IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003970
First-tier Tribunal No: HU/53270/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 October 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mr Shajib Ahmed Riyadh **Appellant**
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department **Respondent**

Representation:

For the Appellant: **Mr Z Mailk KC.**
For the Respondent: **Mr E Terrell.**

Heard at Field House on 5 June 2023

DECISION AND REASONS

1. The appellant, a national of Bangladesh, born on 1 August 1987, appeals against a decision of Judge of the First-tier Tribunal Siddall (hereafter the "judge") who, in a decision promulgated on 15 June 2022 following a hearing on 13 June 2022, dismissed his appeal on human rights grounds against a decision of the respondent of 24 June 2021 to refuse his application of 15 April 2019 for indefinite leave to remain (ILTR) on the basis of having accumulated 10 years' continuous lawful residence.

2. In the decision letter dated 24 June 2021, the respondent relied upon para 322(5) (now Part 5) of the Immigration Rules, calling into question the appellant's conduct. In this regard, the respondent alleged as follows:

   (i) The first allegation: The decision letter stated that, as part of the respondent's Operation Meeker criminal investigations, the respondent had observed interactions between the appellant, a firm of advisers called Immigration4U and certain individuals, including an individual named AKM Rezaul Karim Khan, who were later convicted of offences. Page 3 of the decision letter stated that

"Information identified through a witness statement, 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". The application in question was the appellant's application of 26 November 2012 for leave to remain as a Tier 1 Entrepreneur (see para 7 below) (hereafter the "Tier 1 application"). At page 4 of the decision letter, the respondent stated that the fact that the appellant's Tier 1 application was submitted by Immigration4u who were authorised to act on his behalf indicated his direct association with individuals working with Immigration4u who were subsequently convicted of criminal offences including conspiracy to defraud in respect of immigration offences and cheating the public revenue. The respondent also contended that AKM Rezaul Karim Khan and Md Abul Kalam who the appellant had named in his Tier 1 application as an associate of his father's (see para 7 below) were one and the same person.

(ii) The second allegation: The respondent also alleged that the appellant had submitted false bank documents purportedly issued by Bangladesh Commerce Bank Limited in support of his Tier 1 application. In support of this allegation, the respondent relied upon a document verification report dated 28 May 2015 (the "DVR").

The decision letter contends that the appellant's Tier 1 application was a bogus application, in reliance (inter alia) upon both allegations, the fact that the appellant's Tier 1 application was submitted by Immigration4u, that he had not provided a business plan with his application and he had submitted false bank documents.

3. The respondent was not represented before the judge.

4. I will summarise the judge's decision and quote extracts from it later on in my decision. Suffice it to say for the present that she found that the respondent had not established the first allegation but that she had established the second allegation. In reaching her decision in relation to para 322(5) of the Immigration Rules, she considered the DVR having rejected the submission advanced by Counsel for the appellant (Mr S. Karim) that the respondent's reliance upon it in the decision of 24 June 2021 amounted to an abuse of process.

5. One of the issues in this case (ground 1) is whether, applying relevant legal principles, including the public interest in the finality of litigation, Ladd v Marshall principles and/or the guidance in Devaseelan v SSHD * [2002] UKIAT 702, the judge had erred in law by permitting the respondent to rely upon the DVR.

(A) BACKGROUND

6. The relevant background is as follows:

7. The appellant arrived in the United Kingdom on 4 February 2009 with leave to remain (LTR) as a student valid until 31 December 2012. On 26 November 2012, he made the Tier 1 application. In his Tier 1 application, he named Mr Md Abul Kalam as an associate of his father's who he said would be making funds available to him for his business. In May 2013, the appellant varied his Tier 1 application to an application for an extension of his Tier 4 visa to undertake further study. This application was refused on 15 May 2015. The appellant appealed. This appeal was dismissed, although the judge said that she understood that the appellant was subsequently able to complete a Masters degree.

8. On 5 May 2017, the appellant applied for LTR on the basis of his family life in the United Kingdom with his British partner, RH. This application was refused on 17 April 2018. In this decision, the respondent asserted that the appellant had fraudulently obtained a certificate of passing a TOEIC English language test with ETS by the use of a proxy. The appellant's appeal (which is referred to in the judge's decision as the "first appeal") was heard on 20 November 2018 before Judge of the First-tier Tribunal Chamberlain. In her decision promulgated on 6 December 2018, Judge Chamberlain found that the appellant was a credible witness and that the respondent had not established that the TOEIC certificate had been fraudulently obtained. The appellant was then granted leave until 4 July 2021.

9. The appellant then made the application for ILTR dated 15 April 2019 that was the subject of the decision dated 24 June 2021.

10. Given that the DVR relied upon in the appeal before the judge was dated 28 May 2015, it was in existence at the time of the hearing before Judge Chamberlain. However, the DVR was not relied upon in the decision letter dated 17 April 2018, nor did that earlier decision letter raise the second allegation. Indeed, as the judge noted at para 19 of her decision, the respondent did not raise any allegation of deception in relation to the appellant's Tier 1 application in the course of the appeal before Judge Chamberlain.

(B) THE JUDGE'S DECISION

11. Given that ground 2 contends that the judge erred at para 7 of her decision, I shall begin by quoting para 7. This reads:

> "7. The appellant carries the burden of proving contested facts to the civil standard of a balance of probabilities."

12. The judge set out the detail of the respondent's case with regard to both allegations, at paras 21-31, including (at para 31) a summary of the contents of a witness statement dated 12 October 2020 from Mr Simon Freese, Chief Immigration Officer (RB/181) before turning to the appellant's written response to the allegations (paras 32-36) and his witness statement (para 37).

13. It was submitted before the judge by Mr Karim that the respondent's failure to raise the second allegation in the appeal before Judge Chamberlain and her reliance upon it in the decision letter dated 24 June 2021 amounted to an abuse of process. The judge rejected the submission, at para 44 of her decision which reads:

> "44. Mr Karim argues that failing to raise this further allegation of dishonesty at the first hearing, but relying upon it as grounds for refusing the application made in 2019, amounts to an abuse of process by the respondent. I am not able to accept that. Although I accept that the information suggesting that bank documents were false was available from 2015 onwards, the refusal letter states that criminal proceedings against a number of persons as a result of Operation Meeker were not concluded until November 2018 – around the time when the appellant's first appeal was being heard. The respondent asserts in the refusal letter (page 9 of the bundle) that at the time of the first hearing their investigation had not been completed and that it would not have been appropriate to raise these further allegations at that point. I accept that argument. Further in raising these allegations of dishonesty the respondent is not seeking to challenge the finding of Judge Chamberlain in November 2018 that there had been no deception in relation to the TOEIC test. The principles set out in **Devaseelen** are therefore less relevant as this appeal relates to a different set of facts."

14. The judge directed herself in relation to the guidance given by the Court of Appeal in Balajigari v SSHD [2019] EWCA Civ 673 and the guidance given by the Upper Tribunal in SM and Qadir (ETS – evidence – burden of proof) [2016] UKUT 229 at paras 45-52 which read:

> "45. The respondent relies upon Paragraph 322(5) of the rules, set out above in its original form, which contains discretionary as opposed to mandatory grounds for refusal of a leave to remain application.
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> 46. The application of paragraph 322(5) has been extensively considered by the courts in relation to the issue of alleged dishonesty in tax returns submitted as part of immigration applications. The court of appeal have now provided definitive guidance in the case of **Balajigari v SSHD** [2019] EWCA 573. I refer to the following principles outlined by the court:
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> 47. A two-stage approach is required: first to consider whether the section applies and then to consider the exercise of the discretion.
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> 48. At the first stage there must be reliable evidence of sufficiently reprehensible conduct together with an assessment of all relative evidence including the positive features of the applicant's character to decide if their presence in the UK is undesirable. The conduct can only be 'sufficiently reprehensible' if it is dishonest.
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> 49. The court commented at paragraph 37 that it is difficult to see how the deliberate and dishonest submission of figures to HMRC would not meet that threshold.
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> 50. The court went on to say that an appellant must be given the opportunity to give evidence and call witnesses to challenge an assertion by the respondent that he has acted dishonestly. It will usually not be sufficient to assert that there had been a 'mistake'. There must be a full explanation of what the mistake was and how it arose.
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> 51. I note from Mr Karim's skeleton argument that he agrees that the principles set out in Balajigari are applicable to this appeal.
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> 52. As to the burden of proof and the evidential burden, Mr Karim refers me to **SM and Qadir (ETS – evidence -burden of proof)** [2016] UKUT 229 and the three-stage process which I have adopted in reaching my decision."

15. The judge's conclusions in relation to the allegations were as follows:

(i) In relation to the first allegation, she found (para 63) that the respondent had not demonstrated that the appellant had participated in the criminal conspiracy uncovered by Operation Meeker or that AKM Rezaul Karim and Md Abul Kalam were one and the same person. It will be noted, from my para 16 below which quotes paras 53-65 of the judge's decision, that, in reaching this conclusion, she noted, inter alia, that the respondent had not produced the witness statement referred at page 3 of the decision letter or any other documentary evidence of interactions between the appellant and the criminal group (paras 22 and 55); that the respondent had not produced any evidence to support her assertion that Md Abul Kalam and AKM Rezaul Karim Khan were one and the same person (para 56); and that the appellant's explanation, that the names were different and were in any case common in Bangladesh, was a plausible explanation (para 56).

(ii) In relation to the second allegation, the judge found that "*it was more likely than not that the bank letter and statements submitted to the respondent by the appellant as part of his tier 1 visa application in 2012 were not genuine*" (para 61); that it was "*more likely than not that the appellant deliberately and dishonestly presented documents to the respondent that were not genuine and*

that the threshold required by section 322(5) was met" (para 63); and that section 322(5) applied in this case (para 64). The judge therefore found that the appellant did not meet the requirements of para 276B of the Immigration Rules (para 65).

16. The judge gave her reasons for her conclusions on the allegations at paras 53-65. Although her conclusion on the first allegation has not been challenged by the respondent, I set out paras 53-65 because it is appropriate to consider the judge's reasoning in relation to the second allegation in context and also because the respondent's case was that the allegations were linked to her overall case that the appellant's Tier 1 application was bogus. Paras 53-65 of the judge's decision read:

> "53. I turn to the evidence in this case. Having considered the contents of the refusal letter, the letter and bank statements from Bangladesh Commerce Bank Limited, the email exchange with the bank and the statement of Simon Freese. I find that the respondent has produced sufficient evidence of alleged dishonesty for the evidential burden to shift to the appellant.
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> 54. I go on to consider the appellant's response to these allegations. He says that he had no knowledge of any criminal activities being carried on by advisers at Immigration4u or others. He points out that the representative named on his application form was not convicted of any offence. He asserts that there is no evidence that Md Abul Kalam and AKM Rezaul Karim are the same person. His position is that they are different people and that Mr Kalam was genuinely an associate of his father's. He also asserts that the bank letter and statements are genuine.
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> 55. I note that the refusal letter states that the respondent had observed interactions between the appellant and those charged with criminal offences as part of its Operation Meeker criminal investigation. No evidence of such interactions has been produced and Mr Freese does not deal with these in his statement.
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> 56. The respondent has not produced any evidence either in support of its assertion that AKM Rezaul Karim, a person convicted of serious offences in connection with immigration applications, are one and the same person. This is at present a mere assertion. The respondent may have grounds for making that allegation, but they have not been provided. The appellant makes the point that the names are different and are in any case common in Bangladesh. This is a plausible explanation.
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> 57. On the question therefore of the appellant's involvement with the criminal operation uncovered by Operation Meeker, and whether Md Abul Karim and AKM Rezaul Karim are the same person, I find that the respondent has not produced any evidence to counter the appellant's account.
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> 58. That leaves us with the matter of the letter from the bank and account statements dated 30 September 2012. The appellant asserts that the emails in the bundle do not demonstrate that it was these documents which were shown to the bank, resulting in their email dated May 2015 suggesting that the documents were false.
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> 59. I have considered this aspect of the evidence with care. Having read the email exchange dated May 2020 I am satisfied that the emails from the FCO to the bank enclosed the letter from the bank dated 30 September 2012 and the account statements which are in question. I find that the email from the bank clearly demonstrates that the documents did not emanate from them and that Kalam Enterprise did not hold an account with them.
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> 60. Taking into account the guidance in **Balijagari** *[sic]* I conclude that it is not sufficient in relation to this matter for the appellant to simply respond to the respondent's evidence of deception with the assertion that the documents are genuine. There is prima facie evidence that they are not. It would have been open to the appellant to seek out other documentary evidence, from the bank or from other persons, to verify the documents if that is his case. However I find that neither his witness statement nor his father's affidavit deal with this central point about whether the documents are genuine or not. Both of them assert that the funds were there but were withdrawn. It is suggested that the documents could not be verified because the funds had been removed. However the email from the

bank dated 20 May 2015 does not say that the information could not be verified – it states clearly that the letter had not come from them, and that Kalam Enterprise was not an account holder. I find that the appellant has not provided a plausible explanation for that information.

61. As a result I find that it is more likely than not that the bank letter and statements submitted to the respondent by the appellant as part of his tier 1 visa application in 2012 were not genuine.

62. **Balijigari** *[sic]* makes it clear that I must go on to consider whether the appellant himself acted dishonestly. The appellant does not seek to argue that, if the documents were false, he presented them in good faith without knowledge that they were not genuine. Nevertheless I have considered that possibility. I conclude that it is not feasible. There would be no reason for Mr Kalam to produce false documents and provide these to the appellant and his brother without their knowledge for the purposes of a tier 1 application. It is difficult to see what he would gain from that. The appellant's case however is that the funds were deposited by Mr Kalam and then withdrawn. That assertion is contradicted by the email from Bangladesh Commerce Bank Ltd dated 20 May 2015 and the statement of Simon Freese. The appellant has not provided a plausible explanation as to why that evidence is incorrect.

63. Taking all the evidence into account, and applying the appropriate burden of proof, I find that the respondent has not demonstrated that the appellant participated in the criminal conspiracy uncovered by Operation Meeker. Nor have they shown that AKM Rezaul Karim and Md Abul Kalam are the same person. I go on to find however that it is more likely than not that the appellant deliberately and dishonestly presented documents to the respondent that were not genuine and that the threshold required by section 322(5) is met.

64. The refusal letter is a detailed and careful document which takes into account the appellant's life in the UK and matters such as the appellant's voluntary and front-line work during the pandemic. The respondent's conclusion is that his application for indefinite leave to remain should be refused on grounds of his conduct. A full assessment was carried out and the appellant was given the chance to make representations about the allegations of deception before the decision was made. I find that section 322(5) applies to this case.

65. As a result of these findings I conclude that the appellant does not meet the requirements of section 276B in relation to an application for leave to remain on the basis of his long residence. This is on the basis of his conduct and the fact that his application falls for refusal on other grounds."

17. At paras 66-68, the judge considered Article 8, beginning with an assessment of whether the appellant satisfied the requirements of para 276ADE(1) of the Immigration Rules. She found that the appellant did not meet the requirements of para 276ADE(1).

18. Finally, the judge considered Article 8, explaining the factors she found for and against the appellant, at paras 69-75. She found that the removal of the appellant would not amount to a disproportionate interference with his private life in the United Kingdom (para 76).

19. In view of ground 3, I now set out paras 66-76 of the judge's decision:

"66. An Article 8 assessment must be carried out as this is the basis of the appeal. I accept that Article 8 is engaged as the appellant has been here for a considerable period and has established a significant private life in the UK. I consider first of all paragraph 276ADE which deals with private life under the immigration rules. I note first that this section only applies if the application does not fall for refusal under any of the suitability provisions. In this case I have found that the appellant cannot meet paragraph 276B and that paragraph 322(5) applies. Nevertheless in case I am wrong on that I go on to consider the other provisions of 276ADE.

67. The appellant cannot meet any of the residence conditions set out in that paragraph. I go on to consider whether paragraph 276ADE(vi) applies.

68. The appellant asserts that he would face very significant obstacles to integration back in Bangladesh in light of the length of time he has spent here and his lack of social connections. I note however that he lived there until he was 22 before arriving in the UK to study. There is no suggestion that he no longer speaks the language. I also take into account that the appellant has obtained educational qualifications in the UK as well as substantial work experience in the hospitality sector. He would be well placed to find employment in Bangladesh and re-establish himself. He is not able to meet 276ADE(vi).

69. I approach my evaluation of Article 8 by reference to the five questions to be asked as set out in paragraph 17 of Razgar [2004] UKHL 27.

70. I start by reminding myself of the passage cited above from SS (Congo), in turn citing Beatson LJ in Haleemudeen, that the rules are more than a starting-point. They must be given weight as showing the Secretary of State's policy as to where the balance of interest generally lies. I find that the rules are not met in this case.

71. Section 117B (1) states that the maintenance of effective immigration controls is in the public interest. Where a person is not able to meet the requirements of the rules, this suggests that there will be a public interest in his removal.

72. There are factors which favour the appellant when his situation is considered through the lens of the other subsections of 117B. He speaks good English and has supported himself financially throughout his period of stay in the UK. The private life that he has established here was not formed at a time when his immigration status was precarious as there is no evidence that he has overstayed or has worked illegally.

73. I go on to consider the question of proportionality taking all the factors into account. The appellant has lived in the UK for around 13 years. He has studied here and has been in employment for some time. I accept that he is working in a sector where there is a shortage of staff at present. He has formed a network of friends and enjoys his social life here. He has contributed to the community in the work he carried out during the pandemic.

74. Unfortunately the appellant's relationship with RH, which led to him being granted leave on family life grounds in 2018, appears to have come to an end or at least be stalled at present. Unlike his first appeal, the appellant cannot rely upon a relationship akin to marriage as a compelling ground for seeking further leave to remain.

75. On the negative side of the balance sheet, I find that there is compelling evidence that the appellant acted dishonestly in submitting documents to the respondent that were not genuine, in an effort to obtain a tier 1 visa. I find that this counts heavily against the appellant.

76. Having applied the structured approach envisaged by section 117B and also considered all matters in the round, I come to the conclusion that although the appellant has established a significant private life here and has contributed to British society both as an employee and as a volunteer during the pandemic, this cannot outweigh the fact that he made a dishonest application in an attempt to obtain an immigration advantage. In all the circumstances I find that to remove the appellant would not amount to a disproportionate interference with his private life in the UK."

(C) THE GROUNDS

20. The grounds may be summarised as follows:

(i) Ground 1: The judge erred in permitting the respondent to rely upon evidence of fraud in relation to the bank statements, in that, she failed to apply the correct test. In reliance upon Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398 (IAC), endorsed by the Court of Appeal in SSHD v BK (Afghanistan) [2019] EWCA Civ 1358, and also in reliance upon the judgments

of the Court of Appeal in Ullah v SSHD [2019] EWCA Civ 550 and Sultana v SSHD [2021] EWCA Civ 1876, the grounds contend that the correct test in deciding whether the respondent was to be permitted to rely upon the new evidence was the test in Ladd v Marshall, which was essentially mirrored in principle 7 of the guidance set out in Devaseelan v Secretary of State for the Home Department * [2002] UKIAT 702.

Given that the judge found, at para 44, that "*information suggesting that the bank documents were false was available from 2015 onwards*", the grounds contend that the Ladd v Marshall test was not satisfied because the respondent, with reasonable diligence, could have provided that information to the First-tier Tribunal ("FtT") in the appeal that was heard before Judge Chamberlain. It was therefore not open to the respondent to raise the issue as to the bank statements in the appeal before the judge.

The judge's reference to the criminal proceedings in the Operation Meeker cases did not assist because she resolved the "*Operation Meeker issue*" in the appellant's favour, at para 63. There was no good reason for the respondent not to have relied upon the relevant information concerning the bank statements in the appeal before Judge Chamberlain.

In any event, in allowing the respondent to raise the issue as to the false bank documents in the present appeal, the judge gave no consideration to the public interest in the finality of litigation. The judge erred by not weighing it in the balance in making her decision.

(ii) Ground 2: At para 7, the judge incorrectly placed the burden of proof upon the appellant. Para 7 of the judge's decision is inconsistent with para 52. Given that the respondent had alleged deception, the burden of proof was upon her. Para 52, where the judge referred to the "*three-stage process*" cannot displace what the judge stated at para 7, that the burden of proof was upon the appellant. One could not be confident that the judge had not applied the wrong standard of proof. The benefit of any doubt should be given to the appellant.

(iii) Ground 3: The judge erred in her consideration of whether para 322(5) of the Immigration Rules applied in the instant case. As the Court of Appeal explained in Balajigari at paras 33-34 and 38-39, there were two stages. In Balajigari, the Court of Appeal said, in relation to the first stage:

> "34. There must be (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character).
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> 38. … the assessment of undesirability requires the decision-maker to conduct a balancing exercise informed by weighing all relevant factors. That would include such matters as any substantial positive contribution to the UK made by the applicant and also circumstances relating to the (mis)conduct in question, e.g. that it occurred a long time ago."

In relation to the second stage:

> "39. … the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused … it is at this stage that the Secretary of State must consider such factors as the welfare of any

minor children who may be affected adversely by the decision and any human rights issues which arise ..."

The judge erred in relation to both the first stage and the second-stage as follows:

(a) Only after arriving at her conclusion at para 64, that para 322(5) of the Immigration Rules applied and that the appellant did not qualify under the Immigration Rules, did the judge consider, at paras 66-76, the human rights issues. She therefore put the cart before the horse. Pursuant to Balajigari, the judge was obliged to consider the human rights issues as part of the balancing exercising under para 322(5) of the Immigration Rules in order to decide whether discretionary refusal was justified. Accordingly, the human rights issues were not weighed in the balance in the balancing exercise under para 322(5).

(b) The judge did not weigh in the balance, as required by Balajigari, that the alleged misconduct "*occurred a long time ago*". The allegation against the appellant is that he submitted false bank documents in an application made 10 years ago in 2012. The fact that the alleged misconduct was historical was materially relevant. So was the fact that the respondent did not raise any issue about it until her latest decision. The balancing exercise carried out by the judge under para 322(5) was therefore defective.

(D) SUBMISSIONS

(i) Ground 1

21. Mr Malik relied upon the grounds and his skeleton argument. He submitted that the correct test was the test in Ladd v Marshall. In Sultana, it was held that principle (7) of Devaseelan mirrored the Ladd v Marshall test. The evidence (at RB/130) that the bank statements were false has been in the respondent's possession since May 2015. The question was whether that evidence could not have been obtained with reasonable diligence for use at the hearing before Judge Chamberlain. Mr Malik submitted that the judge did not apply this test. The DVR was available to the respondent as at the date of the hearing before Judge Chamberlain.

22. The respondent has a published policy according to which applications for LTR by individuals in circumstances where the individual has pending criminal proceedings should be placed on hold pending the outcome of the criminal proceedings. The respondent was not contending that the bank statements that were the subject of the DVR were not disclosable at the hearing before Judge Chamberlain. The appellant was not part of the criminal proceedings and the bank statements were not being used in the criminal proceedings. The bank statements had nothing whatsoever to do with the criminal proceedings. The judge decided the broader issue of Operation Meeker investigations in the appellant's favour, at para 63. The judge accepted that the appellant had not participated in the criminal conspiracy. The evidence as to the bank statements did not meet the Ladd v Marshall test and therefore the respondent should not have been allowed to raise the deception issue in reliance upon the bank statements being false, in Mr Malik's submission.

23. Finality of litigation is in the public interest. If the judge had resolved the allegation that the bank statements were false in the appellant's favour and allowed the appeal, it could not be said, in Mr Malik's submission, that the respondent could raise the deception issue again in reliance upon another bank statement.

24. Mr Malik asked me to set aside the judge's decision on the basis that the Ladd v Marshall was not satisfied and that the respondent could not raise the deception issue in reliance upon the bank statements being false.

25. Mr Terrell submitted that the respondent's policy was more nuanced than Mr Malik suggested, although in his submission, the policy may not be relevant. In the instant case, the decision letter sought to rely not only on the fact that the bank statements were false but it also stated that the appellant was associated with individuals who were convicted of criminal offences including conspiracy to defraud in respect of immigration offences and cheating the public revenue. The link between the appellant and the individuals who were convicted was that the appellant's application was submitted by Immigration4u, the firm that was used to perpetrate the frauds, as well as the individuals who were prosecuted, the fact that the appellant did not submit a business plan, and the false bank statements, all of which the respondent relied upon in order to show that the appellant's Tier 1 application was a bogus application.

26. In Mr Terrell's submission, the outcome of the criminal investigation and prosecution was going to be relevant. The respondent was entitled not to make the deception allegation in relation to the bank statements until she had all evidence including the outcome of the trial of the individuals who were prosecuted. Mr Terrell submitted that the respondent's reliance upon the DVR could not amount to an abuse of process.

27. Mr Terrell submitted, in relation to the Ladd v Marshall test, that the respondent was not trying to re-litigate the same issue. The respondent was not saying that the decision of Judge Chamberlain should be departed from. In the appeal before the judge, the respondent raised a new deception allegation in relation to different documents. This was to be distinguished from the facts in Mubu where the respondent sought to rely upon fresh evidence in relation to the same deception allegation concerning the same document which had been decided against the respondent in an earlier appeal, whereas in the instant case the respondent had not raised the deception allegation concerning the bank statements in the appeal before Judge Chamberlain because she considered it inappropriate to do so.

28. In Mr Terrell's submission, it is clear from Sultana and Patel that the judge had to decide the question of fairness when considering whether the respondent's reliance upon the DVR was an abuse of process. In Mr Terrell's submission, it was the question of fairness as opposed to the Ladd v Marshall test that the judge had to consider.

29. Mr Malik submitted that Mr Terrell was wrong in submitting that the issue regarding the bank statements was linked to the Operation Meeker criminal investigations. The judge took the view that the two were separate issues. The bank statements had nothing to do with Operation Meeker. On any view, they were separate issues, in Mr Malik's submission.

30. In response to Mr Terrell's submission that the respondent took the view that it was inappropriate to rely upon the DVR in the appeal before Judge Chamberlain, Mr Malik submitted that the respondent took a strategic decision not to rely upon the bank statements and the DVR. She took the view that she could rely upon the TOEIC issue in order to remove the appellant. It was for the respondent to establish that the evidence in the form of the DVR and bank statements was evidence that she could not have obtained with reasonable diligence in the appeal before Judge Chamberlain.

31. Mr Malik submitted that the submission of Mr Terrell that the Ladd v Marshall test did not apply and that it was necessary to consider fairness was irreconcilable with the authorities in his (Mr Malik's) skeleton argument. It was also inconsistent with the rationale behind one-stop appeals. The Court of Appeal's judgment in Patel was irrelevant because that case concerned different parties. If the parties are the same, then the Ladd v Marshall test applies.

(ii) Ground 2

32. Mr Malik submitted that para 7 of the judge's decision, where she stated that the burden of proof was upon the appellant, was not limited to Article 8 and was inconsistent with para 52. Furthermore, in his submission, paras 52 and 53 of the judge's decision, which referred to the shifting evidential burden, was inconsistent with paras 45-46 of DK and RK (ETS: SSHD evidence; proof) India [2022] UKUT 00112 (IAC) in which the then President stated that the burden of proof does not shift. In any event, the judge had made two inconsistent statements with regard to the burden of proof, at paras 7 and 52. The benefit of the doubt as to whether the judge had applied the burden of proof correctly should be given to the appellant.

33. Mr Terrell drew my attention to the fact that the grounds did not include a ground challenging the judge's application of the three-stage approach in deciding the deception issue pursuant to the SM and Qadir and therefore he submitted that Mr Malik did not have permission to argue this point. Mr Malik agreed.

34. Mr Terrell submitted that there was no inconsistency between para 7 and para 52 of the judge's decision. At para 7, the judge was referring to the burden of proof in relation to Article 8. It is clear from the judge's decision as a whole that she placed the burden of proof on the deception allegation on the respondent. In his submission, there is nothing in ground 2.

(iii) Ground 3

35. Mr Malik submitted that the judge had to consider whether the appellant's dishonesty was serious enough to bring him within the ambit of para 322(5) (the first stage) and, if so, whether a refusal under para 322(5) was justified (the second stage), before proceeding to consider Article 8. Paras 34 and 39 of Balajigari makes it clear that one factor in the first stage was whether the conduct occurred a long time ago. In the instant case, the alleged misconduct took place in 2012. Mr Malik submitted that there was a complete failure by the judge to take this factor into account in deciding whether para 322(5) applied in the instant case. The judge found that para 322(5) applied because the bank statements were false.

36. Furthermore, the judge was obliged to consider Article 8 issues in deciding whether para 322(5) applied, whereas she considered Article 8 separately.

37. Mr Terrell reminded me that the findings of fact at paras 53, 61 and 63 had not been challenged. In his submission, the judge considered the discretion issue at para 64, where she specifically referred to the respondent's consideration of the appellant's life in the United Kingdom and matters such as his voluntary and front-line work during the pandemic. In essence, the judge agreed with the respondent's conclusion that para 322(5) applied, although he accepted that the judge did not refer in terms to the fact that the appellant's misconduct had occurred ten years ago.

38. In relation to the contention that the judge failed to take into account human rights considerations in deciding the balancing exercise in relation to para 322(5), Mr Terrell referred me to para 25 of the skeleton argument that was relied upon before the judge and para 23 of the same skeleton argument which listed a number of factors that were relied upon. It was therefore clear that it was not argued before the judge that she had to consider and take into account human rights considerations in deciding how the discretion in para 322(5) should be exercised in the appellant's case.

39. Furthermore, in Mr Terrell's submission, there was nothing in the judgment in Balajigari that suggested that a Tribunal must always take into account human rights considerations when deciding how the discretion in para 322(5) should be exercised. He referred me to para 39 of Balajigari where the Court of Appeal said:

> "39. Mr Biggs submitted that at this second stage of the analysis the Secretary of State must separately consider whether, notwithstanding the conclusion that it was undesirable for the applicant to have leave to remain, there were factors outweighing the presumption that leave should for that reason be refused. He submitted that it is at this stage that the Secretary of State must consider such factors as the welfare of any minor children who may be affected adversely by the decision and any human rights issues which arise. **That seems to us in principle correct. There will, though no doubt only exceptionally, be cases where the interests of children or others, or serious problems about removal to their country of origin, mean that it would be wrong to refuse leave to remain (though not necessarily indefinite leave to remain) to migrants whose presence is undesirable.**"
>
> (Emphasis supplied)

40. Mr Terrell submitted that para 39 of Balajigari does not suggest that human rights considerations must always be taken into account on the question of whether the discretion should be exercised in an individual's favour. To the contrary, para 39 suggests that it is not necessary in every case. In any event, Mr Terrell submitted that the judge did consider Article 8.

41. Concerning disposal, Mr Terrell confirmed that, if I decided ground 1 in the appellant's favour, I should re-make the decision on the appellant's appeal by allowing it on the basis that, in that event, the appellant satisfied the requirements for ILTR on the basis of his long residence.

(E) POST-HEARING WRITTEN SUBMISSIONS

42. At the end of the hearing on 5 June 2023, I gave directions for: (i) the respondent to file and serve a copy of any policy and/or any guidance relating to pending applications in cases where there is an ongoing investigation or criminal proceedings as at 17 April 2018 (the date of the decision that was the subject of the appeal before Judge Chamberlain) and as at 6 December 2018 (the date of promulgation of Judge Chamberlain's decision), together with any published or unpublished policy regarding the staying of applications for LTR by individuals who may have some link with individuals being investigated or prosecuted as a result of the Operation Meeker investigations, together with her submissions thereon; and (ii) the appellant to respond.

43. The Upper Tribunal received the respondent's submissions by email on 26 June 2023 and the appellant's submissions by email dated 4 July 2023. I was not informed of the receipt of these documents until 1 August 2023 when I enquired whether they had been received.

44. My reason for giving these directions was that, although I had been provided with a copy of a document issued by the respondent entitled: "*Impending Prosecutions*", version 7.0 dated 20 June 2016, this document was irrelevant, as Mr Malik submitted, because it concerned deportations and whether deportation action should be deferred pending the outcome of a prosecution against the individual to be deported.

(F) ASSESSMENT

45. I have taken into account and considered everything that is before me, oral and written, including the parties' post-hearing submissions.

(i) Ground 1

46. In his post-hearing submissions dated 3 July 2023, Mr Malik relied upon para 3 of Mr Terrell's post-hearing submissions dated 26 June 2023 to submit that it is clear that the respondent had internal Operation Meeker guidance aimed at Tier 1 applications.

47. However, in my view, paras 4-6 of Mr Terrell's post-hearing submissions are relevant. At para 4, Mr Terrell stated that there was no guidance in force, internal or external, in cases where a person had made an application for LTR on human rights grounds (including under Appendix FM) and the Secretary of State had evidence that the person had submitted false documents in a previous Tier 1 application linked to Operation Meeker, although it was possible that there was some form of general approach that decision-makers took in these circumstances (para 5).

48. In addition, Mr Terrell stated (at para 6) that, outside the context of Operation Meeker, there was no general policy, published or unpublished, for caseworkers dealing with in-country applications for LTR on human rights grounds in circumstances where the decision-makers had evidence that could be used to justify a refusal on suitability grounds and there was a pending prosecution/investigation which, whilst not against the specific applicant, had a connection to that evidence.

49. However, at para 8, Mr Terrell submitted that, in essence, that the Secretary of State was unlikely to be able to argue successfully that conduct that amounts to an abuse of process does not amount to such abuse because she was acting consistently with her policy. I agree with Mr Terrell that the caselaw to which I was referred by Mr Malik and Mr Terrell does not support such an approach.

50. It follows that the existence or otherwise of any such policy, published or unpublished, is irrelevant. The question whether the respondent's reliance upon the DVR in the appeal before the judge amounted to an abuse of process falls to be decided in accordance with the principles to be derived from the cases to which I have been referred, all of which I have considered very carefully.

51. I agree with Mr Malik that the judgment in Patel can be distinguished on the basis that, although the factual issue in the two appeals in the FtT was the same (i.e. whether the wife of the appellant in Patel had used a proxy in an English language test), the parties were different, in that, the first appeal was an appeal by the husband and the second an appeal by the wife. Nevertheless, the Court of Appeal at para 31 of the decision in Patel summarised, without adverse comment and albeit by way of obiter, paras 45-50 of the decision in Sultana.

52. The thrust of Mr Malik's submissions before me was, in effect, that the test that the judge had to apply was the Ladd v Marshall test. In the instant case, that meant, in his submission, that the only question for her was whether the respondent could have obtained the DVR with reasonable diligence and relied upon it in the appeal before Judge Chamberlain. This narrow single-question approach is the approach that Mr Malik advanced in Sultana, as para 51 of Sultana demonstrates. Mr Malik's reliance upon this narrow single-question approach to the exclusion of all other considerations is inconsistent with the authorities to which I have been referred. The correct approach is more nuanced. Whilst principle (7) of Devaseelan mirrors Ladd v Marshall, provides consistency of approach and takes account of the public interest in the finality of litigation, there is also flexibility which takes account of the fact that a tribunal judge must conscientiously decide the case in front of them applying principles of fairness.

53. The Court of Appeal in Sultana quoted, with approval, from the judgment of Rose LJ (as she then was) in BK, saying at paras 47-50 as follows:

> "47. *Devaseelan* was decided when immigration appeals were heard by adjudicators rather than judges of the FTT. Rose LJ confirmed that the principles apply equally to the FTT. The *Devaseelan* principles are expressed by reference to an individual appellant who is seeking to overturn a decision of the SSHD. They apply with equal force to the SSHD as a party to a second appeal. Thus, the guidance set out in principles (6) and (7) means that, where in relation to a particular issue the SSHD seeks to rely on facts not materially different to those on which she relied in the first appeal, the FTT judge hearing should regard the issue as having been settled in the decision reached at the first appeal.
>
> 48. Rose LJ noted that this guidance had been approved by this court in *Djebbar v SSHD* [2004] EWCA Civ 804. In *Djebbar* Judge LJ said at [40]: "… The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."
>
> 49. As noted by Mr Malik, Rose LJ cited with approval paragraph 66 of the UT decision in *Mubu.* This was an example of the flexible approach enjoined in *Djebbar*. She concluded her review of the principles to be applied at [39]:
>
> > "There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in *Djebbar* referred to the need for consistency of approach. The Court of Appeal in *AA(Somalia) v SSHD* [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently."
>
> 50. I see no basis on which to depart from those principles which have been applied consistently in immigration appeals. Rose LJ went on to say at [44]:
>
> > "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they have previously succeeded particularly where the point was not then challenged on appeal.""

54. BK concerned a case in which notes taken by a Home Office Presenting Officer at the earlier appeal were taken into account by the Upper Tribunal in re-making the decision on the appellant's second appeal together with his oral evidence at the hearing of the appeal before the Upper Tribunal as a consequence of which the Upper Tribunal departed from an adverse finding against him in the earlier appeal. The Court of Appeal said, inter alia, that second tribunals should not be restricted to looking at material that post-dated an earlier decision as such a restriction would be inconsistent with the recognition in case law that every tribunal had to conscientiously decide the case in front of it. The Court made the point that this was not because of estoppel or *res judicata* but because of fairness, although tribunals had to be alive to the unfairness to the opposing party of having to re-litigate a point on which they had previously succeeded.

55. Plainly, the notes of the Home Office Presenting Officer in BK was material that was in existence and related to evidence that the judge in the first appeal had heard. Yet, the Upper Tribunal did not err in taking it into account.

56. In BK, the Court approved of the approach taken by the Upper Tribunal in Mubu, particularly at para 66 which reads:

> "66. We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require…."

57. In Mubu, the Upper Tribunal decided that the finding by a judge in favour of the appellant in an earlier appeal in relation to a factual issue should be regarded as settling the factual issue in question in a later appeal in which the same factual issue arose on the same matter. In reaching that decision, the Upper Tribunal took into account the Secretary of State's failure to produce all of the relevant evidence to the first judge that ought to have been, or could have been with reasonable diligence, made available to that judge.

58. Before me, Mr Malik submitted that Mr Terrell's submission that it was necessary to consider fairness could not be reconciled with the authorities that he (Mr Malik) had relied upon and that it was also inconsistent with one-stop appeals. I do not accept these submissions, for the reasons I have given above. Mr Malik's submission regarding one-stop appeals ignores the fact that the question whether the respondent's reliance upon the DVR was an abuse of process falls to be decided on the basis of recognised principles, i.e. principle (7) of Devaseelan which mirrors the Ladd v Marshall principles taking into account the public interest in finality of litigation, the duty of tribunals to conscientiously decide the case in front of them applying principles of fairness including the potential unfairness of a party to re-litigate a point on which they have previously succeeded (para 31 of Patel which, albeit obiter, represents a summary of paras 45-50 of Sultana).

59. There are cases in which fresh evidence of fraud has been considered in a later appeal in order to re-open an earlier positive finding in an individual's favour. For example, in Ullah, the fresh evidence was evidence of fraud that the respondent did not have at the earlier appeal and could not have obtained with reasonable diligence. However, in the instant case, the respondent did have the DVR at the date of the decision of Judge Chamberlain. Accordingly, there can be no question of my reaching a decision that the respondent was entitled to rely upon the DVR at the hearing before the judge on the basis that it was evidence of fraud. That is simply not a route on which the respondent can rely in the instant case, nor did Mr Terrell attempt to do so.

60. Mr Malik submitted, more than once, that the judge had found that the appellant was not involved in the criminal conspiracy. That is simply not the case. The judge found that the respondent had not demonstrated that the appellant had participated in the criminal conspiracy (para 63). This finding needs to be seen in the context of the fact that, as the judge noted, the respondent had not submitted the witness statement referred at page 3 of the decision letter or any other documentary evidence of interactions between the appellant and the criminal group (paras 22 and 55 of the judge's decision); that the respondent had not produced any evidence to support her assertion that Md Abul Kalam and AKM Rezaul Karim Khan were one and the same person (para 56); and that the appellant's explanation, that the names were different and were in any case common in Bangladesh, was a plausible explanation (para 56). I mention this fact in passing, simply to make it clear. It is not a reason for my decision on ground 1.

61. My reasons for my decision on ground 1, applying the case-law to which I have been referred, are as follows: The order in which I set them below is not meant to convey their relative importance to each other.

62. Firstly, it is wholly inappropriate to decide whether the respondent ought reasonably to have relied upon the DVR in the appeal before Judge Chamberlain with the benefit of hindsight, i.e. with the benefit of knowing that the judge decided that the respondent had not established the first allegation because the respondent failed to submit the witness statement referred to at page 3 of the decision letter and other documentary evidence to establish her assertion that there had been interactions between the appellant and the individuals named in the decision letter who were being prosecuted.

63. It is clear from the decision letter that the respondent's case in relation to both allegations was that they were inter-related. She relied upon the DVR in support of the second allegation. In support of the first allegation, she relied upon the evidence of interactions between the appellant and the individuals named in the decision letter who were being prosecuted and the fact that the appellant had authorised Immigration4u to act for him in relation to his Tier 1 application. She also relied upon the fact that the appellant had not submitted a business plan in his Tier 1 application. All these matters along with other matters as detailed in the decision letter were interlinked and showed that the appellant's Tier 1 application was a bogus one, on the respondent's case as advanced in the decision letter.

64. In these circumstances, I agree with Mr Terrell that the outcome of the criminal proceedings was going to be relevant. If, for example, all of the individuals who were named in the respondent's decision letter had been acquitted at trial, that would have been a relevant consideration in the respondent's decision whether to allege that the appellant's entire Tier 1 application was bogus or whether to restrict her refusal under para 322(5) to the allegation that the appellant had submitted false bank documents with his application. In view of the fact that the criminal proceedings were not concluded until November 2018, i.e. around the time when the appellant’s first appeal was being heard, it was entirely reasonable for the respondent to await the conclusion of the criminal proceedings. I therefore reject Mr Malik’s submission that the two allegations were entirely separate. The submission is misconceived.

65. Furthermore, given that the criminal proceedings were not concluded until November 2018, the first opportunity that the respondent had of relying upon the DVR in order to refuse an application was when the appellant made the application of 15 April 2019 which was the subject of the decision in the appeal before the judge.

66. In addition, the judge noted that the decision letter stated, at page 6 (RB/9), that, although Operation Meeker existed at the time of the decision of Judge Chamberlain, the investigation was not completed. There is no reason to doubt that as a correct statement of fact.

67. Mr Malik's submission that the judge was correct to treat the two allegations as separate is simply incorrect. There is nothing to indicate that she considered that they were entirely separate. The fact that the respondent had not produced the evidence to substantiate her case on the first allegation meant that the respondent's case, that the appellant's entire Tier 1 application was bogus, was not capable of being established but that did not prevent the judge from proceeding to determine the second allegation which she was able to decide and which she did proceed to decide.

68. It is necessary to apply the phrase "*reasonable diligence*" in a sensible way in the instant case, in recognition of the fact that the issue is not whether the respondent could (literally speaking) obtain the document with reasonable diligence for use in the appeal before Judge Chamberlain. There is no dispute that she has had it in her possession since May 2015. Plainly, the focus of the submissions before me, in addressing the "*reasonable diligence*" issue, was whether the respondent could reasonably be expected to have deployed the DVR in the appeal before Judge Chamberlain and advanced the second allegation before her. On that question, I have decided that she could not reasonably have been expected to do so, for the reasons I have given above.

69. For the same reasons, I am satisfied that there was "*some very good reason*" for the purposes of principle (7) of the Devaseelan principles, for the respondent not to have relied upon the DVR in the appeal before Judge Chamberlain.

70. It is important to note that the factual issue that was before Judge Chamberlain was not the same. The appeal before Judge Chamberlain concerned whether or not the appellant had used a falsely obtained English language test certificate in his application of 5 May 2017 for LTR on the basis of his family life with RH, whereas the appeal before the judge was whether or not the appellant had used different documentation that had been falsely obtained in a different application, i.e. false bank documentation in his Tier 1 application. Accordingly, it is simply not the case that the respondent was seeking to re-litigate the same factual issue, as Mr Malik submitted. It is simply not the case that the appellant had succeeded on the same factual issue previously. This is an important consideration in taking into account the principle that the finality of litigation is in the public interest. That principle does not apply where the factual issue is not the same. In any event, even if it is relevant, it has much less relevance than if the same factual issue was being re-litigated.

71. Mr Malik questioned whether, if the judge had resolved the allegation that the bank statements were false in the appellant's favour and allowed the appeal, the respondent could be permitted to raise the deception issue again in reliance upon another bank statement (see my para 23 above). However, the analogy is misplaced because in such an event, the respondent would be seeking to re-open the same factual issue on the basis of fresh evidence. Even in such a case, it is not a foregone conclusion that the respondent's reliance upon such fresh evidence would amount to an abuse of process - see, for example, Ullah.

72. For the reasons given above (with the exception of para 60 above), I have concluded that the judge did not err in law in rejecting the submission advanced on the

appellant's behalf that the respondent's reliance upon the DVR amounted to an abuse of process.

73. Ground 1 is therefore not established.

(ii) Ground 2

74. Mr Malik agreed that he did not have permission to argue that the judge erred in applying the shifting evidential burden pursuant to SM and Qadir. In any event, I do not think that, in DK and RK, Lane J (the then President) intended his decision to be inconsistent with binding Court of Appeal authority to the contrary. However, in case I am wrong about that, the Tribunal is bound by such Court of Appeal authority, i.e. the Court of Appeal's judgment in SM and Qadir [2016] EWCA Civ 1167 which upheld the Upper Tribunal in SM and Qadir.

75. At para 7, the judge placed the burden of proof upon the appellant. This is a correct direction as to the applicable burden of proof in relation to para 276ADE(1) of the Immigration Rules and the appellant's Article 8 claim, although I accept that the judge did not make it explicit that her direction at para 7 as to the burden of proof applied in relation to the para 276ADE criteria and Article 8 only.

76. Nevertheless, it is abundantly clear that, when she came to consider the para 322(5) issue, she correctly placed the burden of proof upon the respondent – see, for example, the first two sentences of para 63 where she said:

> "63. Taking all the evidence into account, and applying the appropriate burden of proof, I find that the respondent has not demonstrated that the appellant participated in the criminal conspiracy uncovered by Operation Meeker…."

77. I reject Mr Malik's submission that there is any element of doubt as to whether or not the judge applied the burden of proof correctly in relation to para 322(5). There is no doubt that she placed the burden of proof correctly upon the respondent in relation to para 322(5) and therefore no real inconsistency between para 7, which plainly concerned para 276ADE(1) and Article 8, and para 52 of the judge's decision.

78. There is therefore no merit in ground 2.

(iii) Ground 3

79. I do not accept that the judge failed to take into account Article 8 considerations in her assessment of the second stage, i.e. in deciding whether the appellant's presence in the United Kingdom is undesirable taking proper account of all relevant circumstances. In the first place, she reminded herself of the two-stage approach explained in Balajigari at paras 46-50 of her decision. At para 63, she stated her conclusion in relation to the first stage. This was followed by para 64 where she referred to the fact that the refusal letter was a detailed and careful document which took into account the appellant's life in the United Kingdom and matters such as his voluntary and front-line work during the pandemic. In essence, she agreed with the respondent's decision that, having taken account of such considerations, his application for ILTR should be refused on grounds of his conduct.

80. In any event, the judge considered the appellant's Article 8 at paras 69-76. Her assessment has not been challenged. The fact that the dishonesty took place more than ten years ago added to the factors that the judge identified in the appellant's favour, taken cumulatively, were not such that, on any reasonable view, they could

have resulted in the exercise of the discretion in paragraph 322(5) in the appellant's favour by any reasonable judge, properly directed as to the applicable case-law. It is clear from para 39 of Balajigari (quoted at my para 39 above) that an exceptional case must be shown for an exercise of discretion in an appellant's favour. The appellant has no partner in the United Kingdom and there is no evidence that he has any dependent children in the United Kingdom. There are no exceptional features of his private life, on any reasonable view.

81. In the written grounds of appeal (see my para 20(iii)(b) above), reliance is placed upon the fact that the judge did not take into account that the respondent did not raise the deception allegation in relation to the bank documentation submitted with the appellant's Tier 1 application until her latest decision, i.e. the decision that was the subject of the appeal before the judge. This submission simply ignores the fact that the respondent relied upon the allegation at the first opportunity that presented itself following the conclusion of the criminal proceedings in 2018. The first opportunity that presented itself was the appellant's application of 15 April 2019 which was the subject of the decision dated 24 June 2021. This is because this was the first application he made following the promulgation of Judge Chamberlain's decision on 6 December 2018 and the conclusion of the criminal proceedings. Accordingly, there has been no unreasonable delay on the part of the respondent.

82. Ground 3 therefore does not establish any material error of law.

83. The appellant's appeal to the Upper Tribunal is therefore dismissed.

84. I extend my unreserved apology to the parties for the delay in my decision being finalised.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent decision stands.

Signed
Upper Tribunal Judge Gill Date: 29 September 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**