



UT Neutral citation number: [2022] UKUT 00154 (IAC)

PB (“Cart” judicial reviews: “new” grounds) Sri Lanka

Upper Tribunal  
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 5 May 2022  
Promulgated on 23 May 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT  
MR C M G OCKELTON, VICE PRESIDENT

Between

P B  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant: *Mr T. Buley QC*, instructed by Duncan Lewis Solicitors  
For the respondent: Mr P. Deller, Senior Home Office Presenting Officer

*The Supreme Court in [Cart v the Upper Tribunal](#) [2011] UKSC 28; [2011] Imm AR 704 did not intend a judicial review of a decision of the Upper Tribunal to refuse permission to appeal to be no more than a third or fourth opportunity to raise new grounds which do not allege errors of a “Robinson” obvious nature.*

## DECISION AND REASONS

1. On 28 April 2022, the Judicial Review and Courts Act 2022 received the Royal Assent. Upon the commencement of section 2 of the Act, the “Cart” judicial review jurisdiction will cease. Thereafter, decisions of the Upper Tribunal refusing permission to appeal from the First-tier Tribunal will be challengeable only upon the very narrow basis specified in section 2.
2. For the present, however, the “Cart” jurisdiction continues. The present case affords the opportunity of reiterating points made by us in earlier reported decisions where there has been a “Cart” quashing of the Upper Tribunal’s decision to refuse permission to appeal. In this regard, we have been much assisted by the oral and written submissions of Mr Buley QC, on behalf of the appellant, and Mr Deller (and his colleague Mr Bait) for the respondent.
3. In MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC), we said:

“40. It is necessary to make one final procedural point. If, as a result of “Cart” judicial review proceedings, the grounds for contending that the First-tier Tribunal Judge erred in law have changed, compared with those that were before the Upper Tribunal when it made its (now quashed) decision, the appellant will need to apply to the Upper Tribunal for permission to amend his or her grounds of permission, in order to be able to rely upon the grounds advanced in the “Cart” judicial review. The fact that such grounds have found favour in the High Court does not mean those grounds automatically become the grounds of challenge to the First-tier Tribunal’s decision.”
4. We had occasion to revert to this particular matter in Osefiso and Another (PTA decision: effect; ‘Cart’ JR) [2021] UKUT 116 (IAC); [2021] Imm AR 1173:

“22. As the Upper Tribunal explained in MA (Cart JR: effect on UT processes) Pakistan [2019] UKUT 353 (IAC), the “Cart” judicial review jurisdiction for which provision is made by CPR 54.7A should not be treated by parties as merely an untrammelled third opportunity to raise grounds of challenge to a decision of the First-tier Tribunal, which have found no expression in the grounds put to the First-tier Tribunal and, then, the Upper Tribunal. In enacting section 11 of the Tribunals, Courts and Enforcement Act 2007, Parliament has provided for there to be a renewed application to the Upper Tribunal, following a refusal by the First-tier Tribunal. That renewed application is not constrained by whatever grounds have been put to the First-tier Tribunal. The “Cart” judicial review is, however, of a fundamentally different character. In order to satisfy the part of

CPR 54.7A(7)(a) which requires the High Court to find an arguable case that the Upper Tribunal's refusal of permission to appeal was wrong in law, the court needs to be satisfied either that:

- (a) the Upper Tribunal's reaction to the grounds of challenge in the application for permission to appeal was arguably wrong in law; or
- (b) where the judicial review grounds have not found expression in the grounds considered by the Upper Tribunal, the judicial review grounds are of such a nature as to have required the Upper Tribunal to have raised them of its own volition, and then considered them; and that its failure to do so is arguably wrong in law."

5. In Osefiso and Another we held that:

"34. ... because the basis of challenge in the judicial review was not the basis of challenge put to the Upper Tribunal in the appellate challenge to the First-tier Tribunal's decision, the appellants were inexorably faced with having to make their judicial review case on the basis set out in paragraph 22(b) above; namely, that the Upper Tribunal should have taken the points of its own volition. That is a more challenging task than under paragraph 22(a), since the basis of challenge needs to be a "Robinson" obvious one (R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929; [1997] Imm AR 568; R (Begum) v Social Security Commissioners [2002] EWHC 401 (Admin); Bulale v Secretary of State for the Home Department [2008] EWCA Civ 806; [2009] Imm AR 102)."

- 6. We can now return to the facts of the present case. The appellant is a citizen of Cameroon. His immigration history is long and complex. Having arrived in the United Kingdom in 2005, he claimed asylum. His appeal against the respondent's refusal of that claim was dismissed in 2005, following a process governed by the Fast-Track Procedure Rules, as then in force. As a result of the Detention Action litigation, those rules were found to be unlawful.
- 7. The appellant was removed by the respondent to Cameroon in November 2010. He re-entered the United Kingdom in August 2012, apparently using false documents. The appellant did not approach the respondent in any way until representations were submitted on his behalf on 26 November 2014.
- 8. In those representations, the appellant said that after his removal to Cameroon in 2010, he had spent 1½ years in prison.
- 9. Following "fresh claim" judicial review proceedings, the appellant was interviewed by the respondent in August 2017 and the decision was made to refuse his protection claim on 5 September 2017.
- 10. The appellant's appeal against that decision came before the First-tier Tribunal in October 2017. In a long and immensely detailed decision, extending to 175 paragraphs, the First-tier Tribunal Judge dismissed the appellant's appeal on 15 November 2017.

11. Permission to appeal against the First-tier Tribunal Judge's decision was refused by that Tribunal and subsequently by the Upper Tribunal. The grounds advanced to both Tribunals by counsel (not Mr Buley) were essentially the same. They were 26 in number. For present purposes, however, only the following grounds need to be mentioned.
12. On behalf of the appellant, it was contended that the First-tier Tribunal Judge should have disregarded the 2005 judicial decision, rather than giving it limited weight, by reason of the "authoritative judicial pronouncements that the [detained fast track procedure] was systematically unfair".
13. As a result of the First-tier Tribunal Judge's reliance upon the 2005 decision, the grounds contended that this led the judge to place little or no weight on the medico-legal report of Dr Jobanputra, who had examined the appellant in 2010, prior to his removal to Cameroon.
14. The grounds contended that the First-tier Tribunal Judge had wrongly said that there was no indication of any of the allegations that the appellant had made about being assaulted by his escorts on removal to Cameroon; whereas one of the witnesses had made this very clear in her witness statement.
15. Following the Upper Tribunal's refusal of permission to appeal, by reference to these grounds, the appellant sought a "Cart" judicial review. Permission to bring judicial review was refused by the High Court. However, on 24 December 2021, permission was granted by the Court of Appeal.
16. By that stage, the appellant's case had changed in a significant respect. Instead of linking the judge's treatment of Dr Jobanputra's report to his approach to the 2005 Tribunal decision, the judicial review grounds now contended that the First-tier Tribunal Judge had made an important discrete error in relation to the doctor's report. The judge had wrongly read Dr Jobanputra as saying that the scarring he had observed on the appellant's body was "consistent" with the appellant's account of ill-treatment in Cameroon, prior to his initial arrival in the United Kingdom in 2005. In fact, the report had categorised that scarring as "highly consistent". Under the terms of the Istanbul Protocol, from which this categorisation derives, the difference was highly material.
17. It is difficult to see how this new ground can be categorised as a "Robinson" obvious error (see paragraph 5 above), which the Upper Tribunal ought to have taken of its own volition, notwithstanding that it failed to feature in the detailed and lengthy grounds settled by Counsel. Accordingly, the "Cart" proceedings in this case might be said to have generated a third or (perhaps even) fourth opportunity to advance novel criticisms of the First-tier Tribunal's decision. Such was never the intention of the Supreme Court.
18. In express accordance with the requirement identified by the Upper Tribunal in Ejiogu (Cart cases) [2019] UKUT 395 (IAC); [2020] Imm AR 383, Mr Buley QC applied for permission to amend the appellant's grounds, as they were before the Upper

Tribunal Judge who refused permission, so as to make them compatible with the basis upon which the judicial review had been put to the Court of Appeal. We granted the application in respect of (new) grounds 1 to 4.

19. We refused permission, however in respect of (new) grounds 5 and 6. These grounds are the result of yet further thought on the part of those representing the appellant, following the order of the Court of Appeal. The respondent opposed the application in respect of these grounds. They are plainly not of a “Robinson”- type and to permit the appellant to advance them now would show a distinct lack of proper procedural rigour and disregard for the overriding objective.
20. In Mr Bait’s written skeleton argument on behalf of the respondent, to which Mr Deller spoke at the hearing, the respondent concedes that there is an error in respect of the mis-categorisation of the report of Dr Jobanputra. The respondent accepts that as a result of this error, the First-tier Tribunal Judge’s decision cannot stand. It should, accordingly, be set aside. In view of the extent of the fact-finding which will be required, we consider (and the parties did not demur) that remittal to the First-tier Tribunal should follow.
21. We accept that this must be so. It is, therefore, unnecessary to make any findings about the other grounds in respect of which permission has been granted. There is, however, one caveat. Ground 2, which interested the Court of Appeal, concerns the approach that should be taken by judicial decision makers in applying the guidelines in Devaseelan v SSHD [2002] UKAIT 702; [2003] Imm AR 1, where the first judicial decision was (as here) decided under the Fast-Track Rules. The Devaseelan guidelines require the second judicial decision maker to take the first judicial decision as their “starting point”.
22. As Mr Buley QC says, this issue was addressed by the Upper Tribunal in R (on the application of MW) v SSHD (Fast-track appeal: Devaseelan guidelines) [2019] UKUT 411 (IAC). In that case, the Upper Tribunal held that the fact 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, for Devaseelan purposes. In MW, the Upper Tribunal reached this decision by reference to the Court of Appeal judgment in TN (Vietnam and Another v SSHD and Another) [2018] EWCA Civ 2838; [2019] Imm AR 582. In that case, the Court of Appeal had upheld the judgment of Ouseley J that a judicial decision taken under those Fast Track Rules was not itself void, notwithstanding the fact that the Rules were unlawful.
23. TN (Vietnam) has been upheld by the Supreme Court: [2021] UKSC 41. Lord Sales held as follows:
  - “86. As Singh LJ pointed out, there is no necessary connection between a determination being made under the FTR 2005 and that determination being arrived at unfairly. Whether a FTT acting under the FTR 2005 procedure acts unfairly in an individual case will depend upon the particular circumstances of that case.

87. On this issue I consider that the guidance given by Singh LJ later in his judgment is correct:

“103. For the future I would recommend that a court which has to consider an application to set aside an earlier appeal decision made under the 2005 Rules should approach its task having regard to the following:-

(1) A high degree of fairness is required in this context.

(2) What the Court of Appeal said in *DA6* should be borne in mind: that [by parity of reasoning] the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.

(3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

(4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

104. The above should not be regarded as an exhaustive checklist. At the end of the day, there can be no substitute for asking the only question which has to be determined: was the procedure unfair in the particular case? That has to be determined by reference to all the facts of the individual case.”

24. At paragraph 90, Lord Sales noted that Ouseley J had examined: “with utmost care the circumstances of TN’s case and the way in which it was considered by the FTT and concluded that the FTT had acted fairly in making the FTT decision”.

25. In the light of the judgment of the Supreme Court in TN (Vietnam), Mr Buley acknowledged that the decision in MW is correct. In the type of case with which we are concerned, the weight to be given to the first judicial decision does not necessarily fall to be materially reduced. The unlawful nature of the Fast Track Rules is not, in itself, a reason to depart from the Devaseelan guidelines. The second judicial decision-maker will need to be satisfied that, on the facts of the appellant’s case, the operation of the fast track rules caused the appellant to suffer unfairness. If, having undertaken that analysis, the second judicial decision-maker decides that unfairness was present, then he or she will need to reduce or (depending on the facts)

eliminate the use that the Devaseelan guidelines would otherwise require him or her to make of the first decision.

26. At the hearing, we made directions as follows:

- (i) Not later than 28 days from the date of the hearing, the appellant shall file and serve written representations concerning his claims (by reference to the position as it is at present).
- (ii) The Secretary of State shall file and serve a written response, not later than 28 days after receipt of those representations.
- (iii) Pursuant to section 12(3)(b) of the Tribunals, Courts and Enforcement Act 2007, the First-tier Tribunal is directed not to list the remitted appeal before 5 September 2022.

## DECISION

27. The decision of the First-tier Tribunal contains an error on a point of law. We set that decision aside and remit the matter to the First-tier Tribunal, for a fresh decision on all issues. No part of the First-tier Tribunal's decision shall stand.

### Direction Regarding Anonymity

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

*Mr Justice Lane*

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

19 May 2022