Neutral Citation Number: [2019] EWCA Civ 550

Case No: C2/2018/0236

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL,
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Rintoul
JR/4589/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HADDON-CAVE

- -

Between:

REHMAT ULLAH	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Sonali Naik QC (instructed by Abbott Solicitors) for the Appellant
Shakil Najib (instructed by the Government Legal Department) for the Respondent

Hearing date: 7 March 2019

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is the appeal of Mr Rehmat Ullah ("the Appellant") from the decision of 13 December 2017 of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal Judge Rintoul) refusing his claim for judicial review of the Respondent's decisions of 12 March and 16 April 2016 to cancel his leave to enter the United Kingdom and to require him to attend on a stated date for departure from the country.

2. The appeal raises the question of the principles arising when, after unsuccessfully resisting an appeal to the First-tier Tribunal from a decision to grant indefinite leave to remain in the United Kingdom ("ILR"), the Respondent finds fresh evidence suggesting to him that the original claim to ILR had been fraudulent.

(B) Background Facts

3. The Appellant is now 67 years old, having been born on 4 January 1952. He entered the UK unlawfully, when aged 43, in 1996. On 16 November 2011 he applied for indefinite leave to remain ("ILR") in the UK on the basis of having been in the country for 14 years. His application was refused on 9 March 2012, but an appeal from that refusal was allowed by the First-tier Tribunal ("FTT") (Tribunal Judge Turkington) in a decision promulgated on 11 June 2012. Following that decision, the Appellant was granted ILR.

4. At some time in 2013, a "denunciation" of the Appellant was sent to the Respondent by an unknown member of the public, apparently bringing into question the basis upon which the Appellant had applied for ILR in 2011 and on which the FTT had found in his favour.

5. According to the Grounds of Defence to the judicial review claim, the letter sent to the Respondent in 2013 alleged that the Appellant had obtained a passport and visas under a date of birth different to that claimed in the application for ILR. It included a photocopy of a passport (numbered J359567) issued at Abu Dhabi on 5 November 2000 and a copy of a further passport (numbered B488351) issued on 6 December 1995, with an original entry of a birth date of 4 January 1952, which had been amended to 20 February 1960.

6. According to the Appellant, after the grant of ILR, he visited Pakistan twice in 2013 and encountered no difficulty with immigration officials on return to the UK. On 4 December 2015, he left the UK again to visit Pakistan. On return to the UK, on 16 January 2016, he was detained. He was interviewed and it was put to him that he had not resided in the UK for 14 years at the time of his ILR application, since on 10 June 2004 he had made an application in Islamabad for a visitor visa to the UK. He was refused leave to enter following that interview but was granted a temporary admission, pending further investigations.

7. The Respondent asserts that the investigations revealed, first, that J359567 was submitted to the British Embassy in Abu Dhabi on 10 November 2001 for the purpose of obtaining a UK visitor's visa. The family name given was "Rehmatullah" and the

date of birth was stated to be 20 February 1960. Secondly, the same passport was, it appears, submitted to the High Commission in Islamabad on 2 April 2003 in order to obtain a further visit visa for the UK; similar family details were given. Thirdly, the passport was submitted to the same High Commission on 10 June 2004, again to obtain another visit visa.

8. These features were put to the Appellant at an interview with immigration officials on 12 March 2016. He denied making the visa applications and insisted that he was in the UK at the relevant times. He acknowledged that J359567 contained his photograph, but denied that the signature was his; he claimed the passport was fraudulent. As for passport B488351, issued in 1995, he blamed the agent who had brought him to the UK in 1996, whom he had not seen since then, but he could not explain how the agent had obtained a recent photograph of him. He mentioned that there had been a burglary at his house in Pakistan on a date that he did not specify.

9. By the first of the decisions under challenge, made on 12 March 2016, the Appellant's Leave to Enter was cancelled. The Notice included the following:

> "At the time of the application on 16 November 2011 you claimed that you had been living continuously in the United Kingdom since 2nd January 1996 and had at least fourteen years continuous residence in the United Kingdom, however during further interview today you admitted that the photograph shown to you in Pakistani Passport No: J359567 issued in Abu Dhabi, UAE on 5/11/2000 was that of you; you also acknowledged that the details in the visit visa application for 2004 were those of yours. Furthermore, Home office records show that on 3 separate occasions visit visas (10/11/01, 7/5/03, 30/6/04) were issued to you.
>
> I am therefore satisfied that there is substantial evidence to conclude that at the time of your application in 2011 you had not been in the United Kingdom continuously for 14 years as claimed.
>
> I therefore cancel your leave to enter the United Kingdom.
>
> I have cancelled your continuing leave. If your leave was conferred by an entry clearance, this will also have the effect of cancelling your entry clearance."

The Appellant sought administrative review of the decision. Following that review, the decision of 12 March was maintained and the cancellation of the Appellant's leave to enter was confirmed. The review decision of 16 April 2016 included the following:

> "The Border Force officer has sight of the Home Office records relating to your application for ILR, the appeal determination in your favour of 11 June 2012, all remaining papers relating to visa applications made with the Pakistan passport J359567, including a copy of the bio data page of that passport and had conducted two interviews with you to test the credibility of the evidence

> held. I am satisfied that the decision maker did undertake all pertinent and necessary enquiries available to him and that the decision to refuse you leave to enter was therefore lawful.
>
> In your grounds for Administrative Review you further raise the common law principle "Res Judicata" and assert that, as a competent authority has determined in your favour on the issue of evidence of your claim to 14 years continuous residence in the UK at the time of your successful appeal, the Home Office cannot reopen the matter. However the Court has accepted that "there may be circumstances in which the executive may re-open a decision without appealing a determination of an adjudicator, for example, because there is fresh evidence, say of deception of the adjudicator about the facts on which the challenged decision was based…" (*Boafa* [sic] [2002] EWCA Civ 1294). The Home Office were not aware of the evidence relating to the three visa applications between 2001 and 2004 at the time of your appeal. I am satisfied that this constitutes new evidence and that had this been put before the Judge they would not have found as they did. I am therefore satisfied that the circumstances of *Boafa* [sic] apply to this case and that the Home Office are entitled to reopen this matter."

(C) **The Proceedings**

10. These judicial review proceedings were begun by claim form issued on 21 April 2016. Permission to apply for judicial review was granted by Upper Tribunal Judge Bruce by a decision of 15 August 2017 on two grounds, as follows:

> "She submitted first that the new evidence relied upon by the Secretary of State for the Home Department did not fall within one of the exceptions set out at paragraph 35 of *Secretary of State for the Home Department v TB* [2008] EWCA Civ 997. In the absence of any explanation from the Secretary of State as to why it was not produced before Judge Turkington that ground is arguable.
>
> Second, she submitted that there was procedural unfairness in that the Applicant was not given an opportunity to address the matters put to him in an interview on the 11th March 2016 before his leave was cancelled on the 12th. That ground is arguable."

11. The application was heard by Upper Tribunal Judge Rintoul on 22 November 2017 and was dismissed by his decision of 13 December 2013. Dealing with the first ground of challenge, the judge said the following (at paragraph 14):

> "14. There is little dispute, if any, that the relevant test to be applied in this case is whether the Secretary of State's evidence falls within the exceptions set out in *TB* which is in effect as Mr Najib submitted the test to be applied in *Ladd v Marshall*. That is a three part test. The first part of the test is whether the

> evidence now relied upon could with reasonable diligence have been discovered earlier prior to the appeal. Second, whether that evidence was likely to have had an impact on the case, that is, that it had an important if not necessarily decisive influence in immigration decisions and, third, the evidence must be apparently credible although not incontrovertible."

12. He examined the case under each of the *Ladd v Marshall* headings and found them satisfied. He held that there was, therefore, no merit in ground 1.

13. As for ground 2, the crux of the judge's decision can be found in paragraph 18 where he said this:

> "18. Turning to the second ground I consider that in addressing the issue of procedural unfairness it is important to note that in this case there were two interviews before a decision was taken. There was also a two month period between those two interviews. Having had regard to the records of the interview I am satisfied that the applicant was given a proper gist of the allegations made against him. Further, he did respond to those allegations. He accepted when asked that the photograph on one of the passports as shown in the visa application was him, the explanation that he gave that somehow it was the agent who had brought him to the United Kingdom and was using this makes, as the Secretary of State says, no sense at all."

(D) **Appeal to this Court**

14. The judge refused permission to appeal. The Appellant applied to this court for permission to appeal on eight grounds, all of which were refused by Singh LJ in his order of 22 May 2018, with the exception of ground 1, as formulated in the original grounds in these terms (in paragraph 8i of that document):

> "8. The learned Upper Tribunal Judge erred in law in the following ways:
>
> i. Failure to correctly apply the test as laid down in the case of *Secretary of State for the Home Department v TB (Jamaica)* [2008] EWCA Civ…."

15. Singh LJ directed the Appellant to file revised grounds of appeal to reflect the limited permission granted. Amended grounds were produced, dated 4 June 2018, subsequently supported by a skeleton argument from Ms Naik QC, originally dated 28 February 2019 and finally revised on 4 March 2019. In my judgment, both documents strayed well beyond the very limited bounds of the permission order made by Singh LJ. At the beginning of the hearing, therefore, we informed Ms Naik that the appeal would be confined to the ground of appeal for which permission had been granted and to the legal principles underlying the power to revoke ILR (for fraud), following an original grant of such leave after a successful Tribunal appeal.

16. We were not entirely successful in confining Ms Naik's oral argument in that way. However, the persuasive submissions of both counsel and their subsequent note (please see below) enabled us to explore the legislation and the decided cases, leading to the decision in *TB's* case, which underlay the decision in the UT.

(E) **Legislation and Decided Cases**

17. During the hearing the only primary statutory provision to which we were referred was the power in s.76(2) of the Immigration and Asylum Act 2002 which provides:

> "(2) The Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if—
>
> (a) the leave was obtained by deception [.] …"

18. Our attention was also drawn to rule 321A of the Immigration Rules, as in force at the relevant time in this case. This provided as follows:

> "**Grounds on which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom**
>
> 321A. The following grounds for the cancellation of a person's leave to enter or remain which is in force on his arrival in, or whilst he is outside, the United Kingdom, apply;
>
> (1) there has been such a change in the circumstances of that person's case since the leave was given, that it should be cancelled; or
>
> (2) false representations were made or false documents were submitted (whether or not material to the application, and whether or not to the holder's knowledge), or material facts were not disclosed, in relation to the application for leave; or in order to obtain documents from the Secretary of State or a third party required in support of the application or, …"

19. At the end of the hearing of the appeal we asked counsel to supply us with a written statement on the statutory power from which rule 321A derived and the status of the Immigration Rules and a joint note was provided. In that note, Ms Naik's submissions again sought to cover ground well beyond the limited scope of this appeal and it is not necessary to deal with that additional material.

20. The note did, however, refer to further relevant provisions of the Immigration Act 1971 namely section 4 of and Schedule 2 paragraph 2A(8) to that Act. Paragraph 2A(8) provides that:

> "An Immigration Officer may, on completion of any examination of a person under this paragraph, cancel his leave to enter".

The paragraph applies to

> "a person who has arrived in the United Kingdom with leave to enter which is in force but which was given to him before his arrival" (para. 2A(1)).

It appears that it was these powers that the Respondent invoked in this case. For practical purposes, the effect of the decision to cancel the Appellant's leave to enter was the equivalent of a decision to revoke his ILR: the result was that he was to be required to leave the country. The Immigration Rules are statements of the SSHD's administrative practice (*Hesham Ali v SSHD* 1 WLR [2016] 4799 at [17]).

21. Until amendments and transitional provisions made in 2014 and 2015, a decision under s.76 to revoke ILR was an "immigration decision" which gave rise to a right of appeal to the Tribunal: see s.82(1) and (2)(f) of the 2002 Act as it stood from 1 August 2008 to 19 October 2014; and Immigration Act 2014 s.15, SI 2014/2771 and SI 2015/371. It seems to me that the same result also followed in respect of a decision to cancel leave to enter, such as was made in this case: see s.82(2)(e) of the Act which provided that "immigration decision" also meant:

> "… (e) variation of a person's leave to enter…the United Kingdom if when the variation takes effect the person has no leave to enter…".

As is well known, those rights of appeal are no longer available and the dissatisfied party is now confined to an administrative review of the decision, the course, followed in the present case.

22. Turning to the cases, the first case to which we were referred was *R (Boafo) v Secretary of State for the Home Department* (in later citations "SSHD") [2002] 1 WLR 1919. There the SSHD had refused the claimant's application for ILR. The claimant appealed successfully to an adjudicator, but the adjudicator failed to give directions as to the implementation of the appeal decision, as then required by s.19(3) of the Immigration Act 1971. The SSHD did not appeal against the adjudicator's decision but rather reconsidered the application in the light of fresh information and again refused it, directing the claimant to leave the UK forthwith. The claimant's claim for judicial review was refused in the High Court, but her appeal was allowed in this court. The court held that the absence of directions under s.19(3) of the 1971 Act did not deprive the adjudicator's decision of binding force and that, in the absence of an appeal by the SSHD, the adjudicator's decision was binding upon him and ILR had to be granted.

23. There are two important passages for our purposes in the judgment of Auld LJ (with whom Ward LJ and Robert Walker LJ (as he then was) agreed). First, in paragraphs 25 and 26, at p. 1927 D-G, Auld LJ said this:

> "25. …Nevertheless, it is a salutary example of the importance, as Rose J emphasised in *Ex p Yousuf* [1989] Imm AR 554, 558, of the executive making use of available machinery of appeal when seeking to challenge the decision of an adjudicator, rather than attempting to circumvent it by reconsidering the matter, whether on evidence going to the original or new facts.

> That is especially so where, as in a case like this, any fresh executive decision is unappealable save by way of judicial review.
>
> 26. On the question whether, as a matter of law, the Secretary of State was entitled to disregard the adjudicator's determination and to consider the matter afresh because it was not accompanied by directions, I take the first two propositions of the judge as starting points. First, this appellate machinery is one of review, not rehearing, and both an adjudicator and the tribunal are normally bound to determine appeals on the facts as they were at the date of the decision under challenge. And, second, an unappealed decision of an adjudicator is binding on the parties. However, I disagree with the judge in his decision that an adjudicator's decision without directions is, *by reason of their absence*, not binding on the Secretary of State and that he may, in consequence consider the matter afresh in the light of new information."

Secondly, in paragraph 28, at p. 1928, the Lord Justice said:

> "28. There may be circumstances in which the executive may reopen a decision without appealing a determination of an adjudicator, for example, because there is fresh evidence, say of deception of the adjudicator about the facts on which the challenged decision was based, or where, as in the entry clearance case of *Ex p Yousuf* [1989] Imm AR 554 the very nature of the second decision calls for decision on contemporaneous facts. But even in such cases, it would be wrong, in my view, for the Secretary of State, as a generality, to regard the matter as hinging on the presence or absence of directions."

It was, of course, that second passage that was quoted in the administrative review decision in the present case.

24. Next, there was the decision of Moses J (as he then was) in *Saribal v SSHD* [2002] EWHC 1542 (Admin). The outline facts of that case were stated by Moses J at paragraphs 1 and 2 of his judgment as follows:

> "1. On 12th October 2000 the Immigration Appeal Tribunal allowed the claimant's appeal from a decision of the Special Adjudicator, given on 28th April 1999, dismissing the claimant's appeal against the Secretary of State's refusal to grant him asylum. Notwithstanding the successful outcome of his appeal, the Secretary of State refused to grant the claimant refugee status or leave to remain. On the contrary, on the 14th September 2001 the Secretary of State served him with notice of his decision to deport on the basis that his presence in the United Kingdom is not conducive to the public good.

> 2. The Secretary of State's decision was based on the ground that the favourable IAT decision was obtained by fraud, the evidence of which had not come to the Secretary of State's attention until after the IAT hearing. The claimant has appealed that decision but contends that the Secretary of State's decision to issue the Notice of Intention to Deport was illegal and irrational. In essence, he asserts the Secretary of State failed to ask himself the correct questions in relation to the evidential basis for setting aside the decision of the IAT."

25. Moses J cited the two passages from *Boafo* which I have quoted above. He then said (at paragraph 17):

> "17. The decision in *ex parte Boafo* demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence."

He continued at paragraph 19 as follows:

> "19. The Secretary of State has not sought to appeal the IAT decision in the Court of Appeal on the basis of the evidence before the IAT at the time of its determination. Thus he can only impugn the IAT decision on the basis of fresh evidence of fraud which is relevant, credible and not previously available without due diligence in accordance with the well known principles enunciated in *Ladd v Marshall* [1954] 1 WLR 1489."

26. Moses J also cited *Taylor v Lawrence* [2002] EWCA Civ 90 in a passage of Lord Woolf CJ's judgment in that case emphasising the importance of finality in litigation and said that the principles were no different in immigration cases. He cited *R v SSHD, ex p. Momin Ali* [1984] 1 WLR 663 in which an application to adduce fresh evidence in the Court of Appeal in judicial review proceedings was refused on the ground that it could not be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. In the *Momin Ali* case Sir John Donaldson MR (as he then was) said:

> "23. …
>
> > Just as I think the doctrine of issue estoppel has, as such, no place in public law or Judicial Review…. so I think that the decision in *Ladd v Marshall* has, as such, no place in that context. However I think that the principles which underlay issue estoppel and the decision in *Ladd v Marshall*, namely there must be finality in litigation, are applicable, subject always to the discretion of the Court to depart from them if the wider interests of justice so require."

27. There follows a passage of interest in the present case in which the SSHD was arguing that judicial review was inappropriate because that applicant had a right of appeal to an adjudicator. In contrast here, it is Ms Naik who argues (beyond the range of her client's permission to appeal) that the Respondent should have agreed to the issue of the Appellant's alleged fraud being remitted to the FTT in any appeal by the Appellant from any refusal of his still extant further claim for ILR based upon human rights considerations.

28. Moses J said that the parties before him did not dispute the principles of finality in litigation or those upon which fresh evidence is sometimes admitted upon appeals in legal proceedings. He continued at paragraphs 25 and 26 of his judgment as follows:

> "25. As I have said, neither party was disposed to dispute these principles. There was, however a dispute as to the appropriate procedure. There is no restriction within the statute on the issue of a notice of intention to deport. Once it has been issued, it is open to the claimant to appeal in accordance with those provisions to which I have already referred. The Secretary of State submits that an appeal to an adjudicator is a more convenient process. It avoids duplication and a hearing before the adjudicator is a more suitable forum for hearing contested evidence. There is, indeed, judicial support for that approach in *ex parte Momin Ali* where Sir John Donaldson MR said:-
>
> > "It is unfortunate that the instant application has arisen in circumstances in which the applicant has no right of appeal to an adjudicator, who would be better equipped to resolve the issues than is a court." (See page 666).
>
> 26. Mr Blake QC, on behalf of the claimant, accepted that there would be cases where it is appropriate to issue a Notice of Intention to Deport without first seeking to set aside a determination either by an out of time appeal or by Judicial Review. Such a course would be appropriate, he concedes, where fraud is admitted after an IAT determination. But in the instant case he contends that it is incumbent upon the Secretary of State to ask himself the correct questions in relation to the nature of the evidence on which he relies for the purpose of setting aside the determination. …"

29. In contrast, in *Saribal*, the claimant did have a right of appeal to an adjudicator and Moses J referred to the argument of counsel for the SSHD as follows (at paragraph 35):

> "35. Mr Kovats starts from the proposition that since there is nothing in the statute which prohibits the issue of a notice an intention to deport, there is no inhibition on the Secretary of State doing so providing only that he asks himself the correct questions. That he did so is demonstrated by paragraph 30 of Mr Bentley's witness statement. There is, he submits, no disadvantage to the claimant in issuing such a notice. Should the Secretary of State be unable to adduce the necessary evidence at

> the hearing, an adjudicator on appeal can so rule when he considers the *Ladd v Marshall* tests as a preliminary issue (see Immigration and Asylum Procedure Rules 2000, rule 30(4)(c)(i)). There is, moreover, every advantage in a hearing before the adjudicator which is appropriate for hearing contested evidence and avoids duplication."

The judge continued in paragraphs 36 and 37 in these terms:

> "36. I do not think that this case turns on the appropriate forum for setting aside the determination of the IAT. But, to my mind it does turn on whether the Secretary of State asked himself those questions which are appropriate to the issue as to whether the determination can successfully be set aside. The acceptance, on behalf of the Secretary of State, that some questions as to that issue must be asked, carries with it the acceptance that it is not sufficient merely to form a view that there are grounds for issuing a Notice of Intention to Deport; he must also consider whether the evidence for supporting those grounds satisfies the principles underlying *Ladd v Marshall*. If it were merely sufficient to issue the Notice and then hope that the evidence will emerge by the time of the hearing of the appeal, then there would be no need for the Secretary of State to consider any question as to setting aside the existing determination. But, rightly, the Secretary of State has not adopted so insouciant a stance. To do so would be to ignore the determination.
>
> 37. I start, accordingly from the position that, in the light of the existence of the IAT's determination, the Secretary of State must consider the question as to whether the *Ladd v Marshall* tests are satisfied."

30. Moses J concluded that the SSHD had not addressed himself sufficiently to the question of whether the principles in *Ladd v Marshall* had been satisfied in that case before deciding to issue the Notice of Intention to Deport in a case where there had been an earlier decision of the Tribunal. He quashed the decision.

31. This case is, therefore, High Court authority to the effect that, in cases where there has been an antecedent Tribunal decision that an immigrant is entitled to ILR, in considering whether to take action which has the effect of revoking the leave, the SSHD must give proper attention to principles akin to those identified for the admission of fresh evidence on appeals in legal proceedings, as set out in *Ladd v Marshall*. If he does not do so, his decision is liable to be set aside on judicial review.

32. That brings me to the decision in the *TB* case. In that case, the respondent Jamaican national did not have an attractive immigration record and on 1 August 2003 in the Crown Court at Guildford he pleaded guilty to an offence of supplying controlled drugs of class A (heroin and crack cocaine). He was sentenced to four years and three months' imprisonment, reduced on appeal to three years and ten months. By letters of 24 August and 28 September 2004 the SSHD signified his intention to make a deportation order against the respondent. The respondent claimed asylum and alleged that his removal

would constitute breaches of Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR"). The claim was refused on 6 April 2005, without the SSHD contending that the respondent was a danger to the community or that he was excluded from the benefit of Article 33.1 of the Asylum Convention. The claim was rejected on credibility grounds, and also, in any event, on the basis that there was no risk of harm to him on return to Jamaica and further that any interference with his private and family life was justified.

33. There was an appeal to the Asylum and Immigration Tribunal ("AIT"). Again, no point as to danger to the community or of exclusion from the benefit of the Asylum Convention was argued. The Immigration Judge allowed the appeal on the basis of all three of the Articles of the ECHR upon which the respondent had relied.

34. The SSHD did not seek to have the AIT decision reconsidered or set aside. Instead, on 25 January 2006 he wrote to the respondent's solicitors raising the issues that the respondent posed a danger to the public and that he was properly excluded from benefit of the Asylum Convention. The solicitors' response was that the SSHD's new stance was an abuse of process in view of the fact that those points had not been raised at any stage up to and including the AIT decision.

35. In the Administrative Court, on review of the SSHD's subsequent decision to grant only limited 6 month periods of discretionary leave, instead of the 5 years normally afforded to a refugee, Bean J (as he then was) held that the SSHD's decision was an abuse of process. He founded his decision on principles of finality in litigation: *Henderson v Henderson* (1843) 3 Hare 100 and *Johnson v Gore-Wood* [2002] AC 1. It seems, as recorded in this court's judgment on appeal, that Bean J said that it was incumbent upon the SSHD to bring forward his entire case before the AIT on any appeal: "Otherwise, the applicant is *relegated* to seeking judicial review of the Secretary of State's decision…which [counsel for the Secretary of State]…realistically accepted was a less advantageous remedy which would make it more difficult for him to succeed."(Emphasis added in the argument of Ms Naik before us): see [2008] EWCA Civ 977 at paragraph 27.

36. This court dismissed the SSHD's appeal. Stanley Burnton LJ (in a judgment with which Rix and Thorpe LJJ agreed) said at paragraph 32 this:

> "32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme."

He then referred to *R (Mersin) v SSHD* [2000] EWHC 348 (Admin) and to *Boafo* (from the latter: "…an unappealed decision of an adjudicator is binding on the parties"). He also quoted the judgment of Moses J in *Saribal* (supra) at paragraph 17 (quoted above) where "the principle" was that the SSHD is not entitled to disregard an adjudicator's decision "unless he can set aside that determination by appropriate procedure founded on appropriate evidence".

37. There then followed the important paragraph, paragraph 35, which was at the heart of the UT's decision in this case and of Singh LJ's limited permission to appeal order. At paragraph 35 of *TB,* Stanley Burnton LJ said:

> "35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in *Boafo* at [28]. But this is not such a case."

(F) **Discussion**

38. It can be seen that it is only the first of the "different considerations" mentioned by Stanley Burnton LJ that is of direct relevance here: "…relevant fresh evidence that was not available at the date of the hearing…" The SSHD says that he has new evidence which was not available at the date of the FTT hearing in 2012. There has been no "change in the law" (as to the Appellant's entitlement to ILR); nor have there been any "change in circumstances" (at least as far as the Appellant is concerned) or "new events after the date of the decision". In any event, *TB* was, as Stanley Burnton LJ said, "not such a case".

39. Clearly, paragraph 35 of the lead judgment in *TB* was obiter dictum. Nonetheless, it seems to me that it is entirely in accord with the earlier authorities of direct relevance to our case.

40. The only change that has occurred since the FTT decision in the Appellant's case relates to the mode of challenge to the Respondent's decision from that which would have been available prior to October 2014. Before that date, a decision to revoke ILR attracted a right of appeal to the Tribunal. That has now gone and the Appellant is "relegated", as Ms Naik put it (adopting the word attributed to Bean J by this court in *TB*), to a remedy in judicial review. Thus, as Ms Naik submitted, the Appellant is denied a full factual review and is confined to a challenge to the Respondent's decision adverse to him on public law grounds.

41. However, Parliament has decided that the categories of decision in immigration cases which are to be afforded a route of challenge in the FTT are to be significantly reduced and that is a decision which the courts are bound to respect. Without entering into the merits of the factual dispute in this case, it is perhaps unfortunate that where a person is accused by the SSHD of fraudulent behaviour in an immigration application, which can have very severe ramifications for him or her, he or she is not able to have an independent review of an adverse decision of the facts by a fact-finding Tribunal. But, that is Parliament's decision. Now the only remedy against the Respondent's decision and any administrative review is by way of judicial review on public law grounds.

42. As it stands, it seems to me that the Respondent had power to cancel the appellant's leave to enter under paragraph 2A(8) of the 1971 Act in the circumstances set out in r.321A(2) of the Rules. The entitlement to reopen a decision in a case of deception was acknowledged (obiter) in *Boafo*.

43. In *Saribal*, however, Moses J decided that if the SSHD wanted to take a decision of that character, after a decision of a Tribunal importing a right to ILR, his decision making process would have to apply by analogy the principles for the admission of fresh evidence on appeals in legal proceedings (essentially applying the principles in *Ladd v Marshall*). Otherwise, the SSHD's decision would be open to challenge on public law grounds. That decision has the approval of this court in *TB* and, in my judgment, we should follow it.

44. Here it is the UT's decision that is the subject of the permitted ground of appeal, rather than that of the Respondent in the decisions of March and April 2016 about which no issue arises on this appeal. It seems clear to me that the UT in the present case reviewed the Respondent's decision through the prism of the *Ladd v Marshall* criteria. I do not consider that those criteria are in any way inconsistent with the brief statement in paragraph 35 of the judgment of Stanley Burnton LJ in *TB*. The potential for such inconsistency was the basis of the very limited grant of permission to appeal afforded by Singh LJ. The UT, therefore, set itself the task of applying the correct test. There is no permission to appeal from the UT's application of that test to the facts of the present case and its decision is, therefore, not open to challenge.

45. It is not necessary, in my view, therefore, to enter into the further argument sought to be advanced by Ms Naik, based upon the very different factual and procedural circumstances of *Ahsan v SSHD* [2017] EWCA Civ 2009. That case concerned the adequacy of an "out-of-country" appeal in a case where oral evidence of an appellant was important. It was necessary to satisfy common law rights and the procedural aspect of Article 8 of the ECHR. The point arose in the context of a case where there was an undoubted right of appeal to a Tribunal; here, as explained, there is no such right. Further, this argument raised by Ms Naik went beyond the limits of the Appellant's permitted appeal, and beyond anything argued in the UT.

(G) **Conclusion**

46. In my judgment, for these reasons, the appeal should be dismissed.

Lord Justice Hamblen:

47. I agree.

Lord Justice Haddon-Cave:

48. I also agree.