IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-000567

First-tier Tribunal Nos: HU/50518/2023
LH/06042/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

LORINDA WILLIAMS
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lester, Counsel instructed by Antony Ogunfeibo & Co, Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 20 May 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Mill promulgated on 15 December 2023 ("the Decision"). By the Decision, Judge Mill dismissed the appellant's human rights appeal on various grounds, including on the ground that the totality of the documentary and oral evidence before him did not establish that the appellant, either at the date of her application or at the date of the hearing, had accrued a period of continuous residence in the UK of at least 20 years.

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Relevant Background

2. The appellant is a national of Ghana, whose date of birth is 20 May 1970. On 15 February 2022 the appellant submitted an application for leave to remain with the assistance of MJ Solomon & Partners Solicitors. In the application form, the appellant said that she had entered the UK on 9 September 1999, and that she had remained in the UK beyond the validity of her visit visa which had expired from March 2000.

3. In a covering letter, the appellant's immigration advisor at the firm, Mr Solomon Farinto, said that the appellant had arrived in the UK in August 2000.

4. The documents submitted in support of the application included a letter dated 14 March 2022 from Mrs Georgina Victoria Anyinsah, who wrote from an address in Blackpool. She said that she was a British citizen. In August 2000 she heard that her sister, Lorinda, had arrived in London. By then, her third child, Sally-Ann Yolanda Mensah, was two months old. She was enclosing Lorinda's photograph with Sally-Ann taken shortly after her arrival in the UK, which was 'Picture 33'. She was also enclosing a copy of her passport and Sally-Ann's birth certificate. It was a great relief for her to see Lorinda, who stayed at her house in Enfield, and assisted her wholeheartedly for many years in taking care of her children until she moved out of London.

5. In a refusal letter dated 28 December 2022 ("the RFRL") which was addressed to Mr Farinto, the respondent said that appellant had not shown that she met the requirements of Rule 276ADE(1)(iii), as she had not provided supporting documents for the years 1999, 2000, 2001, 2002 and 2003. There was also no record of her claimed entry to the UK on 9 September 1999.

6. The respondent went on to address the question of whether there were exceptional circumstances in her case. It had been decided that there were no such exceptional circumstances. The Home Office had no record of her arrival in the UK on 9 September 1999, and furthermore, in the representative's letter it was stated that she had arrived in August 2000. So, conflicting dates had been given as to when she claimed to have arrived in the UK.

7. The appeal bundle compiled by the appellant's solicitors included a witness statement from the appellant. In her witness statement, the appellant said that she had arrived in the UK in August 2000 and she had taken up residence with her sister, Georgina, at her Enfield address. She initially supported Georgina with domestic work caring for her children. Sally-Ann Yolanda Mensah, who was Georgina's third daughter - now 22 years old - was just about two months old when she arrived.

8. In a Respondent's Review dated 6 July 2023, the Pre-Appeal Review Unit (PARU) gave their response to the ASA and the evidence in the appellant's appeal bundle.

9. They agreed that the first issue was whether the appellant had resided continuously in the UK for 20 years. As to the first issue, it was not accepted that the appellant had shown that she had been in the UK continuously since August 2000 as she had claimed. There was no reliable evidence of her residence in the UK in the years 2000 to 2003.

10. On 27 November 2023 the Tribunal made a direction which is recorded as Direction 1 on the CCD file. The Tribunal noted from the hearing requirements that one witness would be attending the hearing, Georgina Victoria Anyinsah. However, no signed and dated witness statement from her had been provided. The Tribunal directed that a signed statement was to be submitted by no later than 4 December 2023.

11. On 4 December 2023 there was uploaded to the CCD file a signed witness statement from the appellant's sister dated 29 November 2023. In her signed statement, she said that she made her statement further to her letter of 14 March 2022. Lorinda arrived in the UK in August 2000 when her third child, Sally-Ann Yolanda Mensah was just two months old. Lorinda had remained here ever since. Lorinda had resided with her and her children at the Enfield address until she (Georgina) had moved out of London in 2005.

The Hearing Before, and the Decision of, the First-Tier Tribunal

12. The appellant's appeal came before Judge Mill sitting at Hatton Cross on 13 December 2023. The appellant was represented by Counsel, and the respondent was represented by a Home Office Presenting Officer. In the Decision, the Judge gave an account of the hearing at paras [7] to [9].

13. It had been intended that there would be one additional oral witness, Georgina, who was the appellant's elder sister. She was not however available. An application was made for an adjournment. The Judge said that he had heard from both parties before determining the issue, and he had applied the decision of the Court in *Nwaigwe (Adjournment: fairness)* [2014] UKUT 00418 (IAC).

14. It was submitted that Georgina was not able to attend due to work commitments. She had commenced a new job as a Carer the day before the hearing. This was evidenced by an email offer of employment confirming that work. It was submitted that it would be difficult for the appellant's sister to have taken time off so early into that new role. The difficulty was compounded by the fact that she had not worked for some months because, very sadly, her 30-year-old daughter had passed away in July 2023.

15. The Judge observed that the appellant’s sister had provided earlier written evidence as well as a recent witness statement which was dated 29 November 2023, which would form her evidence in chief in any event. The appellant’s own representative conceded that it was a weak basis for an adjournment and, despite him knowing about the situation prior to the day of the hearing, no attempt was made to seek an adjournment until the hearing itself. There was no evidence that the appellant’s sister had attempted to take time off her work and had been denied this. Given the importance of the appeal hearing, one may have expected her to take such steps, despite recently commencing employment. The Judge said he had ultimately determined that it would not be unfair to proceed in the absence of the appellant’s sister. It was not in the interests of justice to delay determination of the appeal.

16. In his findings if fact, the Judge observed at para [15] that the appellant’s claim to have entered the UK in September 1999 on a visit visa was entirely at odds with the written and oral evidence of the appellant for the purposes of the appeal, and indeed at odds with the witness statement of her sister. They *“now”* both claimed that she entered in August 2000. The appellant was not able to explain why there had been differences between what she and her sister were saying now, and the date of entry which was declared on her UKVI application. In fact, under cross-examination, the appellant was unable to specify at all the basis of her entry to the UK. It was claimed that all of the documents were arranged by her boyfriend who brought her to the UK under the promise of a better life and work. She said that after a short period in the UK it became apparent to her that he intended her to work as a prostitute. She then ascertained the details of her sister, who she knew to be in the UK.

17. At para [16], the Judge said that the inability of the appellant to be clear about when she entered the UK seriously undermined her credibility. In oral evidence, she sought to depart from any suggestion that she had entered the UK in 1999 - yet that was the very clear declaration within her UKVI application which was the origin of this appeal.

18. The Judge went on to dismiss the appeal on all grounds raised.

<u>The Grounds of Appeal to the Upper Tribunal</u>

19. The grounds of appeal were settled by the appellant’s solicitors. Ground 1 was that the Judge’s refusal of the adjournment request was unfair, and his reasoning was misconceived. Ground 2 was that the Judge’s adverse credibility finding against the appellant in respect of the discrepancy over her claimed date of entry was unfair, having regard to the totality of the evidence that was before the Judge, including the application covering letter, which clearly stated that the appellant arrived in August 2000, and also because of “*a new matter coming to light*” which was the solicitor’s admission that he had made an inadvertent error about the date of the appellant’s arrival in the UK.

The Renewed Application for Permission to Appeal

20. Following the refusal of permission to appeal by the First-tier Tribunal, , the appellant's solicitors re-submitted the grounds of appeal to the Upper Tribunal with an additional commentary.

21. Firstly, when refusing to grant an adjournment, the Judge was emphatic that the adjournment request was only made on the date of the hearing. This was a significant misconception, which would have informed his ultimate decision to refuse.

22. Secondly, in refusing permission to appeal, the First-tier Tribunal had not considered the appellant's representative's unreserved admission of responsibility for the erroneous entry on the application form. This was quite an important point. Although it was post-hearing, it put in perspective the appellant's inability to explain at the hearing why there were conflicting dates in the application form and the covering letter.

23. The Judge had failed to realise that it was a question of discrepancy of evidence and not of its alteration. The Judge made no mention of the covering letter which stated that the appellant arrived in August 2000.

The Reasons for the Eventual Grant of Permission to Appeal

24. On 26 March 2024 Upper Tribunal Judge Gill granted the appellant permission to appeal as it was arguable that the decision of Judge Mill to refuse to adjourn the hearing may have led to the hearing before him being unfair, in the particular circumstances of this case.

25. However, as the grounds did not prove themselves, the appellant's representatives would be expected to file and serve a witness statement from the solicitor or caseworker who completed the online application on the appellant's behalf, attesting to the explanation given in the grounds, that he/she was responsible for mistakenly entering the date of 9 September 1999 in the appellant's online application as the date of her entry into the UK, and that this date was not based upon information/evidence given to the firm by the appellant.

26. Upper Tribunal Judge Gill added that, upon the service of such a witness statement, it would not be appropriate for the appellant to be represented by the firm at the error of law hearing. In addition, it would be necessary for the solicitor/caseworker who made the witness statement to be available to be cross-examined at the error of law hearing.

The Rule 24 Response

27. On 16 April 2024, Andrew Mullen of the Specialist Appeals Team settled a Rule 24 response opposing the appeal. He submitted that the Judge of the First-tier Tribunal had directed himself appropriately. It was noted that the appellant's representatives had been directed to lodge a statement

explaining the circumstances surrounding the asserted error. The respondent observed that the apparent discrepancy between the application form and the covering letter was referred to in the RFRL dated 28 December 2022, and that neither the appellant nor her representatives had dealt with the matter.

The Solicitor's Witness Statement

28. In compliance with the direction made by Upper Tribunal Judge Gill, Mr Solomon Farinto made a witness statement dated 23 April 2024, endorsed with a Statement of Truth.

29. In his statement, he said that he was the Solicitor at the firm of MJ Solomon & Partners Solicitors, and that he had had the conduct of the appellant's online application of 15 February 2022. The application was commenced based upon her initial instructions, during which she indicated that she had arrived in the UK on 9 September 1999 (as stated on the client registration sheet) which was when she believed her niece, Sally-Ann Yolanda Mensah, was two months old. It was also the case that the appellant's instruction was subsequently amended when she attended their office to provide further information. On that occasion, she clearly stated that her niece was actually born in June 2000, and that her date of entry was in fact August 2000, as stated in their covering letter. This was her final instruction in respect of her arrival in the UK. Unfortunately, while her final instruction was noted, her initial instruction stated on the client registration sheet was inadvertently left unaltered, which culminated in the discrepant entry of 9 September 1999 remaining on the application form. It was the firm's error that the application form provided information that was inconsistent with the appellant's instruction.

The Hearing in the Upper Tribunal

30. At the hearing before us to determine whether an error of law was made out, Mr Lester developed Grounds 1 and 2 of the appeal by reference to his ASA dated 16 May 2024 that was uploaded to the CCD file in advance of the hearing.

31. As to Ground 1, the Judge had based his refusal of the adjournment request on a mistaken understanding of the facts. It was not the case that no attempt was made to seek an adjournment until the hearing itself. In reality, the appellant's representatives had applied to adjourn by email on 11 December 2023 - two days prior to the hearing. Where an adjournment has been refused and it is clear that the judge has been mistaken regarding a material matter that was part of the consideration leading to that refusal, such a refusal is unfair and plainly wrong.

32. As to Ground 2, the statement of Mr Solomon Farinto made clear that the date discrepancy in the documents was as a result of his error, not hers. Without such an error, there would have been no discrepancy for the Judge

to attach negative findings to. This error was plainly material, and it rendered the determination unfair.

33. Mr Lindsay submitted that there was no suggestion that what Mr Farinto said was not true, but he was not in a position to confirm whether he would want to cross-examine him, as he had only been notified of his attendance at the hearing during Mr Lester's submissions. He added that if Mr Farinto was to be called as a witness, then he might need to make an application for an adjournment.

34. We adjourned the hearing so that Mr Lindsay could consider his position.

35. On the resumption of the hearing at 2pm, Mr Lindsay said that he was in potentially more difficulty than he was before lunch. He had had a conversation with Mr Lester during the short adjournment, and he had told Mr Lester that he was going to rely upon the case of *Ladd v_Marshall* [1954] 3 All ER 745 CA as a ground for excluding Mr Farinto's evidence. In response, Mr Lester said that he would rely upon the case of *Kabir* [2019] EWCA Civ 1162.

36. Mr Lester pointed out that Upper Tribunal Judge Gill had directed that a witness statement from him should be provided, and that the witness should attend for cross-examination. There was no mention of *Ladd v Marshall* in the permission decision, and it was also not mentioned in the Rule 24 response.

37. Mr Lindsay replied that he was not able to respond to the *Kabir* case, because he had not read it. He might need more time to consider it. At our invitation, Mr Lester explained the relevance of *Kabir*. In *Kabir the* Court of Appeal cited with approval the conclusion of Carnwath LJ in *E & R* [2004] EWCA Civ 49 at para [91] which was, *inter alia*, that an appeal on a question of law may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact"; and that 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. Mr Lester also referred us to para [33], where the Court said:

> When it came to the application to admit the fresh evidence, the UT also had a wide discretion … The UT was, in my view, entitled to refuse the application in view of the failure to follow the correct procedure and to take into account the *Ladd v Marshall* principle that this new evidence could, with reasonable diligence, have been made available to the FTT on the initial appeal.

38. Mr Lindsay formally applied for an adjournment on the ground that the evidence from Mr Farinto had only been received by the respondent late in the day, whereas if it had been received sooner, no doubt the Rule 24 response would have raised the *Ladd v Marshall* exclusionary principle.

As things stood, the respondent did not know what the case was that the respondent was being asked to respond to.

39. Mr Lester opposed the adjournment request, and after a short break for deliberation, we informed the parties that the adjournment application was refused. We did not consider that the case of *Kabir* took Mr Lindsay by surprise, as it merely endorsed and applied what had been said in *E & R* about the application of *Ladd v Marshall* principles in a public law context. It was unclear to us why Mr Lindsay had only received Mr Farinto's witness statement at a very late stage, but we did not consider that the respondent had thereby been prejudiced to the point where an adjournment was reasonably required. The substance of Mr Farinto's witness statement had been foreshadowed by the grounds of appeal. Moreover, we considered that the issues raised by Mr Farinto's evidence were not complex, and that Mr Lester had had sufficient time to prepare any line of questioning which he was minded to pursue, including questions directed to the *Ladd v Marshall* principle.

40. Mr Lester proceeded to call Mr Farinto as a witness, and he adopted his signed witness statement as his evidence in chief. Mr Farinto was cross-examined by Mr Lindsay, and he answered questions for clarification purposes from us.

41. They had worked on the application together. The application started not too long after her first instructions. On the UKVI website you could 'save' as you went along, and come back to it. What he did not do was to go back to the page to do the necessary correction on the entry date after obtaining the second set of instructions from her that the date of entry was August 2000.

42. After the conclusion of Mr Farinto's evidence, Mr Lester acknowledged that *Ladd v Marshall* was a starting point, but he submitted that it was not conclusive on the question of whether the evidence of Mr Farinto should be taken into account as supporting the error of law challenge on unfairness grounds.

43. Mr Lindsay submitted, with reference to Ground 1, that it had not been shown that a valid adjournment application had been made prior to the hearing before the First-Tier Tribunal. In any event, the Judge was not necessarily finding that there was no adjournment application prior to the hearing. He was only recording Counsel's submission on this.

44. As to Ground 2, the respondent's issue with Mr Farinto's evidence was not so much the question of its admissibility, as they had in fact now heard from him, but the effect that the evidence should be considered to have. While it was accepted, in the light of the discussion in *E&R,* that there was a degree of flexibility to be applied in this jurisdiction, Mr Farinto's evidence could have been, and should have been, produced for the purposes of the hearing in the First-tier Tribunal, and so there was no unfairness. The appellant was lumbered with the consequences of his

solicitor's mistake. Mr Lindsay relied on *Mansur (Immigration advisor's failings: Article 8) Bangladesh* [2018] UKUT 00278 (IAC) for the proposition that a person who takes poor advice or receives a poor service from an Immigration Advisor will normally have to live with the consequences.

Discussion and Conclusions

45. Before turning to our analysis of this case, we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].

46. We also keep in mind that the outcome of the analysis conducted in *E & R* was summarised by Carnwath LJ at para [66] as follows:

> 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 a statutory context where the parties share an interest in cooperating 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.

Ground 1

47. As was acknowledged by Judge Elliot when refusing permission to appeal, the grounds of appeal are correct in asserting that the adjournment application was made two days before the scheduled hearing.

48. As is evidenced by the case notes on the CCD file, on 8 December 2023 the appellant's sister emailed the solicitors to say that she was unable to attend the Tribunal for her sister's immigration hearing on 13 December 2023. She was a live-in Carer providing care on a 24-hour basis. She was starting a new package on 12 December 2023 which ran until 23 January 2024. She had pleaded over and over with her agency and client's family to allow her to start on 13 December, but they said that she should either report to work on 12th or lose the placement. She had been out of a job since her previous client had passed away on 5 October 2023. So, she needed this placement.

49. On 11 December 2023, the appellant's solicitors sent as an email to the Tribunal at Hatton Cross requesting an adjournment. They said that they were compelled to request an adjournment as an important witness, Georgina Anyinsah, was unable to attend on the scheduled hearing date.

This was due to her work engagement, which she felt obliged to keep. Ms Anyinsah had furnished them with proof of her work engagement, and had indicated that she was willing to attend on another date, provided that she was given sufficient notice of the hearing. They asked the Tribunal to grant this request, so as not to deprive the appellant to have her evidence corroborated. They attached Ms Anyinsah's communication and her proof of work engagement.

50. On 13 December 2023, at 10:05, a Legal Officer at Hatton Cross emailed Judge Mill to say that he had just come across "*this email*" in the Legal Officer's inbox. The appeal was before him today, and it looked as if he was currently looking at the appeal on CCD. The Legal Officer apologised for the delay in processing this.

51. The email to which the Legal Officer referred was an email sent on the morning of 12 December 2023 by a Clerk to the Tribunal at Hatton Cross, drawing the Legal Officer's attention to the enclosed adjournment request from the Subject Representative.

52. It is apparent from the email trail that the adjournment request was emailed by the appellant's solicitors on 11 December 2023 at 18:49. The email from the Legal Officer to the Judge contained all the attachments that the appellant's solicitors relied upon as supporting the application for the adjournment.

53. In light of this material, we consider that the Judge was mistaken in finding that no attempt was made to seek an adjournment until the hearing itself. We do not consider that the Judge was merely quoting the appellant's Counsel on this point. The Judge was clearly unaware of the fact that the appellant's solicitors had submitted an adjournment request on 11 December 2023, and that the request in writing had only been forwarded to him just after 10am on the day of the hearing. The delay in the written request reaching the Judge was not a delay for which either the appellant or her solicitors was responsible. As Counsel for the appellant did not have access to the CCD file, he could not access it in order to draw the Judge's attention to the case notes.

54. As a result of not considering the contents of the case notes, or the attachments to the email sent to him just after 10am, the Judge was also not appraised of the fact that the appellant's sister said that she had pleaded with her agency to be allowed to start her new assignment a day later, so that she could attend the hearing, but that she had been given a stark choice of either starting the placement on 12 December 2023 or losing the job altogether.

55. The mistake of fact relied upon in Ground 1 is a mistake over the timing of the adjournment request. Although the Judge might reasonably have decided that the adjournment request should be refused anyway, we do not consider that a reasonable Tribunal properly directed could have reached any other conclusion than that the adjournment request should be

refused. The appellant's sister was a crucial witness in that she was only person who could corroborate the appellant's claimed date of arrival of August 2020 and her continuous presence in the UK in the period 2000 to 2003, in respect of which there is a documentary void. Accordingly, we consider that Ground 1 is made out.

Ground 2

56. As to Ground 2, we consider Mr Lindsey's initial line that the evidence of the solicitor should be excluded on *Ladd v Marshall* principles was pre-empted by the decision of Upper Tribunal Judge Gill to direct the appellant's solicitor to make a witness statement and to make himself available for cross-examination. While we accept that as a general rule a party is responsible for mistakes made by their legal advisers, we do not consider that Upper Tribunal Judge Gill exceeded her jurisdiction in requiring proof that the discrepancy over entry dates was the responsibility of the appellant's solicitor, rather than the appellant herself.

57. Furthermore, while we accept that the evidence provided by the solicitor does not meet the test of *Ladd v Marshall* or the test set out in *E & R* at [66], since the evidence could with reasonable diligence have been provided to the First-tier Tribunal, the impact of the failure to take reasonable care on the solicitor's part was aggravated by a mistake of fact on the Judge's part for which neither the appellant nor the appellant's solicitor is responsible.

58. We consider that the Judge was clearly wrong to find that it was only "*now*" that the appellant and her sister were advancing a case that her date of entry was August 2000. We accept that the Judge was not obliged to refer to every relevant piece of evidence, but we do not consider that it can be inferred that the Judge took into account the contents of the covering letter that was sent with the application, or the contents of the supporting letter from the appellant's sister that was enclosed with the application.

Conclusion

59. For the above reasons, we are persuaded that the proceedings before the First-tier Tribunal were vitiated by material unfairness, and accordingly that the decision should be set aside as being unsafe.

60. We have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC), we have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.

61. We consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and we therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Mill.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
14 June 2024