UT Neutral citation number: [2023] UKUT 00163 (IAC)

Lata (FtT: principal controversial issues)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on **30 November 2022**
Promulgated on 1**3 June 2023**

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARSH LATA
(ANONYMITY ORDER SET ASIDE)

Respondent

Representation:
For the Appellant: Ms. H Gilmour, Senior Presenting Officer
For the Respondent: Mr. B Hawkins, Counsel, instructed by Leonard Solicitors LLP

1. *The parties are under a duty to provide the First-tier Tribunal with relevant information as to the circumstances of the case, and this necessitates constructive engagement with the First-tier Tribunal to permit it to lawfully and properly exercise its role. The parties are therefore required to engage in the process of defining and narrowing the issues in dispute, being mindful of their obligations to the First-tier Tribunal.*

2. *Upon the parties engaging in filing and serving a focused Appeal Skeleton Argument and review, a judge sitting in the First-tier Tribunal can properly expect clarity as to the remaining issues between the parties by the date of the substantive hearing.*

3. *The reformed appeal procedures are specifically designed to ensure that the parties identify the issues, and they are comprehensively addressed before the First-tier Tribunal, not that proceedings before the IAC are some form of rolling reconsideration by either party of its position.*

4. *It is a misconception that it is sufficient for a party to be silent upon, or not make an express consideration as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a judge is not required to trawl though the papers to identify what issues are to be addressed. The task of a judge is to deal with the issues that the parties have identified.*

5. *Whilst the Devaseelan guidelines establish the starting point in certain appeals, they do not require a judge to consider all issues that previously arose and to decide their relevance to the appeal before them. A duty falls upon the parties to identify their respective cases. Part of that process, in cases where there have been prior decisions, will be, where relevant, for the parties to identify those aspects of earlier decisions which are the starting point for the current appeal and why.*

6. *The application of anxious scrutiny is not an excuse for the failure of a party to identify those issues which are the principal controversial issues in the case.*

7. *Unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their*

consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.

8. *A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal.*

DECISION AND REASONS

Introduction

1. We refer to the parties as HL and the Secretary of State.

2. The Secretary of State appeals a decision of the FtT sent to the parties on 12 May 2022. Judge of the First-tier Tribunal Cotton ('the Judge') allowed HL's appeal on international protection grounds.

3. On 2 November 2022, UTIAC granted the Secretary of State permission to appeal.

4. This case raises the question of whether it is open to a party to proceedings in UTIAC to raise as the basis for an appeal from a decision reached by the FtT a point which was not one of the principal controversial issues identified by the procedure for case managing appeals which is set out below. The reasoning set out below identifies how this issue should be approached, bearing in mind the requirements of procedural rigour in the IAC and the need to achieve the overriding objective.

Relevant Facts

5. HL is a national of India who entered the United Kingdom with her children as a visitor in December 2011. She sought asylum in 2015, asserting a fear of her former husband. The Secretary of State refused the application in the same year.

6. Judge of the First-tier Tribunal Haria dismissed HL's appeal by a decision dated 17 February 2016. At the time of the hearing, HL's elder son was an adult, and her younger son was aged 16. Judge Haria concluded that it was in the best interests of the younger son that he reside with, and be brought up by, his mother until he reached adulthood. It was noted that he had spent most of his life in India, and with the aid of his mother could integrate back into life in that country on return.

7. The elder son was removed to India. He subsequently secured entry clearance as a spouse, permitting him to return to this country where he lawfully resides.

8. The younger son claimed asylum on 11 September 2017, having turned 18. The application was refused and certified by the Secretary of State as clearly unfounded on 17 February 2018. Further representations were lodged on 13 March 2019. The Secretary of State concluded by a decision dated 8 July 2019 that the representations did not amount to a fresh claim under paragraph 353 of the Immigration Rules.

9. HL submitted further representations in January 2020, asserting that she could not return to India consequent to her conversion to Christianity. She stated that she had commenced attending church services in January 2018 and was baptized in April 2019. By a decision dated 2 June 2021 the Secretary of State accepted that the further submissions constituted a fresh claim but refused to recognise HL as a refugee and grant her attendant leave to remain

10. The appeal came before the Judge sitting at Hatton Cross on 19 April 2022. HL was represented by Mr. Hawkins. The Secretary of State was represented by counsel, Mr. Gazzain. HL gave evidence as did a reverend from her Pentecostal church. HL's elder son attended the hearing and gave evidence, along with his wife. The couple were cross-examined, but not as to their willingness and ability to relocate to India with HL.

11. The focus of the Secretary of State's submissions before the FtT was the genuineness of HL's conversion to Christianity. Alternatively, it was submitted that there was no risk to her if she relocated to Goa, which has a large Christian population. No reference was made by counsel for the Secretary of State in his closing submission to either son being able to relocate to India with their mother. Indeed, the Secretary of State's recorded position was that the children could keep in touch with their mother and visit her in India on occasion.

12. The Judge found HL to be a genuine convert to Christianity who through her commitment would practice her religion openly on return to India and look to inform others about Christianity. He accepted that she would be vulnerable upon her return to India due to a lack of family support and concluded that she would face persecution from non-state agents consequent to her religion, with no sufficient State protection being available to her. On the facts arising there was found to be no internal relocation alternative available in Goa, as HL would be lost in an unfamiliar area of India, would not enjoy access to the

support that she requires and would be vulnerable to such an extent as to make relocation unduly harsh.

Grounds of Appeal

13. The Secretary of State's grounds of appeal filed with the FtT on 12 May 2022 were not drafted by Mr. Gazzain. The decision of the Judge was challenged on the ground of inadequate reasoning:

- When concluding that HL could not internally relocate to Goa, the FtT failed 'to consider the immigration status of her two adult sons present in the UK, or the ability of them to return with her to India.'

- The younger son is without status in the United Kingdom and so the Secretary of State is 'unclear from the FTTJ's reasoning why it would be unduly harsh for [HL], accompanied by one or both of her sons, to internally relocate to Goa thereby providing in India the welfare support required in addition to financial support'.

14. By means of grounds of appeal filed with the Upper Tribunal, dated 29 June 2022, again not drafted by Mr. Gazzain, the Secretary of State relied upon her grounds filed with the FtT and made 'further additional submissions':

- The decision of Judge Haria was before the FtT.

- Judge Haria had found that HL's younger son, then a minor, could return to India with her. This was a '*Devaseelan* starting point'.

- The Judge was aware that by 2022 the younger son was an adult.

- There was no 'clear and explicit concession' by the Secretary of State that it would now be disproportionate to expect the younger son to return to India with his mother, silence not being a concession.

- Whilst HL's witness statement confirms that the partner of her younger son is pregnant, no detail was given to the son's immigration status.

- It would clearly have been materially relevant for the Judge to consider holistically what family support HL could enjoy in India and this 'must' include those unlawfully present in the United Kingdom who 'have given no basis' as to why they could not return with her.

- The Judge's conclusion as to there being a lack of family support in India was inadequately reasoned.

15. The Secretary of State further observed by her grounds:

> '6. The [Secretary of State] was represented by Counsel at the hearing and whilst submissions are recorded as being made on the potential availability of family visits this was likely only informed by the oral evidence [of the elder son] (given [the younger son] appears [not] to have given evidence). Again, however, no concession is recorded that keeping in touch was limited 'solely' to visits as opposed to residing with the appellant (or nearby) in India. The [Secretary of State] would respectfully contend that an absence of explicit submissions on this point given the existing Devaseelan starting point cannot excuse an absence of adequate reasoning.'

Discussion

16. The Secretary of State contends the FtT materially erred in law by failing to consider whether one or both of HL's sons could accompany her to India.

17. This was not the Secretary of State's case as expressly advanced at the hearing before the FtT. HL's elder son and his wife attended. They relied upon short witness statements, neither of which addressed their returning to India with HL. Whilst both witnesses gave oral evidence as to their contact with HL in the United Kingdom, neither were cross-examined about their relocating to Goa to provide HL with support. The Secretary of State's submissions before the FtT addressed the ability of HL to relocate to Goa, with its large Christian population, but no reference was made to one or other of the sons relocating with her. The only express reference to the sons was their ability to keep in touch with their mother from the United Kingdom and to visit her in India.

18. Before us, Ms. Gilmour relied upon the Secretary of State's decision letter of 2 June 2021, a document running to fifty-eight paragraphs over fifteen pages, and its reliance at paragraph 10 upon the starred decision of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702, [2003] Imm AR 1. Though not expressly stated in the decision letter, the Secretary of State's position before us was that the starting point for the FtT should properly have been that the younger son, now an adult, could return to India with his mother in accordance with the finding of Judge Haria in February 2016.

19. We observe the Secretary of State's position in her decision letter was that she did not accept HL to have genuinely converted. There was no consideration of internal relocation and consequently no express consideration was given to whether the sons could relocate to Goa with their mother.

20. Attendant to the new digital service adopted by the FtT, where an appellant is represented, the requirement that an 'appeal skeleton argument' (ASA) be filed and served has been introduced into the appeal process to answer the question - 'Why does the appellant say that the decision of the respondent is wrong?' The appellant is required to set out concisely their objections to the Secretary of State's reasoning in her decision letter, and the answer to the question is to be given with sufficient particularity to enable the Secretary of State to engage in an active, effective, review of the appellant's case following the submission of the ASA and before the hearing is listed.

21. The hearing of this matter pre-dates the coming into force of the Senior President of Tribunal's *Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal* and the President of the First-tier Tribunal's *Practice Statement No. 1 of 2022*, both dated 13 May 2022. The latter confirms in mandatory terms the requirement placed upon a represented appellant to file an ASA, whether the appeal was brought online using MyHMCTS or not. Further, it details the mandatory requirement that the respondent undertake a meaningful review of the appellant's case, taking into account the ASA and appellant's bundle, and provide the result of that review. The respondent is to engage with the submissions made and evidence provided, and to particularise the grounds of refusal relied upon. The same meaningful review is to be undertaken in appeals where appellants are unrepresented and have served an 'appellant's explanation of case'.

22. Case management in this matter proceeded under the terms of the now replaced *Presidential Practice Statement No.1 of 2021*, dated 22 April 2021, in accordance with the model directions located at Annex 1, the latter establishing 'within fourteen days of the ASA being provided the respondent must undertake a meaningful review of the appellant's case, taking into account the ASA and appellant's bundle, providing the result of that review and particularising the grounds of refusal relied upon.'

23. Consequent to the appellant having failed to file her ASA, Judge of the First-tier Tribunal O'Keefe dispensed with the requirement that the Secretary of State conduct a review by an order dated 15 December 2021.

24. The appeal was listed before Judge of the First-tier Tribunal Maka as a remote hearing on 11 February 2022. Mr. Hawkins attended on behalf of HL and Ms. Khan, a Presenting Officer, on behalf of the Secretary of State. Judge Maka was concerned as to the appropriateness of a remote hearing being conducted given HL's vulnerability and attendant safeguarding issues, so converted it into a case management review hearing. Post-hearing the Judge issued directions that identified the outstanding issues between the parties:

> '6. Having confirmed the paperwork and witnesses, the following issues were agreed:
>
> i. Credibility based on *Devaseelan*
>
> ii. Credibility based on conversion and its genuineness.
>
> iii. Risk on return as highlighted in the refusal letter.
>
> iv. Articles 2, 3 and 8. Articles 2 and 3 were relied upon with an argument the act of removal itself would be unlawful given the Appellant's suicidal ideations.
>
> v. Article 8 ECHR was within the Rules and outside based on private and family life.'

25. There is no express reference within paragraph 6 of the directions to the role of the sons in respect of the viability of HL internally relocating if a risk on return were to be established.

26. Complying with Judge Maka's directions, the Secretary of State filed a review on 28 March 2022. This document has provided limited aid to the panel as HL again failed to file an ASA as directed.

27. A judge sitting in the FtT can properly expect clarity as to the remaining issues between the parties by the date of the substantive hearing of the appeal. The parties are obliged by rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 to help the Tribunal to further the overriding objective, and to cooperate with the Tribunal generally. The parties are under a duty to provide the FtT with relevant information as to the circumstances of the case, and this necessitates constructive engagement with the FtT to permit it to lawfully and properly exercise its role. The parties are therefore required to engage in the process of defining and narrowing the issues in dispute, being mindful of their obligations to the FtT.

28. It follows that unless a point was one which was *Robinson* obvious, a judge's decision cannot be alleged to contain an error of law on the

basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules.

29. We are satisfied, on consideration of events leading up to the hearing before the Judge, that the Secretary of State had not expressly identified as an issue before the FtT that one or both of HL's sons could accompany her to Goa to ensure that internal relocation to Goa would not be unduly harsh.

30. Robust and considered decision-making commences with the identification of core and relevant issues. The Judge undertook this step at [16] of his decision, noting paragraph 6 of Judge Maka's directions. He then proceeded to work through the identified issues, addressing whether a real risk of persecution existed and whether it would be unduly harsh for HL to relocate elsewhere in India, with relocation to Goa being identified by the Secretary of State at the hearing. At no point in time did the Secretary of State's counsel request that the sons be considered in the internal relocation assessment, nor was HL's elder son cross-examined on this issue.

31. The Secretary of State's ground of appeal evidences a misconception that it is sufficient for a party to be silent upon, or not make an express concession as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. In simple terms, this amounts to a judge being required to search for and consider an 'obvious' point, though not so obvious that it was raised by a party at the hearing. The reformed appeal process that now operates in the FtT has been established to ensure that a judge is not required to trawl through the papers in an appeal to identify what issues are to be addressed. The task of the judge is to deal with the issues that the parties have identified. It is trite that the hearing before the FtT is not a lap in the warm-up for a subsequent appeal in which the party's case can be differently articulated. Parties are expected to advance their cases to their best advantage, permitting a judge to decide between two competing sets of submissions that identify the full extent of the parties' positions.

32. Whilst the *Devaseelan* guidelines establish the starting point in certain appeals, they do not require a judge to consider all issues that previously arose and to decide their relevance to the appeal before them. A duty falls upon the parties to identify their respective cases, consistent with their obligations under rule 2(4) of the 2014 Procedure Rules. Part of that process, in cases where there have been prior

decisions, will be for the parties to identify those aspects of earlier decisions which are the starting point for the current appeal and why.

33. It is important to appreciate that the parties can properly identify their case on appeal to their opponent and to the FtT at various procedural stages, including the filing of the ASA, the undertaking of a meaningful review, at a case management review hearing, at the commencement of a hearing when a judge requests clarification as to outstanding issues and during closing submissions. If by the conclusion of a hearing, a party has not asserted reliance on an issue, a judge can properly proceed on the basis that it is not a matter upon which they are required to reach a decision, though a judge will be aware of the likely lack of procedural and legal knowledge when an appellant represents themselves and of the incumbent requirement to apply anxious scrutiny in a protection appeal. The latter establishes a need for decisions to show by their reasoning that every factor which might tell in favour of an appellant has been properly considered. The application of anxious scrutiny is not an excuse for the failure of a party to identify through the available procedural requirements those issues which are the principal controversial issues in the case. Indeed, to the contrary, the procedural requirements should drive the parties to identify the principal controversial issues which in turn they consider that it is in the interests of their client for the FtT to apply anxious scrutiny in the determination of the case. At the stage of an appeal from the FtT to UTIAC, it should be rare indeed for there to be a point requiring anxious scrutiny (which is not *Robinson* obvious in the case of an appellant) to have illuded the reformed FtT appeal procedures. The procedures are specifically designed to ensure that the parties identify the issues and they are comprehensively addressed before the FtT, not that proceedings before the IAC are some form of rolling reconsideration by either party of its position.

34. We consider that there exists a duty upon the parties to identify relevant issues of their own motion. There is no place for hiding a jewel of a submission in the hope that it will purchase favour on appeal. A party that fails to identify an issue before the FtT that it subsequently asserts to have been essential for a judge to consider is unlikely to have a good ground of appeal before UTIAC. None of this is to say that a FtT judge is to entirely lack curiosity in relation to an aspect of a case that the judge requires further assistance with or which the judge considers should be examined as part of the evaluation of the case. Where, as here, a point has not been identified by the parties, and nor is it one which has independently drawn the attention of the judge, it is not an issue which can be appropriately raised for the first time in the context of an appeal to UTIAC.

35. We conclude that the Secretary of State's present reliance before us upon an earlier judicial finding that it would be in the interests of HL's younger son, whilst a minor, to return to live with his mother in India, was not part of her case before the FtT. As confirmed in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), [2018] Imm AR 1418, at [64], in its application to asylum law, the *Robinson* approach applies only in favour of the individual, who is seeking asylum; not in favour of the Secretary of State, except in an identified exceptions such as exclusion or the statutory presumptions as to criminality. The exceptions do not arise in this matter.

36. In the circumstances, the respondent's appeal is dismissed.

Anonymity

37. The Judge did not make an anonymity order. The reasons provided were that HL did not make an application for anonymity, and there was 'no reason to make an anonymity order in this case.'

38. We conclude that the Judge was unaware that anonymity had previously been ordered by Judge Maka. The true question for the Judge was whether the order should continue, and consideration should properly have been given to the appeal concerning a claim for international protection.

39. The Supreme Court emphasised in Kambadzi v Secretary of State for the Home Department [2011] UKSC 23, [2011] 1 WLR 1299, that anonymity must be justified on a case-by-case basis. However, as confirmed at paragraph 22 of *Presidential Guidance Note No 2 of 2022: Anonymity Orders and Directions regarding the use of documents and information in the First-tier Tribunal (Immigration and Asylum Chamber)* (21 March 2022), protection appeals are given anonymity to avoid any risk to an appellant arising from publication of details of the protection claim.

40. When granting permission to appeal, UTIAC made an anonymity order, observing that as permission had been granted HL's rights protected by article 8 ECHR outweighed at that time those rights protected by article 10 ECHR. The order identified that the issue was to be reconsidered at the error of law hearing, though ultimately neither representative addressed anonymity in their submissions.

41. The Supreme Court confirmed in re Guardian News and Media Ltd and Others [2010] UKSC 1, [2010] 2 AC 697, that where both articles 8 and 10 are in play, it is for a tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the

weight to be attached to the respective interests of the parties will depend on the facts.

42. Consequently, consideration as to the continuation or otherwise of an anonymity order in a protection appeal requires an intense fact-sensitive evaluation and a balancing exercise must take place when considering curtailing freedom of speech to safeguard article 8 rights. Whilst reasons for the decision can properly be brief, they must be given.

43. We observe that when an appeal in protection proceedings is dismissed by UTIAC it may be necessary to continue an anonymity order, in case of onward appeal.

44. We observe that HL was successful on appeal before the FtT, and we have dismissed the Secretary of State's appeal. We are satisfied that when weighing the extent of the interference with her privacy on the one hand against the general interest at issue on the other hand, the balance now tips in favour of the public interest in open justice. HL will not be returned to India. It is not her case that the authorities are targeting her family in India in pursuit of her. The publication of her name will not adversely affect either her family or herself. We further observe that HL's counsel did not seek anonymity before the FtT and this Tribunal.

45. We accordingly decide that the anonymity order made on 2 November 2022 should be lifted.

46. Observing that the Secretary of State enjoys a right of appeal to the Court of Appeal against our decision under the Tribunal Procedure (Upper Tribunal) Rules 2008 we impose a stay on our decision to lift the anonymity order, whereby the lifting will take effect ten working days after UTIAC has informed the parties of its decision on an application for permission to appeal, with liberty to the parties to request a continuation of the stay if there is an intention by the Secretary of State to renew an appeal to the Court of Appeal on receipt of an adverse decision, if made, issued by this Tribunal.

47. Otherwise, if the Secretary of State does not exercise her right of appeal within the time limit established by rule 44(3A), (3B)(a)(i) of the 2008 Rules the lifting will take place thirteen working days after the sending of this decision to the parties.

48. Since our decision to lift the anonymity order is an ancillary decision made in relation to an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, it is an excluded decision by reason

of article 3(m) of the Appeals (Excluded Decisions) Order 2009 and, thus, challengeable only by means of judicial review.

Notice of Decision

49. The making of the decision of the First-tier Tribunal, sent to the parties on 12 May 2022, did not involve the making of an error on a point of law. The decision of the First-tier Tribunal is upheld.

50. The Secretary of State's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
12 June 2023

TO THE RESPONDENT
FEE AWARD

By its decision sent to the parties on 12 May 2022, the First-tier Tribunal made a fee award 'of any fee which has been paid or may be payable'. The decision failed to engage with HL having been informed by the First-tier Tribunal on 18 August 2021 that she was exempt from paying a fee.

The decision of the First-tier Tribunal to make a fee award is set aside. No fee award is made.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
12 June 2023