Upper Tribunal
(Immigration and Asylum Chamber)

Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 June 2011	**30 June 2011**

Before

SENIOR IMMIGRATION JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMEN CHOMANGA

Respondent

Representation :

For the Appellant: Mr G Saunders, Home Office Presenting Officer

For the Respondent: Ms B Asanovic, Counsel instructed by D J Webb & Co, Solicitors

The parties are bound by unappealed findings of fact in an immigration judge's decision. It is therefore not open to the respondent following a successful and unchallenged appeal by an appellant to make a further adverse decision on the same issue relying on the same evidence as before unless there is evidence of fraud or one of the exceptions identified in para 35 of the judgment of the Court of Appeal in Secretary of State v TB [2008] EWCA 997 applies.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of Immigration Judge Callender Smith who allowed Ms Chomanga's appeal on both immigration and human rights grounds against the decision made on 22 December 2010 cancelling her leave to remain in the UK.

2. In this determination I will refer to the parties as they were before the First-tier Tribunal, Ms Chomanga as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a citizen of Zimbabwe born on 12 March 1965. On 26 July 2006 she was granted leave to remain in the UK until 26 July 2011 on the grounds of her UK ancestry. In support of her application she had submitted firstly, her birth certificate showing her date of birth as 12 March 1965, her place of birth Bulawayo and her mother's maiden name Maud Ford and secondly, her mother's

birth certificate showing her place of birth as Salisbury, Rhodesia but that of her father (the appellant's maternal grandfather) as England. This enabled the appellant to show that one of her grandparents had been born in the UK and that she could meet the requirements for leave to remain as a person with UK ancestry.

4. However, information later became available from the Zimbabwe Central Registry in a letter dated 26 August 2010 that these documents were not authentic and on 15 September 2010 the respondent made a decision under para 323(ii) of HC 395 to curtail the appellant's leave to remain.

5. The appellant appealed against that decision and her appeal was heard on 29 October 2010 by IJ Ross. At that hearing the respondent was not represented. In para 2 of his determination the judge set out the respondent's reasons for curtailing the appellant's leave as follows:

"The reason given for the decision was that information had become available from the Zimbabwe Central Registry of Births and Deaths that her own birth certificate and the certificate of her mother Maud Ford which had been submitted with her original application for entry had been found not to be authentic. The two certificates were found to belong to someone else."

The appellant submitted a bundle of documents in support of her appeal including a witness statement in which she maintained her ancestry, asserting that although the documents she had submitted might have contained errors they were genuine. She gave oral evidence confirming that she had come to the UK as a visitor in December 1998 and that her children Nelson, then aged 18, and Christine, 21, were living with her but neither had any status in the UK. The judge also heard evidence from the appellant's partner Mr Bestman, a naturalised British citizen from Nigeria. He said that he and the appellant were engaged and he was in the process of seeking a divorce from his wife.

6. So far as the immigration appeal was concerned the judge directed himself that the burden of proving that the documents relied on by the appellant in respect of her claim for ancestry in the United Kingdom were false rested on the respondent and must be proved to a high degree of probability. The respondent was not represented at the hearing. The judge noted that the respondent had not submitted any evidence to support the contention that the documents in question were forged. The letter from the Central Registry in Zimbabwe had not been produced and the judge found that it therefore followed that the appeal must be allowed on immigration grounds.

7. He went on to consider article 8, finding that the removing the appellant to Zimbabwe would be an interference with her private and family life. He considered the issue of proportionality, reminding himself that the burden was on the respondent to prove that the decision was proportionate. He said that he did not accept that the appellant and Mr Bestman were living together in a relationship akin to marriage but that they were good friends who had had a relationship in the past. He was not satisfied that they were partners or that they lived together as claimed.

8. He then said in para 17 of his determination:

"Although the appellant has lived in the United Kingdom for twelve years, she was only granted permission to remain in July 2006, her entry and remaining in the UK up to that date was tainted by bad faith in the sense that she came as a visitor and stayed on. Another factor which would be very important in deciding the issue of proportionality is the question of whether the appellant has submitted forged documents in support of her claim to UK ancestry. This issue has not been resolved because the respondent has not submitted the documents on which the decision was based. I consider therefore that it would be premature for me to make a decision on proportionality until this issue is

finally resolved. If the Home Office wish to take steps to curtail her leave again and produce the relevant documents, then they or another immigration judge can also determine the issue of article 8, having determined the issue of ancestry. It seems to me that unusually on the facts of this case I should not determine the article 8 claim. Since I have allowed the appeal in relation to the immigration issue, there is no real prejudice to the appellant in not resolving the issues under article 8."

9. Following that decision the respondent reviewed the position and made a further decision dated 22 December 2010 which was then the subject of the appeal heard by IJ Callender Smith on 28 February 2011. The reasons for the decision were set out in the reasons for refusal letter dated 22 December 2010 as follows:

"However, information has now become available from the Zimbabwe Central Registry verification of births and death registrations, [and] confirms that your own birth certificate and the certificate for Maud Ford, which you submitted with your application, have been found not to be authentic.

Your birth certificate, entry number BYO/634/65, confirms it belongs to someone else and the certificate for Maud Ford, entry number – SMS/166/45, also confirms it belongs to someone else, and with the year of birth 1945 being spelt incorrectly.

Furthermore on both certificates it states the birthplace as Andrew Fleming Hospital, Salisbury, however this hospital was not opened until 1974, although the dates of birth on the certificates show 1945 and 1965, therefore in view of these facts it has been decided that you do not continue to meet the requirements of the rules under which your leave to remain was granted."

10. The judge referred to the respondent's decision and said that there was a complete lack of any evidence from the respondent to support the assertions made in the reasons for refusal letter and commented that this would seem to be the second occasion this had occurred (para 10). He noted that on 15 September 2010 the respondent had curtailed the appellant's leave on exactly the same grounds as in the current appeal. She had appealed that decision and her appeal had been allowed by IJ Ross. It was argued on behalf of the appellant that the respondent's reliance on the Central Registry letter was an abuse of process and that IJ Ross' determination should be regarded as the authoritative determination as to the findings of fact made on the basis of the evidence available at the time of that hearing. The letter from the Central Registry had been in the respondent's possession when that appeal was heard and no explanation had been provided why the letter was not served on the appellant or the Tribunal prior to that appeal hearing.

11. The judge said that the respondent had created an abuse of process in failing to submit this evidence for the second time, particularly when the consequences of an adverse decision in respect of the appellant were that she could be returned to Zimbabwe (para 20). As the respondent had produced no evidence, he failed to discharge the onus of showing that the appellant had obtained leave by deception and the immigration appeal was allowed. The judge then turned to consider article 8. On the basis of the evidence before him he accepted that there was a current relationship between the appellant and Mr Bestman and that they were engaged to be married. He also accepted that the appellant's son Nelson had been granted refugee status in January 2011 and there was a similar application pending from her daughter. He found that removing the appellant to Zimbabwe would not be proportionate in the light of her private and family life built up over the length of time she had spent in the UK. The appeal was allowed on article 8 grounds.

The Grounds and Submissions

12. The respondent's first ground argues that the judge gave inadequate reasons for finding that the respondent's decision was an abuse of process. The decision was incapable of amounting to such an abuse as it was not the respondent who had brought the proceedings. In the alternative it is argued in the light of EG (Abuse of process – legitimate expectation) Serbia and Montenegro [2005] UKAIT 00074 that the concept had a limited application in the field of immigration appeals, the only relevant jurisdiction being whether the decision under appeal was "otherwise not in accordance with the law". The judge failed to direct himself, so it is argued, on the current law on the concept of abuse of process and had not performed the necessary enquiry in accordance with principles summarised by Burnett J in Modi v UKBA [2010] EWHC 1996 (Admin). The second ground argues that when assessing article 8 the judge failed to consider whether the appellant had a protected family life with her children in the UK such as to engage article 8 and then failed when assessing proportionality to take into account the fact that forged documents had been submitted. It is also argued that the judge also erred by failing to consider whether the family could continue its family life in her partner's country, Nigeria.

13. Permission to appeal was granted by the First-tier Tribunal (Senior Immigration Judge Spencer) for the following reasons:

"I am prepared to grant permission to appeal given the importance of ensuring that reliance upon false documents should not be permitted to be successful by the Tribunal. It does seem, however, that the grounds of appeal may be based on a false premise, namely that within the standard bundle the Secretary of State adduced two documents from Zimbabwe which were considered to support the refusal. The Secretary of State was not represented before the immigration judge, however, and he noted in para 7 of his determination that the respondent failed to provide any of the evidence being relied on for the decision. There is no respondent's bundle in the file.

I am satisfied that the immigration judge may have made a material error on a point of law."

14. At the hearing before me the appellant relied on a skeleton argument dated 6 June 2011 and Mr Saunders produced a bundle of documents including the appeal papers, the letter of 26 August 2010 from the Central Registry in Zimbabwe, the two birth certificates in dispute and an internal file note showing that these documents had been forwarded to the Tribunal on 31 January 2011.

15. The fact that the documents were sent to and received by the Tribunal is confirmed by the appeal file. The covering letter from the respondent is stamped as received at Arnhem House on 1 February 2011 and there is a note that the file is in the pending hold for Sutton with a hearing date of 28 February 2011. There is also a stamp to show that the papers were received at Sutton on 2 March 2011 but it is clear that they were not linked to the appeal file before either the hearing (listed at Taylor House, not Sutton) on 28 February 2011 or the issue of the judge's determination on 3 March 2011. It then appears that the papers were sent on to Field House where they were received on 11 March 2011 and they were finally linked to the file after permission to appeal was granted.

16. Mr Saunders submitted that in these circumstances, whilst the judge's comment that there had been an abuse of process might have been justified if in fact the respondent had not filed these documents, the fact remained that they had been forwarded and not linked to the appeal file. The decision of IJ Ross left it open to the respondent to make a further decision and she had done so. The test for showing an abuse of process as set out in para 57 of Modi had not been met. As far as article 8 was concerned, a decision on proportionality was inextricably linked to the appellant's immigration history and the judge had not taken into account, albeit through no fault of his, the evidence that the appellant had relied on forged documents.

17. Ms Asanovic argued that the documents from the Central Registry had been available to the respondent before the date of hearing before IJ Ross and in the light of the failure to prove the allegation of forgery he had allowed the appeal on immigration grounds. In any event the document from the Central Registry was heavily redacted and would not have made any difference to the outcome of the appeal and as the appellant's son had been granted refugee status, it could not now be proportionate to expect her to return to Zimbabwe.

Assessment of the Issues

18. The issue at the heart of this appeal is whether it was open to the respondent to make a further decision on whether the appellant had used false documents in support of her application for leave to remain on the ground of UK ancestry, having failed to establish this in the appeal before IJ Ross. The issue of abuse of process was argued in front of IJ Callender Smith but he was not referred to the judgment of the Court of Appeal in Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA 977. The facts in that appeal can briefly be summarised as follows. The applicant was arrested and sentenced to four years three months imprisonment for supplying class A drugs. The respondent decided to make a deportation order and the applicant appealed on asylum and human rights grounds. The respondent failed to raise in the appeal the issue of whether the applicant was excluded from the protection of the Refugee Convention by article 33(2) or whether he was subject to the presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002. The judge allowed the appeal on both asylum and human rights grounds.

19. The respondent did not seek to have that decision reconsidered or set aside but subsequently wrote to the applicant's solicitors indicating that she proposed to rely on the presumption in s.72 and giving the appellant the opportunity of making further representations. She then decided that article 33(2) of the Refugee Convention applied to the applicant, refused asylum and decided to grant temporary admission only. Her decision was challenged on judicial review and in the High Court it was held that this was an abuse of process. On appeal to the Court of Appeal, the Court noted that it had been open to the respondent to seek to establish article 33(2) at the hearing of the appeal and to appeal the determination of the judge on the ground that she had failed to apply the statutory presumption and thereby erred in law. Stanley Burnton LJ summarised the issues of principle as follows:

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

33. The principle that the decision of the Tribunal is binding on the parties, and in particular on the Home Secretary, has been consistently upheld by the Courts. In R (Mersin) v Home Secretary [2000] EWHC Admin 348 , Elias J said:

'In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision. If he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the Special Adjudicator without appealing it, and indeed Mr Catchpole [Counsel for the Home Secretary] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had

determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position.'

34. In R (Boafo) v Home Secretary [2002] EWCA Civ, [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the court agreed, '… an unappealed decision of an Adjudicator is binding on the parties.' In R (Saribal) v Home Secretary [2002] EWHC 1542 (Admin) , [2002] INLR 596 , Moses J said:

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

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

36. The judge described the attempt by the Secretary of State to raise the s.72 issue after the immigration judge's decision and to refuse leave to enter and to remain as an abuse of process. That is an expression normally reserved for abuses of the process of the courts. The Secretary of State's action might be castigated as an abuse of power, but I would prefer to avoid pejorative expressions of uncertain denotation and application and to hold simply that the Secretary of State was bound by the decision of the immigration judge and that her subsequent action was unlawful on the ground that it was inconsistent with that decision. It follows that the judge's conclusion was correct. The Home Secretary is bound to grant TB the leave to which the immigration judge's decision entitled him."

20. I am satisfied that the application of these principles resolves the issues which have arisen in this appeal and that the arguments about abuse of process raised in the grounds are largely beside the point. The respondent was bound by the findings made by IJ Ross who was not satisfied that she had produced any or any sufficient evidence to maintain the assertion that the appellant had obtained her leave to remain on the basis of UK ancestry by submitting false documents. The respondent had had the opportunity of filing evidence in support of that contention but had failed to do so or indeed to attend the hearing. By making a further decision by relying on evidence which could and should have been produced at that hearing, the respondent was in substance attempting to circumvent the judge's decision. It is right that in para 17 of his determination the judge expressed the view that it was open to the respondent to curtail the leave again and to produce the relevant documents on any subsequent appeal but in the light of TB that view was incorrect. He said that the issue of falsity had not been resolved but it had by the respondent's failure to produce evidence and by the immigration appeal being allowed. These comments made obiter by the judge did not give the respondent the power to take a course of action not open to her under the law.

21. None of the exceptions to the general principle that an unappealed decision is binding set out in para 35 of Stanley Burnton LJ's judgment apply in the present case. There was no fresh evidence which was not available at the date of the hearing, no change in the law and no relevant change of circumstances or new events after the date of decision. This was also not a case where there was subsequent evidence of fraud: see EB (fresh evidence – fraud- directions) Ghana [2005] UKAIT 000131. The issue before IJ Ross was whether false documents had been relied on and the evidence on which the respondent based her subsequent decision was exactly the same as the evidence previously relied on.

22. For these reasons I am not satisfied that it was open to the respondent to curtail the appellant's current leave following the dismissal of the appeal by IJ Ross by making a fresh decision based on precisely the same evidence. It is correct that there was a procedural irregularity in that the documents submitted by the respondent for the appeal before IJ Callender Smith did not reach him before he determined the appeal or issued his determination but even if they had and in particular if his attention being drawn to TB , he would inevitably have allowed the immigration appeal. As the issue of whether the appellant had submitted false documents had been resolved, it is not arguable that he left any relevant matter out of account when considering the appeal on article 8 grounds.

23.
I adopt the comments of Stanley Burnton LJ in para 36 of his judgment. This is not a case where the respondent's actions can be categorised as an abuse of process but as a failure to apply the law in accordance with the principles set out in TB .

Decision

24. In so far as there was a procedural irregularity in the hearing before IJ Callender Smith, it had no bearing on the outcome of the appeal. The respondent's appeal is dismissed and the judge's decision to allow the appeal on both immigration and human rights grounds stands.

Senior Immigration Judge Latter

(Judge of the Upper Tribunal)