Upper Tribunal
(Immigration and Asylum Chamber)

Abbasi (rule 43; para 322(5): accountants' evidence) [2020] UKUT 00027 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2019	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD KAMRAN ABBASI

Respondent

Representation :

For the appellant: Mr P Singh, Senior Home Office Presenting Officer

For the respondent: Mr J Gajjar, instructed by Awan Legal Associates Limited

(1) The Upper Tribunal can apply rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 of its own motion.

(2) The use of fraud before the Upper Tribunal constitutes an abuse of process such as to amount to a "procedural irregularity" for the purposes of rule 43(2)(d).

(3) In a case involving a decision under paragraph 322(5) of the immigration rules, where an individual relies upon an accountant's letter admitting fault in the submission of incorrect tax returns to Her Majesty's Revenue and Customs, the First-tier or Upper Tribunal is unlikely to place any material weight on that letter if the accountant does not attend the hearing to give evidence, by reference to a Statement of Truth, that explains in detail the circumstances in which the error came to be made; the basis and nature of any compensation; and whether the firm's insurers and/or any relevant regulatory body have been informed. This is particularly so where the letter is clearly perfunctory in nature.

DECISION AND REASONS

A. INTRODUCTION

1.
The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, we shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as “the respondent” and Mr Abbasi as “the appellant”.

2.
The appellant is a citizen of Pakistan. He arrived in the United Kingdom as a student in 2006. In 2010 he applied for leave to remain as a Tier 1 HS (General) Migrant and was granted leave in that capacity until March 2012. F urther such applications were also successful.

3.
In March 2016, the appellant applied for indefinite leave to remain as a Tier 1 HS (General) Migrant. The application was subsequently varied to an application for indefinite leave to remain based on long residence.

4.
The appellant’s application in that regard was refused by the respondent in September 2016. That refusal also comprised the refusal of a human rights claim by the appellant, which meant that he could appeal to the First-tier Tribunal . Appeals were also made to the First-tier Tribunal by the appellant’s wife and one of their children.

5.
The reason for the refusal by the respondent centred upon paragraph 322(5) of the Immigration Rules, whereby leave to enter or remain in the United Kingdom should normally be refused if, in the light of the conduct, character or associations of the applicant (or the fact that he represents a threat to national security), it would be undesirable to permit the person concerned to remain in the United Kingdom.

6.
In the case of the appellant, the respondent was concerned by the following matters. In his application for leave to remain of 2011, the appellant claimed to have an income of £51,036.51 from all sources between 1 February 2010 and 31 January 2011, including £ 35,056.00 from self-employment. If that were true, the appellant was entitled to 30 points under the “previous earnings” category in the relevant Immigration Rules. As part of his application for leave to remain in 2013, the appellant claimed to have an income of £57,506.20 from all sources between 1 February 2012 and 31 January 2013, including £45,777.77 from dividends. This entitled the appellant to the award of 35 points.

7.
The respondent wrote to the appellant in May 2017 and asked him to complete a tax questionnaire. The appellant answered in the affirmative to the question “Have you ever needed to correct or re-submit your tax return … ?”.

8.
A revised tax calculation for the appellant dated 10 May 2016 showed that he initially declared to HMRC a total income for 2010/2011 of £13,612. That level of earnings would have meant that the appellant received 0 points for previous earnings, leaving him 30 points short of the tally required to obtain leave.

9.

The same revised tax calculation showed that the appellant amended the figures declared to HMRC in order to show total income received for the relevant period of £51,036, including £37,424 from self-employment. That amendment meant that the relevant earnings were “more in line with those claimed” to the respondent as part of the appellant’s application for leave.

10.
The revised tax calculation of the appellant for 2012/2013, also dated 10 May 2016, showed that the appellant initially declared a total income to HMRC of £ 7,488. Again, that would have meant that the appellant received 0 points for previous earnings and would have been 35 points short of the tally required to obtain leave to remain.

11.
The amended tax calculation for 2012/2013 resulted in the appellant declaring to HMRC a total income for the relevant period of £ 58,517 including £ 44,222 from dividends. Again, this amendment was “more in line” with what the appellant had claimed to the respondent was his total income.

12.
The tax re-calculations, which followed from the amendments, resulted in the appellant’s tax liability for 2010/2011 rising from £0 to £4,487.45. For 2010/2011, the tax liability rose from £0.40 to £11,454.12.

13.
The respondent concluded that:-

“The delay of several years in correcting your declaration to HMRC indicates that you had little intention of correcting the errors promptly and as such show little respect for the UK tax laws.

It would not be considered a credible explanation that a registered accountant would submit a self-assessment tax return declaring earnings which are considerably lower than their client’s actual earnings. It was your responsibility to ensure that your tax return was submitted to HMRC on time and with the correct information.

The Secretary of State considered that it would be undesirable for you to remain in the United Kingdom in light of your character and conduct. She is satisfied that you have misrepresented you earnings at various times and from time to time have changed what you have represented in respect of your earnings to HM Revenue and Customs and/or UK Visas and Immigration for the purpose of reducing your tax liability or for the purpose of obtaining leave to remain or both.”

The appellant appealed to the First-tier Tribunal. Following a hearing in September 2018, a First-tier Tribunal Judge allowed the appellant’s appeal and that of his wife and daughter.

B. THE DECISION OF THE FIRST-TIER TRIBUNAL

14.
The First-tier Tribunal Judge considered that the respondent had supplied evidence of significant discrepancies between the income figures submitted by the appellant to HMRC and for the purpose of obtaining leave to remain. She found, however, that:-

“41. … t he appellant put forward an innocent explanation for the discrepanc y . He states that he was relying on the professional services of his accountants who submitted the tax form online which he did not see. I accept the explanation that he has provided as often those instructing professionals rely on their expertise and have confidence in their work. I also accept that professionals such as accountants

can make mistakes. As soon as the [appellant] became aware of this he changed his accountants, notified the HMRC and he is repaying the overdue tax to HMRC .

…

45. The [appellant] states that when he became aware of the error made by his accountants he contacted his accountants immediately and notified them of the error, for which they apologised. The [appellant's] accountants provided a letter confirming that there was an unreported income for the year 2010-2011 and 2012-2013 (See respondent's bundle D15 letter from Tax Assist Accountants).

…

47. Looking at all the evidence in the round, I conclude that the respondent has not discharged his burden of demonstrating that it is more probable than not that the appellant used deception in declaring his income to either the HMRC or inflated his earnings to the respondent. The most that can be said about him is that he was somewhat naïve, placed too much trust in his accountant, and failed to exercise sufficient scrutiny himself … ."

15.
Having concluded, for these reasons, that the appellant met the requirements of the Immigration Rules, it followed that it would be a disproportionate interference with the appellant's Article 8 rights, and those of his family in the United Kingdom, if he were to be removed. Accordingly, the First-tier Tribunal Judge allowed the appeals.

16.
It is evident from the First-tier Tribunal Judge's decision that she placed significant weight on a letter to be found at D14 of the bundle of documents before her. The letterhead reads "TaxAssist Accountants – The Accountancy and Tax Service for Small Business". The letter is dated 25 May 2017. It is addressed "To Whom it May Concern". It reads as follows:-

"Dear Sir/Madam,

This is to confirm that Mr Muhammad Kamran Abbasi has appointed TaxAssist Accountants as his HMRC authorised Agent and Accountants for all his Self-Employment and tax related services.

We are enclosing Mr Abbasi 2010-11 to 2015-16 tax returns, SA302 and tax overviews. Please note that Mr Abbasi 2016-17 tax return is not submitted as it is due to HMRC by 31 January 2018.

I am writing to confirm that our client's tax returns for the years 2010/11 and 2012/13 were submitted with incorrect details.

The mistake was from our side as we inadvertently mixed earnings details of two clients.

Late, We approached our client and pointed out this mistake and we amended the HMRC records accordingly an d client was compensated.

Although we always try to maintain high level of standards in our professional work and engagement, but as a human being errors and mistakes can't be ruled out.

Please consider this as a genuine mistake which should not adversely affect Mr Abbasi application. If you have any questions, please do not hesitate to contact us.

Yours faithfully,

[Signature]

TaxAssist Accountants

Samantha Skyring – ACCA Membership no. [redacted]”

17.
Pro-forma information at the bottom of the letter gives the address of TaxAssist Accountants as 390 Hoe Street, Walthamstow. It also state s that the business is “A TaxAssist Accountants Franchise owned and operated under licence by Nadeem Iqbal. Directors: Nadeem Iqbal”.

C. THE DECISION OF THE UPPER TRIBUNAL

18.
The respondent obtained permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal Judge. The appeal came before Deputy Upper Tribunal Judge Chamberlain on 8 January 2019. In a decision dated 28 January 2019, she found that the First-tier Tribunal Judge’s decision contained an error of law. The First-tier Tribunal Judge had “failed to conduct a proper analysis of the evidence, and failed to give adequate reasons for finding that the appellant was naïve rather than dishonest”. The judge had made no clear finding regarding when the appellant found out about the errors and had given no reasons for accepting the claim that the appellant did not realise until January 2016 that anything was amiss. The judge had also made a factual error when setting out the evidence of how the appellant discovered the true position. Deputy Upper Tribunal Judge Chamberlain accordingly set aside the decision of the First-tier Tribunal.

19.
Deputy Upper Tribunal Judge Chamberlain re-heard the matter in June 2019. The Deputy Upper Tribunal Judge considered that, in the light of the judgment of the Court of Appeal in Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673, the respondent was required to state, in terms, in her decision that a person in the position of the appellant had used dishonesty. It was “not enough merely to set out that there is a discrepancy” (paragraph 15). Since, in the present case, the respondent had not contended expressly that the appellant had been guilty of dishonesty, the Deputy Upper Tribunal Judge concluded that the respondent had not discharged the evidential burden upon her in cases involving the application of paragraph 322(5) of the Immigration Rules.

20.
The Deputy Upper Tribunal Judge, nevertheless, went on to make findings in the event that she was wrong about her application of Balajigari . She concluded that the appellant had, in any event, discharged the burden on him to show that dishonesty and deception were not employed and had provided an explanation for the discrepancy in the figures.

21.
The Deputy Upper Tribunal Judge considered it significant that the appellant had “voluntarily informed the respondent that he had made amendments to his tax return” in March 2016, when his solicitors had written to the respondent to say that the appellant “has also revised his income tax returns for the period of 2010-11, 2012-13 because of some errors and he has provided updated copies of returns and accounts”.

22.

Having found that “the appellant used and relied on accountants, and I find that there is nothing implausible or unusual in this” (paragraph 23), the Deputy Upper Tribunal Judge’s decision continued as follows:-

“24. It was submitted by Mr Karim that the accountant had taken responsibility for the error. I was referred to the letter from Samantha Skyring, an accountant at TaxAssist Accountants, dated 25 May 2017 (D14 of the Respondent’s bundle). She has given her ACCA membership number. Ms Skyring states:

“I am writing to confirm that our client’s tax returns for the years 2010/11 and 2012/13 was submitted with incorrect details.

The mistake was from our side as we inadvertently mixed earnings details of two clients.”

25. It was submitted by Mr Karim that it was dangerous to underplay the consequences of an accountancy firm admitting to such a mistake as it opened the firm up to being sued. It was implausible that any professional would put pen to paper in this way if he was not responsible, given the possible repercussions. It was submitted that full weight should be given to the admission by the accountants.

26. I find that there is force in this submission. It was submitted by Mr Avery that there were some discrepancies between the evidence of the [a ppellant] and the evidence in the letter, in relation to how the mistake had been made. I find that these are not significant given that the accountant has admitted the mistake. The core of the [a ppellant’s] claim is that the accountant made the mistake , which is supported by the letter. The [a ppellant’s] evidence is that the accountants did not declare his self-employment income at all. In the letter it states that they mixed the earnings details of two clients. However, these two are not mutually exclusive. There is nothing inconsistent.”

23.
At paragraph 30, the Deputy Upper Tribunal Judge considered it did not detract from the appellant’s evidence that he was still using the same accountants. That appears to conflict with the evidence given by the appellant to the First-tier Tribunal Judge who recorded at paragraph 21 of her decision that when the appellant came to learn of the discrepancies ”he changed his accountant in 2016”. Be that as it may, the Deputy Upper Tribunal Judge’s decision concluded that the respondent had “wrongly applied paragraph 322(5)” and that the appellant met the requirements of “paragraph 276B of the Immigration Rules”. That being so, the Deputy Upper Tribunal Judge concluded that the human rights appeal of the appellant and his wife and child should be allowed, since it would be a disproportionate interference with their Article 8 rights if they were to be removed.

D. SUBSEQUENT EVENTS

24.
The Deputy Upper Tribunal Judge’s decision was promulgated on 10 July 2019. On 16 September 2019, the Upper Tribunal received an e-mail from TaxAssist Direct Limited. The e-mail caused the Upper Tribunal to convene a hearing, which took place on 25 November 2019. The Upper Tribunal indicated that it intended to consider whether it would be appropriate to use its powers under r ule 43(2)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to set aside the decision of the Deputy Upper Tribunal Judge.

25.
So far as relevant, r ule 43 provides as follows:-

“ **Setting aside a decision which disposes of proceedings**

43.(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

(a) the Upper Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) T he conditions are—

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

(3) Except where paragraph (4) applies, a party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Upper Tribunal so that it is received no later than 1 month after the date on which the Upper Tribunal sent notice of the decision to the party. ”

26.
On 14 November 2019, Ms Skyring filed a witness statement. The relevant paragraphs read as follows:-

“3. I am employed by TaxAssist Direct Limited and have been in their employment since November 2014.

4. My current day to day role is Senior Training and Communications Manager.

5. My qualifications are: FCCA (Fellow of Association of Certified Chartered Accountants), MAAT (Member of the Association of Accounting Technicians) & ACIPP (Associate of the Chartered Institute of Payroll Professionals).

6. TaxAssist is a franchise network. TaxAssist Direct Ltd, by whom I am employed, is the franchisor. There are a number of franchisees of which Nadeem Iqbal trading as TaxAssist Walthamstow is one. For the avoidance of doubt, therefore, TaxAssist Walthams t ow is an independent and different trad i n g entity from TaxAssist Direct ltd.

7. I have read and fully examined document D14 th a t is a letter dated 25 May 2017, purportedly signed by me, in respect of which I would comment as follows:

a. It is on the notepaper of TaxAssist Accountants Walthamstow which as stated above is a franchisee and hence a separate legal entity, by which I am not employed. However, it clearly purports to suggest that I am employed or engaged by that business when this is not the case.

b. I did not create this letter and I am not aware of this document having been created by any member of staff at TaxAssist Direct Ltd.

c. I did not sign this letter and nor do any colleagues of mine sign or have authority to sign letters on my behalf. The signature is not only not mine but does not resemble my signature.

d. I had no knowledge that this document existed until it was brought to my attention by a colleague on 13 th September 2019.

e. I do not have any knowledge of D15 that appears to be a letter from the franchisee to HMRC or of E1 that seems to be a related tax calculation.

f. I would not in any event be asked to produce a letter such as this or to be involved in the creation of such a document. It is not within my remit or qualifications. Whilst TaxAssist Direct Ltd provides a service for franchisees, when the franchisee does not itself have a certain qualificat i on under which circumstances a suitably qualified employee of TaxAssist Direct Ltd can assist them, I do not prepare letters covering in this area o r work in any event. Indeed, not only is this not of the type of document I would sign off but I would be in breach of the Association of Certified Chartered Accountants professional rules in doin g so.

g. I have never met and have no knowledge of M uhammed Kamran Abbasi and nor have I ever been asked to assist him in any way whatsoever through TaxAssist Direct Limited , TaxAssist Accountants Walthamstow or directly. I have only corresponded with Nadeem Iqbal through email and maybe the odd phone call but not very often.

h. The style of the letter is not mine. It contains some punctuation and style errors. Generally it does not ‘read’ as the professional l y drafted letter that I would ever create.

i. I would not ordinarily deploy my ACCA Membership in any form of correspondence or emails. I am suspicious as to how that membership number has been acquired to be included in this document. The only way I believe they c o uld have obtained this would be by my handing it out where a student for either ICAEW or ACCA needed me to sign off their work experience to become a member of the relevant body. In order for me to do this I have to be appointed as their supervisor via the body and as a result need to give the student my ACCA membership number so they can add me. In this regard I should add that Mansoor Malik Ahmed (an employee of Nadeem Iqbal) added me as his supervisor in February 2017 and therefore had my ACCA number. Although he added me he did not actually submit any work experience for me to sign off. So to date I have not signed off any work experience for him. This is one possible explanation as to how my number came to appear on the letter in question.

j. In short Document 14 is one the purports to have been created and signed by me but this is entirely false.

8. I have no personal knowledge of Documents D1 to D13 that also consist of what appears to be a letter from Douglas Blake (a colleague of mine who was employed by TaxAssist Direct Ltd and not by the franchisee) and related items. From investigations conducted by TaxAssist Direct Ltd I am able to say that to the best of my own knowledge and belief this document was also not created by any TaxAssist Direct Ltd member of staff including Douglas Blake. Further D1 also refers to Douglas Blake’s ICAEW membership that would not normally appear on letters drafted by us and, moreover, the inclusion of his name and details at the bottom right of the letter would never be used as part of the letter head as it would imply he works there whe n he does not.

9. I regard myself as a person of the utmost integrity and honesty. My name and accreditation have clearly been used without my knowledge. I am very angry and upset that my details have been used without my knowledge or consent and also feel violated as a result of this.”

27.

At the hearing on 25 November 2019, Ms Skyring adopted her witness statement. Neither Mr Singh nor Mr Ga jj ar had any questions to ask her. We are entirely satisfied that Ms Skyring is a wholly credible witness. We accept that, despite what is set out in the letter of 25 May 2017 at D14, Ms Skyring did not sign the letter. Indeed, she had nothing at all to do with its composition.

E. THE UPPER TRIBUNAL'S POWER TO SET ASIDE ITS DECISION

28.
Mr Gajjar's skeleton argument on behalf of the appellant contended that the Upper Tribunal lacked jurisdiction to re-open the appeal, since r ule 43 was confined to procedural errors. Mr Singh's skeleton argument concurred:-

"It should be recalled that this is not a situation where a party is seeking a set-aside, and the question of "jurisdiction" is conditional on whether any part of Rule 43 is arguably met in the eyes of the Tribunal. That is the very issue in contemplation. It is, however, the Secretary of State's view that the provision of information to the Tribunal after the appeal has been disposed of can n ot in any way be classified as a procedural irregularity "in the proceedings". The proceedings had been concluded and the Tribunal was functus officio . Whereas subsequent evidence can potentially found an error of law by reason of error of fact, that quest ion can only be considered in extant proceedings. It is another matter whe th er the Secretary of State may in due course seek to act upon the ramifications of the allegation which has come to light."

(a) The respondent's ability to take action

29.
There is a body of caselaw that considers the circumstances in which the respondent may refuse to give effect to a decision of (now) the First-tier Tribunal or the Upper Tribunal, in an immigration case, which has not been disturbed on appeal, on the basis that fresh evidence has come to light which shows that the Tribunal was deceived as to the facts of the case. There is a detailed consideration of the earlier cases in the judgment of McCombe LJ in Ullah v Secretary of State for the Home Department [2019] EWCA Civ 550:-

"22. Turning to the cases, the first case to which we were referred was R (Boafo) v Secretary of State for the Home Department (in later citations "SSHD") [2002] 1 WLR 1919 . There the SSHD had refused the claimant's application for ILR. The claimant appealed successfully to an adjudicator, but the adjudicator failed to give directions as to the implementation of the appeal decision, as then required by s.19(3) of the Immigration Act 1971. The SSHD did not appeal against the adjudicator's decision but rather reconsidered the application in the light of fresh information and again refused it, directing the claimant to leave the UK forthwith. The claimant's claim for judicial review was refused in the High Court, but her appeal was allowed in this court. The court held that the absence of directions under s.19(3) of the 1971 Act did not deprive the adjudicator's decision of binding force and that, in the absence of an appeal by the SSHD, the adjudicator's decision was binding upon him and ILR had to be granted.

23. There are two important passages for our purposes in the judgment of Auld LJ (with whom Ward LJ and Robert Walker LJ (as he then was) agreed). First, in paragraphs 25 and 26, at p. 1927 D-G, Auld LJ said this:

"25. ...Nevertheless, it is a salutary example of the importance, as Rose J emphasised in Ex p Yousuf [1989] Imm AR 554, 558, of the executive making use of available machinery of appeal when seeking

to challenge the decision of an adjudicator, rather than attempting to circumvent it by reconsidering the matter, whether on evidence going to the original or new facts. That is especially so where, as in a case like this, any fresh executive decision is unappealable save by way of judicial review.

26. On the question whether, as a matter of law, the Secretary of State was entitled to disregard the adjudicator's determination and to consider the matter afresh because it was not accompanied by directions, I take the first two propositions of the judge as starting points. First, this appellate machinery is one of review, not rehearing, and both an adjudicator and the tribunal are normally bound to determine appeals on the facts as they were at the date of the decision under challenge. And, second, an unappealed decision of an adjudicator is binding on the parties. However, I disagree with the judge in his decision that an adjudicator's decision without directions is, by reason of their absence , not binding on the Secretary of State and that he may, in consequence consider the matter afresh in the light of new information."

Secondly, in paragraph 28, at p. 1928, the Lord Justice said:

"28. There may be circumstances in which the executive may reopen a decision without appealing a determination of an adjudicator, for example, because there is fresh evidence, say of deception of the adjudicator about the facts on which the challenged decision was based, or where, as in the entry clearance case of Ex p Yousuf [1989] Imm AR 554 the very nature of the second decision calls for decision on contemporaneous facts. But even in such cases, it would be wrong, in my view, for the Secretary of State, as a generality, to regard the matter as hinging on the presence or absence of directions."

It was, of course, that second passage that was quoted in the administrative review decision in the present case.

24. Next, there was the decision of Moses J (as he then was) in Saribal v SSHD [2002] EWHC 1542 (Admin) . The outline facts of that case were stated by Moses J at paragraphs 1 and 2 of his judgment as follows:

"1. On 12th October 2000 the Immigration Appeal Tribunal allowed the claimant's appeal from a decision of the Special Adjudicator, given on 28th April 1999, dismissing the claimant's appeal against the Secretary of State's refusal to grant him asylum. Notwithstanding the successful outcome of his appeal, the Secretary of State refused to grant the claimant refugee status or leave to remain. On the contrary, on the 14th September 2001 the Secretary of State served him with notice of his decision to deport on the basis that his presence in the United Kingdom is not conducive to the public good.

2. The Secretary of State's decision was based on the ground that the favourable IAT decision was obtained by fraud, the evidence of which had not come to the Secretary of State's attention until after the IAT hearing. The claimant has appealed that decision but contends that the Secretary of State's decision to issue the Notice of Intention to Deport was illegal and irrational. In essence, he asserts the Secretary of State failed to ask himself the correct questions in relation to the evidential basis for setting aside the decision of the IAT."

25. Moses J cited the two passages from Boafo which I have quoted above. He then said (at paragraph 17):

"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."

He continued at paragraph 19 as follows:

"19. The Secretary of State has not sought to appeal the IAT decision in the Court of Appeal on the basis of the evidence before the IAT at the time of its determination. Thus he can only impugn the IAT decision on the basis of fresh evidence of fraud which is relevant, credible and not previously available without due diligence in accordance with the well known principles enunciated in Ladd v Marshall [1954] 1 WLR 1489 ."

26. Moses J also cited Taylor v Lawrence [2002] EWCA Civ 90 in a passage of Lord Woolf CJ's judgment in that case emphasising the importance of finality in litigation and said that the principles were no different in immigration cases. He cited R v SSHD, ex p. Momin Ali [1984] 1 WLR 663 in which an application to adduce fresh evidence in the Court of Appeal in judicial review proceedings was refused on the ground that it could not be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. In the Momin Ali case Sir John Donaldson MR (as he then was) said:

"23. ...

Just as I think the doctrine of issue estoppel has, as such, no place in public law or Judicial Review.... so I think that the decision in Ladd v Marshall has, as such, no place in that context. However I think that the principles which underlay issue estoppel and the decision in Ladd v Marshall , namely there must be finality in litigation, are applicable, subject always to the discretion of the Court to depart from them if the wider interests of justice so require."

27. There follows a passage of interest in the present case in which the SSHD was arguing that judicial review was inappropriate because that applicant had a right of appeal to an adjudicator. In contrast here, it is Ms Naik who argues (beyond the range of her client's permission to appeal) that the Respondent should have agreed to the issue of the Appellant's alleged fraud being remitted to the FTT in any appeal by the Appellant from any refusal of his still extant further claim for ILR based upon human rights considerations.

28. Moses J said that the parties before him did not dispute the principles of finality in litigation or those upon which fresh evidence is sometimes admitted upon appeals in legal proceedings. He continued at paragraphs 25 and 26 of his judgment as follows:

"25. As I have said, neither party was disposed to dispute these principles. There was, however a dispute as to the appropriate procedure. There is no restriction within the statute on the issue of a notice of intention to deport. Once it has been issued, it is open to the claimant to appeal in accordance with those provisions to which I have already referred. The Secretary of State submits that an appeal to an adjudicator is a more convenient process. It avoids duplication and a hearing before the adjudicator is a more suitable forum for hearing contested evidence. There is, indeed, judicial support for that approach in ex parte Momin Ali where Sir John Donaldson MR said:-

"It is unfortunate that the instant application has arisen in circumstances in which the applicant has no right of appeal to an adjudicator, who would be better equipped to resolve the issues than is a court." (See page 666).

26. Mr Blake QC, on behalf of the claimant, accepted that there would be cases where it is appropriate to issue a Notice of Intention to Deport without first seeking to set aside a determination either by an out of time appeal or by Judicial Review. Such a course would be appropriate, he concedes, where fraud is admitted after an IAT determination. But in the instant case he contends that it is incumbent upon the Secretary of State to ask himself the correct questions in relation to the nature of the evidence on which he relies for the purpose of setting aside the determination. ..."

29. In contrast, in Saribal , the claimant did have a right of appeal to an adjudicator and Moses J referred to the argument of counsel for the SSHD as follows (at paragraph 35):

"35. M r Kovats starts from the proposition that since there is nothing in the statute which prohibits the issue of a notice an intention to deport, there is no inhibition on the Secretary of State doing so providing only that he asks himself the correct questions. That he did so is demonstrated by paragraph 30 of Mr Bentley's witness statement. There is, he submits, no disadvantage to the claimant in issuing such a notice. Should the Secretary of State be unable to adduce the necessary evidence at the hearing, an adjudicator on appeal can so rule when he considers the Ladd v Marshall tests as a preliminary issue (see Immigration and Asylum Procedure Rules 2000, rule 30(4)(c)(i)). There is, moreover, every advantage in a hearing before the adjudicator which is appropriate for hearing contested evidence and avoids duplication."

The judge continued in paragraphs 36 and 37 in these terms:

"36. I do not think that this case turns on the appropriate forum for setting aside the determination of the IAT. But, to my mind it does turn on whether the Secretary of State asked himself those questions which are appropriate to the issue as to whether the determination can successfully be set aside. The acceptance, on behalf of the Secretary of State, that some questions as to that issue must be asked, carries with it the acceptance that it is not sufficient merely to form a view that there are grounds for issuing a Notice of Intention to Deport; he must also consider whether the evidence for supporting those grounds satisfies the principles underlying Ladd v Marshall . If it were merely sufficient to issue the Notice and then hope that the evidence will emerge by the time of the hearing of the appeal, then there would be no need for the Secretary of State to consider any question as to setting aside the existing determination. But, rightly, the Secretary of State has not adopted so insouciant a stance. To do so would be to ignore the determination.

37. I start, accordingly from the position that, in the light of the existence of the IAT's determination, the Secretary of State must consider the question as to whether the Ladd v Marshall tests are satisfied."

30. Moses J concluded that the SSHD had not addressed himself sufficiently to the question of whether the principles in Ladd v Marshall had been satisfied in that case before deciding to issue the Notice of Intention to Deport in a case where there had been an earlier decision of the Tribunal. He quashed the decision.

31. This case is, therefore, High Court authority to the effect that, in cases where there has been an antecedent Tribunal decision that an immigrant is entitled to ILR, in considering whether to take action which has the effect of revoking the leave, the SSHD must give proper attention to principles akin to those identified for the admission of fresh evidence on appeals in legal proceedings, as set out in Ladd v Marshall . If he does not do so, his decision is liable to be set aside on judicial review.

32. That brings me to the decision in [Secretary of State for the Home Department v TB [2008] EWCA Civ 997] . In that case, the respondent Jamaican national did not have an attractive immigration record and on 1 August 2003 in the Crown Court at Guildford he pleaded guilty to an offence of supplying controlled drugs of class A (heroin and crack cocaine). He was sentenced to four years and three months' imprisonment, reduced on appeal to three years and ten months. By letters of 24 August and 28 September 2004 the SSHD signified his intention to make a deportation order against the respondent. The respondent claimed asylum and alleged that his removal would constitute breaches of Articles 2, 3 and 8 of the European Convention on Human Rights ("ECHR"). The claim was refused on 6 April 2005, without the SSHD contending that the respondent was a danger to the community or that he was excluded from the benefit of Article 33.1 of the Asylum Convention. The claim was rejected on credibility grounds, and also, in any event, on the basis that there was no risk of harm to him on return to Jamaica and further that any interference with his private and family life was justified.

33. There was an appeal to the Asylum and Immigration Tribunal ("AIT"). Again, no point as to danger to the community or of exclusion from the benefit of the Asylum Convention was argued. The Immigration Judge allowed the appeal on the basis of all three of the Articles of the ECHR upon which the respondent had relied.

34. The SSHD did not seek to have the AIT decision reconsidered or set aside. Instead, on 25 January 2006 he wrote to the respondent's solicitors raising the issues that the respondent posed a danger to the public and that he was properly excluded from benefit of the Asylum Convention. The solicitors' response was that the SSHD's new stance was an abuse of process in view of the fact that those points had not been raised at any stage up to and including the AIT decision.

35. In the Administrative Court, on review of the SSHD's subsequent decision to grant only limited 6 month periods of discretionary leave, instead of the 5 years normally afforded to a refugee, Bean J (as he then was) held that the SSHD's decision was an abuse of process. He founded his decision on principles of finality in litigation: Henderson v Henderson (1843) 3 Hare 100 and Johnson v Gore-Wood [2002] AC 1 . It seems, as recorded in this court's judgment on appeal, that Bean J said that it was incumbent upon the SSHD to bring forward his entire case before the AIT on any appeal: "Otherwise, the applicant is relegated to seeking judicial review of the Secretary of State's decision… which [counsel for the Secretary of State]…realistically accepted was a less advantageous remedy which would make it more difficult for him to succeed."(Emphasis added in the argument of Ms Naik before us): see [2008] EWCA Civ 977 at paragraph 27.

36. This court dismissed the SSHD's appeal. Stanley Burnton LJ (in a judgment with which Rix and Thorpe LJJ agreed) said at paragraph 32 this:

"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."

He then referred to R (Mersin) v SSHD [2000] EWHC 348 (Admin) and to Boafo (from the latter: "…an unappealed decision of an adjudicator is binding on the parties"). He also quoted the judgment of Moses J in Saribal (supra) at paragraph 17 (quoted above) where “ the principle ” was that the SSHD is not entitled to disregard an adjudicator ’ s decision “ unless he can set aside that determination by appropriate procedure founded on appropriate evidence ” .

37. There then followed the important paragraph, paragraph 35, which was at the heart of the UT's decision in this case and of Singh LJ's limited permission to appeal order. At paragraph 35 of TB , Stanley Burnton LJ said:

"35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the 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 the decision: see Auld LJ in Boafo at [28]. But this is not such a case."

30.
In Ullah itself, the court held, in the light of that earlier caselaw, that the Ladd v Marshall requirements had to be satisfied where, after the First-tier Tribunal had allowed an appeal against a decision to refuse to grant indefinite leave to remain, the respondent was informed by a third party that the original claim to indefinite leave to remain had been fraudulent, in that it had been obtained under a different identity and that the individual concerned, in his true identity, had not been resident in the United Kingdom throughout the fourteen year period that was then required in order to give rise to a decision in his favour.

31.
The court dismissed the appellant's appeal against the decision of the Upper Tribunal, which had refused permission to bring judicial review proceedings against the respondent's decision to revoke the grant of indefinite leave to remain that had resulted from the First-tier Tribunal's allowing of the appeal. McCombe LJ (with whom the other members of the court agreed) considered it clear "that the UT in the present case reviewed the respondent's decision through the prism of the Ladd v Marshall criterion " .

(b) Takhar v Gracefield Developments L imited and others

32.
After the hearing in Ullah , the Supreme Court gave judgment in Tak h a r v Gracefield Developments L imited and O thers [2019] UKSC 13. Mrs Takhar claimed that certain properties had been transferred to Gracefield as a result of undue influence or other conscionable conduct on the part of Dr and Mrs Krishan. The High Court rejected Mrs Takhar's claim. The judge placed weight on the fact that the last page of a version of a profit share agreement appeared to have survive d in the form of a scanned copy, which bore Mrs Takhar's signature. The original of the agreement ha d never been found. Mrs Takhar sought permission to obtain evidence from a handwriting expert to examine the signature on the document that had been adduced but that application was refused because it was not made until the trial was imminent. At trial, Mrs Takhar gave evidence that she could not say the signature was not hers but she was unable to explain how it had got there.

33.
After the trial, Mrs Takhar's new solicitors obtained a report from a handwriting expert, who stated conclusively that the signature on the profit share agreement had been transposed from a letter of 24 March 2006 which had been sent to the solicitors acting for the Krishans.

34.
On the strength of that report, Mr s Takhar issued proceedings to have the judgment of the High Court and its order set aside on the basis that these had been obtained by fraud. On the trial of the preliminary issue of whether Mrs Takhar's claim amounted to an abuse of process, Newey J held that a party who seeks to set aside a judgment on the basis that it was obtained by fraud did not have to

demonstrate that he could not have discovered the fraud by the exercise of reasonable diligence. The claim was, accordingly, not an abuse of process.

35.
The Court of Appeal disagreed. Patten LJ held that the “due diligence condition” needed to be satisfied.

36.
The Supreme Court unanimously allowed Mrs Takhar’s appeal against the judgment of the Court of Appeal and restored the order of Newey J. Lord Kerr gave the leading judgment, with whom three other members of the seven-judge panel unequivocally agreed. At paragraph 19, Lord Kerr examined the reliance placed by the Court of Appeal on the judgment of Wigram V C in Henderson v Henderson (1843) 3 Hare 100 (mention ed at paragraph 35 of McCombe LJ’s judgment in Ullah : see above). Lord Kerr held, at paragraph 20, that although Henderson was authority for the “general principle that parties must normally advance the totality of their case on the first bout of litigation” and that it was “not open to them, save in exceptional circumstances, to bring up a point which should have been raised in that litigation and which could, with reasonable diligence, have been discovered and canvassed on the first trial”, Henderson had nothing to say on whether such a rule applied “where the new point was not in issue between the parties on the first trial and where, if it had been and evidence on the point had been led, a different outcome might have ensued”; nor “where the new issue raises an allegation of fraud by which, it is claimed, the original judgement was obtained”.

37.
Lord Kerr found that there was nothing in the judgments of the Supreme Court in Virgin Atlantic Ai r ways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160 or the judgments of the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 that precluded the course taken by Newey J. In this regard, it was important that the “case before Judge Purle [in the High Court] did not involve an allegation of fraud on the part of the Krishans. The points which “had to be or were decided” in Mrs Takhar’s case before Judge Purle were not concerned with possible fraud” (paragraph 27).

38.
At paragraphs 40 to 42, Lord Kerr rejected the reliance placed by the Court of Appeal on the judgments in Owens Bank Ltd v Etoile Commerciale SA [1995] 1 WLR 44 and Owens Bank Ltd v Bracco [1992] 2 AC 443 on the basis that the rule to be derived from them – namely that the party alleging fraud must prove it by fresh evidence not available at the time and not discoverable with reasonable diligence – applied only “where there is a proposed re-litigation of the issue of fraud which has been determined in the earlier litigation. That is not the position here” (paragraph 42).

39.
Beginning at paragraph 43, Lord Kerr examined the authorities to the effect that fraud is “a thing apart” which does “unravels all”:-

“43. In HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 2 Lloyds Rep 61 , para 15, Lord Bingham of Cornhill said that:

“… fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all … once fraud is proved, ‘it vitiates judgments, contracts and all transactions whatsoever’: Lazarus Estates Ltd v Beasley [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712 per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and

omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal."

44. This reflects the basic principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud. It also carries echoes of what Lord Wilberforce said in The Ampthill Peerage [1977] AC 547, 569:

"… any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution … and having reached that solution it closes the book … in the interest of peace, certainty and security it prevents further inquiry … there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud."

45. This passage from Lord Wilberforce's speech resonates with earlier authority. In Hip Foong Hong v H Neotia & Co [1918] AC 888 , 894, Lord Buckmaster said:

"In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail …"

46. The clear implication from this statement is that in cases of fraud, unlike other instances of claimed miscarriages of justice, it is not necessary to show that the further evidence would have been a determining factor in the result. And, if it was not necessary to show that, it could hardly be said that it would have to be shown that evidence of the fraud could not have been obtained before the first trial by the exercise of reasonable diligence (a more rigorous requirement, by any standard).

47. A need to show reasonable diligence did not feature in Jonesco v Beard [1930] AC 298, where an application was made to set aside a judgment obtained by fraud. At p 300, Lord Buckmaster said

"the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegations established by the strict proof such a charge requires."

No mention was made of a need to show that evidence of the fraud could not have been uncovered by reasonable diligence. If that was deemed to be a requirement, it would surely have been mentioned at this point. This is particularly so because affidavits relating to evidence other than fraud, which had not been produced at the trial, were said by Lord Buckmaster not to be capable of sustaining the case for setting aside the judgment because "there was no sufficient explanation of why the evidence had not been made available at the trial" (at p 300). The same stricture was not applied to the argument in relation to fraud. "

40.
Having examined caselaw from Australia and Canada to the same effect, Lord Kerr reached the following conclusions:-

“ 54. For the reasons that I have given, I do not consider that the Etoile and Bracco cases are authority for the proposition that, in cases where it is alleged that a judgment was obtained by fraud, it may only be set aside where the party who makes that application can demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment. If, however, they have that effect, I consider that they should not be followed. In my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.

55. Two qualifications to that general conclusion should be made. Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. Since that question does not arise in the present appeal, I do not express any final view on it. The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question. In Mrs Takhar’s case, she did suspect that there may have been fraud but it is clear that she did not make a conscious decision not to investigate it. To the contrary, she sought permission to engage an expert but, as already explained, this application was refused.

56. At para 26 of his judgment, Newey J said that the principles which govern applications to set aside judgments for fraud had been summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners lp [2013] 1 CLC 596 , para 106. There, Aikens LJ said:

“The principles are, briefly: first, there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be ‘material’. ‘Material’ means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court’s decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.”

57. I agree that these are the relevant principles to be applied. I also agree with Newey J’s view (expressed at para 47 of his judgment) that Mrs Takhar’s application to set aside the judgment of Judge Purle has the potential to meet the requirements which Aikens LJ outlined. She should not be fixed with a further obligation to show that the fraud which she now alleges could not have been discovered before the original trial by reasonable diligence on her part. ”

41.
Lord Sumption, agreeing with Lord Kerr, added some observations of his own “because the disorderly state of the authorities is apt to make the question before us appear more complicated than it really

is” (paragraph 59). Lord Sumption considered an action to set aside an earlier judgement for fraud “is not a procedural application but a cause of action” (paragraph 60). It “is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings and not to the underlying dispute” (paragraph 61). That meant there could be no question of cause of action estoppel. The rule in Henderson v Henderson , although –

“commonly treated as a branch of the law of res judicata” was “better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of process … Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court’s procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion . ” (paragraph 62).

42.
At paragraph 63, Lord Sumption held that -

“… the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to an action in deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in.”

43.
Lord Sumption concluded his judgment as follows:-

“ 66. I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material.

67. I recognise the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners lp [2013] 1 CLC 596 , para 106, combined with the professional duties of counsel, are enough keep it within acceptable limits. I do not think that the imposition of further conditions would be consistent with the long-standing policy of equity of reversing transactions procured by fraud. ”

(c) The respondent’s powers to take action, following Takhar

44.
It is, of course, important to recognise that Takhar involved a civil action between individuals, rather than public law proceedings, such as an appeal under the Nationality, Immigration and Asylum Act 2002. It is, nevertheless, doubtful whether the “reasonable diligence” requirement in Ladd v Marshall should now be held to apply, in a case where the Secretary of State has lost an appeal under the 2002 Act, in circumstances where she has not raised the issue of fraud, but where it later transpires that fraud has been employed, such as occurred in Ullah .

45.

So far as concerns an appeal that involves an allegation of dishonesty in relation to paragraph 322(5), the position may be less clear cut. It would seem that, in such a case, we are in the realm of judicial discretion, of the kind described by Lord Kerr at paragraph 55 of Takhar . If so, then a relevant criterion for exercising discretion might be the inability to have discovered the fraud, with reasonable diligence; although paragraph 66 of Lord Sumption's judgment (with whom three of his colleagues agreed) leave s the matter in some doubt.

(d) The scope of rule 43

46.
Interesting though they are, these questions are not for determination in the present case. The question for us concerns what light, if any, the caselaw sheds on the ability of the Upper Tribunal to invoke r ule 43 where it appears that evidence relied upon by the Tribunal in an appeal was forged or is otherwise bogus .

47.
The first point t o make is that an application under r ule 43(3) by a party is not a pre-condition of the Tribunal's power to set aside under r ule 43(1). If that had been the legis lature's intention, r ule 43(1) would have said so. The Tribunal may, accordingly, apply r ule 43 of its own motion.

48.
The second poin t is that, contrary to Mr Gajjar's submission, the decision of Deputy Upper Tribunal Judge Chamberlain, on the re-making of the appeal, was a decision that disposed of the proceedings in the Upper Tribunal . T he fact that an appeal could be made to the Court of Appeal, with permission granted either by the Upper Tribunal or that court, in no way affects the character of th e Deputy Judge's decision.

49.
Third ly , the caselaw, culminating in Ullah , makes it plain that the respondent can, in certain circumstances, respond to the fact a Tribunal may have been deceived into allowing an appeal, otherwise than by seeking to have the Tribunal's decision overturned or set aside. But that ability on the part of the respondent does not mean the ambit of r ule 43(1) is thereby restricted , so as to preclude the Tribunal from taking action to set aside its own decision . Rather, the respondent's ability to act in such a matter will be a factor for the Upper Tribunal to consider in deciding , in the exercise of its discretion, whether its decision should be set aside.

50.
Fourthly, the submissions of Mr Gajjar and Mr Singh that the Upper Tribunal has no power to act, even where it appears that fraud "was an operative cause of the [Tribunal's] decision to give judgment in the way it did" (Takhar , paragraph 56) sit very ill indeed with the judgments in Takhar and the earlier caselaw that "fraud is a thing apart", which "unravels all", vitiating "judgments, contracts and all transactions whatsoever" (Takhar , paragraph 43).

51.
Both representatives submitted that, even if Ms Skyring 's name and signature on the letter were bogus, r ule 43 was not engaged because the proffering of that evidence was not a "procedural irregularity in the proceedings" within the meaning of s ection 43(2)(d). We emphatically reject those submissions. Any issue as to what constitutes a "procedural irregularity" falls to be determined by reference to r ule 2. Rule 2(1) states that the overriding objective of the Rule s "is to enable the Upper

Tribunal to deal with cases fairly and justly". Rule 2(3) states that the Upper Tribunal "must seek to give effect to the overriding objective when it … (b) interprets any rule or practice direction".

52.
Having regard to the overriding objective, it would be wholly i n i m ical to the status of the Upper Tribunal, as a superior court of record, if it were to be powerless to correct an abuse of its own process , of the kind with which we may be concerned. Although it was dealing with a cause of action to set aside a judgement, the Supreme Court in Takhar regarded fraud as relating to "the conduct of the earlier proceedings, and not to the underlying dispute" (paragraph 61). A case that is advanced by reference to evidence that turns out to be forged involves an irregularity in the Tribunal's process.

53.
The correctness of that finding can be tested as follows. If , say , the Tribunal hears evidence from the spouse of an individual, who gives evidence in support of that individual in an Article 8 appeal, and it later transpires that the person giving th e evidence was an imposter , it is plain that r ules 2(3)(b) and 43(2)(d) enable the Upper Tribunal to correct what has been a serious abuse of process , resulting from the use of the imposter. By the same token , the Upper Tribunal must, in our view, be able to set aside a decision taken by reference to a document put in evidence purporting to come from an individual who has in truth had nothing to do with it .

54.
In conclusion on this aspect, r ule 43 enables the Upper Tribunal to set aside a decision and to re-make that decision where the Tribunal is satisfied that (as summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP) there has been conscious and deliberate dishonesty in relation to evidence given to the Tribunal, which was material to the Tribunal's decision : Takhar , paragraph 56.

55.
The Upper Tribunal must, however, consider whether it is in the interests of justice to set aside the decision. In that regard, each case will be fact and context-specific. Amongst the matters of potential relevance will be the existence and/or nature of the party's involvement in the malfeasance; whether the malfeas ance is, or could be, the subject of an appeal; and whether it could result in action being taken by the Secretary of State to cancel or revoke any leave that might fall to be granted in the light of the decision (see, however, paragraph 60 below) .

(e) The accountants' letter of 4 November 2019

56.
Mr Gajjar submitted that TaxAssist Accountants of 390 Hoe Street, Walthamstow had, in fact, provided an innocent explanation for the letter of 25 May 2017 , purporting to be from Ms Skyring. This explanation is said to have been given in a letter dated 4 November 2019. The letter reads as follows:-

" **To Whom I t May Concern**

Re: Mr Muhammad Kamran Abbasi

Dear Sir/Madam

This is in relation to our client's query regarding the letter issued to him on 25.05.2017 from our office under reference KAM001.

I the undersigned confirm that TaxAssist Accountants Walthamstow have a membership and do p ractice under Institute of Financial Accountants Practicing Licence No: 245404 and we are part of a Franchise Network namely TaxAssist Accountants. We held our office at 390 Hoe street London E17 9AA (sic).

I can confirm that the letter in question dated 25 May 2017 was issued from our franchise office by one of our senior accountants at 390 Hoe Street London E17 9AA to Mr Muhammad Kamran Abbasi.

It is important to mention here that Ms Samantha Skyring is a part of Franchisor Technical team for 200 franchisees of TaxAssist Accountants, whose name was mentioned in the aforementioned letter. In fact, it was issued on behalf of our franchise; nevertheless , it shows Ms Skyring's name who does not directly sign the letter of engagement with our clients. She would have known Mr Abbasi, if Home Office would have referred her that the query is with regards to the franc h ise based in Walthamstow at 390 Hoe street London E17 9AA where client record is held (sic).

Should you have any further queries, please feel free to contact us at local franchise office at Walthamstow 390 Hoe street London E17 9AA and we will be pleased to assist.

Yours faithfully

[Signature]

Mansoor Ahmed

TAXASSIST ACCOUNTANTS "

57.
Mr Gajjar informed us at the hearing that TaxAssist Accountants of Walthamstow had been asked by those instructing him if they would attend the hearing but they had not done so. Mr Gajjar said he would have liked to have an opportunity to call the relevant person to give evidence.

58.
We duly note this. As matters stand, the letter of 4 November 2019 is, on its face, manifestly problematic. It fails to explain why Ms Skyring's name and ACCA membership number occur at the foot of the letter of 25 May 2017, underneath the signature. It is manifest that whoever wrote the letter of 25 May 2017 intended it to be regarded as having been written by Ms Skyring. That is precisely how Deputy Upper Tribunal Judge Chamberlain regarded it. We accept Ms Skyring's unchallenged evidence that she d oes not know the appellant. It is unclear why the writer of the letter of 4 November 2019 thinks it was the responsibility of the respondent to have referred anything to Ms Skyring . The letter of 25 May 2017 is now said to have been "issued from our franchise office by one of our senior accountants". We are not told, however, who that is. The letter of 4 November 2019 is signed by Mansoor Ahmed. His status in the organisation is unknown. The s ole director is still, according to foot of the letter, Nadeem Iqbal.

59.
As matters stand, t he position is, in short, highly unsatisfactory. However, notwithstanding that , for the reasons we have given, r ule 43 would otherwise have been available to the Upper Tribunal to make relevant findings and , in the light of them, to decide whether to set aside the decision of the Deputy Upper Tribunal Judge, it is now no longer possible to deploy that power . The reason is that, following receipt of Deputy Upper Tribunal Judge Chamberlain's decision, the respondent on 21 October 2019 granted the appellant indefinite leave to remain. This was nine days before the Upper

Tribunal sent its notice of hearing and directions, drawing attention to the information from the TaxAssist G roup that Samantha Skyring had not written the letter of 25 May 2017.

F. ABANDONMENT OF THE APPEAL

60.
The consequence of the grant of leave is that on 21 October 2019 the appellant's human rights appeal ceased to exist. Section 104(4A) of the 2002 Act provides as follows:-

"(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom …" .

61.
The effect of s ection 104(4A) is to terminate the jurisdiction of the Upper Tribunal. Since the appeal of the appellant against the respondent's decision to refuse his human rights claim has been abandoned, the Upper Tribunal cannot invoke r ule 43(1) in order to re-make the decision in that appeal.

62.
The upshot is that it will be for the respondent to decide, what, if any, investigations to make and, in the light thereof, whether she considers grounds exist for revoking the appellant's indefinite leave to remain in the United Kingdom.

G. EVIDENCE FROM ACCOUNTANTS IN PARAGRAPH 322(5) CASES

63.
Both the First-tier Tribunal and the Upper Tribunal have seen a considerable number of human rights appeals stemming from the refusal of the respondent of indefinite leave to remain, by reference to paragraph 322(5). In many such appeals, appellants have sought to lay the blame for discrepancies in disclosed earnings provided to, respectively, the respondent and Her Majesty's Revenue and Customs, at the door of their accountants. As in the present case, those accountants have frequently written "To whom it may concern" letters acknowledging responsibility for what are often large discrepancies.

64.
We consider that particularly where, as in the present case, an accountant's letter is clearly perfunctory ("… we inadvertently mixed earnings details of two clients … The client was compensated … Errors and mistakes can't be ruled out"), the First-tier Tribunal or Upper Tribunal, as the case may be, should expect the accountant in question to attend the hearing, having provided in advance a S tatement of T ruth, in order to explain in detail the circumstances in which the error came to be made ; the basis and nature of a ny compensation ; and whether the firm's insurers and/or any relevant regulatory body have been informed . In the absence of such evidence, the Tribunal is unlikely to be able to place any material weight on letters of this kind .

Signed Date : 7 January 2020

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber