Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: AA/06623/2015**

AA/06632/2015

AA/06636/2015

AA/06639/2015

AA/06648/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th March 2016	**On 22nd April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MSS
FRA
FNS
MRS
FIS
(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr P Richardson of Counsel, instructed by Lawland Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

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DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal that is Mr MSS as the appellant and the Secretary of State as the respondent. The appellants are mother and father and three children all citizens of Sri Lanka born on 2nd June 1971, 8th May 1974, 22nd April 2004, 2nd May 2006 and 7th January 2009.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Ford who allowed the appeals on asylum grounds against a decision to remove the appellants to Sri Lanka in decision promulgated on 25th September 2015.

3. The appeals came before the Tribunal on 27th July 2015 (and that followed an adjournment of the appeal on 13th July 2015 for the appellant to obtain an arrest warrant via his solicitors). On that date, the Secretary of State submitted that 27th July 2015 was a Monday and, in the event on the Friday before the weekend the appellants' representatives produced a bundle of documents which included an arrest warrant. The appeals were consequently adjourned to give the respondent an opportunity to carry out verification checks on the document. The adjournment was made with directions that the matter be listed on the first open date after 4 weeks. There were no further directions.

4. The appeal came before Judge Ford on 2nd September 2015 and in the following decision at paragraph 34 the judge recorded that the case turned on credibility. At paragraph 41 the judge noted that the appellants had produced a warrant of arrest, two summonses and a letter from a lawyer. The judge recorded that the respondent had had the opportunity to conduct verification checks there being no response to those checks the judge found the documents were reliable. Consequently at paragraph 42 the judge found that the principal appellant's account was credible and the judge gave as one of the reasons for that finding the reliability of the document.

5. An application for permission to appeal was made by the Secretary of State seeking to rely on a document verification report which appeared to have been received by the respondent on the afternoon *of the day of the hearing*. According to the report police in Colombo confirmed that the warrant was not genuine and the grounds sought to admit the document in line with the principles laid out in **Ladd and Marshall [1954] 1WLR 1489**. In effect a mistake of fact amounting to an error of law might arise if the **Ladd and Marshall** principles were met.

6. Permission to appeal was granted by Judge Nicholson who found that it may have an important influence on the case.

7. At the hearing before me Mr Walker submitted that the document verification report had not been received by the Secretary of State until 2nd September 2015 which was the date of the hearing. It was argued that had the document been before the judge his decision may have been different given the findings made. The document verification report showed that the High Commission in Colombo had verified that the arrest warrant was not genuine.

8. I enquired as to the nature of RALON, the body undertaking the document verification on behalf of the Secretary of State. RALON was the Risk and Liaison Overseas Network which was part of the Home Office. It was to this organisation that the arrest warrant was referred for checking. Mr Walker also submitted at the hearing, with the consent of Mr Richardson, email correspondence showing that the Presenting Officer Ian Proctor had sent an email to an official of the Home Office on 29th July 2015 requesting the document verification check. A chasing email was also attached dated 1st September 2015 the same official of the Home Office to RALON Colombo. That official confirmed that the request had been sent on 30th July 2015.

9. Mr Walker submitted **MM (Unfairness E & R) Sudan [2014] UKUT 00105 (IAC)** and specifically referred to paragraph 25 which stated

> *"The pivotal importance of the error of fact upon which the reasoning of the judge was demonstrably based helps to explain why in appeals raising issues of international protection there is room for departure from an inflexible application of common law rules and principles where this is necessary to redress unfairness."*

10. As stated in **MM**

> *"It is established that neither the rule in **Al-Mehdawi v Secretary of State for the Home Department [1990] 1 AC 876** (that a procedural failure caused by an appellant's own representative did not lead to an appeal being in breach of the rules of natural justice) nor a failure to meet the first of the Ladd and Marshall principles applies with full vigour in asylum and human rights appeals – see **SP (Iran) v Secretary of State for the Home Department [2007] EWCA Civ 13**. The decision of the Court of Appeal in E&R v Secretary of State points towards a broader approach in which the common law right to a fair hearing predominates. We consider that this appeal must succeed accordingly."*

11. Mr Richardson submitted at the hearing that the Home Office could not in any sense be said to have acted with reasonable diligence and indeed he also submitted that the case law referred to by President McCloskey in **MM** related to appellants and not the Secretary of State.

12. I am not so persuaded that the Home Office failed to act with due diligence, the first principle in relation to Ladd and Marshall, in this matter. It is clear that the Home Office Presenting Officer Mr Proctor made efforts to contact the official of the Home Office to arrange for a verification check on 29th July 2015 shortly after the hearing date. He cannot be said to have delayed. I am rather surprised that the judge knowing that a document check was due to be organised only gave five weeks for that check but as Mr Richardson pointed out the Home Office did not apply for a further adjournment when the hearing was resumed on 2nd September 2015. It is not the case however that the Home Office failed to attempt to verify until the day of the hearing. Even if the Home Office did not act with reasonable diligence the genuineness of the documentation goes to the very heart of this determination and this is characterised by paragraph 41 of the decision which states

> *"The Appellant has produced documents including a warrant, two summonses and a letter from a lawyer representing him in Sri Lanka quoted above. I have to take all of the evidence into account and having done so, I find those documents to be reliable. The Respondent had the opportunity to conduct verification checks but did not do so within the 28 days allowed. I am satisfied that those documents are reliable."*

13. As pointed out by Mr Walker, the letter from the lawyer produced by the appellant also refers to the arrest warrants and the authenticity of the letter is also called into question by the document verification check. The second principle of the **Ladd and Marshall** principles is that the new evidence must be such that if given it would probably have an important influence on the result of the case (though it need not be decisive). I find that this criteria is met as is the third criteria in **Ladd and Marshall** in that the new evidence was apparently credible although it need not be incontrovertible.

14. Mr Richardson submitted that further to **SD (Treatment of post hearing evidence) Russia [2008] UKAIT 00037** the Home Office Presenting Officer should have applied to have the matter reconvened or obtain the written submissions of the other side in relation to the matters including in the late submission. He maintains that this decision was not in fact promulgated until 25th September 2015.

15. That the decision, however, was not promulgated until 25th September 2015 does not mean that it was not written and decided before that date. Nonetheless, I take guidance from **E v Secretary of State for the Home Department [2004] EWCA Civ 49** which acknowledges that a mistake of fact giving rise to unfairness is a separate head of challenge in appeal on a point of law.

16. At paragraph 66 in **E v SSHD**, Lord Justice Carnwath sets out

> *"In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."*

17. I note that at paragraph 91 it is stated that the admission of new evidence is subject to **Ladd and Marshall** principles but those may be departed from *in exceptional circumstances where the interests of justice require*.

18. First I am not persuaded that the Secretary of State did not act with reasonable diligence. The documents were sprung upon the Tribunal on 27th July and the Presenting Officer acted with diligence in requesting document verification checks shortly after the hearing. Had the failure to respond occurred over a matter of weeks the diligence of the Home Office may be called into question but that was not the case here. The documents provided by the appellant go, as I have said, to the heart of this determination and in these particular circumstances I consider even if there were no reasonable diligence, which I think there was. Paragraph 94 of **E v SSHD** confirms that practical realities should not be ignored and the evidence throws considerable doubt on the Tribunal's understanding of the credibility of the lead appellant and the documentation verification check provided not only, in my view, complies with the **Ladd and Marshall** test but also should be considered to have exceptional treatment in the interests of justice.

Notice of Decision

19. I therefore find there is an error of law which is material and the matter should be remitted to the First-tier Tribunal for a hearing bearing in mind the nature and extent of the findings to be made.

20. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 20th April 2016

Deputy Upper Tribunal Judge Rimington