Upper Tribunal
(Immigration and Asylum Chamber)

Akter (appellate jurisdiction; E and R challenges) [2021] UKUT 00272 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 July 2021	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

MAHMUDA AKTER – FIRST APPELLANT
MIZANUR RAHMAN – SECOND APPELLANT
MARSHIAT RAHMAN – THIRD APPELLANT
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mr M West, instructed by JKR Solicitors
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

(1) GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 is not authority for the proposition that an appellate court or tribunal has a free-standing duty, derived from section 6 of the Human Rights Act 1998 (public authority not to act incompatibly with ECHR right), to disturb a decision of a lower tribunal. The jurisdiction of the appellate court or tribunal is governed by sections 12 and 14 of the Tribunals, Courts and Enforcement Act 2007, which depends on the lower tribunal having made an error of law before its decision can be disturbed on appeal.

(2) A party who wishes to submit that a decision of a tribunal which is otherwise free from legal error should be disturbed on appeal on the basis identified by Carnwath LJ in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 should do so clearly, when seeking permission to appeal on that basis.

(3) In deciding whether the principles in Ladd v Marshall [1954] 1 WLR 1489, as applied by E & R, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

1. This our decision on an oral application for permission to appeal against the decision of the First-tier Tribunal. It follows the quashing by the Court of Appeal of the refusal by the Upper Tribunal of permission to appeal the decision of the First-tier Tribunal, which dismissed the appellants' appeals against the decision of the Secretary of State to refuse their human rights claims.

A. THE APPELLANTS

2. The first and second appellants are wife and husband and the third appellant is their elder daughter, born in 2010. Another daughter, M, was born in November 2015.

3. The second **appellant** arrived in the United Kingdom in December 2003 on a one year work permit. He subsequently overstayed. The first appellant arrived in October 2009 as a student. She applied unsuccessfully for further leave to remain on human rights grounds but by 13 July 2016 she had exhausted her rights of appeal.

4. In August 2017, the three appellants made an application for leave to remain, together with a human rights claim. The application and claim were refused by the respondent on 26 July 2018 and the appellants appealed to the First-tier Tribunal against the refusal of the claims.

B. THE APPELLANTS' APPEAL TO THE FIRST-TIER TRIBUNAL

5. The appeals were heard at Hatton Cross on 15 March 2019 by First-tier Tribunal Judge Bowler. Before the judge, the case for the appellants was that it was in the third appellant's best interests to remain in the United Kingdom, with significant weight being given to the fact that she had lived there for more than seven years. It was also submitted that each of the appellants had a strong private life in the United Kingdom, as well as a family life with the extended family of the second appellant.

6. The First-tier Tribunal Judge considered the submissions and evidence, which included oral evidence from the first and second appellants and various other individuals. The judge's decision was promulgated on 11 April 2019. In examining the position of the family comprising the three appellants and M, the judge noted at paragraph 54 of her decision, that M "is only 3 years old. She was also born in the UK but has been here for less than seven years now and her life will inevitably be almost entirely focused on her parents and sister". At paragraph 63, the judge noted that M had Bengali spoken to her as a baby and she had spent less time than the third appellant away from her family. At paragraph 63, the judge found it "inevitable that she will be developing some initial understanding of the language".

7. At paragraph 66, the judge noted that the third appellant had eczema and that she was on medication for this condition. Although the first appellant claimed that the third appellant would face problems in Bangladesh owing to her eczema, as a result of the heat in that country, the judge noted that the first appellant's doctor had made no reference to any such problems, were the family to move to Bangladesh.

8. Having completed a thorough examination of the evidence, by reference to relevant legislation and case law, the First-tier Tribunal Judge dismissed the appellants' appeals against the refusal of their human rights claims.

C. THE GROUNDS OF CHALLENGE TO THE DECISION OF THE FIRST-TIER TRIBUNAL

9. On 25 April 2019, the appellants applied to the First-tier Tribunal for permission to appeal. They did so on five grounds. Ground 1 contended that the judge had erred in law in her analysis of what the best interests of the third appellant comprised and that no "significant weight" had been given to the fact that the third appellant had lived in the United Kingdom for over seven years. Ground 2 asserted that the judge had erred in relation to the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, in concluding that it would not be unreasonable to expect the third appellant to leave the United Kingdom.

Ground 3 submitted that the judge's approach in respect of section 117B(6) in relation to the first and second appellants was materially flawed. Ground 4 challenged the judge's assessment of the matters to which section 117B(1) to (5) requires consideration to be given. Ground 5 submitted that the judge's Article 8 ECHR proportionality assessment was flawed. Nowhere in the grounds was there any specific reference to any medical diagnosis in respect of the third appellant.

10. Following the refusal of permission by the First-tier Tribunal, the appellants applied to the Upper Tribunal for permission to appeal. The grounds that accompanied Form IAUT-1 were the five grounds just described. Before the articulation of those grounds, their drafter wrote the following:-

> "4. It may be pertinent to mention, though [it] may not be relevant at this stage, that just the day after the hearing the child appellant … was admitted to Royal London Hospital on 16/03/2019 with one-month history of vomiting, poor oral intake and fatigue. She remained admitted there until 05 April 2019. After various medical examinations she was diagnosed with abdominal pain, hypercalcemia, and acute kidney injury. She is still on follow up treatment and weekly review. She is prescribed with various medications, and a weekly blood test. A community nurse visits her once a week (Friday), when she is injected with METHOTREXATE. (Please see enclosed Hospital Discharge letter date 05 April 2019 enclosed as ENCLOSURE-A).
>
> 5. The evidence of this medical condition of the child could not be introduced before the hearing because she was admitted to hospital just after the hearing day and her medical conditions were diagnosed after that. It is our instruction that if permission is granted the appellants would seek permission under rule 15(2A) of the Tribunal Procedure rules to admit documents/evidence of her medical condition, if the matter proceeds to a rehearing."

11. The renewed application for permission was dated 12 June 2019. On 17 October 2019, Upper Tribunal Judge Owens refused permission to appeal. She dealt with the grounds as follows:-

> "3. The thrust of the challenge is that the Judge erred in considering the analysis of the best interests of the child; erred in the assessment of reasonableness, erred in taking into account the parent's immigration history when considering KO (Nigeria) & Ors v SSHD [2018] UKSC 35; erred in the approach to section 117B(6); and erred in the approach to the proportionality exercise under Article 8 ECHR.
>
> 4. Contrary to the assertion in the grounds, it cannot be argued that the Judge did not carry out a proper assessment of the best interests of the child which at [10] and [48] was noted to be a primary consideration. When considering this issue and the issue of reasonableness, the Judge took into account all of the relevant factors including the child's age, education, health, her connections to her extended family, her linguistic, cultural and social ties to Bangladesh and the conditions in which she would be living in Bangladesh. The Judge unarguably gave adequate and sustainable reasons for finding that overall, the best

interests of the child lay in remaining as a family unit with her parents, particularly given the young age of the appellant. The assessment was unarguably made without reference to the immigration status of the parents. It cannot be argued that this assessment was flawed. The Judge unarguably similarly approached correctly the issue of 'reasonableness'.

5. It cannot be argued that the Judge's approach to section 117(6) was flawed. In particular the Judge gave significant weight to the fact that the child had lived in the UK for over 7 years and had full regard to all the relevant factors. The Judge unarguably gave adequate and sustainable reasons, grounded in the evidence as to why it would be reasonable for the child to return to Bangladesh. It was open for the Judge to find that it is in the child's best interests to remain with her parents and that the family unit should return to Bangladesh, noting, in accordance with KO, that neither parent has leave to remain in the UK and that both could be expected to return to Bangladesh. It is not arguable that the Judge failed to take into account any relevant factors in the proportionality assessment or applied the wrong legal test.

6. It is not arguable that the grounds identify any error of law which would affect the outcome of the appeal."

12. Upper Tribunal Judge Owens ended her decision as follows:-

> "7. There has been a change of circumstances since the date of the hearing in that the child's health has deteriorated. However, this evidence was not before the Judge and would need to be submitted to the Secretary of State by way of a fresh claim."

D. THE JUDICIAL REVIEW

13. The appellants applied for judicial review of Judge Owens's decision under CPR 54.7A. On 23 January 2020, Linden J refused permission. He concluded that there was nothing in the grounds of challenge to the First-tier Tribunal Judge's decision that merited the grant of permission to bring judicial review. So far as the change in circumstances in respect of the third appellant was concerned, Linden J said this:-

> "(7) … I have considered the third claimant's diagnosis with Sarcoidosis very shortly after the decision of the FtT. Although it is arguable that the UT could have admitted this evidence under Ladd v Marshall [1954] 1 WLR 1489, I consider that it was equally open to UTJ Owens to hold that the evidence should be submitted to the Secretary of State as part of a fresh claim."

14. Following receipt of Linden J's refusal, the appellants sought permission from the Court of Appeal. In his skeleton argument, filed in connection with this application, Mr Biggs, who was at that time Counsel for the appellants, submitted that when considering an application for permission to appeal, the Upper Tribunal had to apply Part 5A of the 2002 Act,

including section 117B(6). Furthermore "given that it was required to act compatibly with s.6 of the Human Rights Act 1998, it was obliged to consider for itself whether article 8 required that the appeal be allowed in the light of the change of circumstances regarding A3". The change of circumstances compelled the overturning of the First-tier Tribunal's decision because that decision was "albeit in the light of fresh evidence, contrary to section 117B(6) and Article 8 ECHR; or that that proposition was "at the very least arguable".

E. GM (SRI LANKA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2019] EWCA Civ 1630

15. Mr Biggs argued that these submissions were strongly supported by the Court of Appeal's judgment in GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. In that case, there had been a change of circumstances after the decision of the Upper Tribunal which was under appeal. The Court of Appeal had to decide whether it was appropriate to consider the up-to-date situation in determining the appeal.

16. In order to understand the significance of GM, it is necessary to set out rather more than the two paragraphs from the judgment that were reproduced in Mr Biggs's skeleton argument:-

> "2. The Appellant appeals against the dismissal of her appeal by the Upper Tribunal ("UT") on 2nd December 2015 upholding the decision of the First-Tier Tribunal ("FTT") of 25th August 2015 upholding the decision of the Secretary of State of 20th February 2015 ("the Decision" and "the Respondent" respectively), refusing her application for asylum and for leave to remain on human rights grounds *outside* the Immigration Rules ("IR") and seeking to remove her from the United Kingdom.
>
> 3. The judgment under appeal was made in 2015. Since then the Supreme Court has clarified a series of issues relating to the test to be applied under Article 8 in relation to the IR and section 117B Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002" and "section 117B"). The main judgments are: *Agyarko v SSHD* [2017] UKSC 11 ("*Agyarko*"); *Ali v SSHD* [2016] UKSC 60 ("*Ali*"); *KO (Nigeria) v SSHD* [2018] UKSC 53 ("*KO*"); and, *Rhuppiah v SSHD* [2018] UKSC 58 ("*Rhuppiah*").
>
> 4. These judgments clarify such matters as: the application of the applicable proportionality test and the relative weight to be attached to various factors in the balancing and weighing exercise; the relationship between the IR, the NIAA 2002 and Article 8; the meaning of "*little weight*" in sections 117B(4) and (5); the extent to which the "*little weight*" test applies to family rights; the relevance of a person's immigration status in a family life assessment; and the relevance of "*insurmountable obstacles*" to return in the family life context.

5. The FTT Judge in the present case did not have the benefit of these judgments. She plainly adopted considerable care in her approach to the evidence and the law. And it is right to note that the focus of the appeal before her was on the asylum claim of the Appellant. The Article 8 family rights issues were secondary, albeit, as is evident from the material before the FTT and included in the bundles before us, they were not advanced merely as a makeweight. A serious argument was advanced.

6. It is our judgment that (not having had the benefit of the Supreme Court rulings to guide her) the Judge erred in the approach that she adopted to the issue relating to Article 8 family life rights. This is the context in which we have concluded that the Decision, and the judgment and decisions of both the FTT and the UT must be set aside.

7. The position of the family has materially changed in the period elapsing between the FTT judgment and this appeal. This means that in this appeal we must consider to what extent the decision we take reflects the most up to date position. This raises a point of principle. When a Court is required to address an issue relating to fundamental norms or human rights that Court must ensure that any order that *it* makes is also compliant with such rights. Under section 6 Human Rights Act 1998 all public bodies, *including courts*, must apply the Act and thereby the ECHR. It follows that if an appellate court finds that a lower court or tribunal acted lawfully by reference to the evidence before it but that based upon the facts now known to the appeal court to uphold the decision would violate fundamental norms, then the appellate court must ensure that the decision *it* takes is compliant with the law. This was made clear by Lord Reed in *Agyarko* (ibid) paragraph [5]. In this case there has been a material change of circumstances brought about primarily by fresh decisions made by the Respondent which have fundamentally altered the legal position of the Appellant's husband and children by conferring settled status upon them. Mr Jafferji, for the Appellant, argued that the sensible way to proceed was to address the impugned FTT decision upon the basis of the evidence that was before the Judge but, in the light of our conclusion, then to consider the up to date evidence in relation to what follows by way of relief, in other words, to defer consideration of the changed circumstances. Ms Apps, for the Respondent, did not demur that there would need to be a two stage process, but reserved the Secretary of State's position on relief as subject to instructions. This is the course we have adopted.

8. We therefore consider the present-day evidence when it comes to relief. We set out our conclusions on this at section F below. In short, to give effect to our conclusion that the FTT erred we will simply set aside the Decision and relevant judgments. We will not remit the matter back to the FTT. We direct that the Respondent considers the position of the Appellant afresh, in the light of the altered circumstances. We leave it, in the first instance, to the Appellant and the Respondent to discuss and agree the best way in which this can be achieved." (Green LJ)

17. The events that had arisen after the decisions of the First-tier Tribunal and the Upper Tribunal were that, on 3 August 2018, the respondent had granted indefinite leave to remain to the husband of the appellant and to two of her children. According to Green LJ, no reasons or explanations were given for this in the decision of the respondent; but it was explained during the hearing in the Court of Appeal that the grants were because the first appellant's husband was treated as a "legacy" applicant. When this development was drawn to the respondent's attention, in the context of the Court of Appeal proceedings, the Government Legal Department responded –

> "… briefly, without addressing the merits of the points advanced, that the grant of ILR was not a matter arising upon the appeal. If the appellant wished to rely upon evidence post-dating the decision of the UT she could "… *upon conclusion of this appeal*" make further submissions under paragraph 353 and the respondent will consider those submissions accordingly." (paragraph 21, original emphasis)

18. In his skeleton argument in the present case, Mr Biggs stressed the finding at paragraph 7 of the judgment of Green LJ that if an appellate court finds a lower court or tribunal has acted lawfully by reference to the evidence before it but that, based upon the facts now known, to uphold that decision would "violate the fundamental norms", then the appellate court has a duty to ensure that the decision it takes has complied with the law.

19. Mr Biggs submitted in the alternative that –

> "even leaving aside the implications of s.6 of the HRA and s.117A(2) of the 2002 Act, on orthodox principles [it] is at least arguable that the appellants were entitled to rely upon the third appellant's change of circumstances on appeal before the Upper Tribunal applying the correct legal principles set out in Ladd v Marshall … the UT simply failed to consider this."

20. On 23 November 2020, Singh LJ granted permission to bring judicial review. His reasons were as follows:-

> "1. The only ground which is now advanced is that based on the change of circumstances, relating to the medical condition of A3. Having had the benefit of Mr Biggs's skeleton argument before this Court, I consider that that ground is arguable and has real prospects of success.
>
> 2. I also consider that it raises an important point of principle, relating to cases such as this where the medical circumstances of a child change after the determination of the FTT, so that the assessment to be made about whether it would be reasonable to expect that child to leave the UK may be materially affected. That raises the issue whether that is simply a matter for the discretion of the UT, and whether it can be left, as the UT said, to be raised in a fresh application to the SSHD.
>
> 3. Further and in any event, I consider that, in all the circumstances, there is another compelling reason to permit this case to be argued, in particular the impact that the decision may have on the welfare of a young child.

4. Accordingly, this is one of those relatively rare cases in which the Cart criteria are satisfied."

F. THE AMENDED GROUNDS

21. Before us, Mr West (who now has conduct of the matter for the appellants) applied to amend the appellants' grounds of appeal to the Upper Tribunal. He did so because, as will have become apparent, the previous grounds were no longer relied upon and, in any event, had not been found in the judicial review proceedings to be such as to raise any question of quashing Upper Tribunal Judge Owens's refusal of permission to appeal. In other words, there was nothing arguably wrong with her refusal of permission by reference to those grounds. We have decided to give permission to amend and therefore substantively consider these grounds.

22. The amended grounds submit that the First-tier Tribunal made a material mistake of fact because the diagnosis of the third appellant and the medical condition thereby identified "were extant at the time the FtT decided the appeal". Although the First-tier Tribunal could not be faulted for having failed to consider this matter, the decision of the Upper Tribunal in MM (Unfairness; E & R) Sudan [2014] UKUT 105 (IAC) made it clear that the absence of fault was not relevant where one is considering a mistake giving rise to unfairness.

23. As in the skeleton argument of Mr Biggs, the amended grounds go further, in submitting that if the Upper Tribunal were to admit evidence which established that there had been a change of circumstances after the date of the hearing of the appeal, such that requiring an appellant to leave in the light of that change would breach Article 8 of the ECHR, then "the Upper Tribunal will be obliged to find that the FtT's decision to dismiss the appeal is unlawful and must accordingly allow the appeal" (paragraph 6). The authority given for this is GM (Sri Lanka).

24. So far as Ladd v Marshall is concerned, the amended grounds contend that it is "tolerably clear that the first and second appellants acted with all reasonable diligence in protecting and promoting the welfare of their child, and that this resulted in the third appellant's diagnosis, coming to light only after the FtT's hearing of the appeals".

25. The amended grounds also submit that, quite apart from the third appellant's diagnosis, there has been a "separate change in her circumstances since the First-tier Tribunal's decision". On 7 April 2021, the third appellant was registered as a British citizen. The proposed grounds submit it is "obvious that the third appellant's British citizenship, being a factor that arose only recently, could not have been brought to the attention of the FtT before it decided the appeal". In deciding whether to admit fresh evidence, the Upper Tribunal "must also be alive to its obligations pursuant to section 6 of the HRA".

26. In the Administrative Court, the appellants filed a witness statement of the first appellant. At paragraph 2, she said that the day before the hearing in the First-tier Tribunal, the third appellant was admitted to the Royal London Hospital, where she remained until 5 April 2019. Exhibited to that statement is a "Discharge Summary", issued by the Great Ormond Street Hospital. It is dated 5 April 2019. It gives as the third appellant's diagnosis "Sarcoidosis". The statement records that although the third appellant was ill for a few weeks before the date of the First-tier Tribunal hearing, "we could not realise the extent and severity of her illness until she was admitted to hospital and had the diagnosis". The statement continues:-

> "4. Once she was discharged from hospital on 05 April 2019, we informed our representatives. However, owing to the condition of our daughter, we could not visit our representatives with the necessary medical papers for few weeks thereafter. By then we had already received the tribunal determination. So, it was not practically possible to inform the tribunal about our daughter's medical condition before the determination was promulgated. *Hospital Discharge letter date 05 April 2019 appended to this statement and exhibited as* ***Exhibit MA2***.
>
> 5. It is clear that she was suffering from the above life-threatening complication at the time of the appeal hearing, but this could not be raised before the judge as she was not diagnosed with this until after the appeal hearing and we did not have any clue up until then.
>
> 6. However, [the third appellant's] medical issue with the available supporting documents was raised before the Upper Tribunal with the application for permission to appeal to the Upper Tribunal. The UT Judge perused them, but he (sic) did not consider them as this evidence was not before the First-tier Tribunal Judge."

27. The reference to "life threatening" complications derives from a letter dated 11 September 2019 from Dr Lacassagne, Consultant in Paediatric, Rheumatology at Great Ormond Street Hospital. In order to gain an accurate understanding of the way in which the expression "life threatening" was used by Dr Lacassagne, it is necessary to set out the following passages from her letter:-

> "3. [The third appellant] was referred to GOSH, on the 16th of March 2019, by Royal London Hospital, where she had been admitted, as she had symptoms of raised calcium levels that is a life threatening complication that may lead to cardiac arrythmia. She was transferred to GOSH and received intravenous hyper-hydration and a medication to lower the calcium level to prevent cardiac complications.
>
> 4. Furthermore, in order to identify the cause of this abnormal calcium level, she underwent submandibular biopsy at GOSH.
>
> 5. The results of the biopsy showed that [the third appellant] had sarcoidosis. Paediatric sarcoidosis is a rare inflammatory condition that may affect any organ in the body. It may manifest with a rash, fever, joint swelling, enlarged glands, kidney or liver dysfunction.

There is little evidence on long-term outcome as this is a rare paediatric condition.

Current Treatment:

6. [The third appellant] is currently on immunosuppressive treatment (Methotrexate) and has recently managed to stop oral steroids. She requires close monitoring to ensure she does not get symptoms or organ damage when she stops steroids or does not need to start more immunosuppression.

7. Given the rarity of her condition and the lack of expertise internationally, she needs to be managed in a Rheumatology tertiary centre such as GOSH.

Prognosis:

8. [The third appellant's] prognosis is good on treatment and with the appropriate monitoring, she might be able to discontinue treatment at some point in the future. Monitoring includes regular blood tests, clinical examination and investigations to monitor organ involvement.

9. Should [the third appellant's] management or monitoring be discontinued, she might develop hypercalcemia again or end-organ damage that might be life-threatening. The risk of this is unknown given the rarity of the disease.

Please feel free to contact me should you need more information."

G. SUBMISSIONS

28. In his oral submissions, Mr West said that although the diagnosis of the third appellant had become available on 5 April 2019, in considering whether that evidence could have been obtained with reasonable diligence for submission to the First-tier Tribunal, before the judge promulgated her decision, it was necessary to have regard to the circumstances of the first and second appellants, who were understandably very concerned about the third appellant. It was plain that the evidence, if it had been forthcoming, would have been likely to have had an impact on the judge's decision, albeit not that it would necessarily have been determinative. The evidence of the diagnosis was plainly credible. In all the circumstances, the delay in raising the diagnosis which, as we have seen, did not occur until it was mentioned in the renewed application for permission to appeal, was excusable.

29. For the respondent, Mr Lindsay submitted that the requirements of Ladd and Marshall were not met; nor was the case of E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 of assistance to the appellants.

H. DISCUSSION

30. We are in no doubt that the appellants are in error in seeking to rely upon paragraph 7 of GM (Sri Lanka) to found the proposition that an appellate court or tribunal has a free-standing duty, derived from section 6 of the 1998 Act, to disturb the decision of the lower court or tribunal. Our reasons for so finding are as follows.

31. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 provides that section 12(2) applies, "if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law". If that condition is satisfied, then section 12(2) provides that the Upper Tribunal may set aside the decision of the First-tier Tribunal and, if it does, must either remit the case to the First-tier Tribunal or re-make the decision in the Upper Tribunal.

32. Corresponding provisions are to be found in section 14 of the 2007 Act, concerning the jurisdiction of the relevant appellate court (here, the Court of Appeal). It is only where the relevant appellate court finds that the making of the decision by the Upper Tribunal involved the making of an error of law that the court may set aside the decision of the Upper Tribunal; and, if it does, either remit the case to the Upper Tribunal etc or re-make the decision itself.

33. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. In paragraph 5 of Agyarko, referred to by the Court of Appeal in GM (Sri Lanka), the Supreme Court noted this duty extends to tribunals and courts considering an appeal against a decision of the Secretary of State.

34. If, however, there is no error of law in the decision of the First-tier Tribunal or Upper Tribunal, the jurisdiction of the Upper Tribunal or the relevant appellate court will simply not be engaged. There will, therefore, be no scope for the Upper Tribunal or the relevant appellate court to act contrary to section 6 of the 1998 Act. The situation in GM (Sri Lanka) was different in that, as the judgment of Green LJ makes clear, there were discrete errors of law in the decisions of both tribunals, which meant that, pursuant to section 14 of the 2007 Act, the Court of Appeal was determining the outcome of the appeal after its review of the decision below for error of law. The issue then was whether a change in circumstances occasioned by the grant of indefinite leave to remain to the husband and children of the appellant should be reflected in the relief granted by the Court of Appeal.

35. GM (Sri Lanka) is, accordingly, not arguably authority for the bald proposition that section 6 of the 1998 Act has the effect of fundamentally re-writing the statutory functions of the Upper Tribunal and the Court of Appeal under the 2007 Act. It does not.

36. In any event, the question of whether an appellate court or tribunal may be said to act in a way incompatible with a Convention right is context-specific. In the immigration sphere, to leave undisturbed a decision of a tribunal which is free from error of law is unlikely to cause that tribunal, or any appellate tribunal or court, to be in breach of section 6(1) of the 1998 Act. In immigration and asylum appeals, neither the First-tier Tribunal nor the Upper Tribunal enforces its decisions. If, as a result of an unsuccessful appeal, a person may at that point be lawfully removed by the Secretary of State, the latter has a continuing obligation to act compatibly with the ECHR, up to the point of actual removal. Accordingly, where the position of an individual changes, such that it would now be contrary to Article 3 or Article 8 of the ECHR to remove them, the Secretary of State must not do so. The fact that the tribunal decision remains undisturbed is immaterial. The continuing relevance of any judicial adjudication of an individual's removability from the United Kingdom has, therefore, to be seen in this important light.

37. No doubt in consequence of her ongoing duty, specific provision is made by paragraph 353 of the Immigration Rules for the consideration by the Secretary of State of submissions, following the conclusion of an earlier claim (and any subsequent appeal), which can include submissions that the position of the individual has changed, or that information has come to light which it is argued would make removal based on the earlier adjudication unlawful. If the Secretary of State considers that the new information would give rise to a realistic prospect of success before a hypothetical First-tier Tribunal, then she will make a fresh appealable decision, if she does not decide to grant leave in the light of the new information. If the Secretary of State does neither of these things, her decision may be challenged on judicial review. So too may any decision under section 94 of the 2002 Act to certify the fresh claim as clearly unfounded.

38. The paragraph 353 procedure accordingly constitutes an important mechanism, which must be firmly borne in mind in deciding whether an appellate tribunal or court will be acting contrary to section 6(1) of the 1998 Act by leaving undisturbed the earlier adjudication. We shall return to this point later, in the context of the present proceedings.

39. In the seminal judgment of the Court of Appeal in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49, Carnwath LJ undertook a comprehensive review of the authorities concerning the circumstances in which a decision of a tribunal may be disturbed on the basis of a mistake of fact, even though that mistake may not be due to any judicial fault:-

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a

precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

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

"91. In summary, we have concluded in relation to the powers of this Court:

i) An appeal to this Court on a question of law is confined to reviewing a particular decision of the Tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State;

ii) Such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" (as explained by Lord Slynn in *CICB* and *Alconbury*);

iii) The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require.

92. In relation to the role of the IAT, we have concluded

i) The Tribunal remained seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties;

ii) Following the decision, when it was considering the applications for leave to appeal to this Court, it had a discretion to direct a re-hearing; this power was not dependent on its finding an arguable error of law in its original decision.

iii) However, in exercising such discretion, the principle of finality would be important. To justify reopening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors.

We should emphasise that this analysis is based on the regime applicable to this case, under which the right of appeal to the IAT was not confined to issues of law (before the change made by the 2002 Act, s 101: see para 17 above)."

41. At the end of paragraph 92, Carnwath LJ emphasised that his analysis was based on the regime then applicable, under which a right of appeal to the former Immigration Appeal Tribunal was not confined to issues of law. Between June 2003 and April 2005, when the Adjudicators and the Immigration Appeal Tribunal were replaced by the Asylum and Immigration Tribunal, appeals to the IAT were confined to issues of law. Since the establishment of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal in February 2010, appeals have, likewise, as we have already seen, been confined to errors of law.

42. This subsequent restriction has not, however, had any practical effect on the way in which the judgment of Carnwath LJ in E and R is viewed. It therefore follows that the only way in which the decision of the First-tier Tribunal in the present case can be disturbed is on the basis of a mistake of fact giving rise to unfairness, whereby the Tribunal ought to take account of new evidence demonstrating that mistake.

43. Adopting the Ladd v Marshall principles, as required by E and R, we are firmly of the view that the evidence in the form of the "discharge summary" (see paragraph 26 above), including the diagnosis of sarcoidosis, unarguably could and should have been put before the First-tier Tribunal judge, before she made her decision. In so finding, we have had regard to the statement of the first appellant. From this, it is plain that the appellants' representatives were in a position to inform the First-tier Tribunal, prior to promulgation of the decision on 11 April 2019, of the third appellant's admission to hospital and of the subsequent diagnosis. We reject the suggestion, contained in the first appellant's statement, that it was not practically possible to inform the Tribunal about the third appellant's condition before the determination was promulgated.

44. Although Carnwath LJ spoke about the possibility of the Ladd and Marshall principles being modified in exceptional circumstances, we see no reason in the present case why they should be. The ability of the appellants to make fresh submissions pursuant to paragraph 353 of the Immigration Rules is, in our view, highly material to the question of whether those principles should be diluted. The existence of the "fresh claim" procedure, arising from the overarching continuing obligation of the Secretary of State to act compatibly with the ECHR up to the point of actual removal, means there is no reason to modify.

45. At paragraph 10 above, we set out paragraphs 4 and 5 of the original grounds of application to the Upper Tribunal. As can now be seen, the drafter of those grounds was unarguably correct in doubting whether the matter of the third appellant's diagnosis was relevant as a ground of challenge to the decision of the First-tier Tribunal judge; and in postulating that, if permission were granted on one or more of the original grounds, it might be possible to introduce the diagnosis as evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. If the decision were to be set aside under section 12 of the 2007 Act, the

present position would certainly be relevant in the case of any re-making of the decision in the appeal.

46. What we have just said underscores the necessity of making a clear, substantiated E and R case, as a ground of appeal, when seeking permission to appeal on that basis.

47. We turn to the issue of the third appellant's registration as a British citizen on 7 April 2021. As we have noted at paragraph 25 above, the amended grounds submit it is obvious that her citizenship could not have been brought to the attention of the First-tier Tribunal judge before she decided the appeal. As with the medical position of the third appellant, the amended grounds contend that, in deciding whether to admit the fresh evidence of her citizenship position, the Upper Tribunal must be alive to its obligations under section 6 of the 1998 Act.

48. We are alive to those obligations. We observe that, unlike the position in GM, the decision under appeal is otherwise free from legal error (no attempt having been made to make good the original grounds 1 to 5). Whilst we note the similarity between the grant of citizenship to the third appellant and the grant of indefinite leave to remain, which was under consideration in GM, we must be guided by paragraph 92(iii) of E and R in deciding how we should exercise our discretion in respect of this new evidence. We are, in particular, mindful of Carnwath LJ's statement that, to justify re-opening the case, we would "normally need to be satisfied that there was a risk of serious injustice".

49. It is entirely plain that no such injustice arises in the present case. As we have already explained, the Secretary of State has an ongoing obligation to act compatibly with the ECHR, as regards persons subject to immigration control who remain in the United Kingdom. As with the issue of the third appellant's health, the fact of her citizenship can be the subject of submissions made by the appellants pursuant to paragraph 353 of the rules.

50. In all the circumstances, there is no legitimate reason to keep the present proceedings in being any further. They have already been in existence far longer than was warranted.

51. As can now be appreciated (i) because of the way in which the Cart judicial review evolved, it has not been decided that the decision of Upper Tribunal Judge Owens was legally flawed; and (ii) given the grounds before her, that decision was not so flawed. For the reasons we have given, even on the basis of the new grounds, there is no arguable error of law in the decision of the First-tier Tribunal.

I. DECISION

We refuse permission to appeal.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

15 September 2021