



**Upper Tribunal
(Immigration and Asylum Chamber)**

Mubu and others (immigration appeals - res judicata) [2012] UKUT 00398(IAC)

THE IMMIGRATION ACTS

**Heard at: Field House
On 26 September 2012**

Determination Sent

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Before

Upper Tribunal Judge Storey

Upper Tribunal Judge O'Connor

Between

Secretary of State for the Home Department

Appellant

and

Paul Mubiana Mubu

Olivia Tengende

Paula Kamona Mubu

Mwendabai Patrice Mubu

Respondents

Representation :

For the Appellant: Ms M. Tanner, Home Office Specialist Appeals Team

For the Respondents: Mr Z. Malik, instructed by Malik Law Chambers Solicitors

The principle of res judicata does not operate in immigration appeals.

The guidelines set out in Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1 are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties. This is so whether the finding in the earlier determination was in favour, or against, the Secretary of State.

DETERMINATION AND REASONS

1.

The respondents [hereinafter 'the claimants'] are citizens of Zimbabwe. They are aged 36, 35, 13 and 9 years old respectively. The first and second claimants are married and the third and fourth claimants are their children.

2.

The first three claimants entered the United Kingdom as visitors in 2001. They failed to leave the United Kingdom by the date their leave expired, and subsequently overstayed. On the 11th July 2003 the first claimant was granted leave to remain until the 11th July 2007. Such leave was granted on the basis of his UK ancestry, it having been accepted by the Secretary of State that he is the grandson of a British citizen by birth, a Mr Ernest Alletson. The second and third claimants were granted leave to remain for the same period, as dependents of the first claimant. The fourth claimant was born in the United Kingdom on the 8th June 2004.

3.

On the 18th June 2007 the first claimant (with the second to fourth claimants being named as his dependents) applied for an extension of his leave to remain, again, on the grounds of his UK ancestry. On the 14th January 2008 the Secretary of State refused each of the claimants' applications. The Secretary of State refused the first claimant's application pursuant to paragraph 186(iii) of HC 395. It was concluded that two certified copy birth certificates that had been produced by the first claimant in support of his application, these being in his own and his mother's [Mrs Christina Alletson] names, were not authentic.

4.

The conclusions of the Secretary of State in the decisions of 14th January 2008 were based on the contents of a letter, dated 27th November 2007 and authored by the Registrar General of Births and Deaths in Zimbabwe. This letter was written in response to an enquiry made by the British Embassy in Harare and, inter alia, stated that the entry numbers shown on the aforementioned birth certificates were such that the certificates were found to be 'not authentic'. The entry number on the certificate in Mrs Alletson's name [SMS/662/48] was said not to exist in the 'files' and the certificate said to relate to the first claimant ['entry number' HMS/4221/76] 'was in respect of someone else in our files and not Paula (sic) Mubiana Mubu'.

5.

Each of the claimants appealed the Secretary of State's decisions to the Asylum and Immigration Tribunal. Judge Tipping heard the appeals on the 25th June 2008. The Secretary of State was not represented at that hearing. In a determination promulgated on the 1st July 2008 [referenced IA/01712/2008] Judge Tipping allowed the first claimant's appeal, concluding that he met the requirements of the immigration rules. We only have before us the appeal determination of Judge Tipping in relation to the first claimant, however, the Secretary of State accepts that each of the claimants' appeals were allowed by Judge Tipping and, indeed, we note that Judge Tipping refers to hearing all of the claimants' appeals on the same basis concurrently, in paragraph 1 of his determination made in relation to the first claimant.

6.

In allowing the appeal of the first claimant, Judge Tipping materially stated as follows:

"[9] In response to this refusal, the appellant has obtained further certified copy birth certificates from Zimbabwe, and these were submitted under cover of a letter dated 7 April 2008 from his representatives. In anticipation of the arrival of these certificates the hearing of this appeal was adjourned from 26 February to 11 April 2008, by which date the certificates had been received, albeit only recently. The hearing on 11 April was therefore adjourned to allow the respondent to consider and make enquiries about the new certificates. However, by the further adjourned date, 3 June, this had not been done. The Immigration Judge reluctantly adjourned the hearing again...

[10] Mr A Pompa, a Presenting Officer, represented the respondent at the hearings on 11 April and 3 June 2008, and stated that he would reserve the appeal to himself. Nevertheless, neither he nor any other representative of the respondent was present at the hearing before me. No further evidence has been submitted on the respondent's behalf. The burden of establishing that the further certificates submitted in April by the appellant are not genuine rests on the respondent...

[13] In compliance with the direction by the Immigration Judge on 3 June, the appellant has sought to obtain confirmation that these certificates are genuine. He contacted the Registry in Harare by telephone, but in a faxed reply received on the day of the hearing and submitted by the appellant, the Registry stated that it could not act except in response to a formal application by the British Embassy. The appellant also contacted the Zimbabwean Embassy (formerly the High Commission) for help, but the authorities said that this was not a matter in which they were prepared to become involved.

[14] In the absence from the hearing of representation on the part of the respondent, the appellant's evidence was unchallenged in cross-examination. I found the appellant a clear and consistent witness, and his evidence is to some extent supported by the submitted documents. His description of the obtaining of the second set of certificates matches that which was given to the Immigration Judge at the hearing on 3 June. No further evidence or submissions on this, the sole issue in the appeal on immigration grounds, has been provided on the respondent's behalf.

[15] In these circumstances, I accept to the relevant standard of proof that the appellant is the grandson of Mr Ernest Alletson. No other failure to meet the requirements of paragraph 186 and 189 is alleged on the part of the respondent. For these reasons, I find that the appellant satisfies on a balance of probabilities all of the relevant requirements of HC395."

7.

The Secretary of State chose not make an application for reconsideration of the determinations of Judge Tipping, but instead granted each of the claimants leave to remain until the 16th June 2010.

8.

On the 14th June 2010 the first claimant applied for Indefinite Leave to Remain pursuant to paragraph 192 of the Immigration Rules. Each of the other claimants were detailed therein as being his dependents. On the 28th October 2010 the Secretary of State refused the first claimant's application, pursuant to paragraph 193 of the Immigration Rules, with reference to paragraphs 186 and 192 of those rules. The Secretary of State treated the second to fourth claimants as having made separate applications, and each of these claimants' applications were refused on the sole basis that the first claimant had not been granted Indefinite Leave to Remain. The Secretary of State did not refuse the claimants' applications in reliance on any other provisions.

9.

In her decision of the 28th October 2010 the Secretary of State gave the following reasons for refusing the first claimant's application;

"To demonstrate your claimed relationship to Ernest Alletson you have submitted Zimbabwean birth certificates for yourself and your mother, Christina Alletson. Although the Zimbabwean Central Registry have been unable to trace the records for the birth certificate submitted in your name, they have confirmed that the birth certificate submitted for your mother is not authentic.

It is noted that this is the third certificate bearing your mother's name which the Zimbabwean Central Registry have confirmed is not authentic. It is noted that all three birth certificates show that your

mother was born on 23 November 1948 in the Andrew Fleming Hospital, Salisbury. The Annals of the Royal College of Surgeons of England confirm that the Andrew Fleming Hospital did not open its doors to patients until May 1974. It is considered that this casts further doubt on the authenticity of all the birth certificates which you have submitted bearing your mother's name.

As your mother's birth certificate is not authentic, it is not accepted that Ernest Alletson is your grandfather.

10.

The claimants appealed to the First-tier Tribunal. Judge Andonian heard the appeals on the 14th January 2011. The judge allowed each of the claimants' appeals in a combined determination promulgated on the 21st January 2011. In doing so the judge referred to the claimants' history in the United Kingdom and summarised the determination of Judge Tipping. Immediately after doing so the judge stated as follows:

"[8] There is no doubt therefore that this Tribunal categorically holds that the Appellant is the Grandson of a British Citizen born in the UK and meets the requirements of the Immigration Rules in that respect.

[9] There was no Presenting Officer before me to dispute the evidence. The 1st Appellant appeared and gave evidence in support of his appeal.

[10] I believe the Appellant has discharged the burden of proof incumbent on him on the civil standard"

11.

The Secretary of State filed grounds of appeal in support of an application for permission to appeal to the Upper Tribunal. The grounds contended that Judge Andonian had erred in treating the determination of Judge Tipping as disposing of the central issue between the parties, without having given consideration to the 'new' evidence provided by the Secretary of State that had not been placed before Judge Tipping. On the 31st March 2011 Upper Tribunal Judge C.N. Lane granted the Secretary of State permission to appeal and thus the matter came before us.

12.

Prior to the hearing we drew the parties attention to the reported decision of the Upper Tribunal (Senior Immigration Judge Latter) in Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC), and gave them opportunity to consider their respective positions in light of its conclusions.

13.

At the outset of the hearing Ms Tanner requested an adjournment on the basis that (i) another Home Office Presenting Officer, Mr Kandola, had previously had involvement in the appeal and wished to retain conduct of it; (ii) she had assumed that the hearing was listed as a 'for mention'; and (iii) she had only received the claimants' skeleton argument on the 24th September 2012.

14.

Having considered the Tribunal Procedure (Upper Tribunal) Rules 2008 , and in particular rules 2 and 5, we refused to adjourn the hearing. This is an appeal in which there has already been a significant delay, the Secretary of State's decision having been made approximately two years ago and Ms Tanner made no submission to the effect that she was not sufficiently well prepared to conduct the hearing and, indeed, indicated that she had anticipated that the decision in Chomanga may be seen to be

relevant. Further, Ms Tanner could provide no explanation as to why the application for an adjournment was being made for the first time on the morning of the hearing. We, therefore, proceeded to hear the submissions of the parties.

15.

The crux of Ms Tanner's submissions were to the effect that it had been incumbent on Judge Andonian to give consideration to all of the documents that had been placed before him, including those that had not previously been relied upon by the Secretary of State before Judge Tipping. She drew the Tribunal's attention to these documents and asserted that they demonstrated that the evidence provided by the claimants was not genuine and that they had acted fraudulently.

16.

The panel invited Ms Tanner to make submissions as to the relevance of the fact that the 'new' documents produced by the Secretary of State before Judge Andonian could, prima facie, have been produced before Judge Tipping. She responded by accepting that the document obtained from the Annals of the Royal College of Surgeon could have been produced before Judge Tipping. She asserted, however, that a number of the letters from the Zimbabwean Central Registry could not have been produced to Judge Tipping because they post-dated his determination.

17.

Ms Tanner finally submitted that if the Tribunal were to set aside the determination of the First-tier Tribunal it ought to consider the 'new' documents for itself and conclude that the documentation relied upon by the claimants is not genuine. She asserted that, in such circumstances, the claimants' appeals ought be dismissed.

18.

In response, Mr Malik relied upon the contents of his skeleton argument, asserting that the First-tier Tribunal had not erred as claimed, or at all. He submitted that the nature of the relationship between the first claimant and Mr Ernest Alletson had been determined by Judge Tipping and was consequently to be considered as being subject to the principles of *res judicata*. He drew the Tribunal's attention to the judgment of the Supreme Court in R (Coke-Wallis) v Institute of Chartered Accountants [2011] UKSC 1. Placing particular reliance on paragraphs 27 and 34 of this judgment, he asserted that a cause of action estoppel operated in the instant appeal so as preclude the Secretary of State, under any circumstance, from seeking to re-litigate the issue of the relationship between the first claimant and Ernest Alletson. He asserted that given that the fact of such relationship was the only issue between the parties before the First-tier Tribunal, the First-tier Tribunal was correct to have allowed the appeals.

19.

The panel invited Mr Malik, on a number of occasions, to make submissions as to why, if *res judicata* operated at all in this appeal, it fell to be considered in relation to principles relevant to a cause of action estoppel as opposed to those relevant to an issue estoppel. In response Mr Malik again referred the panel to paragraph 34 of the Supreme Court's judgment in Coke-Wallis, asserting that the facts of the instant case were such that they fulfilled the criteria relevant to cause of action estoppel and thus could not fall to be considered in reliance on the principles relevant to an issue estoppel.

20.

We also invited Mr Malik to make submissions as to the application of the principles set out in Chomanga. He asserted that the decision in Chomanga fell to be distinguished from the instant case on the basis that (i) the Secretary of State had not given effect to the first Tribunal's decision in

Chomanga , whereas in the instant appeal the Secretary of State had given effect to Judge Tipping's decision; and (ii) the Tribunal's decision in Chomanga did not give effect to the judgment in Coke-Wallis and that it should, consequently, be re-visited in light of it.

21.

In reply Ms Tanner submitted that estoppel could not apply to immigration matters because it was a well establish principle that fresh evidence could lead to earlier decisions being altered in immigration cases. In support of this submission she sought to place reliance upon the starred decision of the Tribunal in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702.

22.

At the end of the parties' submissions we reserved our decision. For the sake of completeness we note that Mr Malik's skeleton argument made a number of further submissions as to why the claimants appeals ought be allowed, in the event that we were not with him on the assertions we have set out above. We indicated to the parties that we saw no need to hear from them in relation to these additional submissions.

Immigration Rules

23.

We need only set out the following immigration rules for the purposes of determining the first claimant's appeal. As we have detailed above, the Secretary of State refused the second to fourth claimants' applications solely on the basis that the first claimant did not have the required leave to remain.

"[186] - The requirements to be met by a person seeking leave to enter the United Kingdom on the grounds of his United Kingdom ancestry are that he:

...

(iii) is able to provide proof that one of his grandparents was born in the United Kingdom and Islands and that any such grandparent is the applicant's blood grandparent or grandparent by reason of an adoption recognised by the laws of the United Kingdom relating to adoption...

[192] Indefinite leave to remain may be granted, on application, to a Commonwealth citizen with a United Kingdom born grandparent provided:

(i)

he meets the requirements of paragraph 186(i)-(v)...

[193] Indefinite leave to remain in the United Kingdom on the grounds of a United Kingdom born grandparent is to be refused if the Secretary of State is not satisfied that each of the requirements in paragraph 192 is met..."

Discussion on the Legal Principles

24.

Mr Malik's principle submission is to the effect that, by operation of the principle of res judicata and in particular cause of action estoppel, the findings made by Judge Tipping that the first claimant is the grandson of Mr Ernest Alletson and that Mr Alletson was a British citizen by birth, cannot be the subject of further litigation and must be considered to be final.

25.

In support of his submission that such principles are operative in immigration appeals Mr Malik sought to rely on paragraph 27 of Lord Clarke's judgment in Coke-Wallis . Lord Clarke materially stated as follows when referring to the principle of res judicata :

"... There is no doubt that it applies to what may be called ordinary civil proceedings. In Thrasylvoulou v Secretary of State for the Environment [1990] 2 AC 273, where an issue of estoppel was held to arise out of a determination of a planning application, the principle was held to apply to public law proceedings"

26.

In his opinion in Thrasylvoulou Lord Bridge stated as follows, at 289C-D:

"In principle they must equally apply to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self contained statutory code, the presumption, in my opinion, must be that where statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can be properly inferred as a matter of construction of the relevant statutory provisions."

27.

It is clear that the principles of res judicata can apply in the public law field, and that it is generally to be presumed that they apply in a statutorily created jurisdiction. Lord Bridge recognised, however, that the principle of res judicata would not apply if an intention to exclude that principle can be properly inferred as a matter of construction of the relevant statutory provisions. The Tribunal and the Courts have, on a number of occasions, rejected the contention that the principle of res judicata applies to immigration appeals.

28.

In AS and AA (Effect of previous linked determination) Somalia [2006] UKAIT 00052, (approved by the Court of Appeal in [2007] EWCA Civ 1040), Mr Ockelton, Deputy President, said as follows, in the context of an appeal by an appellant who asserted that a previous finding of fact by an immigration adjudicator as to his sister's clan membership, was binding on the tribunal determining his appeal:

"60. Generally speaking, parties to an action must regard the matter as finally settled between them by a subsisting order of a competent court. This is the rule of res judicata. ... It is sometimes said that there is no rule of res judicata or issue estoppel in immigration appeals. Technically speaking, that must be right."

29.

In Ocampo v SSHD [2006] EWCA 1276, Auld LJ stated, when considering the relevance to the determination of the appellant's appeal of a conclusion by the Immigration Tribunal that the appellant's daughter had given credible evidence in her own appeal, in circumstances where there had been a material overlap of factual assertions between appellant's, and his daughter's, appeal:

"24. In my view, it is at the very least doubtful whether the principles of res judicata or issue estoppel have any application, certainly in their full rigour, to appeals before immigration tribunals, any more than they do to successive claims for judicial review:"

30.

Similar comments were made by Sir John Donaldson MR in R v Secretary of State for the Home Department ex parte Momin Ali [1984] 1 WLR 663.

31.

We find nothing in the decision of the Supreme Court in Coke-Wallis that leads us to come to a different conclusion to that which is expressed in the decisions cited above. We conclude that the principles of res judicata are not applicable in immigration appeals.

32.

If we are wrong in this conclusion, however, we nevertheless reject Mr Malik's submission that cause of action estoppel, as opposed to issue estoppel, is operative in the instant appeal.

33.

The distinction is of some significance because if cause of action estoppel is operative it creates an absolute bar to re-litigation of a cause of action whereas the operation of issue estoppel does not [Coke-Wallis at paragraphs 26 and 47].

34.

Mr Malik drew the Tribunal's attention to paragraph 34 of the judgment of Lord Clarke in Coke-Wallis (cited above) [with whom Lords Rodgers, Collins, Clarke and Dyson were in agreement], when seeking to establish that a cause of action estoppel operates in the instant appeal. Lord Clarke says as follows, in that paragraph:

"In para 1.02 Spencer Bower and Handley makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are that: "(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was - (a) final; (b) on the merits; (v) it determined a question raised in later litigation; and (vi) the parties are the same or their privies or the earlier decision was in rem."

35.

Mr Malik asserts that the six factors referred to by Lord Clarke in the aforementioned paragraph are all present in the instant appeal and that, consequently, the principles of cause of action estoppel arise. This submission fails, however, to take cognisance of the fact that the claimants succeeded before Judge Tipping. The relevance of this can be explained by reference to paragraph 1.04 of 4th Edition of Spencer Bower and Handley on Res Judicata (2009):

"If the action succeeds the cause of action merges in the judgment and is extinguished. A second action cannot be brought on that cause of action, not because there is an estoppel, but because there is no longer a cause of action."

36.

Lord Clarke also refers to this distinction in paragraph 26 of his judgment in Coke-Wallis, when considering the difference between a cause of action estoppel and an issue estoppel, quoting Diplock LJ in the decision in Thoday v Thoday [1964] P 181, 167-198:

"The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.

If the cause of action was determined to exist, ie judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim 'causa' bears its literal Latin meaning."

37.

In the instant matter the claimants succeeded before Judge Tipping in their challenge to the Secretary of State's decision of the 14th January 2008 and, as a consequence, their cause of action merged into Judge Tipping's determinations. These decisions cannot be re-litigated, not because the Secretary of State is estopped from doing so, but because the cause of action i.e. the claimants' appeals against the Secretary of State's decisions of 14th January 2008 not to grant them leave to remain, were, extinguished by the fact that there was a final determination in the claimants' favour. Indeed, the Secretary of State acted on that determination by granting the claimants leave to remain.

38.

The claimants now seek to challenge different decisions of the Secretary of State i.e. those of the 28th October 2010. This is a different cause of action to that brought by the claimants against the decision of 14th January 2008.

39.

Further, and in any event, the appeals against the decisions of the 28th October 2010 are not causes of action brought by the Secretary of State, but by the claimants themselves. Even if cause of action estoppel could, in principle, be brought to bear in immigration appeals, it could not operate in the First-tier Tribunal as against the Secretary of State because the legislation permits of no circumstance in which the Secretary of State could be the instigator of a cause of action before that Tribunal i.e. the appeal.

40.

For all these reasons we reject Mr Malik's submissions that the principles of res judicata operate in these appeals.

41.

We next turn our consideration to the issue as to what the appropriate principles are that ought be applied in circumstances such as those that arise in the instant appeals.

42.

Senior Immigration Judge Latta considered similar circumstances in his decision in Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC). In Chomanga the appellant, a Zimbabwean national, was granted leave to remain for five years on the basis of her United Kingdom ancestry, it being asserted by Ms Chomanga that her grandmother was a British Citizen by birth. In support of her application she produced birth certificates in her own, and her mother's, names.

43.

After having granted Ms Chomanga leave to remain, the Secretary of State obtained information from the Zimbabwe Central Registry stating that the birth certificates produced by the appellant were not genuine. The Secretary of State curtailed Ms Chomanga's leave as a consequence. The appellant appealed to the Asylum and Immigration Tribunal. The Secretary of State failed to submit the

documents from the Zimbabwean Central Registry, and Ms Chomanga's appeal was allowed. This determination was not appealed. However, after reviewing the evidence the Secretary of State issued a further decision curtailing the appellant's leave. The appellant again appealed against the decision to the Asylum and Immigration Tribunal, and that appeal was again allowed. The Secretary of State appealed and thus the matter came before Senior Immigration Judge Latter.

44.

Having quoted extensively from the decision of the Court of Appeal in Secretary of State v TB (Jamaica) [2008] EWCA 977, Judge Latter concluded as follows:

"[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 paragraph 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."

45.

Mr Malik, in pursuit of his submission that the principle of cause of action estoppel ought be applied, sought to distinguish the decision of Chomanga on the basis that the Tribunal in Chomanga had been considering an appeal in which the Secretary of State had not given effect to the first determination of the Tribunal, whereas in the instant case the Secretary of State had given effect to Judge Tipping's determination by granting the claimants leave to remain.

46.

We see no force in this submission. Mr Malik is plainly wrong in his assertion that the Secretary of State did not give effect to the first determination of the Tribunal in Chomanga . Had the Secretary of State not done so she could not have issued a further decision to curtail Ms Chomanga's leave. By curtailing Ms Chomanga's leave for a second time it is trite that the Secretary of State must have

given effect to the first Tribunal's determination that the original curtailment of Ms Chomanga's leave had been unlawful.

47.

Ms Tanner submitted that the principles set out in the starred determination of the Tribunal in Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1 ought be applied to the instant appeal, and not the principles enunciated in Chomanga. She did not develop this point beyond making the bald assertion. Nevertheless, it is a point that deserves careful consideration if, for no other reason, than the fact that the Tribunal in Chomanga did not specifically allude to the potential application of the Devaseelen ' guidelines' in its determination.

48.

Devaseelan concerned second appeals made on human rights grounds by an asylum seeker whose asylum appeal had been earlier dismissed. The guidance given in Devaseelan was approved by the Court of Appeal in Djebbar v Secretary of State for the Home Department [2004] EWCA 804 at paragraphs 30, 31 and 40. In DB [2003] UKAIT 00053 the AIT said that '[15] There is nothing in Devaseelan which limits its principles to asylum and human rights appeals. There is no reason why they should be so limited. We are satisfied that the principles set out in Devaseelan apply to all categories of appeals coming before Adjudicators and the Tribunals".

49.

The most relevant points of the guidance given by the Tribunal in Devaseelan , for the present purposes, are as follows:

"(1) The first Adjudicator's determination should always be the starting-point.

(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. ...

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be relitigated...

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. We think such reasons will be rare..."

50.

We can see no logical basis for concluding otherwise than that the same guidelines apply whether the 'previous decision' was in favour of or against the Secretary of State. The fact that the Secretary of State accepts that this is so is implicit in the submissions made before the IAT by Miss Giovannetti of Counsel, on behalf of the Secretary of State, in Devaseelan . When seeking to identify reasons in support of her submission that 'legal and policy considerations demanded that the appellant's second appeal be determined in line with the first' , save in limited circumstances, it is recorded that she asserted as follows:

"The first is fairness: it would be unfair to an Appellant, who had satisfied the first Adjudicator that his account of events was credible, to deprive him of the benefit of that finding. If that is right, it must

follow that an Appellant who has failed to satisfy an Adjudicator of his credibility is not entitled to have the same evidence re-assessed by a second Adjudicator. It is not fair to the public for there to be a system in which favourable findings stand but unfavourable findings are always questionable. Secondly, general principles of consistency and finality in litigation are important even in the absence of a rule of *res judicata*. Thirdly, the general approach to findings of fact in immigration cases both on appeal to the Tribunal and outside the IAA (e.g. *ex parte Danaie* [1998] 1mm AR 84) is that findings of fact stand unless there is good reason to displace them. Fourthly, it would, in Miss Giovannetti's submission, be contrary to good administration to have a system which allowed for the continuing existence of two undisturbed determinations of the IAA containing inconsistent findings of fact in relation to the same individual." [paragraph 34]

51.

In *AS & AA Mr Ockelton* concluded as follows, when considering the application of the *Devaseelan* guidelines:

[62] ... a decision-maker considering a second application, or second claim, or second proceedings, to which a person involved in earlier proceedings was a party, should no doubt have regard to the previous judgment. There are two reasons. First, it may well summarise what was said on the appellant's behalf on the earlier occasion. In a jurisdiction such as ours which has no hearsay rule, that material has evidential value of its own. Secondly, it is (so far) the authoritative decision on the matters that were raised at that time. If the parties did not take any opportunity available to them to challenge those findings then, the Tribunal should require a good reason for departing from them now. Considerations of that sort are behind the guidance in *Devaseelan*, which we set out earlier in this determination. The previous judgment is not binding, but it is not to be ignored. If there is no good reason for departing from it, it must, as between the parties to that litigation, be treated as settling the issues with which it was concerned and the facts on which the determination was based"

52.

We respectfully endorse that as the correct approach to be applied in appeals such as the instant one.

53.

Although no mention was made of the *Devaseelan* guidelines in the decision of *Chomanga*, the decision itself is entirely consistent with the proper application of points 1, 6 and 7 of those guidelines. In *Chomanga* the Secretary of State was relying on identical factual assertions in the second appeal as had been determined in the first appeal. There was found to be no 'good reason' why the Secretary of State had failed to adduce relevant evidence before the Tribunal hearing Ms Chomanga's first appeal, it being noted that, on the facts of that case, the Secretary of State was doing no more than attempting to circumvent the first Tribunal's decision without having appealed against it.

Findings and Reasons

Setting Aside

54. With those principles in mind we now turn to the decision of Judge Andonian. It is not suggested by Mr Malik, nor could it have been, that the Judge gave any consideration to the application of the *Devaseelan* guidelines, or in particular as to whether there was 'good reason' for the failure of the Secretary of State to produce to Judge Tipping the letters from the Registrar General of Births and Deaths in Zimbabwe, dated 28th May 2008 19th July 2010 and 14th October 2010, or the extract from the *Annals of the Royal College of Surgeons of England* (1974) Vol 54 .

55. Judge Andonian proceeded to determine the appeal on the basis that Judge Tipping's conclusions on the issue of the relationship between the first claimant and Mr Ernest Alletson were determinative of that same issue before him. They were not. Applying the Devaseelan guidelines they were to be treated as the starting point for his considerations.

56. For this reason we find that the making of the First-tier Tribunal's determination involved the making of an error on a point of law and we set aside that decision and re-make it for ourselves.

Re-making of Decision

57. When concluding in the first claimant's favour on the issue of whether he was related as claimed to Mr Ernest Alletson, Judge Tipping had before him two copies of birth certificates bearing the first claimant's name, referenced with 'entry numbers' HMS/4221/76 and NCA/9052/76 respectively. He also had before him two birth certificates bearing the name Christina Alletson, referenced with 'entry numbers' SMS/662/48 and SBY/148/48 respectively (paragraphs 8 and 10 of Judge Tipping's determination).

58. The Secretary of State produced a letter to Judge Tipping, dated 27th November 2007, from the Central Registry in Zimbabwe, authored by the Registrar General of Births and Deaths. This letter purported to respond to an enquiry by the British Embassy in Harare, and states that 'Entry number SMS/662/48 in respect of Christina Alletson does not exist in our files' and 'Entry number HMS/4221/76 [is] in respect of someone else in our files and not Paula [sic] Mubiana Mubu'.

59. Judge Tipping's determination indicates that the hearing of the claimants' appeals was adjourned on both the 11th April 2008 and 3rd June 2008 to allow time for the Secretary of State to make further enquiries of the Central Registry in Zimbabwe in relation to the birth certificates referencing 'entry numbers SBY/148/48 and NCA/9052/76'. However, the Tribunal had received no further evidence in this regard by the date of the hearing on the 25th June 2008 and neither did the Secretary of State seek a further adjournment of the hearing on that occasion. As detailed above, Judge Tipping subsequently proceeded to allow the claimants' appeals, accepting the nature of the first claimant's relationship with Mr Alletson when doing so. The Secretary of State did not make an application for reconsideration of this decision.

60. We now have before us a letter from the Registrar of General Births and Deaths in Zimbabwe, dated 28th May 2008, which, inter alia, states that the birth registrations of both the first claimant and Mrs Christina Alletson (respectively referenced NCA/9052/76 and SBY/98674/60) are 'Not Authentic'. The Secretary of State has provided no explanation as to why this evidence was not placed before Judge Tipping given that it pre-dates the hearing before him by nearly a month. Neither has any explanation been provided as to why the Registrar General of Births and Deaths was asked to consider a certificate in Mrs Alletson's name bearing an 'entry number' SBY/98674/60, given that no evidence has been placed before the Tribunal that the first claimant has ever produced a certificate bearing this 'entry number'; as recorded by Judge Tipping, the certificate produced by the first claimant in March 2008, in Mrs Alletson's name, bore the entry number 'SBY/148/48'.

61. The Secretary of State also produces a further letter from the Registrar General of Births and Deaths in Zimbabwe, dated 19th July 2010. This letter states, inter alia, that the birth certificate produced by the first claimant in Mrs Christina Alletson's name (referencing 'entry number' SBY/148/48) is 'Not Authentic' and the birth certificate produced by the first claimant in his own name (referencing 'entry number' NCA/9052/76) had 'not been confirmed'. It is to be recalled that these were also the 'entry numbers' on the birth certificates produced to Judge Tipping, in relation to which

the Asylum and Immigration Tribunal granted the Secretary of State two adjournments in 2008 in order that she may obtain further evidence regarding their authenticity. It is also notable that, by way of a letter dated 14th October 2010, the Registrar General of Births and Deaths in Zimbabwe stated that the record of 'entry number NCA/9052/76', in the first claimant's name, was 'missing' .

62. Ms Tanner submits that significant weight ought be attached by the Tribunal to the letters of the 28th May 2008, 19th July 2010 and 14th October 2010, asserting that, at least in respect of the latter two letters, they post date the decision of Judge Tipping and could not, therefore, have been placed before him. She further asserts that because the Secretary of State has been active in pursuing evidence in relation to these claimants, she [the Secretary of State] should not be prejudiced by the failure to produce relevant evidence before Judge Tipping.

63. We do not accept this is so. The Secretary of State has had copies of the birth certificates in the names of the first claimant and Mrs Alletson, referenced with entry numbers NCA/9052/76 and SBY/148/48, since March 2008. It was on the basis of the documents referencing these entry numbers that Judge Tipping concluded in the first claimant's favour in his determination of 1st July 2008; the hearing having been twice adjourned for the Secretary of State to check the authenticity of these documents.

64. The letter of the 28th May 2008, plainly, pre-dates the hearing before Judge Tipping and still no explanation has been provided as to why it was not placed before him. The subsequent letters from the Registrar General of Births & Deaths say no more than the letter of the 28th May 2008, save that one of them refers to a birth certificate in Ms Alletson's name containing a reference number that the evidence does not demonstrate has ever been provided by the claimants.

65. The only other evidence relied upon by the Secretary of State before us, that was not relied upon before Judge Tipping, is a copy of an article obtained from the 'Annals of the Royal College of Surgeons of England (1974) vol 54' . This article indicates that the Andrew Flemming Hospital in Salisbury, Rhodesia, did not open its doors to patients until May 1974. It was in this hospital that the first claimant asserts that his mother was born in 1948. Ms Tanner accepts, however, that there is no good reason as to why this evidence was not produced to Judge Tipping.

66. We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require. We bear in mind, however, that the nature of the issue now in dispute between the parties was the same issue that was determinative of the appeal before Judge Tipping. We also bear in mind the failure of the Secretary of State to produce all of the relevant evidence to Judge Tipping that ought to have been, or could have been with reasonable diligence, made available to him. In light of these considerations we conclude that the determination of Judge Tipping should be treated as settling the issue of the relationship between the first claimant and Mr Ernest Alletson.

67. The Secretary of State takes no further issues in relation to the claimants' satisfaction of the respective immigration rules and, as such, we allow each of the claimants' appeals on the basis that the Secretary of State's decisions were not in accordance with the immigration rules.

Decision

For the above reasons we conclude:

The First-tier Tribunal materially erred in law and its decision is set aside.

The decision we remake is to allow each of the claimants' appeals on the basis that the Secretary of State's decisions were not in accordance with the Immigration Rules.

Signed: Mark O'Connor

Judge of the Upper Tribunal

Date: 22nd October 2012