Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00054/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6th February 2018

Decision & Reasons Promulgated
On 22nd February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

SHAIZA NOOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Naumann (Solicitor, Magrath LLP)
For the Respondent: Ms J Isherwood (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. In this appeal the term Appellant refers to Shaiza Noor and the term Respondent refers to the Secretary of State this avoids the confusion that arises from this being the Secretary of State's appeal against the decision under consideration. There is a history to this appeal which makes it desirable to maintain the same appellations for the parties as will become apparent.

2. The Appellant is the spouse of Sajjad Ahmad, the Sponsor, who is lives in the UK but at present only with discretionary leave. On the 1st of May 2014 she applied for entry clearance as his spouse, that application was refused for the reasons given in the Refusal Notice of the 20th of November 2014. In the Refusal Notice the reasons given were that the ECO was not satisfied that the marriage was genuine and the Appellant did not meet the English language requirements.

3. The Appellant's appeal was heard by First-tier Tribunal Judge Thanki on the 14th of August 2015. The appeal was allowed in a decision promulgated on the 28th of August 2015. In the decision Judge Thanki found that the Appellant did meet the requirements of the Immigration Rules.

4. The ECO did not raise the Sponsor's status in the UK as an issue in the Refusal Notice and it was not raised as an issue in the hearing before Judge Thanki. In paragraph 36 of the decision Judge Thanki noted that the Sponsor appeared to have only discretionary leave but as the point was not taken before him did not take that a reason to find against the Appellant so leading to the finding that the Appellant did meet the Immigration Rules. The decision of Judge Thanki was not challenged by the Respondent as there was no application for permission to appeal to the Upper Tribunal.

5. Following the decision of Judge Thanki nothing happened until the 5th of January 2016 when the Appellant wrote to the ECO for the appropriate endorsement to be placed in her passport. The response was a further Refusal Notice of the 20th of January 2016 in which the ECO raised the issue of the Sponsor's status in the UK and refused to endorse the passport on the basis that he did not have settled status or leave on a basis that permitted the Appellant entry as a spouse. That was the only ground of refusal.

6. The Appellant appealed that decision which came before Judge Farmer at Hatton Cross on the 19th of June 2017, the appeal was allowed in a decision promulgated on the 21st of June 2017. In that decision Judge Farmer set out the history and quoted directly paragraph 36 of Judge Thanki's decision in paragraph 7.

7. In paragraph 9 of the decision Judge Farmer recorded the concession made by Mr Naumann that the Sponsor could not be found to be a settled person by virtue of the nature of his leave and that he did not meet the requirements of appendix FM. The claim was pursued under article 8 outside the rules.

8. In finding that the interference in the Appellant's and Sponsor's family life was not in accordance with the law Judge Farmer referred to TB (Jamaica) [2008] EWCA Civ 977. That was a deportation case where it was decided that the Secretary of State could not raise an Appellant's criminal convictions to exclude him from refugee status when that issue could have been raised at an earlier stage in the process. The Court of Appeal observed that such a matter could be raised where fresh evidence that had not been previously available was relied on or there had been a change in the law or circumstances.

9. In paragraph 16 Judge Farmer went on to find that the ECO's decision which was made on evidence that was available at the time of the First-tier Tribunal hearing and the original decision was not in accordance with the law. It was not raised by the Secretary of State in the 2014 decision of in the 2015 appeal but was the sole ground of refusal in January 2016.

10. The Home Office sought permission to appeal to the Upper Tribunal on the grounds that Judge Farmer had used article 8 as a general dispensing power. It was accepted that the ECO had not raised the Sponsor's status in the first decision but it was submitted that the situation was different from that in TB, that involved the refugee convention and an absolute right. It was incumbent on the Judge to ensure that all aspects of the Immigration Rules were satisfied, Kwok on Tong. It was a fact that the Sponsor did not have settled status and could not satisfy the rules. the Judge had not considered whether the Appellant and Sponsor could enjoy family life in Pakistan and had not identified obstacles to their doing so and so had not adequately considered the proportionality exercise.

11. Permission was granted by Judge Saffer stated that it was arguable that the Judge had erred in not carrying out an adequate proportionality balancing exercise by not weighing up all factors (including the fact that the Immigration Rules were not met) and just relying on 2 facts of the Appellant's side.

12. At the hearing the representatives made submissions in line with their respective positions. These are set out in full in the Record of Proceedings. For the Home Office it was submitted that the Judge had not carried out a balancing exercise as it had been accepted that the Immigration Rules were not met. There was no guarantee that the Sponsor would be granted ILR. It was suggested that the status of the Sponsor could not be ignored and the proportionality of the decision had to be overcome, it needed a proportionality assessment and the Judge had not looked at both sides. TB was an asylum case which was different.

13. For the Appellant it was submitted that the Judge was right to look at the legality of the decision and TB should have been applied. The issue was raised unexpectedly but the circumstances were the same. The ECO had had the opportunity to challenge the decision of Judge Thanki but had not taken it, the decision of Judge Thanki could not be circumvented administratively and the decision was binding. The Secretary of State was bound by the decision of Judge Thanki.

14. In the course of argument I was provided with a number of authorities. Although Kwok on Tong was referred to I was not given a copy of the decision itself and have not been able to locate one. On that point I was handed RM (Kwok On Tong: HC 395 para 320) India [2006] UKAIT 39. I was also provided with Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 312 (IAC) and TB.

15. In paragraph 10 of RM Judge Ockelton said *"In Kwok On Tong (and also in R v IAT ex parte Hubbard [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise."*

16. In TB at paragraph 34 and 35 the basic rule and exceptions were explained: *"In R (Boafo) v Home Secretary [2002] EWCA Civ, [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the Court of Appeal agreed, "... an unappealed decision of an adjudicator is binding on the parties." In R (Saribal) v Home Secretary [2002] EWHC 1542 (Admin), [2002] INLR 596, Moses J said:*

> *"17. The decision in ex parte Boafo demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence."*
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> *35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in Boafo at [28]. But this is not such a case."*

17. In Chomanga the headnote summarised the position as follows: "*The parties are bound by unappealed findings of fact in an immigration judge's decision. It is therefore not open to the respondent following a successful and unchallenged appeal by an appellant to make a further adverse decision on the same issue relying on the same evidence as before unless there is evidence of fraud or one of the exceptions identified in para 35 of the judgment of the Court of Appeal in Secretary of State v TB [2008] EWCA 997 applies.*"

18. Chomanga was not an asylum or international protection case but was an immigration decision based on an ancestry application made by the Appellant in that case. When the Appellant's application had been refused and appealed the Respondent had failed to provide evidence to support assertions that the birth certificates relied on were false and that deception had been used. Following that finding the matter had been remitted to the Respondent who then provided the evidence supporting the claims made.

19. The Judge found that was an abuse of process and was upheld by the Upper Tribunal following a discussion of the issues at paragraphs 18 to 23. Judge Latter with the principal reasoning in paragraphs 20 and 21 *"I am satisfied that the application of these principles resolves the issues which have arisen in this appeal and that the arguments about abuse of process raised in the grounds are largely beside the point. The respondent was bound by the findings made by IJ Ross who was not satisfied that she had produced any or any sufficient evidence to maintain the assertion that the appellant had obtained her leave to remain on the basis of UK ancestry by submitting false documents. The respondent had had the opportunity of filing evidence in support of that contention but had failed to do so or indeed to attend the hearing. By making a further decision by relying on evidence which could and should have been produced at that hearing, the respondent was in substance attempting to circumvent the judge's decision. It is right that in para 17 of his determination the judge expressed the view that it was open to the respondent to curtail the leave again and to produce the relevant documents on any subsequent appeal but in the light of TB that view was incorrect. He said that the issue of falsity had not been resolved but it had by the respondent's failure to produce evidence and by the immigration appeal being allowed. These comments made obiter by the judge did not give the respondent the power to take a course of action not open to her under the law.*

> *21. None of the exceptions to the general principle that an unappealed decision is binding set out in para 35 of Stanley Burnton LJ's judgment apply in the present case. There was no fresh evidence which was not available at the date of the hearing, no change in the law and no relevant change of circumstances or new events after the date of decision. This was also not a case where there was subsequent evidence of fraud: see EB (fresh evidence – fraud- directions) Ghana [2005] UKAIT 000131. The issue before IJ Ross was whether false documents had been relied on and the evidence on which the respondent based her subsequent decision was exactly the same as the evidence previously relied on."*

20. The final case that is relevant is Devaseelan [2002] UKAIT 000702*. That case established the authority that a decision of the First-tier Tribunal is to be taken as the starting point for the consideration of the facts in any subsequent appeal. The full guidance is as follows:

> *"39. In our view the second Adjudicator should treat such matters in the following way.*
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> > *(1) **The first Adjudicator's determination should always be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.*

(2) ***Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.*** *If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.*

(3) ***Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.*** *The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.*

40. We now pass to matters that could have been before the first Adjudicator but were not.

4) ***Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.*** *An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.*

(5) ***Evidence of other facts - for example country evidence may not suffer from the same concerns as to credibility, but should be treated with caution.*** *The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.*

41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) ***If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,*** *and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time,* ***the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination*** *rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to*

> *the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion."*

21. The common feature that runs through the decisions set out above is that a point should be raised when it first arises and that it cannot be raised at a later stage unless there is new information that justifies the earlier failure to raise it. The unchallenged decision of the First-tier Tribunal Judge is binding on the ECO and is the starting point for the consideration of the facts by a Judge considering any subsequent appeal.

22. From the approach taken by Judge Latter in Chomanga, a decision which was not challenged in the Court of Appeal, I am satisfied that there is no difference in principle between an asylum decision and an immigration decision. The ECO in the first decision did not take the point about the Sponsor's status, it could have been taken in the first appeal but was not leading to the unchallenged finding that the Appellant met the Immigration Rules. That decision is binding and as there is no suggestion that there was new information before the ECO making the second decision or a justification for the point not being raised earlier I find that the Judge Farmer was right to find that it could not be raised in the second decision.

23. The situation is complicated by 2 other matters. The first is that the decision of Judge Thanki was made under the old appeal rights when an appeal could be allowed on the simple basis that the Appellant met the Immigration Rules, as he found. The subsequent Tribunal decision was made under the new appeal regime where the Immigration Rules are relevant to the assessment of the proportionality of the decision under article 8. The finding that a person meets the Immigration Rules is a strong reason in their favour in the balancing exercise that follows.

24. The second issue is that this case is confused by the concession that the Appellant did not meet the Immigration Rules by virtue of the Sponsor's immigration status. That concession is troubling because there was a decision that the Appellant did meet the Immigration Rules, that decision was binding on the ECO in the second refusal and was itself the starting point for the consideration of the facts by Judge Farmer.

25. Given the unfortunate history of the case, the findings previously made and the troubling concession I am satisfied that Judge Farmer was entitled to consider article 8 on the basis that there were exceptional reasons to consider the claim outside the rules. In the alternative Judge Farmer could simply have held that, notwithstanding the concession, the Immigration Rules were met and that with the continued exclusion of the Appellant and the birth of the couple's child the decision was disproportionate.

26. It is not entirely clear that Judge Farmer needed to carry out a full balancing exercise but if such an exercise was required and the failure to do so was an error I find that the error is not material. Judge Farmer was right in finding that the ECO could not raise the Sponsor's status as an issue in the second refusal. With a decision that the Appellant met the Immigration Rules the Judge was entitled to find, as indicated in paragraph 25, that exclusion was disproportionate.

27. Following from Judge Thanki's decision there are a number of routes that could have been taken by Judge Farmer. In my view all lead to the same finding, that the Appellant met the

Immigration Rules and that continued exclusion was disproportionate. There was no material error in the decision of Judge Farmer which stands as the disposal of this appeal.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

This was an appeal by the Secretary of State which I have dismissed, I make no fee award, the fee award of the First-tier Tribunal remains in force.

Signed: 

Deputy Judge of the Upper Tribunal (IAC)

Dated: 16th February 2018