bin Aziz, Immigration4U. CIO Freese further confirmed that as of 12 December 2012, the date of the application, one of the two bank accounts relied upon had funds of £163.95 and not the claimed £171,908.00.

35. We have not been provided with a witness statement from Mr Bin Aziz as to the circumstances surrounding the making of the Tier 1 (Entrepreneur) application. It is presently unclear to this Tribunal as to whether Mr Bin Aziz, identified by Mr Ahsan at paragraph 15 of his witness statement, dated 8 November 2021, as an OICS level 3 immigration adviser, is one and the same as a solicitor with the same name working at Mr Ahsan's present solicitors. We proceed on the basis that if they are one and the same person, we would have been informed by Mr Ahsan being mindful of the Secretary of State's serious allegation. Consequently, we proceed on the basis that they are not the same person.

36. A copy of Judge Hodgkinson's decision was not filed with the First-tier Tribunal by either the Secretary of State or Mr Ahsan. The Judge refused the Secretary of State's request to file Judge Hodgkinson's decision after the hearing. We detail the Judge's reasoning in full:

> "20. What is not in evidence is the original determination of the Tribunal from Judge Hodgkinson of 8 April 2016. Despite his best efforts in the days leading up to the hearing, Mr Baker was unable to obtain the determination from the Respondent's files prior to the hearing. The case worker who held the paper copy of the determination was on holiday. That is no criticism of Mr Baker: he can only deal with the file as it is presented to him to prepare. Therefore, the Respondent requested permission at the hearing to file the determination after the hearing, which was opposed by the Appellant.
>
> 21. I refused the application by the Respondent. Rule 24(1)(d) requires that:
>
> "…the respondent must provide the Tribunal with—

> (a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;
>
> […]
>
> (d) any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the respondent;

22. This obligation must be met within 28 days from when the Tribunal serves the notice of appeal on the Respondent: rule 24(3). This was not done, nor had any application been made prior to the hearing to file the document out of time or seek directions. I bore in mind the finding of the Vice President in MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC) at [13] (which concerned the previous incarnation of the rule):

> "The requirements of rule 13 are mandatory. Their intention is clear: it is to enable the Appellant to know the case he has to meet, and the Tribunal to have the material upon which the case can be judged … but it seems to us that, because the documents mentioned in subparagraph (a) are essentially the statement of the Respondent's case, even in a case where the obligation to disclose a document arises from the fact that it is "referred to in a document mentioned in subparagraph (a)", the Tribunal is entitled to conclude that a document not furnished under rule 13 is not a document upon which the Respondent relies; and that if there is reference to it in the Notice of, or Reasons for Refusal, the Tribunal is entitled to conclude that that reference no longer forms part of the Respondent's case."

23. The previous determination was patently available to the Respondent when the decision was made (it is referred to, although not quoted, in the refusal letter and the Respondent's Review). I accept it is relevant evidence and no doubt its findings would form a starting point for my consideration under Devaseelan. This weighed in favour of exercising my discretion to admit the document (if eventually found) and so to does the fact that the dishonesty of the Appellant, if proved by the

Respondent, would likely be a determinative factor in the appeal.

24. However, I concluded at the hearing that to admit it would ultimately be contrary to the overriding objective in rule 2 to decide cases fairly and justly. I remain of that view having reflected on the position in writing this determination. The document must be disclosed right at the start of the procedure (not 'should be' or 'could be') and it was not. As of the hearing, it was still not available to the Tribunal. I do not know if it runs to a few pages or many several and thus the ability to decide whether it was appropriate to still proceed on the day of hearing was unknown. Admitting it late runs the substantial risk in a dishonesty case that the hearing might then go part heard with the parties required to re-attend to allow the consequences of its admission to be addressed again in evidence and submissions. These are not minor matters and would bear a serious financial consequence for the Appellant in respect of his legal representation (even if the Respondent might have been required to pay some of his wasted costs).

25. In these circumstances and balancing up all these factors, I concluded the Respondent must bear the consequences for not complying with a basic rule of procedure and refused to admit the previous determination, Again, I lay no blame at all at the door of Mr Baker."

37. The *Devaseelan* guidelines, approved by the Court of Appeal in *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804; [2004] Imm AR 497, provide guidance on how appellate bodies should deal with the fact of an earlier unsuccessful application when deciding a later one so as to ensure "consistency of approach": *Djebbar*, at [29].

38. We note Judge LJ's observation in *Djebbar*, at [28]:

"28. ... Re-litigation of issues which have already been resolved is contrary to the public interest, and nothing in the process suggests that the first application should or must automatically be treated as irrelevant to second applications arising in cases like those with which we are presently concerned. If the first application may be relevant, then the extent of its possible relevance and the proper approach to it should be addressed as a matter of principle. That is what the [Devaseelan] guidance purported to provide."

39. The Judge does not record Mr Ahsan's objections to the request. We address this failure below. There is no record of the Presenting Officer seeking an adjournment to produce Judge Hodgkinson's decision when made aware of the Judge's position in respect of not permitting late filing. Mr Parvar's submission before us was that the Presenting Officer had taken a pragmatic decision to proceed, though as the Judge does not record the parties' concluding submissions in summary form, we are entirely unclear as to how the Presenting Officer sought to address previous judicial findings of fact following what amounted to the exclusion of Judge Hodgkinson's decision.

40. We observe the Judge's reference at [24] to the decision of Judge Hodgkinson not having been disclosed at the outset of proceedings. Disclosure has a technical meaning under CPR 31.2, namely that a "document exists or has existed". It is distinguishable from inspection and a party to whom a document is disclosed has a right to inspect that document except where specific exceptions apply. However, the rule and principles relating to civil litigation disclosure do not apply in statutory appeals in the Immigration and Asylum Chamber. The Secretary of State is under a duty not to knowingly mislead, but in statutory appeal matters before the Immigration and Asylum Chamber there is no general duty of disclosure, nor is the duty of candour as exists in judicial review imported into immigration appeals: *Nimo (appeals: duty of disclosure)* [2020] UKUT 00088 (IAC); [2020] Imm AR 89.

41. Rule 24(1)(d) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides that other than in certain identified circumstances, when provided with a copy of a notice of appeal the respondent must provide the First-tier Tribunal with "any other unpublished document" which is referred to in a document mentioned in the notice of decision to which the notice of appeal relies or is relied upon by the respondent. Underpinning this mandatory rule is a recognised need to ensure that an appellant knows the case they have to meet and for a tribunal to have the material upon which the case is to be judged: *MH (Respondent's bundle; documents not provided) Pakistan* [2010] UKUT 00168 (IAC); [2010] Imm AR 658.

42. In simple terms, this provision of the Procedure Rules seeks to ensure that an appellant is not caught by surprise.

43. We are not required to define "unpublished" for the purpose of this appeal. Whatever the position as to compliance with rule 24(1)(d), the Judge was required to abide by the overriding objective. It is clear to us that as at the date of the hearing before the Judge, Mr Ahsan and his legal team were aware of the contents of the decision and the conclusions as to fact reached by Judge Hodgkinson. We observe that Mr Malik referenced Judge Hodgkinson's decision at paragraph 17 of his skeleton argument filed with the First-tier Tribunal, dated 9 November 2021, some three months before the hearing before the Judge. We cite the paragraph in full:

> "17. As is clear from the First Tier Tribunal's earlier decision, at [11]-[16], the Appellant had applied for an adjournment to obtain original bank documents in order to demonstrate that no false representations were made. The adjournment application was unfortunately refused by the First Tier Tribunal. The Appellant has since obtained the originals and further evidence. The Secretary of State had conducted further verification checks. In the circumstances, it would be appropriate for the First Tier Tribunal to depart from the previous findings and accept that the Appellant had not provided false documents."

44. We observe that no complaint is made within the skeleton argument as to the decision of Judge Hodgkinson not being placed in the Secretary of State's bundle, which was filed and served on 13 October 2021. Elsewhere the skeleton argument advances clear reliance upon the guidelines set out in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702; [2003] Imm AR 1. The skeleton argument acknowledges that the decision of Judge Hodgkinson is the starting point for the factual assessment to be undertaken by the First-tier Tribunal in this appeal.

45. The prejudice identified by the Judge to Mr Ahsan consequent to the failure of the Secretary of State to disclose Judge Hodgkinson's decision is that the hearing might go part-heard and so result in a serious financial consequence.

46. The Judge did not record asking Mr Malik if he or his client had access to the decision, whether at the hearing centre or elsewhere. In answer to a question from the panel, Mr Malik confirmed that if he had brought a copy of Judge Hodgkinson's decision with him to the hearing centre and had been asked by the Judge to provide his copy, he would have done so even though he contends that Mr Ahsan was under no

obligation to adduce it. Mr Malik confirmed that he would have acted in accordance with his professional duty to the First-tier Tribunal.

47. We are concerned as to whether the Judge adequately and lawfully assessed the overriding objective when refusing to permit the filing of Judge Hodgkinson's decision after the hearing.

48. Though rule 24(1)(d) is in mandatory terms, a failure to comply is a case management issue and a judge is to deal with the case fairly and justly: rule 2(1) of the 2014 Procedure Rules. Rule 4(3)(a) expressly permits the First-tier Tribunal to extend the time for complying with any rule. The Judge in this matter was empowered by rule 6(2) to take such action as considered just, including waiving the requirement or requiring the failure to be remedied.

49. The decision does not record the Judge asking Mr Malik as to what prejudice his client would suffer if the Secretary of State's request was acceded to. There is silence as to the basis of Mr Ahsan's opposition to the application. We consider the Judge was required to place into his assessment that Mr Ahsan was aware of the substance of Judge Hodgkinson's reasoning, having been a party to the previous proceedings. We observe that Mr Ahsan sought to address some, but not all, of the adverse findings by means of his November 2021 witness statement. Mr Malik submitted that the Judge must have been aware that Mr Ahsan, or at least his solicitors, had a copy of the decision because it was referenced in the skeleton argument. However, it is unclear to us as to whether this was at the forefront of the Judge's mind when considering rule 24(1)(d), as his decision is rooted in the requirement that the decision had not been "disclosed right at the start of the procedure" and was not before the Tribunal, in circumstances where the paperwork before him established, at the very least, that the decision could be accessed by Mr Ahsan on the day through his solicitors. Additionally, the Judge's concern that the hearing may go part-heard to permit the parties to address "the consequences of admission" in evidence and submissions fails to exhibit an understanding that both parties had filed documents addressing Judge Hodgkinson's conclusions as to fact.

50. We are concerned as to the approach adopted by the Judge in light of the content of the skeleton argument, which confirmed that Mr Ahsan's solicitors possessed a copy of Judge Hodgkinson's decision. He appears not to have taken the opportunity to ask Mr Malik whether a copy could be sent to the Tribunal that day by his instructing solicitors. The

possibility of this step being undertaken is, to us, a much preferable case management option to excluding an earlier, relevant judicial decision.

51. Additionally, the Judge expressed no intention to give his decision on the day of the hearing. The decision was signed on 11 March 2022, ten working days after the hearing, and sent to the parties on the same day. We conclude that permitting the filing of Judge Hodgkinson's decision shortly after the hearing would not have significantly delayed the promulgation of the Judge's decision.

52. We acknowledge that Mr Malik would have acted properly throughout. It is unfortunate that the Judge does not record Mr Ahsan's reasons for challenging the request for an extension of time; though we conclude that it cannot have been on the basis that the content of Judge Hodgkinson's decision would catch Mr Ahsan by surprise, or that he was not prepared to address the adverse findings reached. As addressed above, steps to address Judge Hodgkinson's findings had been taken by Mr Ahsan in his human rights application, in his witness statement evidence and by means of the skeleton argument filed with the First-tier Tribunal.

53. In the circumstances, we are concerned by the approach adopted by the Judge in deciding to exclude from his consideration in the appeal a judicial decision addressing various arising issues before him, when neither party was prejudiced by the decision of Judge Hodgkinson being filed soon after the conclusion of the hearing. We have real difficulty in understanding how the Judge could rationally conclude that it was fair and just to exclude the previous decision, being mindful of the well-established application of the *Devaseelan* guidance that a previous decision that ultimately concludes appeal proceedings is a starting point for the factual assessment in subsequent proceedings where the same factual matters are advanced.

54. Having, in reality, excluded a previous judicial decision relevant to the conclusion of previous, related proceedings, the Judge considered at [54] that the guidance in *Devaseelan* could potentially apply to the contents of Upper Tribunal Judge Kekic's decision to refuse permission to appeal.

55. By no means can a permission to appeal decision be considered a starting point as to the authoritative assessment of status at the time Judge Hodgkinson's decision was made. Permission to appeal decisions

are solely concerned with whether an arguable material error of law is identifiable in grounds of appeal. They are not a factual assessment. Nor by design do they address each and every fact reached by a First-tier Tribunal judge. We are satisfied that the Judge erred in his consideration that Judge Kekic's decision could constitute an adequate foundation for the application of the *Devaseelan* guidance in the appeal before him. However, this error of law is of no impact in this appeal as ultimately the Judge concluded that relevant facts could not be drawn from Judge Kekic's decision.

56. The Judge proceeded in absence of Judge Hodgkinson's findings of fact and so was unaware as to the striking inconsistency in oral evidence between Mr Ahsan and his cousin as to their planned business at the appeal hearing in March 2016. We observe Mr Ahsan's evidence before the Judge, recorded at [49]:

> "49. Concerning the venture overall, the Appellant says he and Mr Ahmed approached Mr Uddin to invest in the United Kingdom through their business. He said they heard about the Tier 1 route and decided to form a team and create a business together. The Appellant had worked as a trainee chef and as waiting staff and Mr Ahmed has worked in a carpet/flooring business. They had decided that the Appellant would manage and operate a restaurant, and Mr Ahmed would manage and operate the carpet/flooring business. He said that he did not submit a business plan because such a document was not required by the Respondent in the Tier 1 application."

57. Neither Mr Ahsen nor Mr Ahmed informed Judge Hodgkinson of their intention to run two separate businesses together.

58. There is no record of Mr Ahsan providing any oral explanation before the Judge as to why Mr Uddin would agree to provide £200,000 to a start-up business in the absence of a written agreement setting out the terms of repayment. An explanation is provided at paragraph 12 of Mr Ahsan's witness statement; Mr Uddin is a cousin who was content to enter into an oral agreement to lend the required investment. The statement confirms an intention to "share profit" upon securing a visa, though we observe that no detail is provided beyond this vague assertion.

59. Turning to the documents said by Mr Ahsan to have been issued by the Al-Arafah Islami Bank and the Dutch-Bangla Bank, the Judge observed, at [55]-[57]:

> "55. ... Both sets have two components – the covering letters (the 'solvency certificates') and the account statements attached. Importantly, and curiously, it is not the case that the account statements are false at all nor have ever been regarded as so. The Respondent's own verification enquiries confirmed direct from the Banks themselves via the High Commission that the account statements were genuine, related to accounts owned by Mr Uddin, and contained the sums of money stated in them (and indeed the level of money supports what the Appellant said Mr Uddin was making available). The various statements about how much money were in the accounts as of the date of verification are irrelevant because that information concerned the balances as of 2015, not the balance on 2012 (which the Respondent could have asked about).
>
> 56. It is the covering letters which are said by both Banks not to be from them. However, even that position is far from clear cut. DBB told the Respondent in 2015 that Mr Uddin owned the account, that the account number was correct, that the statements were correct, but the solvency's certificate was not issued by them. But when the Respondent contacted DBB again in 2021 (not by email but verbally from the High Commission to the Bank) to verify the latest letter provided by the Appellant which explained the solvency certificate was in fact genuine, DBB confirmed it matched the bank's records. That therefore verifies the explanation given by the Appellant as to why the solvency certificate was not in the central bank database. So, the net position is that DBB has now verified to the Respondent the authenticity of both its documents submitted in 2015 (and indeed this was the Respondent's final position in the refusal letter).
>
> 57. The AAIB verification position on its solvency certificate is set out [in] an email from the Bank to the Respondent. It is a remarkable email. It is sent from a 'yahoo.com' account when it would appear from other documents that AAIB has an established business domain name. It contains numerous spelling errors and says the solvency certificate is "totally fake". However, the email confirms the account number and details are correct. The email is not signed by any individual not is any official position within AAIB stated. I harbour grave misgivings about the reliability of the information provided in

> the email due to these inconsistencies, in fact I would go so far as to say it is the sort of unreliable document that appellants seeking to deceive the Tribunal often put into evidence, not the Respondent herself. For these reasons, I give it very little weight."

60. In respect of the Yahoo email account, we observe this is the account used by the entry clearance administrator at the High Commission in Bangladesh to contact the bank confident that it was genuine. Additionally, the title situated in the 'from' line of the correspondence title is "Al Arafah Islami Bank Ltd". These relevant facts were not expressly placed by the Judge into his assessment of the evidence, though they are clear from the email trail filed with the First-tier Tribunal (and addressed by Judge Hodgkinson).

61. The Secretary of State accepted that the documents issued by the Dutch-Bangla Bank were genuine. In her June 2015 decision, she considered the bank statements as appearing to be genuine. She went no further. She accepted that the bank accounts they referred to were genuine. However, by means of her decision letter of 27 July 2021, the Secretary of State did not accept that "the third-party investor held £171,908.00 [22,840,397.10 BDT] in Al-Arafah Islami Bank" and concluded that the supporting documentation was not genuine. We note that the sum of 22,840,397.10 BDT is detailed as the balance on the last page of the bank statements accompanying the application. Consequently, on the face of the decision letter the Secretary of State did not accept the statements issued by both banks as genuine, contrary to the position identified by the Judge, at [55].

62. We also note that the Judge failed to expressly engage with CIO Freese's evidence, drawn from records, that one of the bank accounts had £163.95 at the date of application and not the claimed £171,908.00.

63. We note the Judge's observation of Mr Ahsan as a witness before him, at [58]:

> "58. The Appellant was a singularly unimpressive witness in oral evidence when it came to his intended business venture. He has no details at all of how the business was going to work, and whilst I agree with his multiple assertions that a business plan was not needed for the Tier 1 application, it is remarkable that he appears to have had no plan at all about how to invest £200,000 of third-party investor money. His answers in cross-

> examination were vague and generic and I took the view from watching him give evidence that he did not wish to give further details because he would trip himself up. The Appellant's own evidence in this appeal corroborates the statement from Judge Page [refusal of permission to appeal from the First-tier Tribunal, 2016] that he and Mr Ahmed were clearly at odds with what they were trying to achieve from their business. Putting aside the issue of dishonesty, I can see without any stretch of the judicial imagination why three judges found against him in the previous proceedings that he was not entitled to a Tier 1 visa."

64. The Judge observed, at [59], that his finding at [58] did not speak to Mr Ahsan's honesty or otherwise, only to the fact that he was not a businessman worth a Tier 1 visa. He reminded himself that negligence, recklessness and a poor business idea are not the same as dishonesty.

65. The Judge proceeded to consider whether the Secretary of State had adduced sufficient evidence as to dishonesty, adopting the test established by the Supreme Court in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391 namely that when dishonesty is in question a fact-finding tribunal has first to ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest is then to be determined by applying the objective standards of ordinary decent people.

66. Applying the test, and consequent to findings addressed above, the Judge concluded at [61] that the answer to the allegation of dishonesty must be "no", "the documents submitted are genuine and no link to any criminality by his immigration advisers has been proved. There is no case for him to answer here when all the extraneous and irrelevant materials and suspicions are stripped away." We address the Judge's approach to the immigration advisors in consideration of ground 3 below.

67. In respect of paragraph 276B, the Judge found at [65]:

> "65. ... the Appellant has not put forward a basis under which he would have had lawful leave to remain whilst his application was considered. Therefore, I agree with the Respondent's submission that the Appellant does not have 10 years' lawful and continuous residence and so cannot meet the requirements of paragraph 276B."

68. The Judge's conclusion as to paragraph 276B is consistent with the Supreme Court judgment in *R (Afzal) v. Secretary of State for the Home Department* [2023] UKSC 46; [2023] 1 WLR 4593.

69. When considering Mr Ahsan's rights under article 8 outside of the Immigration Rules, the Judge found that the individual circumstances of his case were exceptional, at [70]. By the date of the appeal decision, he had resided in this country for twelve years and had he submitted his application for further leave twenty-seven days earlier, he would have enjoyed section 3C leave throughout, at [70]. The Judge weighed into the balance that the Secretary of State had pursued a series of allegations which she had been unable to evidence at the hearing, at [71]. Consequently, the public interest in Mr Ahsan's removal was significantly lessened and it would be a disproportionate in his protected private life rights for him to be now removed, at [74].

70. When reading the decision, the relevance of the twenty-seven days delay is unclear. Mr Ahsan did not make an application within permitted time, and so did not enjoy the benefit of section 3C leave. He has been an overstayer since 2016. That he could have made an application earlier does not alone establish the exceptionality identified by the Judge at [70]. The Judge may have unlawfully applied a "near miss" consideration in respect of article 8: *Patel & Others v Secretary of State for the Home Department* [2013] UKSC 72; [2014] AC 651.

Grounds of Appeal

71. First-tier Tribunal Judge Barker granted the Secretary of State permission to appeal on all grounds by a decision dated 21 April 2022.

72. As is common with grounds filed by the Secretary of State, the document identifies one ground of appeal, in this instance that there was a "material misdirection in law", followed by several paragraphs which may, or may not, identify one or more grounds of challenge. It is not style of pleading that aids the Upper Tribunal.

73. There was a dispute between the parties as to the scope and nature of the Secretary of State's grounds at the hearing held on 4 December 2023. The Upper Tribunal adjourned the hearing to permit the parties time to address rule 24 of the 2014 Procedure Rules, particularly as to whether the obligation to provide a previous appeal decision arises

under sub-rule (1)(d) or 1(e). For the purpose of this appeal, we agree with Mr Malik that the obligation arises under the former.

74. By its order adjourning the hearing, the Upper Tribunal identified the pleaded grounds of appeal as follows:

> (1) The First-tier Tribunal arrived at a perverse conclusion as to the Al-Arafah Islamic Bank letter and the Dutch-Bangla Bank letter.
>
> (2) The First-tier Tribunal unlawfully failed to follow the guidelines in *Devaseelan* (this is the Secretary of State's reading of the pleaded grounds of appeal), or, it was perverse for the First-tier Tribunal to find in favour of Mr Ahsan on the issue of dishonesty (this is Mr Ahsan's reading of the pleaded grounds of appeal).
>
> (3) The First-tier Tribunal unlawfully disregarded the evidence of CIO Freese or arrived at a perverse conclusion in relation to it.

Discussion

75. We address the grounds out of order.

Ground 2

76. It may be concluded from our observations above that the Secretary of State was looking at an open goal in respect of the Judge's decision not to extend time for the Secretary of State to file the decision of Judge Hodgkinson. The point was not taken in the written grounds of appeal, nor did Mr Parvar seek to amend the grounds to incorporate a challenge on this issue.

77. Whilst the possibility, or otherwise, of the Upper Tribunal taking a *Robinson* obvious point in favour of the Secretary of State in respect of the exclusion of a judicial decision by a decision not to extend time to file was canvassed at the hearing, and addressed in detail by Mr Malik, the Court of Appeal has recently confirmed in *George*, at [75], that the principle is limited to points of refugee law which favour a person who claims to be a refugee, and which are "obvious" and arguable with "strong prospects of success". It was confirmed that there are obvious policy reasons why this principle should not be extended any further in

favour of the Secretary of State. Consequently, our observations above remain observations. We are not askedby the Secretary of State to consider whether the decision to refuse an extension of time was a material error of law.

78. The appeal is brought by the Secretary of State and so we consider the ground advanced at its highest, namely in the terms identified by Mr Parvar at the hearing: the First-tier Tribunal unlawfully failed to follow the guidelines in *Devaseelan.*

79. As the decision of Judge Hodgkinson was, ultimately, excluded from consideration by the Judge, and the reasoning underpinning such exclusion is not challenged by the Secretary of State, there was no decision before the Judge upon which the guidelines in *Devaseelan* bit. Consequently, this ground is properly to be dismissed. In the circumstances, there is no requirement for this panel to consider the identification of ground 2 advanced by Mr Malik on behalf of Mr Ahsan.

Ground 1

80. The Secretary of State contends that the Judge arrived at a perverse conclusion as to the content of the bank letters. The challenged decision letter was founded upon the findings of Judge Hodgkinson in respect of the bank evidence. It was said to be irrational that one judge could find the bank letters to be unreliable, and another to find them genuine. The clear difficulty for the Secretary of State in respect of this contention is that she has not challenged the judicial decision not to permit the filing of Judge Hodgkinson's decision. Secondly, she herself now accepts that one of the bank letters is genuine.

81. Reliance is placed upon the two bank letters being written in similar form. This element of Judge Hodgkinson's decision is not one that is expressly identified in the Secretary of State's decision letter, nor do we have any evidence before us that it was advanced before the Judge at the hearing.

82. We conclude that paragraphs 1 and 2 of the Secretary of State's grounds were drafted with Judge Hodgkinson's decision is mind, without adequate recognition that there was no challenge to the decision that ultimately resulted in its exclusion.

83. This challenge advanced on perversity grounds is properly to be refused.

84. Our observations from [60] to [62] above suggest that the Secretary of State had a second open goal to aim at in respect of the Judge's consideration of the bank evidence. Ground 1 as drafted suggests she was standing in the wrong field and unable to see the goal.

Ground 3

85. Mr Parvar confirmed, and Mr Malik accepted, that this ground was founded upon a perversity challenge.

86. As to the role of Immigration4U the Judge concluded:

> "52. ... There is no evidence before the Tribunal which is capable of supporting adverse findings about Immigration4U or individual convictions. No certificates of conviction have been provided, and the witness statements of Mr Freese does not even name the individuals he says have been convicted (they are only referred to by their initials). I can see no adverse link between the Appellant and Immigration4u based on the Respondent's evidence. The contents of the refusal letter are not evidence but submissions and assertions which have to be backed up [by] evidence (evidence which it is relatively easy for the Respondent to obtain."

87. As addressed above and noted by the Court of Appeal in *Al-Azab,* the Secretary of State collated evidence as a party to the Operation Meeker investigation. The Secretary of State supported the subsequent prosecution.

88. We are satisfied that the Judge's consideration of CIO Freese's evidence was perverse.

89. We observe the contents of CIO Freese's witness statement, dated 26 June 2021, which is referred to by the Judge above, at [52]. CIO Freese confirmed that he relied upon information from the Home Office's records kept in both paper and computer form when preparing his statement. He detailed that consequent to Operation Meeker, an investigation was conducted into the abuse of Tier 1 (General) and Tier 1 (Entrepreneur) routes of the Points Based System, and following two trials held over a twelve-month period, nine defendants were found guilty at Southwark Crown Court. The defendants are identified in his statement by initial, though it is a simple step to cross-identify several of them by reference to the Secretary of State's decision letter.

Immigration4U was identified as one of two immigration advisory companies used to facilitate the fraud. We make it clear that Mr Ben Aziz was not one of the defendants.

90. CIO Freese detailed evidence upon which the defendants were connected linking them to either, or both, Immigration4U and Rukhaiya & Associates, immigration advisory firms based in east London and Enfield, north London. The prosecution case was that the two companies had an interdependent relationship, sharing both staff and business. Forty-seven other businesses were found to have been engaged in the fraud investigated under Operation Meeker and found to be non-genuine during the Crown Court trials.

91. Those involved in the fraud were identified as being members of an organised crime group ("OCG"). Three of the defendants absconded during their trial, as detailed above. Sentences imposed ranged from ten years and six months to one year and seven months, with some sentences suspended in relation to OCG members considered to be at the lower end of the organisation. Importantly, Immigration4U was identified at the trial as a business vehicle for fraudulent immigration applications.

92. We note the skeleton argument drafted by Mr Malik and filed with the First-tier Tribunal. It was not Mr Ahsan's case that several of those involved in the running of Immigration4U were not convicted. His case was that Mr Ben Aziz was not involved in conspiracy.

93. CIO Freese expressly stated that he referred to Home Office records created by officers at Immigration Enforcement, Criminal and Financial Investigations in the course of their duties "in relation to matters they had personal knowledge of at the time, from documents they received or from information supplied by persons who had personal knowledge of the matters dealt with in that information". We are mindful that the Home Office was engaged as a party supporting in the police operation. We conclude the statement of CIO Freese referencing information held in respect of Operation Meeker and related investigation by the Home Office properly constitutes evidence as to Immigration4U being a business designed to aid the commission of fraud on an industrial scale. In the circumstances, we consider the Judge's conclusion that there was "no evidence before the Tribunal which is capable of supporting adverse findings about Immigration4U or individual convictions" to be perverse.

94. We consider it could be open to a judge considering the evidence filed in the round and reasonably directing themself to conclude that Mr Ben Aziz was not a member of, or a willing agent of, the OCG and so unaware of the conspiracy. In such circumstances a reasonable judge could accept Mr Ahsan's evidence as to the genuineness of the documents. However, such assessment should properly commence from the foundation established by the criminal convictions and the evidence of CIO Freese. The failure to file certificates of conviction does not diminish the evidence established by Home Office records as to an investigation in which it was involved.

95. We consider that the materially erroneous approach adopted to the evidence of CIO Freese adversely infects the entirety of the Judge's decision, because it goes to the core of the Secretary of State's public interest case under paragraph 322(2) and (5) of the Rules.

96. The decision of the Judge is properly to be set aside in its entirety.

Remaking the decision

97. We observe the guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 0046 (IAC); [2023] Imm AR 558 and note the general principle that upon setting aside a decision of the First-tier Tribunal a case will be retained within the Upper Tribunal for the remaking of the decision. However, we consider that the nature and extent of any necessary fact finding requires this matter to be remitted to the First-tier Tribunal: section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2000.

98. The decision of Judge Hodgkinson was filed by the Secretary of State with her notice of appeal. Consequently, it is properly to be considered to have been "provided" for the purposes of the remitted appeal and is before the Judge remaking the decision in this matter. If required to do so, we admit the document under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as it is in the interests of justice to do so. It should not have been excluded by reason of a decision not to extend time to file.

Notice of Decision

99. The decision of the First-tier Tribunal sent to the parties on 11 March 2022 is set aside in its entirety for material error of law.

100. The matter is remitted to the First-tier Tribunal sitting in Newport to be heard by any judge other than First-tier Tribunal Judge Napier.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 December 2024