Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13924/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2018	**On 19 February 2018**

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE
UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR USMAN ZIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Iqbal, Counsel instructed by Burney Legal Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is a statutory appeal pursuant to permission to appeal granted by Upper Tribunal Judge Coker. Her reasons for giving permission to appeal were that it was arguable that the Judge of the First-tier Tribunal ("the judge") gave inadequate reasons for admitting witness statements and/or failed to identify the weight that those witness statements should be given. She went on to say that if an error of law was found the result might have been the same due to the apparent evidence of fraud.

2. On this appeal the appellant was represented by Mr Iqbal of Counsel and the Secretary of State by Mr Jarvis, a Home Office Presenting Officer. We are very grateful to both representatives for the help which they gave us and the very clear and frank way in which they did their best to assist us in relation to the facts of the hearing.

The Facts

3. The appellant is a citizen of Pakistan who was born on 12 April 1988. He entered the United Kingdom as a student on 26 March 2005. He was given successive leave as a student until 20 December 2010. He was then given leave as a Tier 1 (Post-Study) Migrant until 20 August 2012. He applied for further leave to remain as a Tier 1 (General) Migrant in 2011. That application was based on earnings from employment by Awdry Enterprises ("AE"). That application was refused on 29 July 2013. The Secretary of State reconsidered that decision. She refused it again with a right of appeal. The appellant's appeal was allowed in a determination promulgated on 5 March 2014 ("Determination 1"). The Secretary of State did not ask for permission to appeal from that decision. That determination was made on paper. Neither the appellant nor the Secretary of State appeared at the hearing.

4. The evidence before the First-tier Tribunal consisted of a witness statement from the appellant dated 25 November 2013, payslips, a P45 and two letters from HMRC purporting to set out the appellant's earnings in one tax year.

5. The evidence from the Home Office consisted of a brief witness statement from Catherine McGovern dated 11 December 2012. This said that she worked for HMRC and that UKBA had asked her to "verify the following businesses have provided any evidence of genuine trading". She listed several businesses including AE. She asserted without further elaboration that "from records available to me... none of the above companies have demonstrated that they had participated in any legitimate trade". The First-tier Tribunal recorded the appellant's evidence in his witness statement that he worked as an office manager and that he was paid in cash. The First-tier Tribunal considered the Secretary of State's evidence at paragraph 18. The First-tier Tribunal noted the absence of any detail and that the witness statement did not say what records had been consulted or over what period. The First-tier Tribunal said it would expect to see a more particularised investigation in order to be persuaded of an allegation that the appellant had relied on false documents. The First-tier Tribunal referred to two letters from HMRC provided by the appellant confirming that according to their records he had earned £42,000 in the tax year ended 5 April 2011 and that the employer was T Awdry, plus payslips, the P60 and the P45. The Secretary of State had not "demonstrated that the appellant relied on false documents. The witness statement relied on is insufficiently detailed and the appellant has provided persuasive evidence in rebuttal" (see paragraph 19 of Determination 1).

6. In paragraph 20 the FtT said:

> "I am satisfied that the letters from HMRC and the other documentation listed above in relation to his employment demonstrate his claimed earnings of £42,000. I am therefore satisfied that he should have been awarded 25 points for previous earnings and he meets the requirements of the Immigration Rules."

7. On 28 May 2016 the appellant applied for indefinite leave to remain ("ILR") based on ten years' residence pursuant to paragraph 276B of the Immigration Rules HC 395 (as amended) ("the Rules"). We consider that the provisions under which such leave is available are the Secretary of State's recognition of the private life rights which may be built up by a migrant after ten years' lawful residence in the United Kingdom. That is reflected in the Home Office's guidance on rights of appeal promulgated after the enactment of the Immigration Act 2014. Applications under paragraphs 276B and 276ADE are said to be human rights applications with a right of appeal. This is also referred to in paragraph 19 of the determination which is the subject of this appeal ("Determination 2").

8. The Secretary of State refused that application in a decision dated 9 December 2016. The Secretary of State said that the appellant had in his 2011 application relied on earnings from AE. The Secretary of State said that:

> "Subsequent to your original refusal and appeal following an investigation by the Home Office, it was determined that evidence supplied by you in support of your application was unreliable and that a substantial number of other individuals had been complicit in the same fraud. The investigation concluded with the facilitators being jailed for three years and eighteen months respectively and also ten beneficiaries being jailed for nine months each."

9. The letter went on to say that that investigation had uncovered a fraud involving Matloob and Shaharyar. They were convicted in March 2014 of providing false documents to facilitate applications for leave to remain. The letter went on "further to this HMRC verification checks and witness statements confirm that [AE] has not demonstrated that it has participated in any legitimate trade". That application was refused under paragraph 322(2) of the Rules. The appellant appealed against that decision. A right of appeal was available on human rights only. Before we turn to the decision of the First-tier Tribunal we should say a little bit about what happened in the run-up to the appeal.

10. It appears that the appellant had appealed against a decision under the EEA Regulations 2006 and that he had an appeal on foot against a decision made under those Regulations. It further appears, we having asked Mr Jarvis about this, that the bundle for the appeal which led to the second determination was not, so far as he could tell, from checking the Home Office file, and the CID notes, served on the appellant's solicitors at any stage before the hearing of the appeal. We also asked Mr Jarvis whether there was any trace on the file or on the CID notes of any letters sent

by the Home Office to the appellant's representatives on 17 December 2015 enclosing any documents with respect to the appeal against the refusal of IRLR. He told us that there was no evidence of any such letter having been recorded either on the Home Office file or on CID notes.

11. Upper Tribunal Judge Rimington in the course of her review of the Tribunal file found a document on that file dated 17 December 2015. This is a document on template ICD.2730 and it was sent by the Appeals Directorate of the Home Office at Lunar House to the First-tier Tribunal in-house Support Centre in Leicester. No IAC reference appears in the heading of the letter but the letter refers in its title to this appellant and to his date of birth. It then refers to a decision made on 9 December 2015 which is the date of the decision refusing ILR. Against the heading 'date of appeal lodged' it says 'NOT APPLICABLE'. It then says 'POU Stoke'. The date of hearing is said to be '15.6.2016'. There are six boxes then on the template referring to different types of decision and the ILR box, box 3, has a cross by it. Under the sideline comments there is this text:

> "Please note applicant refused with a ROA, however not issued a IDC5005 as already has an outstanding appeal against revocation. Application should be raised at appeal hearing due 15/66/16 Ref. EEA/00647/2015."

The letter is signed by Felix Akiode in APC Team A. Mr Jarvis told us that APC stands for 'Appeals Processing Centre'.

12. Having discussed this document with the parties we are satisfied that the purpose of this document was to inform the First-tier Tribunal Support Centre, in relation to an ongoing appeal (that is the appeal that the appellant already had against the EEA decision) of a further decision which had been made in his case by the Home Office so that, at the hearing of the EEA appeal it was not forgotten that a further decision had been made, and in order to alert the support centre to the possibility that a further appeal might be generated by the decision, which should be joined with the existing appeal. In the Tribunal file this document is attached by a rubber band to two further witness statements from Ms McGovern but we are not satisfied that those documents were attached to this document dated 17 November 2015 when it was sent to the First-tier Tribunal by the Home Office, for no other reason than that under the heading 'Encs' at the bottom of the template there is no reference to any documents. In any event this document was not sent to the appellant's solicitors so it could not form any evidence of service on those solicitors of any documents at all.

The decision of the First-tier Tribunal

13. In a determination promulgated on 30 March 2017 which we have referred to already as Determination 2, the judge dismissed the appellant's appeal against the Secretary of State's decision of 19 December 2015. The issues on the appeal, according to Mr Iqbal's submissions, included whether it was unfair to allow the Secretary of State to rely on two witness statements from Catherine McGovern dated 18 July 2013 and 16

July 2014 as evidence and, if not, what weight they should be given, whether the dispute in the second appeal was the same as the dispute in the first appeal and, if so, whether the witness statements were fresh evidence which warranted a departure from the decision made in Determination 1. Upper Tribunal Judge Rimington has consulted the notes of the proceedings on the Tribunal file.

14. While Mr Iqbal when asked very frankly conceded that he could not remember whether or not he had applied for an adjournment of the hearing, it is clear from notes of the proceedings that he did apply for an adjournment and that that application was refused at 11:40am. He was then given some time to prepare a skeleton argument. The EEA appeal, in which the appellant was not represented by those who instructed Mr Iqbal, was heard by the same judge in the afternoon of the same day. What prompted the application for an adjournment by Mr Iqbal was the two further witness statements from Ms McGovern to which we have referred. These explained, in short, that the companies referred to in the first short witness statement of 11 December 2012 were part of a large fraud. The companies were said to have submitted documents to HMRC which purported to show that they employed predominantly, or wholly, Pakistani nationals, and paid them salaries, but the companies had never in fact paid the tax that was due on those salaries and the companies were impossible to contact when HMRC tried to contact them. They were said to have made returns after the statutory filing dates and not to have paid any of the penalties due for those late returns. Most of the letters sent to them by HMRC were returned to HMRC by the post office. The companies did not reply to any of the letters. The companies did not follow PAYE procedures correctly. Ms McGovern concluded from this pattern of behaviour that the businesses were not, and had not been trading, and that they had not made any payments of salary to employees. The purpose of the records was to make it seem as though the applicant's income was actually higher than it really was. The second of the two witness statements explains that once information has been filed online by an employer it automatically "populates" an individual's tax record. That person can then ask HMRC about the information which HMRC holds on them. HMRC responds on a standard form which will be filled in on the basis of the information submitted by the employer. At that stage the "employer's" information has not in any way been tested by HMRC.

15. The appellant did not give evidence at the second appeal (Determination 2, paragraph 11), and the adjournment having been refused by the judge, the hearing consisted of submissions only. The judge explained that the appellant's representative, Mr Iqbal, did not have the Secretary of State's bundle of documents. The judge recorded that Mr Iqbal objected to the Secretary of State's attempt to rely on Ms McGovern's two later statements. The judge said that Ms Alfred, the Home Office Presenting Officer "was able to satisfy me that these [that is the witness statements] had been served on the appellant's solicitors with a covering letter dated 17 December 2015" (Determination 2, paragraph 9). The judge summarised the Secretary of State's submissions. The HMRC letters which the appellant relied on were based on fraudulent returns submitted by AE which had not been verified by HMRC when they wrote the letters to the appellant on which the appellant relied. It was incumbent on the appellant to prove that the salary had been paid into his

account. The judge recorded that Mr Iqbal relied on the decision of this Tribunal in **Mubu [2012] UKUT 00398 (IAC)**:

> "The guidelines [in **Devaseelan**] are always to be applied to the determination of a factual issue, the determination of which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties."

16. Mr Iqbal submitted that the Secretary of State had not explained why the two later statements were not before the First-tier Tribunal which made Determination 1. If the statements were admitted the First-tier Tribunal had to decide what weight to give them and should give them none. Ms Alfred accepted that the two later statements were in existence at the time of the first hearing but that they had not been in the possession of the Home Office until after that hearing. She relied on to the decision letter which says, "subsequent to your original refusal and appeal...". She also submitted that she was not seeking to re-determine the application decided by the First-tier Tribunal in March 2014 but was seeking to ensure that the present application was not decided on incomplete evidence as had been the case in March 2014.

17. At paragraph 21 the judge summarised the approach in **Devaseelan [2002] UKIAT 00702**. He also referred to **Djebbar [2004] EWCA Civ 804** at paragraphs 30, 31 and 40 and to **DB [2003] UKIAT**00053. He said that the **Devaseelan** guidelines had been approved in **Dhebbar** and that they had been applied to all categories of appeal in **DB**. He recited the law about the burden of proof in paragraph 23. In paragraph 25 he said that it was clear that the Secretary of State has the burden of proving the precedent fact relied on for the purposes of paragraph 320 of the Rules, that is that a fourth representation has been made and that the standard of proof is to the higher balance of probabilities.

18. At paragraph 26 he said that the issue was whether the Secretary of State should be allowed to rely on Ms McGovern's two later statements "bearing in mind that the Immigration Judge in March 2014 had considered and effectively rejected Ms McGovern's original statement of December 2012". He said there is no principle of *res judicata* in immigration appeals, that an unappealed decision of an adjudicator is binding on the parties but "different considerations apply where there is fresh evidence that was not available at the date of the hearing". That, he said, raised the question of what is meant by "available". From **AS and AA (effect of previous linked determination) Somalia [2006] UKAIT 00052**, he derived the proposition that if there is good reason for departing from it, a previous determination does not settle the issues between the parties on a subsequent appeal. The judge found from the decision letter that the two later witness statements were not available to the Home Office on 3 March 2014. He found that there was a further investigation by the Home Office after the convictions at Snaresbrook on 4 March 2014. There was good reason to depart from the previous decision as the previous vague evidence from HMRC had been replaced with evidence that was particularised and compelling. The judge found that the Secretary of State had established a precedent fact for the purposes of

paragraph 322 "namely evidence indicating that the appellant was not actually employed by AE". The burden of proof switched to the appellant but there was nothing other than his bare assertion and the letters from HMRC to show that he had been employed by AE. The judge accepted Ms McGovern's evidence about the letters from HMRC. The appellant could have produced evidence that the salary he claimed was actually paid to him. No such evidence was produced. The judge was not satisfied that the appellant was employed and was satisfied that the documents were false. The appellant had also used deception in a previous application when he applied for ILR. All those finding the judge said supported the Secretary of State's decision.

19. The judge then considered Article 8 apart from paragraph 276B. There is no appeal against that part of the determination.

Discussion

20. We asked the parties to address us on the question of fairness first. It was in the course of that that the parties and the Tribunal discussed the document dated 17 December 2015. Having reviewed the document dated 17 December 2015 and having carefully considered Mr Jarvis's very frank information about his researches into the Home Office file and the CID notes, we do not understand how the judge was persuaded that the Secretary of State had served the appellant's representatives with Ms McGovern's two later witness statements on 17 December 2015. Upper Tribunal Judge Rimington has noted from the Record of Proceedings that what appears to have happened is that the Home Office Presenting Officer must have made a telephone call, because she is reported as saying something "on the advice of the Senior Presenting Officer", but there is nothing on the Home Office file, as Mr Jarvis has told us, which supports the suggestion that any documents were served on 17 December 2015. In any event it is wholly improbable that the Secretary of State could have served any documents with respect to the appeal against the refusal of ILR on 17 December 2015 because 17 December 2015 was the date when the appellant's notice of appeal against the refusal of ILR was stamped as having been received by the First-tier Tribunal. Unless the Secretary of State is to be attributed with supernatural powers, we do not see how she could possibly have lodged a bundle of documents relevant to that appeal with the First-tier Tribunal at the very date when that appeal was lodged with the First-tier Tribunal. We simply do not consider it plausible that the Secretary of State would have served those witness statements out of the blue on the appellant's solicitors coincidentally on the date when the appeal was lodged. If they were not served then, then it is probable that the appellant's solicitors did not get them until the day of the hearing. The fact that the Home Office bundle was not served until the day of the hearing is supported both by Mr Jarvis's researches and indeed by material in Determination 2.

21. Unsurprisingly, in that situation, Mr Iqbal was taken wholly by surprise that the two further witness statements put a completely different complexion on the case. It is clear from the Record of Proceedings that Mr Iqbal did what was sensible in that situation, which was to apply for an adjournment. We are all the more persuaded

that Mr Iqbal was right to apply for an adjournment, and that an adjournment should have been granted, by the fact that the judge in Determination 2 relied when deciding the merits of the appeal, on the fact that the appellant had not produced any evidence to show that the salary claimed was actually paid to him. There was no reason for the appellant in advance of the appeal to think that he needed to produce any further evidence than the evidence he had already relied on because, in the absence of the two further statements by Ms McGovern, for all the appellant knew, the Secretary of State was advancing exactly the same case on the second appeal as she had advanced, unsuccessfully, on the first appeal. We consider that without the two later statements the Secretary of State's case was no stronger than it had been at the first hearing, and that the appellant's solicitors were entitled to consider that they did not need to provide any further evidence themselves, or, indeed, to call the appellant to give evidence. The two later witness statements filled the gap which had been identified by the First-tier Tribunal in Determination 1. We consider that it was unfair for the judge to proceed with the appeal in circumstances where that important information had only been disclosed, as we find, to the appellant and his representatives on the very day of the hearing. That is particularly the case, since the two latest witness statements are on their face so cogent, and, in the absence of rebutting evidence so apparently decisive of the issues on the appeal. For all we know the appellant may well have had documentary evidence to show that the salary he claimed had actually been paid to him or other documents evidencing payment of a significant salary. Crucially, in our judgment, he might also have been advised to give evidence rather than simply relying on his written witness statement. Mr Jarvis having considered the material that Upper Tribunal Judge Rimington discovered from the file including the document of 17 December 2015 and the Record of Proceedings very fairly conceded that there was a real problem with the fairness of proceeding with the appeal in those circumstances. We agree. That, in our judgment, means that we should allow this appeal, as we consider that the appellant was deprived of his right to have a fairly-conducted appeal in front of the First-tier Tribunal. We therefore remit this case to the First-tier Tribunal for the First-tier Tribunal to re-hear it.

22. It is for the First-tier Tribunal to decide whether it is satisfied by the general assertions in the decision letter about the timing of the investigation by the Secretary of State, and, by inference, the date on which the two further witness statements of Ms McGovern became available to the Secretary of State. We suggest that the Secretary of State may consider it prudent on the remitted appeal to provide the First-tier Tribunal with a more detailed and circumstantial explanation of when the second two witness statements of Ms McGovern became available to the Secretary of State and why it was, despite their much earlier dates, that the Secretary of State did not rely on them in the first appeal in March 2014. We consider that it will then be for the First-tier Tribunal to decide whether in the circumstances it admits the second two witness statements and, if so, what weight it gives them. The First-tier Tribunal will no doubt take into account the public interest in ensuring that ILR is not granted to a person who has submitted false documents to the Secretary of State. It will be for the First-tier Tribunal to decide how to apply the **Devaseelan** guidelines and the subsequent case law, what weight to give that public interest consideration and what

weight to give the other factors in the case when it has the parties' further submissions and evidence on the remitted appeal.

Notice of Decision

23. For those reasons we allow this appeal and we remit the appeal to the First-tier Tribunal to determine it in accordance with this judgment.

No anonymity direction is made.

Signed Elisabeth Laing Date 12 February 2018

Mrs Justice Elisabeth Laing DBE

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Elisabeth Laing Date 12 February 2018

Mrs Justice Elisabeth Laing DBE