



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

R (on the application of MW) v Secretary of State for the Home Department (Fast track appeal: Devaseelan guidelines) [2019] UKUT 00411 (IAC)

THE IMMIGRATION ACTS

**Heard at Field House
On 17 September 2019**

Decision & Reasons Promulgated

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Before

**THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE PICKUP**

Between

**THE QUEEN
ON THE APPLICATION OF
MW (SRI LANKA)
(ANONYMITY ORDER MADE)**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr A Bandegani, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms J Anderson, Counsel instructed by the Government Legal Department

(1) *The fact that an appeal was decided pursuant to the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 does not mean that the weight to be attached to the decision necessarily falls to be materially reduced, when applying the Guidelines in Devaseelan v Secretary of State for the Home Department [2002] UKAIT 702.*

(2) *Under those Guidelines, the first judicial decision is “the starting point” for the subsequent judicial fact-finder. The “starting point” principle is not a legal straitjacket. It permits subsequent*

judicial fact-finders to depart from the earlier judicial decision on a principled and properly-reasoned basis.

JUDGMENT

A. INTRODUCTION

1. The applicant seeks judicial review of the respondent's decision of 30 June 2015 to decline to treat the applicant's further submissions as a "fresh claim" pursuant to paragraph 353 of the Immigration Rules. The application raises the issue of the significance, or otherwise, to a decision on whether the submissions amount to a fresh asylum or human rights claim, of the fact that the applicant had an appeal dismissed by the First-tier Tribunal on asylum (now, protection) grounds and human rights grounds, where that appeal was decided pursuant to the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005. Those Rules were declared by Ouseley J to be *ultra vires* in a judgment of 20 January 2017 ([2017] EWHC 59 (Admin)). Ouseley J found, however, that appeal decisions made under the Rules were not automatic nullities and therefore require an application to be made to set them aside.
2. Ouseley J envisaged that an application to set aside a particular decision of the First-tier Tribunal under the Fast Track Rules 2005 would be made to, and determined by, that Tribunal, pursuant to rule 32 of the current Procedure Rules. The First-tier Tribunal, however, held that it did not have jurisdiction to do this. The First-tier Tribunal's conclusion was upheld by a Divisional Court (sitting also as a Court of Appeal to determine an appeal against Ouseley J's judgment): TN (Vietnam) and Another v Secretary of State for the Home Department and Another [2018] EWCA Civ 2838.

B. HISTORY

(a) The applicant's asylum claim

3. After that brief introduction to the main issue in this judicial review, it is necessary to engage with the somewhat complex history of the current application. The applicant is a citizen of Sri Lanka, born in 1986. He has a twin brother, who also features prominently in the account that follows. The applicant and his brother entered the United Kingdom in September 2009, with entry clearance as students. In 2010, they each applied for, and were granted, limited leave to remain as Tier 1 (Post-Study Work) Migrants. A day before that leave was due to expire, both of them applied for leave as Tier 4 (General) Students, which was also granted.
4. However, in March 2014 the brothers were encountered working in breach of their visas and enforcement action was commenced. Three days later, each of them claimed asylum, some four and half years after they had entered the United Kingdom.
5. The respondent refused their claims on 24 April 2014 and on 7 May 2014, their appeals were heard at Hatton Cross by First-tier Tribunal Judge Pedro. In a decision

promulgated on 9 May 2014, First-tier Tribunal Judge Pedro dismissed both of the appeals.

(b) The decision of First-tier Tribunal Judge Pedro

6. The First-tier Tribunal Judge's decision needs to be examined in some detail. At paragraph 5, he stated that the core of the brothers' claim to asylum concerned the murder of a journalist named Mr De Silva in 2006. Mr De Silva had been working for the Sri Lankan Intelligence Service and the brothers claimed that he was their cousin, with whom they had formed a close association. Mr De Silva told the brothers about the nature of his work with the Intelligence Service and, indeed, they assisted him with it. Part of Mr De Silva's work involved gathering sensitive information implicating the Sri Lankan authorities in war crimes and assassinations, for which reason the brothers told the judge that they believed Mr De Silva had been murdered by those authorities. Although no direct threats had been made at that time against them, the brothers' father took the step of moving them to another address where they remained in hiding, with the only visitors being two individuals known as Mohan and Ravi.
7. The brothers believed that Mohan and Ravi were also working for or associated with the Government Intelligence Service. They frequently visited the brothers' hiding place between 2006 and 2009, when the brothers left Sri Lanka for the United Kingdom. Shortly before the brothers departed, Mohan and Ravi came and told them that they also planned to leave Sri Lanka and reveal all of the sensitive information they had stored on their computer to the outside world. Mohan and Ravi duplicated this information on the brothers' laptop as a backup and the brothers subsequently took this with them to the United Kingdom.
8. After Mohan and Ravi left the brothers' residence in some haste and disappeared, the brothers had no further contact with them. However, on 5 October 2009, a few days after arriving in the United Kingdom, their father told them that the army had come to the brothers' residence looking for them and had made it known that Mohan and Ravi had been captured and killed. The brothers' mother had been assaulted and threatened with a pistol to her head, whereupon she revealed the brothers had left Sri Lanka. The army warned her that if any information were revealed they would kill the entire family and demanded that the brothers returned to Sri Lanka, leaving a threatening note to that effect, accompanied, a few days later, by a photograph of the dead bodies of Mohan and Ravi.
9. Both brothers gave oral evidence to First-tier Tribunal Judge Pedro. He did not find them to be credible witnesses. On the totality of the evidence before him, both oral and documentary, he found that the credibility of their claim was seriously undermined.
10. First-tier Tribunal Judge Pedro set out his reasons for that finding. He concluded that they had fabricated their claim and the facts upon which it was based, in order to prolong their stay in the United Kingdom and frustrate their removal after they

had ceased any studies in this country and had been arrested for being in breach of their conditions of stay, detained and served with removal directions.

11. Although the core of the brothers' claim was their alleged relationship with Mr De Silva, the judge found that they had not produced any corroborative evidence of that claimed relationship as cousins. Although the judge was given evidence that showed that Mr De Silva had been killed and that there was a strong suspicion that this had been instigated by the army or Intelligence Service, the internet material regarding this made no mention at all of the brothers or any involvement of them with his journalistic or other activities. Although the brothers had had supporting documents sent to them by their family in Sri Lanka, including a statement from their older brother and their birth certificates, the judge concluded that none of this corroborated the claimed relationship with Mr De Silva.
12. The judge went on to find that, "quite apart from the claimed relationship with Mr De Silva", the brothers' account of their involvement with his activities was "riddled with a lack of credibility" (paragraph 22). The judge considered it was curious that, although they were cousins from birth, they had only become involved with Mr De Silva at the point of which they became engaged with his military intelligence work. The judge also considered that if Mr De Silva was, as claimed, working for the Intelligence Service against Tamil separatists, whilst at the same secretly gathering information against the government, he would have made a conscious effort to keep these activities a secret. The brothers claimed to the judge that Mr De Silva needed to do this as he required "their assistance with writing articles as he had poor writing skills". The judge considered that that did not sit comfortably with the internet articles produced about Mr De Silva's death, which indicated that he had been a journalist since the age of 17 and "was a born writer as well as a skilled speaker ... he was internally writing novels and poetry ..." (paragraph 22).
13. The judge was also troubled by the fact that although the father of the brothers sent them away for their safety, he continued to reside in the same family home in which they had all been living. The judge was puzzled as to how the brothers' father would think that simply moving the brothers to another address would prevent the authorities from pursuing them, should the authorities ever become aware of their involvement with Mr De Silva's work.
14. The judge also considered it incredible that the brothers' father, having done this, would have informed Mohan and Ravi of the brothers' secret address or that the brothers would have entertained them as visitors from 2006 to 2009.
15. The judge found it incredible that, although the brothers' father had decided to send the brothers abroad immediately after De Silva's death in July 2006, no arrangements had been made until some three years later. The brothers said that their father needed to save funds and that he had paid an initial course fees of approximately £20,000, as well as funding their stay in the United Kingdom from 2009 until he had a stroke in 2013. The judge considered that the father could have at least attempted to make arrangements to send the brothers abroad "whether through an agent or otherwise, a lot earlier than he did if really concerned as to their safety in Sri Lanka" (paragraph 25). This was all the more so, given that, in the end, particularly

expensive courses of study had been selected for the brothers. The delay in leaving strongly indicated to the judge that the brothers were never in fear of their safety, which seriously undermined their credibility. The judge found that, instead of a hasty departure, the brothers left as a result of “a carefully planned and orderly departure designed to enable them to arrive in the United Kingdom as students” and not for reasons of international protection. The truth of the matter was that the brothers had at all times been motivated by the desire to settle and work in the United Kingdom rather than return and seek employment in Sri Lanka.

16. At paragraph 26, the judge noted that the brothers appeared never to have had any concerns about approaching the Sri Lankan government for passports to be issued in Colombo in March 2009, in their own identities, which they obtained without apparent difficulty. The brothers also did not leave Sri Lanka until six months after the passports had been issued to them and did not apply for UK entry clearance as students until five more months had elapsed.
17. At paragraph 27, the First-tier Tribunal Judge considered the alleged events in Sri Lanka on 5 October 2009, at the home of the brothers’ parents. The brothers claimed that, after the phone call from their father, they “panicked into deleting all of the sensitive information that they held on their laptop implicating the Sri Lankan government” which had been put there by Mohan and Ravi. This was particularly problematic, given that the brothers claimed that they had left Sri Lanka with every intention of revealing this information to bodies such as the United Nations, in order to incriminate the Sri Lankan government. At the hearing, the explanation provided for the deletion changed, in that the brothers told the judge that they did so because they feared the Sri Lankan government would send someone to kill them. The judge did not find this explanation to be satisfactory: “Frankly, it makes no sense at all”, since the brothers confirmed they had not told the authorities that they had deleted the information (paragraph 27).
18. At the time of the hearing before First-tier Tribunal Judge Pedro, the brothers’ mother was in the United Kingdom as a visitor, but she intended to return to Sri Lanka. The mother, however, failed to attend the hearing to give oral evidence. The brothers said that she was “too traumatised by the incident of 5 October 2009 and has a fear of attending this tribunal to give evidence”. The First-tier Tribunal Judge did not find that to be a satisfactory or credible explanation for her failure to attend the hearing.
19. The judge also noted that the mother had made several visits to the United Kingdom, in order to see the brothers, returning to Sri Lanka at the end of every such visit. This had been in 2010, 2011, 2012 and 2014. The judge found it lacked any credibility that the mother would be able to travel freely in and out of Sri Lanka without ever being questioned on departure or return about them, if the authorities really believed they were of adverse interest.
20. The First-tier Tribunal Judge gave no weight to the document, said to have been produced by the army at the time of its visit to the house of the father and mother. It was anonymous and undated, and unaccompanied by any photograph. The judge considered the document had been manufactured. He considered the birth

certificates and other materials took the brothers' case nowhere.

21. At paragraph 31, the First-tier Tribunal Judge noted the delay of several years in the brothers claiming asylum. Their explanation, that they did not want to be a burden on the United Kingdom as they were young and fit to work, was not considered by the judge to be satisfactory, as their fitness to work had no bearing on their alleged need for international protection. He also rejected the explanation that the brothers did not want to cause problems for their family in Sri Lanka or put them at risk. Any asylum claim would be confidential by its very nature. Overall, the First-tier Tribunal Judge did not believe any of the explanations provided by the brothers for the delay in making their asylum claims.

(c) Subsequent events

22. Following the dismissal of their appeals, the applicant and his brother applied for permission to appeal to the Upper Tribunal. This was refused by the First-tier Tribunal on 15 May 2014 and by the Upper Tribunal on 21 May 2014, following which they became appeal rights exhausted. The respondent then set removal directions for 6 June 2014 but the applicant and his brother were disruptive and refused to board the flight.
23. In June 2014, they made submissions which they wished to be treated as a fresh claim. Although these were rejected by the respondent on 27 June 2014, she did accept that Mr De Silva was the cousin of the brothers, on the basis of evidence produced to her.
24. On 11 July 2014, the applicant's brother was removed to Sri Lanka. On 14 July 2014, the applicant made another set of submissions, citing the alleged detention and mistreatment of his brother at the airport in Sri Lanka, on the latter's arrival there. The submissions were rejected.
25. On 30 June 2015, a third set of further submissions from the applicant was rejected by the respondent. It is this decision of the respondent that is the one under challenge in the present judicial review.

(d) The decision under challenge

26. After setting out the immigration history of the applicant, the decision of 30 June 2015 described paragraph 353 of the Immigration Rules and the task to be undertaken by the respondent in relation to it, as articulated by the Court of Appeal in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495. The respondent was required "to give anxious scrutiny to the question of whether further submissions will create a realistic prospect of success before an immigration judge" (paragraph 19).
27. At paragraph 20, the letter noted that the applicant claimed he could not return to Sri Lanka due to his association with Mr De Silva and that he carried sensitive material on his laptop regarding war crimes in Sri Lanka, bringing this into the United Kingdom.

28. The letter continued as follows:-

“21. Your client further claims that he cannot return to Sri Lanka as he will face persecution as the son of his father who claimed to be ‘Jesus Christ reborn’. In addition, your client claims to be a Satanist who would face discrimination and persecution on his return to Sri Lanka.”

29. It is common ground that the applicant no longer seeks to pursue the claims set out in paragraph 21 as reasons for fearing return to Sri Lanka.

30. Beginning at paragraph 23, the letter described the Country Guidance of the Upper Tribunal in GJ and Others (post-civil war: returnees) Sri Lanka CG [2013]. Beginning at paragraph 28, the letter examined the submissions relating to the return of the applicant’s brother to Sri Lanka. Having regard to the broad categories listed in GJ and Others, and bearing in mind the fact that the applicant and his brother had not been arrested or detained in Sri Lanka and had claimed asylum only after being detected illegally working in the United Kingdom, the respondent observed that the applicant and his brother were not journalists and had not engaged in *sur place* activities whilst in the United Kingdom. Nor had they given evidence to the Lessons Learned and Reconciliation Committee or witnessed war crimes. They were not members of the LTTE nor was any member of their family such a member. It was not accepted that the applicant and his brother were on any watch list or of any interest to the government of Sri Lanka.

31. Following his enforced return to Sri Lanka, the applicant’s brother said that he had been detained and ill-treated. This information had been conveyed by email to the applicant’s solicitor, Ms Laura Smith. The email provided an account of the applicant’s detention by the CID in Colombo Airport. His solicitor in Sri Lanka had confirmed that the applicant’s brother was not detained when he contacted the CID at the airport at 14:47 hours on 12 July. The brother had also emailed photographs of injuries, claimed to have been received by him during his interrogation through being hung upside down by the CID.

32. At paragraph 40, the letter noted that the brother was said to have been released from the airport after payment of a bribe and that he had been detained there for almost six hours. The respondent, however, rejected this account “in its entirety”. Reference was made to the evidence in the Country Guidance case of GS and Others, which was that there were “no detention facilities at the airport, if a returnee was of interest by reason [of] past or current links with known LTTE front organisations abroad, they would be invited for interview once they had returned home, rather than at the airport”.

33. At paragraph 41, the respondent noted the discrepancy in the evidence, in that the brother’s email of 13 July said he gave the CID his old address whereas, in the 14 July submissions, it was claimed that the brother had given the CID his brother’s father-in-law’s address.

34. In the email, the brother further explained (according to paragraph 42) that he was taken downstairs in a lift to a small office/torture chamber where the CID “produced a dusty old file regarding your client’s father”. The respondent noted that the father

had been able to remain living in the family home for 34 years “whilst claiming to be *‘Jesus Christ reborn’* and it is maintained that the GOSL have no interest in your client’s father”. The brother’s claim that his cousin (Mr De Silva) was a supporter of the LTTE was rejected by the respondent “as it is not consistent with your client’s account of his cousin’s occupation as a member of the GOSL Intelligence Services”.

35. The brother’s email asserted that the CID had told him they were planning to detain and torture him for another day and that he was hooded and hung upside down and that the inquisitors were talking about Mohan and Ravi. The brother then voluntarily disclosed that it was not his laptop (“he didn’t claim they asked him about the laptop”) and that he further informed the CID that the applicant “was a selfish person”.
36. At paragraph 44, the respondent noted the witness statement from Laura Smith in respect of the email she had received on 12 July and that, being concerned that the brother may have been mistreated at the airport, she made a series of phone calls. Laura Smith said that Frances Harrison [a former BBC journalist with experience of Sri Lanka] advised her that Ms Harrison had been involved in other cases where returnees had been detained at the airport for nine – eleven hours. The respondent considered, however, that the brothers had “failed to provide independent and objective evidence to support these assertions” (paragraph 44).
37. At paragraph 45, the respondent set out a letter from the British High Commission in Colombo of 2 November 2012, explaining who would be subject to arrest on arrival in Sri Lanka.
38. At paragraph 46, the respondent stated that she did not accept the applicant’s brother had been detained at the airport as claimed. The brother’s account lacked credibility, when considered against the evidence of various country experts and the evidence from the British High Commission. Whilst bribes were accepted to be common at IDP and detention centres, there was no evidence that bribes were used to ensure the release of those detained at the airport. The evidence also showed that it was, in any event, rare for returnees to be detained at Colombo Airport and the brother did not fit the profile of those who (according to the British High Commission document) would be likely to be detained there. If the government had any interest in a returnee they would normally be visited at their home address after they had passed through the airport, as the airport was routinely monitored by the British High Commission and others and there were no facilities to detain people at the airport.
39. At paragraph 47, the respondent said that the brother’s account of his detention, interrogation and threats was not consistent with the submissions made in the Country Guidance case in GJ and Others, and was therefore rejected. Had the government had any interest in the father of the brothers, who had been claiming to be Jesus Christ since 1980, they would have had ample opportunity to interview the brothers prior to their arrival in the United Kingdom in 2009. The respondent also stated that she “not aware of the existence of a room used for the purposes of hanging returnees upside down below the airport” (paragraph 47).
40. At paragraph 48, the respondent did not consider it credible that the brother would

voluntarily implicate himself in the transportation of evidence related to war crimes in Sri Lanka. In this regard, the email from the human rights lawyer in Colombo did not assist the applicant as it merely said "CID informed me that they released him. Can you check with the family?" The email from the lawyer did not, in any event, confirm that the brother was ever detained; nor did it confirm that he was held by the CID for six hours as claimed. It simply stated that he had been released.

41. Paragraph 49 also stated that the applicant's brother was due at the airport at 12:45 and the lawyer confirmed at 14:27 that he was not being interviewed and had been released. This meant that the brother was not detained as claimed at the airport and that his assertions were made for the sole purpose of being returned to the United Kingdom to be reunited with his mother and brother.
42. So far as photographs of the brother were concerned, no independent or objective medical evidence had been shown in respect of the marks shown on the feet of the person in the photograph. It was also noted that the brother had self-harmed before, according to the applicant (paragraph 50).
43. Turning to Frances Harrison's observations, the respondent's letter noted the judgment of AK (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 535, where the court found that the respondent must ask herself whether an independent tribunal might realistically come down in favour of the applicant's claim, on considering the new material with the material previously considered. In this regard, the respondent, whilst acknowledging Ms Harrison's extensive knowledge of the situation in Sri Lanka, did not consider her views could be given any real weight, since she had had no direct involvement in the case and was merely consulted on an advisory basis in respect of returns to the airport (paragraph 57).
44. Having given anxious scrutiny to the issues and considered the evidence in the round, the respondent stated at paragraph 59 that there was "no realistic prospect that your client's submissions when taken together with all the previously considered material, create a realistic prospect of an immigration judge deciding that your client should be allowed to stay in the United Kingdom". At paragraph 60, the respondent's conclusion was that the submissions, taken together with previous material "would not create a realistic prospect of success before an immigration judge and do not amount to a fresh claim".

C. TN (VIETNAM)

45. We have referred at paragraph 2 above to TN (Vietnam). Before going any further, it is necessary to say more about the Court of Appeal's judgment, delivered by Singh LJ. The court upheld Ouseley J's finding that appeals decided under the Fast Track Rules 2005 were not automatic nullities, notwithstanding that the Rules were *ultra vires*. At paragraph 116 of his judgment, Ouseley J had refused to countenance the suggestion that "in considering the lawfulness of the SSHD's decision on fresh claims, the court could consider whether she had taken 'improper account of the content of the appeal decision ... given the particular circumstances in which the appeal was decided ... '". Ouseley J considered that

"to be a recipe for confusion in relation to a lawful appeal decision and irrelevant to the

consequences of one set aside or held unlawful as unfair ... I see nothing but confusion in some halfway house, which could still require examination of the lawfulness and fairness of the decision, and it would not be a confusion born of some necessary but unhappy application of principle”.

46. Singh LJ upheld Ouseley J on this issue:-

“82. In my judgement, the straightforward argument made on behalf of the Appellants by Ms Lieven must be rejected on its own merits in the present context and without the need for extensive reference to authority from other contexts.

83. The first and fundamental reason for this is that, in my view, there is a conceptual distinction between holding that the Procedural Rules were *ultra vires* and the question whether the procedure in an individual appeal decision was unfair.

...

88. In my view, the decision of this Court in *Connors*, if anything, supports the submissions advanced on behalf of the Secretary of State by Mr Tam rather than those advanced by Ms Lieven. This is because the question which has to be addressed is whether the *ultra vires* act influenced or infected the later decision which it is now sought to challenge. That requires an assessment of whether there has in fact been procedural unfairness in the individual case.

89. Finally, I would add that, as a matter of legal principle, if the Appellants' submissions on the first issue were correct, it would necessarily follow that even appeal decisions where the appeal was allowed would fall to be set aside, because they would be a nullity. That cannot possibly be correct. At the hearing before us Ms Lieven submitted that this was a theoretical point and not a real one, since in practice individuals will have been granted leave to remain in the light of a successful appeal decision and this would not be curtailed. However, in my view, it is revealing that, if the logic of her submission were accepted, this would be the result as a matter of principle. That analysis of principle helps to test whether the submission can be correct.

90. For those reasons, I conclude on the first issue that the Appellants' submissions must be rejected. It follows that it is necessary, if an application is made to set aside an earlier appeal decision, to assess whether there was procedural unfairness on the particular facts of that case. There may or may not have been. That will depend on a careful assessment of the individual facts. It is not enough to say that the 2005 Rules were *ultra vires*.”

47. At paragraph 144 of his judgment, Ouseley J held as follows:-

“114. Even where some such challenge is permitted, for it to be successful there would also have to be a basis for holding that the decision was unfair beyond that it was reached under the FTR 2005. There is no presumption of unfairness in relation to appeal decisions under the 2005 FTR. The basis must be evidenced by reference to disadvantages, specific to the case, which the FTR timetable caused but which the Principal Rules timetable and practice would have avoided, and which led to an unfair process. A high standard of

fairness is required. The SSHD might be able to show that there was no unfairness in reality. This is not the same at all as requiring the appellant to show that the result would have been different under a different regime; that is not required. But the claim may require greater justification where no applications for transfer out of the fast track or for adjournments have been made, and where no attempt has been made to advance claims or circumstances based on vulnerability, or if no issues about fairness have been raised during the appeal, or if the evidence which was said to be missing is not provided as part of a fresh claim made reasonably swiftly after the appeal concluded. The points I have referred to in relation to the "interests of justice" in the FtT would also be relevant in judicial review cases as to whether or not time should be extended, and relief granted, if that were a route to relief available for challenging appeal decisions."

48. Singh LJ said this about paragraph 114:-

"98. In my judgement, on a fair reading of para. 114 in the judgment of Ouseley J, it is clear that he was not imposing a burden on the claimant to show that there had been unfairness. To the contrary, he said: "The SSHD might be able to show that there was no unfairness in reality." Furthermore, it is clear that Ouseley J did not fall into the error (as suggested on behalf of the Appellants) of not appreciating the importance of procedural fairness irrespective of the outcome. He said: "This is not the same at all as requiring the appellant to show that the result would have been different ... that is not required."

99. In my view, there was nothing wrong in the approach which Ouseley J took in para. 114. Indeed in my view it was correct: he was in essence saying that the issue of the fairness of the procedure had to be determined by reference to the specific facts of an individual case.

100. However, it is important not to read what he said in the second half of para. 114 as if it were a checklist. Mr Tam disavowed any suggestion that it is a checklist and invited this Court to make it clear that it should not be regarded as such. I agree. This Court should make it clear, in my view, that there is no such checklist. Each such case will be highly fact-sensitive.

101. As long as that is understood, it seems to me that there was no error of law into which Ouseley J fell in setting out specific factors which he said might or might not be relevant in a particular case."

49. An application by TN for permission to appeal the Court of Appeal's judgment is currently outstanding before the Supreme Court. This has particular relevance for the present applicant. In an earlier judicial review brought by the applicant against a refusal by the respondent on 11 July 2014 to treat his submissions as a fresh claim, the Upper Tribunal refused permission. The judicial review application was brought on the basis that the decision of First-tier Tribunal Judge Pedro was asserted to be a nullity. Permission to appeal to the Court of Appeal against the Upper Tribunal's refusal of permission was sought from that court in July 2015. That application was stayed by Singh LJ on 28 January 2019, pending the determination of the application by TN for permission to appeal to the Supreme Court.

D. THE APPLICANT'S GROUNDS

50. It is now possible to address the applicant's grounds in the present proceedings. It is convenient to begin with ground 7, added with the permission of the Upper Tribunal when the latter granted the applicant permission to bring judicial review proceedings.

(a) Ground 7: the significance of the First-tier Tribunal's decision to the paragraph 353 exercise

51. Ground 7 alleges unlawfulness on the part of the respondent, in her paragraph 353 decision, in relying on the decision of First-tier Tribunal Judge Pedro. Mr Bandegani rightly accepted that, as matters currently stand, the Upper Tribunal is bound by the judgment of the Court of Appeal in TN (Vietnam). Unless and until the First-tier Tribunal Judge's decision is declared a nullity in judicial review proceedings, it retains its status as an undisturbed decision of the First-tier Tribunal. As we have mentioned, a direct challenge to the First-tier Tribunal Judge's decision is a feature of the judicial review proceedings which are currently stayed in the Court of Appeal, pending a decision from the Supreme Court (whether by way of refusal of permission to appeal or otherwise) on the issue of whether appeals decided under the Fast Track Rules 2005 fall to be treated as automatically void.

52. In the light of this, Mr Bandegani's development before us of ground 7 took the following form. Even if the applicant's appeal was not unfairly determined by the First-tier Tribunal, or if that question did not arise, it is, Mr Bandegani submits, still a relevant consideration in determining a submission pursuant to paragraph 353 of the Immigration Rules that the applicant's original claim for asylum and the resulting appeal, were subjected to the Fast Track procedure. Matters such as the speed of the Fast Track process, the ability or otherwise of the applicant to secure and translate documents and whether he was without legal representation before the First-tier Tribunal may all be relevant, according to Mr Bandegani, in deciding whether there is a realistic prospect of the applicant succeeding in an appeal before a putative or hypothetical Judge of the First-tier Tribunal.

53. The fact that a challenge to the respondent's decision under paragraph 353 not to treat submissions as a fresh claim is one that may be made only on *Wednesbury* irrationality grounds was articulated by the Court of Appeal in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495. Notwithstanding Buxton LJ's judgment in WM, the legal basis of a challenge to a paragraph 353 decision was, however, not authoritatively resolved until MN (Tanzania) v Secretary of State for the Home Department [2011] EWCA Civ 193.

54. Although the basis of challenge is rationality, the intensity of the judicial review of a paragraph 353 decision will be at the higher end of the spectrum. This is because of the obligation on the respondent, also deriving from WM, to apply "anxious scrutiny" to the submissions.

55. At the heart of Mr Bandegani's submission on ground 7 is the approach which a hypothetical First-tier Tribunal Judge would take to be undisturbed findings in a decision of an earlier such judge, reached in an appeal by the applicant against a

relevant adverse decision of the respondent. The leading case on this matter is the decision of the Immigration Appeal Tribunal in Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702.

56. In BK (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 1358, the Court of Appeal (per Rose LJ) summarised the Devaseelan Guidelines as follows:-

- “(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
- (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
- (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
- (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
- (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
- (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
- (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
- (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.” (Paragraph 32)

57. The judgment of Rose LJ in BK contains a useful summary of the way in which the Devaseelan Guidelines have been interpreted by the Upper Tribunal and the Court of Appeal:

- “34. The guidance was referred to with approval by the Court of Appeal in *Djebbar v SSHD* [2004] EWCA Civ 804, [2004] Imm AR 497 on the basis that it had not created any difficulty for or inconsistency among special adjudicators. Judge LJ, giving the judgment of the Court, said that the specialist Tribunal was entitled to provide guidance to the entire body of specialist adjudicators about how they should deal with the fact of an earlier unsuccessful application when deciding a

later one. The extent of the relevance of the earlier decision and the proper approach to it should be addressed as a matter of principle. He went on:

"29. ... Such guidance was essential to ensure consistency of approach among special adjudicators. The guidelines remedied an immediate and pressing difficulty, with direct application to, but not exclusively concerned with, the many cases in which, after unsuccessfully exhausting all the possible legal channels, asylum seekers remained in the United Kingdom and put forward a case on human rights grounds after October 2000."

35. He then said this about the application of the guidelines:

"30. Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved."

36. Having set out the guidance and considered the criticisms made of it by the claimant in that case, Judge LJ said:

"40. ... The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."

37. The importance of not allowing the guidance to place unacceptable restrictions on the second adjudicator's ability to determine the appeal in front of him has been emphasised in subsequent cases. In *Mubu and others* [2012] UKUT 00398 (IAC) a tribunal judge, Judge Tipping, had made a finding that copy birth certificates provided by the Mubu family were genuine and showed that Mr Mubu was the grandson of a British citizen, Mr Ernest Alletson. When Mr Mubu later applied for indefinite leave to remain for himself and his family, the SSHD rejected the application on the grounds that the certificates were not authentic. The FTT allowed the appeal on the grounds that Judge Tipping's conclusion on the issue of the relationship between Mr Mubu and Ernest Alletson was determinative of the issue. The Upper Tribunal held that that was an error of law. They confirmed that the principle of *res judicata* was not applicable in immigration appeals. After setting out the *Devaseelan* guidance, the Tribunal concluded that there was no logical basis for holding that the guidance applied differently depending on whether the previous decision was in favour of or against the SSHD. However, they held that the FTT judge had erred because Judge Tipping's decision had not been determinative of the issue before him; according to the *Devaseelan* guidance it should have been treated as the starting point. They went on to remake the decision. They examined in detail what had happened before Judge Tipping, the further evidence adduced by the SSHD before them, whether that evidence pre-dated the previous tribunal hearing and why that evidence had not been available previously. The Tribunal concluded:

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

38. The ability of a tribunal to depart, after careful examination, from a previous conclusion on the facts does not always operate in favour of the appellant. For example in *Ocampo v SSHD* [\[2006\] EWCA Civ 1276](#), [\[2007\] Imm AR 1](#) the Court of Appeal upheld a decision by the tribunal rejecting the asylum claim of the claimant. This was despite the fact that before a different tribunal, his daughter had been granted asylum on the basis of her father's flight from Colombia. The further evidence which the tribunal hearing the father's appeal had considered would not have met the *Ladd v Marshall* criteria because it could have been put before the adjudicator in the daughter's appeal. The Court held however that it was right that the tribunal as a matter of common sense and fairness took the evidence into account. Auld LJ (with whom Rix and Hooper LJ agreed) stressed at paragraph 26 that the daughter's status as a refugee was not affected by any finding in reliance on new and cogent evidence that the father had lied in supporting her successful appeal against refusal of asylum. The flexibility for the tribunal to take a fresh decision allowed proper regard to be given to the public interest giving effect to a consistent and fair immigration policy - the matter should be judged, Auld LJ said, "as one of fairness and maintenance of proper immigration control".

58. Rose LJ also had this to say about the juridical basis of the Guidelines:-

"39. There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in *Djebbar* referred to the need for consistency of approach. The Court of Appeal in *AA (Somalia) v SSHD* [\[2007\] EWCA Civ 1040](#) also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently.

...

44. I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them. The basis for the guidance is not estoppel or res judicata but fairness. A tribunal must be alive to the unfairness to the opposing party of having to relitigate a point on which they

have previously succeeded particularly where the point was not then challenged on appeal.”

59. Beginning at paragraph 45 of her judgment, Rose LJ analysed the criticisms made of the decision of the earlier judge, from which the Upper Tribunal had departed in the decision challenged by the respondent before the Court of Appeal. There were, amongst other things, unusual procedural aspects because BK had not been subjected to an asylum interview in which his alleged complicity in torture and murder could be explored. It was also unclear where the finding in paragraph 40 of the earlier decision, “that BK had tortured and killed anyone”, had come from. Rose LJ’s conclusions on this issue were as follows:-

“50. In my judgment those procedural features of the 2004 Decision coupled with the difficulty of identifying the evidence on which the Adjudicator's finding was based, entitled the Upper Tribunal, once they had recognised that the 2004 Decision was the starting point, to depart from that starting point and make their own assessment of the evidence before them.

51. The position might well have been different if the Adjudicator's finding had been based on admissions made in the asylum interview, or in a witness statement or in the course of the hearing. It would also have been different if conflicting evidence had been placed before the Adjudicator and she had decided that she preferred the evidence demonstrating a greater severity of BK's involvement. As it was, this was an unusual case which was not covered by any of the paragraphs of the *Devaseelan* guidance. A conscientious tribunal would not have been acting fairly if they had decided that BK had tortured and killed people and hence had committed war crimes and was a person of bad character and hence that his answers to the terrorist activity questions were inaccurate, all on the strength of a few words in the PO Notes which were at best bordering on illegible.”

60. Mr Bandegani also relied upon the judgment of Upper Tribunal Judge Coker in R (Saboun) v Secretary of State for the Home Department IJR [2015] UKUT 0269 (IAC). This was a fresh claim judicial review, in which it was said that the undisturbed decision of the First-tier Tribunal Judge, who had dismissed the applicant’s appeal in March 2013, was, in fact, defective.

61. At paragraph 10 of her judgment, the Upper Tribunal Judge described a point of contention before her as follows:-

“10. The essence of the issue before the parties is that the respondent took as her starting point for consideration of the issues raised in submissions by the applicant the determination of the First-tier Tribunal as per *Devaseelan*. The applicant’s premise is that although that is certainly permissible in the generality of cases, in this case that approach is incorrect: this applicant’s case falls within one of the few cases where such an approach is inappropriate because the result is that her lack of credibility as found by the First-tier Tribunal significantly and substantially undermined all subsequent submissions yet those findings on credibility were significantly flawed for the following combination of reasons:

(a) the applicant had been unrepresented and had sought an adjournment to obtain legal representation;

- (b) she had to give evidence through an interpreter;
- (c) the reasons for refusal letter had not been read through to her;
- (d) there was a significant error in the reasons for refusal letter;
- (e) significant challenges to her account, which she could have explained and has done so since, were not put to her at the hearing;
- (f) the further evidence produced, namely the psychiatrist report, the sister's witness statement, the cousin's statement and the social services report were corroborative of persecutory treatment."

62. At paragraph 16, Upper Tribunal Judge Coker acknowledged that "This is not an appeal against the First-tier Tribunal decision". However, at paragraph 17, she described the issue for her as "essentially whether the First-tier Tribunal hearing could have been vitiated by procedural unfairness such that the findings could not reasonably stand". At paragraph 18, she held that if the respondent had been right to consider the further evidence "through the prism of the credibility findings of the First-tier Tribunal Judge, i.e. applying Devaseelan", then the respondent had acted correctly in terms of paragraph 353. Upper Tribunal Judge Coker concluded, however, that the Reasons for Refusal Letter had not been read to the applicant and that there were significant errors in that refusal letter, which had not been put to the applicant. These involved "significant challenges to her account which she could have explained" which were "not put to her" (paragraph 22).
63. Mr Bandegani submitted that the Upper Tribunal Judge's conclusion was that the applicant's case was "one of those rare cases where the credibility findings of the First-tier Tribunal did not stand as the starting point" (paragraph 19). That does, indeed, appear to be the way in which the Upper Tribunal Judge determined the matter.
64. We do not accept Mr Bandegani's submissions on ground 7. His contention that the weight to be attached to First-tier Tribunal Judge Pedro's decision necessarily falls to be materially reduced, because that decision was taken pursuant to the Fast Track Rules 2005, is incompatible with the upholding by the Court of Appeal in TN (Vietnam) of Ouseley J's conclusion that there is no "halfway house" between a decision of this kind being void and valid. Generic criticisms, such as that the applicant was in detention and had little time to obtain documents from abroad or legal representation, will not do.
65. Where the earlier judicial decision has been taken under the 2005 Fast Track Rules, the Devaseelan Guidelines apply, as they would to any other First-tier Tribunal decision. As those Guidelines make plain, and as has been subsequently confirmed by the Court of Appeal, the first judicial decision is "the starting-point". The Guidelines prescribe a process which, as Rose LJ identifies in BK, has its roots in the principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently. We do, however, agree with Ms Anderson, for the respondent, that principles of finality, legal certainty and judicial loyalty are also relevant. So much is plain from TN (Vietnam).

66. BK shows how the “starting point” principle in Devaseelan is not a legal straitjacket. It permits subsequent judicial fact-finders to depart from the earlier judicial decision on a principled and properly-reasoned basis. We therefore respectfully disagree with the conclusion in Saboun that the Guidelines themselves may be jettisoned, if circumstances demand.
67. It is plain from BK (and the other cases there mentioned) and, indeed, from Saboun that there needs to be a very good reason why, on the particular facts of a case, the Devaseelan Guidelines should not require the second judicial decision-maker to “regard the issues as settled by the [first judicial decision-maker’s decision] and make his findings in line with that ... rather than allowing the matter to be re-litigated”. In the context of submissions pursuant to paragraph 353, there will, accordingly, need to be a reason why the hypothetical First-tier Tribunal Judge hearing the new appeal would not see themselves as being subject to this requirement.
68. No such reason has been put forward on behalf of the present applicant. He advances no detailed forensic criticism of First-tier Tribunal Judge Pedro’s decision, such as we find in BK or Saboun.
69. As a result, the applicant has not shown any reason why First-tier Tribunal Judge Pedro’s decision should not be treated as the starting point for the analysis of what the hypothetical judge might realistically do. This means the respondent was entitled to view the subsequent submissions (including the documentary evidence) through the prism of that decision.

(b) The other grounds

70. We turn to the other grounds of challenge, in the order in which Mr Bandegani advanced them before us. Grounds 4 and 6 alleged a failure on the part of the respondent to give reasons for aspects of her decision. The respondent accepted that Ms Harrison, formerly a BBC correspondent in Sri Lanka, had “extensive knowledge” of the situation there. Ms Harrison said she had seen the applicant’s brother’s account of his detention and torture and that this was typical of what she had seen, as were the events described by the brother at the airport, extending over several hours. Ms Harrison’s evidence was supported by a contemporaneous note from the applicant’s legal adviser, together with a series of exchanges between them and the Sri Lankan lawyer, Mr Dias. The grounds submit that no good or indeed any reason was provided to reject this evidence individually or in the round.
71. We agree with Ms Anderson’s submission, for the respondent, that the challenge to the treatment of these submissions is in the nature of a disagreement which could, in any event, never have been sufficiently material to the overall outcome. It is no criticism of Ms Harrison or to question her expertise to observe that she had no direct involvement in the case and was merely consulted on an advisory basis in respect of returns at the airport. Although she could offer some mild support, to the extent that what the brother was asserted to have said about his treatment at the airport fitted with her own experience of what might happen there, given the manifest credibility problems identified by the First-tier Tribunal Judge regarding the basis of the

brothers' claims, the respondent did not err in law in concluding that this aspect of the new submissions would not be reasonably likely to be given weight by the hypothetical judge. Furthermore, it is, we consider, impossible to know precisely what Ms Harrison was told and which aspects of it she was agreeing to.

72. Ground 5 alleges a material error of fact. At paragraph 49 of her decision, the respondent said that the brother was not detained for six hours but only for two. This was based upon timings given by the applicant's solicitors, including in emails. The brother's arrival time of 12:45 was, the applicant says, the time in Sri Lanka, not the United Kingdom. The email of 14:27, confirming the brother's release, was given in United Kingdom time. The two events were, accordingly, six hours apart. This is said to constitute "a significant error of fact".
73. Again, looking at matters overall, we find the applicant has failed to demonstrate that this error has any materiality. We agree with the respondent's submission that it is unlikely the email of 14:27 would have coincided with the actual release of the brother, which must have happened earlier. More particularly, however, paragraphs 41 to 43 of the respondent's decision identify incoherence in the brother's description of what was supposed to have happened to him. The evidence is inconsistent as to what address the brother is said to have given his interrogators. The suggestion that the authorities had a file on the applicant's father is inconsistent with the findings of the First-tier Tribunal Judge and with the fact that the father was able to live without problems in Sri Lanka, notwithstanding his claim to be "Jesus Christ reborn". The respondent was also entitled to place weight on the claim that the brother voluntarily disclosed that he did not have the laptop upon which anti-government information was said to be stored, despite the fact that the brother did not say that those who interrogated him had even asked about this.
74. The respondent was, we find, entitled to place weight on the Country Guidance that detention facilities were not to be found at Colombo Airport. The evidence adduced by the applicant appears to be to the effect that the brother was taken to some sort of *ad hoc* torture chamber. Taken in the round, however, the respondent did not act unlawfully in concluding in effect that the Country Guidance on this issue would not be seen by the hypothetical judge as having been displaced.
75. Grounds 1 and 3 concern the submission that, in reaching her decision, the respondent took into account irrelevant matters and failed to take into account relevant ones. So far as alleged irrelevances are concerned, the respondent is criticised for examining the applicant's case, by reference to the Country Guidance, in finding that the applicant had not, for example, undertaken *sur place* activity, such as to make him a person of adverse interest to the Sri Lankan authorities. A thorough consideration of the applicant in the context of the Country Guidance was, however, called for. It has not been shown to be a material error on the part of the respondent to look at the categories of those identified by the Upper Tribunal as being, in general, at real risk on return. We agree with Ms Anderson that these matters were unarguably relevant as to whether the applicant could be said to have a risk profile.

76. So far as relevant matters are concerned, the grounds contend that the respondent failed to follow the Country Guidance, which held that risk “runs in families” and that those who seek to reveal human rights abuses put themselves at risk. As we have seen, however, these aspects of the applicant’s case had been emphatically rejected by the First-tier Tribunal judge. With the exception of the link between the brothers and Mr De Silva, for the reasons we have given the new submissions did not take matters further.
77. We have had full regard to the fact that the respondent accepts Mr De Silva was a cousin of the applicant and his brother. That was a matter upon which First-tier Tribunal Judge Pedro did not believe the brothers. We conclude, however, that the respondent did not err in law in concluding that this would not, in effect, undermine the adverse credibility findings of First-tier Tribunal Judge Pedro, in the eyes of the hypothetical judge. At paragraph 22 of his decision, First-tier Tribunal Judge Pedro made it abundantly plain that “quite apart from the claimed relationship with Mr De Silva”, the brothers’ account of their involvement with his activities was “riddled with a lack of credibility” (our emphasis). Put bluntly, viewed in its own terms the account made no sense. For instance, it was bizarre that Mr De Silva, a noted journalist, needed the assistance of the brothers “as he had poor writing skills”. Whether or not the brothers were related to Mr De Silva also had no material bearing on the adverse credibility findings of First-tier Tribunal Judge Pedro concerning the individuals, Mohan and Ravi, who formed an integral part of the rejected claim.
78. Standing back and looking at matters overall, we are satisfied that none of the grounds, either individually or in combination, demonstrates that the respondent erred in law in rejecting the applicant’s submissions as amounting to a fresh claim under paragraph 353 of the Immigration Rules.
79. The application is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 16 December 2019

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber