Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09929/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th November 2021	**On 24th November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR SHAHANAS KANHIRAKANDAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik QC, instructed by Louis Kennedy Solicitors
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of India. His appeal to the First-tier Tribunal ("FtT") against the respondent's decision of 21st May 2019 to refuse his application for

leave to remain in the UK on human rights grounds, was dismissed by FtT Judge Black for reasons set out in a decision promulgated on 28th October 2019.

2. Permission to appeal to the Upper Tribunal was initially refused by the FtT and Upper Tribunal, but granted by Mr C M G Ockelton, the Vice President of the Upper Tribunal following proceedings before the High Court challenging the decision of the Upper Tribunal to refuse permission.

3. The matter comes before me to determine whether the decision of FtT Judge Black is vitiated by a material error of law, and if so, to remake the decision.

Background

4. The appellant arrived in the UK on 19th January 2007 with leave to enter as a student of valid until 31st May 2008. He was subsequently granted further leave to remain in the UK, initially as a student, and thereafter as a Tier 1 migrant until 26th February 2016. On 26th February 2016, the appellant made an in-time application for indefinite leave to remain as a Tier 1 (General) Migrant. That application was refused by the respondent on 26th August 2016. The appellant applied for Administrative Review and the respondent's decision to refuse the application was maintained following Administrative Review for reasons set out in a decision dated 10th October 2016.

5. The appellant remained in the UK and on 18th December 2018, he made an application for leave to remain on human rights grounds, and on the basis of his long residence in the UK. The application was refused by the respondent for reasons set out in her decision dated 21st May 2019. The respondent noted the appellant had only resided in the UK lawfully between 19th January 2007 and 10th October 2016, a period of 9 years and 8 months. The appellant could not therefore satisfy the requirements for indefinite leave to remain on the ground of long residence set out in paragraph 276B of the immigration rules. The application was also refused because the respondent considered that having regard to the public interest, there are reasons why it would be undesirable for

the appellant to be given indefinite leave to remain on the grounds of long residence. The respondent alleged that in support of a previous application made on 5th November 2010, the appellant had used false documents in relation to work he had claimed to have undertaken for Iwin Technologies Ltd. Addressing the appellant's private life claim under paragraph 276ADE(1) of the immigration rules, the respondent concluded the requirements of the rules cannot be met. The respondent was not satisfied that there would be very significant obstacles to the appellant's integration into India.

6. The appellant was represented at the hearing of his appeal before FtT Judge Black by Counsel, Dr Chelvan. At paragraphs [10] to [12] of the decision, Judge Black said:

> "10. I heard oral evidence from the appellant and there were no challenges raised in terms of his evidence or credibility. The respondent failed to produce any documentary evidence to support the allegation that the appellant's previous application in November 2010 was based on false information. There was no reliance on paragraph 322(5) by the respondent, but reliance was placed on the requirements in paragraph 276B(ii) as to desirability to be granted ILR. The basis of the refusal in terms of the appellant's undesirability amounted to an unsubstantiated assertion. I am satisfied that the respondent failed to discharge the burden to show that the appellant had been involved in deception in a previous application.
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> 11. As to paragraph 276ADE I find that the appellant has adduced no evidence to show that he would not be able to return to India where he has a wife, parents and a sibling all of whom would provide support in practical and emotional terms. There was no evidence before me to show how the appellant supported himself financially in the UK, but I accept that there was no recourse to public funds. I find that the appellant would be able to obtain employment in India or that he could continue to support himself as he is done in the UK. Dr Chelvan acknowledged that the evidence failed to meet paragraph 276ADE(1)(vi).
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> 12. It was accepted by the appellant that he did not meet the immigration rules under paragraph 276ADE(1) and 276B on the grounds of length of continuous residence. It was argued that outside of the Rules, under Article 8 the decision was disproportionate given the length of residence and private life in the UK. It was argued that the appellant had missed out by a short period of time only namely four months; in effect a near miss."

7. Judge Black went on to address the Article 8 claim outside the immigration rules, accepting the appellant has lived in the UK for a considerable period of time and had established nine years and eight months of continuous lawful

residence between 2007 and 2016. She acknowledged the appellant feels a sense of unfairness because he failed to meet the '10-year rule' by a margin of four months but concluded that the length of residence is not a compelling circumstance. Judge Black concluded that if the appellant has established a private life by reason of the length of residence, taking into account the public interest considerations set out in s117B of the 2002 Act, any interference is proportionate.

The appeal before me

8. The appellant relies upon the renewed grounds of appeal dated 12th March 2020. The appellant claims Judge Black erred in law in failing to follow the guidance given by the Court of Appeal in Ahsan v SSHD [2017] EWCA Civ 2009; Where a finding was made by the FtT in an ETS 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.

9. The appellant submits Judge Black exonerated the appellant of any wrongdoing in unambiguous terms, such that the respondent had erroneously refused the appellant's application for leave to remain as a Tier 1 Migrant on 26th August 2016. The appellant claims the First-tier Tribunal was obliged to allow the appellant's appeal by placing him in the same position as he would have been if the respondent had not made the unfounded allegation of deception against him on 26th August 2016. It is said that the appellant would not have become an overstayer, but for the unfounded allegation against him, and the respondent is obliged to deal with the appellant "as if that error had not been made". It is said that absent the unfounded allegation made by the respondent, the appellant would have established 10 years continuous lawful residence and qualified for indefinite leave to remain on the grounds of long residence under the immigration rules.

10. The focus of the oral submissions be fore me was upon matters set out in the respondent's rule 24 reply dated 11th October 2021. The respondent refers to

the decision of the Court of Appeal in SSHD v Devani [2020] EWCA Civ 612 and claims that an appeal against the decision of First-tier Tribunal Judge Black had not been open to her because she had ostensibly been the winning party. The Court of Appeal held that the effect of Rule 24 is that in a case where a respondent wishes to rely on a ground on which they were unsuccessful below, the respondent is obliged to provide a response. The respondent does so and claims there is a material mistake of fact in the decision of Judge Black. The respondent claims Judge Black found, at [10], that the respondent had failed to discharge the burden to show that the appellant had been involved in deception in a previous application because the respondent had failed to produce any documentary evidence to support the allegation. However, the appellant had previously filed a claim for Judicial Review (JR/12790/2016) challenging the respondent's decisions of 30th August 2016 and 10th October 2016. Permission to claim judicial review was granted and the claim for judicial review was dismissed following a contested hearing by Upper Tribunal Judge Perkins for reasons set out in a judgment dated 27th July 2017. The respondent refers to the decision of the Court of Appeal in E and R v SSHD [2004] EWCA Civ 49, in which the Court of Appeal held that the IAT and the Court of Appeal have the power to review a decision of the Tribunal where it is shown that an important part of the Tribunal's reasoning was based on ignorance or mistake of fact, and to admit new evidence to demonstrate the mistake. The respondent relies upon the documents that were filed by the appellant and the respondent in the previous claim for Judicial Review to establish that the decision of the First-tier Tribunal Judge was based on ignorance or a mistake of fact.

11. Insofar as the appellant's appeal is concerned, before me, Mr Malik QC refers to the judgement of the Court of Appeal in Ahsan -v- SSHD in which Underhill LJ said, at [120]:

> "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 section 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 section 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. To pick up a particular point relied on by Mr Biggs, I do not regard the fact that a person commits a criminal offence by remaining in the UK from (apparently) the moment of service of a section 10 notice as constituting a substantial detriment such that he is absolutely entitled to seek to have the notice quashed, at least in circumstances where there has been no prosecution. (It is also irrelevant that the appellant may have suffered collateral consequences from the section 10 decision on the basis that his or her leave has been invalidated, such as losing their job; past damage of that kind cannot alas cannot be remedied by either kind of proceeding.)

12. Mr Malik QC accepts Judge Black's attention was not drawn to the decisions of the Court of Appeal in Khan v Others v Secretary of State for the Home Department [2018] EWCA Civ 1684 and Ahsan v SSHD [2017] EWCA Civ 2009. However, he submits the First-tier Tribunal is a specialist Tribunal and the Judge erred in failing to apply the guidance provided by the Court of Appeal.

13. In reply to the matters set out in the respondent's Rule 24 response, Mr Malik QC submits the respondent was represented at the hearing before the First-tier Tribunal but, as recorded at paragraph [10] of the decision, decided not to challenge the appellant's credibility and failed to produce any documentary evidence to support the allegation that the application in November 2010 was based on false information. He submits it is not now open to the respondent to adduce such evidence to impugn the finding made by Judge Black and in any event, new evidence should only be admitted in accordance with the well-known principles set out Ladd v Marshall [1954] 1 WLR 1489. That is: first, the fresh evidence could not have been obtained with reasonable diligence for use at the trial; second, that if given, it probably would have had an important influence on the result; and third, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce

the evidence was that of the party's legal advisers provides no excuse. Mr Malik QC submits the evidence was plainly available to the respondent, with reasonable diligence for use at the hearing of the appeal before the First-tier Tribunal. Mr Malik QC submits the First-tier Tribunal was the fact-finding Tribunal and an appeal to the Upper Tribunal lies only on a point of law and the function of the Upper Tribunal is to decide whether the First-tier Tribunal made an error on a point of law. He submits there is no general jurisdiction to interfere with findings of fact absent an error of law, or to admit fresh evidence. Mr Malik QC submits the respondent's reliance upon the judgement of Upper Tribunal Judge Perkins in the judicial review claim is misconceived, because there was no finding the fact made in that claim. Upper Tribunal Judge Perkins simply reviewed the respondent's decisions of 30th August 2016 and 10th October 2016 on conventional public law grounds and concluded that the respondent's decisions were neither irrational nor unfair.

14. In reply to the appellant's grounds of appeal, Ms Ahmad submits Judge Black recorded at paragraphs [11] and [12] of her decision that it was acknowledged by counsel for the appellant that the appellant is unable to meet the requirements set out in paragraphs 276ADE(1) and 276B of the immigration rules on the grounds of the length of his continuous lawful residence. She submits the appellant did not rely upon the judgement of the Court of Appeal in Ahsan -v- SSHD. She submits that at paragraph [120] of his judgment in Ahsan v SSHD, Underhill LJ was referring to a category of cases where an appellant is found by the Tribunal not to have cheated, which inevitably means that the s10 had been wrong. Here, the First-tier Tribunal Judge had reached her decision, not following an evaluation of the appellant's evidence, but because the respondent failed to produce any documentary evidence in support of the allegation made. She submits, in the end it was open to Judge Black to dismiss the human rights appeal, having had particular regard to the appellant's length of residence in the UK.

15. Ms Ahmad relied upon the matters set out in the respondent's rule 24 response. She submits the allegation that the appellant had deposited monies into the personal account of the director of Iwin Technologies Ltd, which was then transferred into the company accounts and subsequently transferred back to the appellant, as an invoice payment, had previously been made in the respondent's decision of 30 August 2016. The respondent's decision to refuse the application for indefinite leave to remain as a Tier 1 (General) Migrant was maintained following Administrative Review for reasons set out in the respondent's decision dated 10th October 2016. The appellant sought judicial review of those decisions and the claim for judicial review was dismissed by Upper Tribunal Judge Perkins. Ms Ahmad submits the respondent's Detailed Grounds of Defence referred to the evidence relied upon by the respondent. She referred me in particular to paragraphs [8] and [9] of the judgment of Upper Tribunal Judge Perkins in which he refers to a report relating to 'Operation Cudgegong', looking into the business activity of Iwin and its associated entities. She referred to paragraphs [12] and [13] of the judgment of Upper Tribunal Judge Perkins in which he said:

> "12. [Counsel for the applicant] argued that there is evidence that there was legitimate business activity. With respect that is exceedingly thin. The best that it gets is a recognition in the forensic report that at the material time the business declared a turnover and a profit to the revenue. Of course, it does not follow that that declaration was based on legitimate trading; it merely means that it was made. As was pointed out by [counsel for the SSHD], on its own terms that is a very unsatisfactory assertion because at the time when a turnover of profit was declared to the Revenue, a much more substantial sum had been paid by way of consultancy fees, allegedly, to the applicant. On the applicant's own figures, the turnover could not be right. There is really nothing in that slim piece of evidence to support any view that there was any legitimate business activity going on.
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> 13. It follows therefore that the Secretary of State was faced with good evidence that the organisation generating the consultancy fees was a sham organisation. Indeed, that has been admitted by many people and someone who has been to prison as a result. There was evidence that the method of operation of the scam could be traced to this applicant. There was no evidence of legitimate trading, and it was, I am entirely satisfied, even bearing in mind all the need for scrutiny which [counsel for the applicant] has properly reminded me about, open to the Secretary of State to conclude that this was a sham business and that the applicant had been involved in dishonesty."

16. Ms Ahmad submits the appellant had put a witness statement before the First-tier Tribunal dated 21st October 2019, in which he stated, at paragraph [5], that his application for indefinite leave to remain as a Tier 1 Migrant had been refused because his business activities and earnings were found not to be credible. He denied the allegations and said that the respondent must produce cogent evidence to discharge the burden upon her. However he failed to refer in that statement to the claim for judicial review by which he had previously challenged the respondent's decisions and failed to refer to and address the evidence that had previously been disclosed to him, and upon which Upper Tribunal Judge Perkins had concluded it was open to the Secretary of State to conclude that the applicant had been involved in dishonesty.

17. When I pressed Ms Ahmad to explain why the respondent had simply not placed the evidence previously relied upon to defend the claim for judicial review before the First-tier Tribunal, or to refer to the decision of Upper Tribunal Judge Perkins, Ms Ahmad submitted that the appeal had been listed in a 'float list' and was picked up by a Presenting Officer to deal with on the day. She submits the evidence relied upon by the respondent is material that the appellant is aware of and has known about since the claim for judicial review was issued in 2016 and determined in August 2017. It does not therefore take the appellant by surprise or cause any prejudice to him. In any event the material has been served upon the appellant and his representatives again with the rule 24 response.

18. In reply, Mr Malik QC accepts the material the respondent now seeks to rely upon is relevant but submits there is no special rule for 'float cases', and in any event, Rule 24 of The Tribunal Procedure Rules 2014 required the respondent to provide the Tribunal with the evidence relating to the matters relied upon by the respondent in her decision, within 28 days of the date on which the Tribunal sent to the respondent a copy of the notice of appeal. The respondent filed her evidence on 26th July 2019 but did not include any evidence to support the allegation made against the appellant in the decision. Furthermore, even if the

Presenting Officer did not have the evidence available, it was open to the Presenting Officer to seek an adjournment, but no such application was made. Mr Malik QC refers to the decision of the Vice President in MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC) in which he said the Tribunal is likely to assume that a document mentioned, but not supplied to the Tribunal, is no longer relied on. Here the respondent did not refer to the judgment of Upper Tribunal Judge Perkins in the decision under appeal, and the appellant was entitled to assume that decision was no longer relied upon by the respondent, particularly given the subsequent developments in the law in this area. Mr Malik QC submits that here the respondent seeks to extend the well-known principles set out Ladd v Marshall, for admitting new evidence. In any event, Rule 15(2A)(b) requires the tribunal to consider whether there has been unreasonable delay in producing the evidence now relied upon. Here, there has been an extensive delay in providing the Tribunal with contentious evidence that could properly have been adduced by the respondent with reasonable diligence before the First-tier Tribunal. Mr Malik QC submits the appropriate course is for the Tribunal to set aside the decision of First-tier Tribunal Judge Black, and to preserve the finding made at paragraph [10] of her decision. Mr Malik QC submits the decision should be remade on that basis. He submits that if the decision is set aside with no findings preserved, the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing afresh.

Discussion

19. Judge Black found, at [10], that the respondent had failed to discharge the burden upon her to establish that the appellant had been involved in deception in a previous application. Judge Black records at paragraph [12] of the decision that it was accepted by the appellant that he did not meet the requirements set out in paragraphs 276ADE(1) and 276B of the immigration. Judge Black went on to consider whether there are any other exceptional or compelling

circumstances that justify the grant of leave to the appellant outside the application of the immigration rules.

20. Although the issue was not raised and her attention was not drawn to the decision of the Court of Appeal in Ahsan v SSHD, it is clear that in reaching the decision Judge Black did not consider the impact of the finding that the appellant had not used deception in a previous application, and the consequences that flow from that finding, when addressing the Article 8 claim made by the appellant and in the assessment of proportionality. For reasons that are not apparent, counsel for the appellant relied upon the judgment of the Court of Appeal in Balajigari v SSHD [2019] EWCA Civ 673 but did not draw the Tribunal's attention to the Court of Appeal decision in Ahsan. As Underhill LJ said in Ahsan, where on a human rights appeal an appellant is found not to have cheated, 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.

21. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 provides that section 12(2) applies, "if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law". If that condition is satisfied, then section 12(2) provides that the Upper Tribunal may set aside the decision of the First-tier Tribunal and, if it does, must either remit the case to the First-tier Tribunal or re-make the decision in the Upper Tribunal. I am quite satisfied that the decision of Judge Black is vitiated by a material error of law such that it must be set aside for the reasons set out in the appellant's grounds of appeal. I must therefore consider whether I should remit the appeal to the First-tier Tribunal or re-make the decision in the Upper Tribunal.

22. In considering that issue, it is necessary for me to consider and say a little more about the respondent's cross-appeal because that is relevant to whether the findings made by Judge Black at paragraph [10] should be preserved, and thus the extent to which further findings will be necessary. In E and R v SSHD [2004] EWCA Civ 49, Carnwath LJ undertook a comprehensive review of the

authorities concerning the circumstances in which a decision of a Tribunal may be disturbed on the basis of a mistake of fact, even though that mistake may not be due to any judicial fault. He said, at [66]:

> "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 CICB. 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 been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

23. Having considered the authorities on the related issue of whether, and in what circumstances, evidence may be adduced to prove a mistake of fact, Carnwath LJ summarised his conclusions, insofar as relevant to the Tribunal, as follows:-

> "92. In relation to the role of the IAT, we have concluded
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> 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;
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> ii) Following the decision, when it was considering the applications for leave to appeal to this Court, it had a discretion to direct a re-hearing; this power was not dependent on its finding an arguable error of law in its original decision.
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> 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.
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> 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, s 101: see para 17 above)."

24. I acknowledge that here, 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 a mistake of fact giving rise to unfairness.

25. Adopting the Ladd v Marshall principles, the respondent candidly accepts the evidence that she now relies upon to establish that at paragraph [10] of her decision, Judge Black's reasoning was based on ignorance or mistake of fact, was available at the date of the hearing before the First-tier Tribunal but was not brought to the attention of the First-tier Tribunal. It is common ground between the parties that the evidence was relevant to the question whether the respondent had raised a prima facie case that the appellant's previous application in November 2010 was based on false information. The context here is important. Here, the appellant was plainly aware of the allegation made by the respondent and the evidence relied upon by the respondent because he had challenged the prior decisions of August and October 2016 by Judicial Review, and the evidence relied upon by the respondent, had been filed and served in that claim. Although it was not for the appellant to make out the respondent's case, it is surprising the appellant made no reference whatsoever in his witness statement dated 21st October 2019 to the claim for judicial review, the evidence that had been relied upon by the respondent and made no attempt to address that evidence in his witness statement, or to refer to the judgement of Upper Tribunal Judge Perkins. Judge Black plainly proceeds in ignorance of the evidence that was before Upper Tribunal Judge Perkins and of the observations that he made regarding that evidence, albeit in a claim for judicial review when he was considering the evidence and the respondent's decisions on conventional public law grounds.

26. The judge of the First-tier Tribunal cannot be criticised in her approach, but a finding which otherwise has no justifiable basis and is made in ignorance of the fact of material evidence that was relevant, is capable of establishing a mistake as to fact or unfairness, such that it amounts to an error of law. Here, although there was an unsubstantiated assertion before the First-tier Tribunal, the appellant was aware that there was evidence to substantiate the allegation

made. Looking at the conduct of the parties objectively, I am satisfied that the decision of the First-tier Tribunal was vitiated by unfairness. The unfairness arose primarily because of the conduct of the respondent herself, who had failed to provide the Tribunal with the underlying evidence to support the allegation that she was making and to that extent the respondent was responsible for the error. If that had been the end of the matter, the respondent would be the author of her own misfortune. However here, importantly, the appellant was well aware of the allegation made against him and as far back as 2016. When he challenged the respondent's decisions of August and October 2016, he was aware of, and was provided with the evidence relied upon by the respondent. He was aware of the judgment of Upper Tribunal Judge Perkins in August 2017, before he made his application for leave to remain in the UK in December 2018. In her decision, the respondent repeated the same allegation against the appellant. I accept as Mr Malik QC rightly points out, the respondent does not refer to the Judicial Review claim and the judgment of Upper Tribunal Perkins in her decision, but the respondent nevertheless repeated the same allegation. 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 the 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. It is surprising in that context that the appellant did not draw the First-tier Tribunal's attention to the previous judicial review claim pursued by him, the evidence in that claim, the judgment of Upper Tribunal Judge Perkins and his order. If the Tribunal's attention had been drawn to the evidence or of 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.

27. The Tribunal has a discretion to admit the new evidence. The respondent has made a Rule 15(2A) application and has provided the evidence relied upon. In essence it is the documents relating to the Judicial Review claim, including the appellant's judicial review bundle, the pleadings filed by the respondent and the evidence in support, together with the judgement and order of Upper Tribunal Judge Perkins. I accept the submission made by Mr Malik QC that there has been delay in producing that evidence before the Tribunal, but it is, in the end, evidence that does not take the appellant by surprise and evidence that the appellant, as the applicant in the claim for judicial review, has been aware of for a number of years.

28. The Ladd v Marshall principles remain the starting point, but there is a discretion to depart from them in exceptional circumstances. The decision here was made by Judge Black in ignorance of evidence that was available before her decision was made. This is not a case such as in MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC) where a document which the respondent relied upon had not been provided to the Tribunal, but one where the documents were available to both parties but had not been provided by either. I accept the respondent was under a duty to file and serve the evidence that she relied upon to support the allegation made, but it is also important to note that the appellant was aware of the evidence relied upon by the respondent, and more importantly failed to make any reference at all to the previous claim for Judicial review that he had pursued. No explanation has been given at all as to why the appellant did not make even an oblique reference to the claim for judicial review, the evidence he had been made aware of, or to the judgment of Upper Tribunal Judge Perkins. There was therefore some level of culpability on the appellant's part for failing to ensure the First-tier Tribunal Judge was properly appraised of the background to the appeal.

29. I am quite satisfied that if the evidence had been before Judge Black whether provided by the respondent or the appellant, it probably would have had an important influence on the conclusions that she reached at paragraph [10] of her

decision. She is likely to have found that the respondent has established a prima facie case that calls for an explanation from the appellant. Although the appellant had provided an explanation in his witness statement, Judge Black did not, quite understandably, engage with that explanation in reaching her decision. The evidence relied upon by the respondent had been considered by Upper Tribunal Judge Perkins, who in paragraph [13] of his judgement went so far as to say that he was entirely satisfied it was open to the respondent to conclude that Iwin Technologies Ltd was a sham business, and that the appellant had been involved in dishonesty. It was therefore credible evidence, although not incontrovertible. The evidence is potentially significant, going much further than the material that was before the First-tier Tribunal and 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.

30. Carnwath LJ spoke about the possibility of the Ladd and Marshall principles being modified in exceptional circumstances, and in the particular circumstances of this case I am satisfied they should be, particularly when the decision of the First-tier Tribunal is in any event set aside under section 12 of the 2007 Act. I acknowledge the importance of the principle of finality, but guided by paragraph 92(iii) of E and R v SSHD as to the exercise of my discretion, I am satisfied that to remake the decision without having regard to all of the evidence is likely to give rise to a risk of serious injustice, because important evidence which both parties were aware of, and neither party brought to the attention of the First-tier Tribunal, has not been considered and has been overlooked. The injustice here is that the respondent 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 and the material had already received some judicial scrutiny. Although that scrutiny was on public law grounds, here Upper Tribunal Judge Perkins went so far as to say there was no evidence of legitimate trading and that he was satisfied, it was open to the Secretary of State to conclude that this was a sham business and that the applicant had been involved in dishonesty.

31. In all the circumstances, I am satisfied that the respondent too, has made out her grounds of appeal and that the decision of Judge Black must be set aside with no findings preserved.

32. As to disposal, I have had regard to the background that I have set out and my decision that the decision of the First-tier Tribunal Judge is set aside with no findings preserved. In all the circumstances, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, I am satisfied that the nature and extent of any judicial fact-finding necessary will be extensive and the appropriate course is as Mr Malik QC urges, to remit the appeal to the First-tier Tribunal for hearing afresh. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

DECISION

33. The decision of First tier Tribunal Judge Black is vitiated by material errors of law and is set aside.

34. The appeal is remitted to the First-tier Tribunal for hearing afresh with no findings preserved.

V. Mandalia Date 19th November 2021

Upper Tribunal Judge Mandalia