Case No: CA-2021-000104
Neutral Citation Number: [2022] EWCA Civ 119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
JUDGES BLUM, RIMINGTON AND NORTON-TAYLOR

The Royal Courts of Justice
Strand, London, WC2A 2LL

19 January 2022

Before:
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Divison))
LADY JUSTICE ANDREWS

Between:

KK AND RS (SRI LANKA)	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Applicant**

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Naina Patel and **Hollie Higgins** (instructed by **the Treasury Solicitor**) appeared on behalf of the **Applicant**

Alastair Mackenzie, Ali Bandegani and **Antonia Benfield** appeared on behalf of the **Respondent**

Judgment

(Approved)

LORD JUSTICE UNDERHILL:

Introduction

1. On 27 May last year the Upper Tribunal (Immigration and Asylum Chamber), comprising Upper Tribunal Judges Blum, Rimington and Norton-Taylor, promulgated a country guidance decision in two appeals, *KK* and *RS*, concerning Sri Lankan Tamils who claim to have a well-founded fear of persecution if returned to Sri Lanka by reason of their political activities in this country – so called *sur place* activities. Although *sur place* activities are the principal focus of the decision, there is also a consideration of the principle in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] AC 596. The decision replaced the previous country guidance decision concerning returns to Sri Lanka, *GJ and Others (Post-Civil War: Returnees) Sri Lanka CG v Secretary of State for the Home Department* [2013] UKUT 00319 (IAC). An appeal against *GJ* was dismissed by this court in *MP (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 829.

2. The Upper Tribunal reached its conclusions in the present case after hearing extensive evidence and submissions. Its reasons, which run to some 661 paragraphs, are full and careful. It upheld the appeals of both the individual appellants (to whom I will continue to refer as such, although they are the respondents before us). In both cases the appellants had failed in the First-tier Tribunal but the Upper Tribunal had found an error of law and had directed that the decision be re-made by it; it upheld both their individual appeals.

3. The Secretary of State seeks permission to appeal against the Upper Tribunal's decision. Permission was sought from the Tribunal itself but was refused by Upper Tribunal Judge Norton-Taylor in a fully reasoned decision dated 30 June 2021.

4. The application to this court has been directed to be determined at an oral hearing under CPR 52.5(2). Such applications in country guidance cases have in recent years always been determined at an oral hearing, in accordance with the observations of the then Vice-President, Maurice Kay LJ, in *R (SG) (Iraq) v Secretary of State for the Home*

Department [2012] EWCA Civ 940, [2013] 1 WLR 41. I will have something to say about those observations at the end of this judgment.

5. The Secretary of State has been represented before us by Ms Naina Patel and Ms Hollie Higgins and the appellants by Mr Alastair McKenzie, Mr Ali Bandegani and Ms Antonia Benfield. Counsel on both sides produced very helpful skeleton arguments. I also wish to pay tribute to the care and accuracy of the pleading of the Grounds of Appeal, which is an art which is not as common as it should be.

6. I should say at the outset that I would refuse permission to appeal. Since this is not a substantive appeal, I need not set out any of the background and I can proceed directly to the grounds. Six grounds are pleaded, with various sub-grounds, but there is a degree of overlap between them and rather than go through them one by one I prefer to consider them under four heads.

Clarification/amendment

7. In two respects the Upper Tribunal went beyond, to use a neutral term, the decision of the Tribunal in *GJ*.

8. First, in *GJ* the principal group at risk if returned to Sri Lanka was defined in paragraph 356(7)(a) as:

> "individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka".

(The reference to "a significant role in relation to post-conflict Tamil separatism within the diaspora" is in practice a reference to *sur place* activities in support of Tamil separation.) The Tribunal in *GJ* did not offer any guidance on what constituted "a significant role." The appellants argued that such guidance would be useful by way of

clarification. The Secretary of State contended that clarification was unnecessary, and also that if it were to be given it would constitute "amendment" and should only be given if there were evidence of durable and well-established changes in the relevant circumstances such as to justify amendment of a previous country guidance decision. In that respect she relied on some observations at paragraph 72 of the decision of the Upper Tribunal (Blake J, the then President) presiding in *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC): those observations were quoted with apparent approval by Maurice Kay LJ in *MP*. The Tribunal preferred the appellants' submissions and devoted paragraphs 451 to 501 of its reasons to guidance about the correct approach to what constituted a "significant role" as that phrase had been used in *GJ*. It is said that it regarded this guidance as "clarification", not amendment, but it also said that if it was wrong about that there had been sufficient change in Sri Lanka since the date of *GJ* to justify amendment in accordance with the approach prescribed by *EM*.

9. Second, the Tribunal in *GJ* said nothing about the correct application of the principle in *HJ (Iran)* in the context of the return of Tamils to Sri Lanka. The Tribunal in this case believed that that question should be addressed and it did so at paragraphs 537 to 555 of its decision.

10. The Secretary of State wishes to argue on appeal that in both respects the Upper Tribunal made an error of law because it was indeed amending the guidance in *GJ* and no sufficient basis for doing so had been established. Various aspects of this argument are the subject of grounds 1A to 1C, 2A and 4A.

11. In my view the premise of that argument is misconceived. Blake J's observations in *EM* lay down no rule of law prescribing the circumstances in which the Upper Tribunal may promulgate country guidance which departs from or amends previous country guidance. It is of course the practice, for reasons which make obvious sense, that country guidance should only be revisited where strong reasons for doing so are shown, which will hopefully only be at infrequent intervals. But where the Tribunal decides that fresh country guidance decision is required, which will be a decision involving judges with specialist responsibility for the country in question, it must be free to give whatever guidance it believes will be useful and is justified by the evidence which it hears. It will

generally take the previous decision as its starting point, but there can be no rational basis for imposing artificial constraints on whether it can go beyond what was said in the previous decision, even if that can properly be characterised as amendment rather than clarification (though in fact the distinction between the two will often be impossible to apply in practice). As I understand it, Blake J himself made this very point in his later judgment in *CM (EM Country Guidance: Disclosure) Zimbabwe CG* [2002] 12 UKUT 00059 (IAC): see paragraph 118. But even if that was not the precise point he was making in that passage, it is in my view plainly the case. I of course accept that, as he says there, a Tribunal altering the country guidance on the basis of a perceived reduction in the level of risk to returnees in the country in question will need to be satisfied that the change in question is durable; but that is a different point.

12. I therefore see no arguable error of law in the Tribunal's decision to offer guidance on the meaning of "significant role" or on the application of *HJ (Iran)*. Although, prudently in view of the submissions made, it addressed in the alternative the question of whether there was sufficient justification for "amendment", that was, as a matter of law, an unnecessary exercise.

13. I would add, generally, that I am not in the least surprised either that it was thought sensible to revisit *GJ*, since seven years had passed since that was promulgated and there had been significant changes in Sri Lanka since then, or that it was thought useful to offer tribunals further guidance on the meaning of “significant” role and on the application of *HJ (Iran)*.

Motivation

14. At paragraph 475 of its decision the Upper Tribunal concludes that the objective of the Government of Sri Lanka ("GoSL") in relation to *sur place* activities by Tamils was:

> “… to identify those who are an actual or perceived threat to the integrity of the Sri Lankan State by reason of their committed activism in pursuit of a separate Tamil state on the island of Sri Lanka”.

It goes on to say that that is “the contextual prism through which the term ‘significant role’ should be interpreted”.

15. Between paragraphs 476 and 499 the Tribunal identifies a number of elements which would or would not be relevant to an assessment of whether an individual would be perceived by GoSL as playing a significant role by reason of their *sur place* activities. One of the factors which it considered as part of that exercise was the relevance of the applicant's “motivation” – that is, whether they took part in the activities in question because of a genuine commitment to Tamil separatism or only because they wanted to give that appearance in order to found or support an asylum claim. That phenomenon, of what has been described as “opportunistic hangers-on” or people taking part in *sur place* activities "in bad faith", has been considered in several authorities – in particular *YB (Eritrea) v Secretary of the State for the Home Department* [2008] EWCA Civ 360; *TL and Others (Sur Place Activities: Risk) Burma CG v Secretary of State for the Home Department* [2009] UKAIT 00017; *KS (Burma) v Secretary of State for the Home Department* [2013] EWCA Civ 67; and *TS (Burma) v Secretary of State for the Home Department* [2013] UKUT 000281 IAC. Those cases establish that it is a question of fact whether a particular government is likely to try to distinguish between the sincere and the insincere activist in order to be able to persecute the former but not the latter, and that if it is likely to make no such distinction an asylum-seeker may, however unpalatable this may be, be able to succeed in a claim based on *sur place* activities even where those activities have been undertaken in bad faith.

16. As regards that issue in the present case, the Tribunal said at paragraph 494 of its reasons:

> "In terms of the evaluative assessment of an individual's profile as it is reasonably likely to be perceived by GoSL, we agree with the appellants' submission that motivation is not relevant. The reason for this lies within the previous sentence: the critical question is what the authorities will make of the activities in respect of which they have obtained information. They will have little or no inclination to enquire into an individual's good faith or lack thereof. We acknowledge that there must exist the possibility of opportunistic 'hangers on' making out

> a claim for international protection. Unattractive as this may seem, it cannot act as a valid basis for rejecting a risk."

I should note the Tribunal's use of the phrase, "little or no inclination to enquire": I will come back to that phrase later.

17. The Secretary of State claims, as her ground 2B, that there was no proper evidential support for that finding. Paragraph 30 of the skeleton argument makes three points in that regard.

18. First, at (a) it is said that, on the evidence, GoSL had the means to form a view about motivation, because it had been found in *GJ*, and accepted in the present case, that it has sophisticated facilities for monitoring online and mobile phone communications of diaspora members and has a network of informers here. It might be doubted how reliably those means would be able to distinguish insincere from sincere activists; but in any event the essential point is that proof that the GoSL has the means to make such an assessment is not evidence that it has the inclination to do so.

19. Second, at (b) it is said that potential returnees would typically have to undergo an interview at the High Commission in order to obtain temporary travel documents, and that if they were asked about whether they had separatist views, or more particularly about *sur place* activities in support of separatism, it was necessary to assume that they would give truthful answers – that is, that they would say that their participation in separatist activities had been insincere. It is said that the Tribunal "failed sufficiently to consider why GoSL would pay no regard to such an answer". We were told that there was in fact no evidence about what questions were asked at such interviews. However, even if it is reasonable to assume that in many or most cases questions would be asked about *sur place* activities, and that someone who had in fact been participating in them but doing so insincerely would say that that was the case (since it would be in their interests to do so), it does not follow that they would be believed: indeed it might be be thought that the interviewer would be distinctly sceptical. I do not believe that it is arguable that the Upper Tribunal was obliged to attach weight to the Secretary of State's

argument in this regard or to refer expressly to it in its reasons (assuming it was raised at the hearing in its reasons).

20. Third, at (c) the skeleton argument identifies some passages in parts of the Tribunal's findings addressing different issues to the effect that GoSL applies at least a degree of "qualitative assessment" to information about involvement in separatist activity. That is no doubt the case: indeed for that very reason the Tribunal rejected the appellants' contention that any but the most trivial involvement in *sur place* activities would meet the necessary threshold of risk. I do not regard those findings as inconsistent with a finding that GoSL would have no inclination to inquire into the sincerity of a person participating in *sur place* activities. It must be recalled that the question only arises where a person is known to have taken part in activities which, by reference to the other factors specified by the Tribunal (including the nature, extent and duration of those activities), show them playing a significant role in separatist activity in the sense glossed by the Tribunal at paragraph 475. If a person's activities pass that threshold, it is not difficult to see that the GoSL might not wish to take the trouble of trying to ascertain how sincere they were; and in any event that was a conclusion which the Tribunal was unarguably entitled to reach.

21. At paragraph 30 of the Secretary of State's skeleton argument it is argued that, even apart from those points, paragraph 494 of the decision is too widely expressed; and this was an aspect which Ms Patel emphasised in her oral submissions. She pointed out that even if GoSL had no inclination to enquire into the motivation of a particular person who had been taking part in separatist activities, it did not follow that it would ignore evidence of insincere motivation of which it was otherwise aware - yet the Tribunal says without qualification that "motivation is not relevant".

22. I do not believe that that is a fair reading of what the Tribunal was saying. The paragraph must be read as a whole. It is in my view unarguably clear, in particular from the third sentence, that the essential point being made is that if GoSL has information about a person's involvement in *sur place* activities which cross the necessary threshold it will have no inclination to seek to go behind that information and enquire into whether there involvement was really sincere. The Tribunal was not saying that GoSL would in no

circumstances have regard to information that such participation was insincere when it was otherwise aware of it. One example canvassed in argument before us was a case where the person in question was in fact an informer or agent who was taking part in separatist activities, to GoSL's knowledge, in order to obtain information about others or to maintain their cover. Plainly the Tribunal did not mean to say that such a person would be a risk of persecution on return because of their participation in those activities. That is an extreme case, but there could no doubt be other cases where GoSL would become aware, without itself initiating enquiries, that a person's involvement was insincere. Paragraph 494 to my mind quite clearly does not mean that evidence that that was the case would be irrelevant. That is in my view apparent on a fair reading of the decision, but it is in fact confirmed by paragraph 19 of Judge Norton-Taylor's reasons for refusing permission to appeal where he said:

> "The panel did not discount or in any way exclude the relevance GoSL might place on information going to an individual's motivation which was 'otherwise apparent'. Nothing in the decision precludes taking into account evidence obtained which might indicate to GoSL that the individual concerned might have undertaken activities in bad faith."

23. I would finally note that at paragraph 501 of its decision the Upper Tribunal said:

> "The guidance we have provided is just that: the assessment to be undertaken in any given case is always fact-specific and there may be exceptional scenarios which fall wholly or partially outside the parameters of our analysis."

That is entirely correct and could have particular application in the context of the issue of motivation.

Risk of detention for expressing separatist views

24. The effect of the decision in *HJ (Iran)*, as applied in the context of political opinion by *RT (Zimbabwe) and Others v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 AC 532, is well known. I can sufficiently summarise it for present purposes as being that, if a person would be persecuted on return for the manifestation of their political opinions, it is no answer to say that they could avoid persecution by concealing those opinions; accordingly, if it is found that but for the threat of persecution they would manifest those opinions they are entitled to international protection. (Ms Patel reminded us of what Lord Dyson said at paragraph 50 of his judgment in *RT* about the relevance of whether the expression of a belief lay at the core or the margin of the right in question, but that is not a relevant point for the purpose of the particular issue raised here.)

25. It was the Secretary of State's case in the Upper Tribunal that not every expression of separatist views by a returnee to Sri Lanka would be likely to lead to detention or therefore persecution. GoSL would it, was submitted, make a "qualitative assessment" of the significance of what had been said, as the Tribunal had found it would in the case of *sur place* activities. It was reasonable to suppose that it would take the same approach to activities in support of separatism whether in the UK or in Sri Lanka.

26. The Tribunal did not accept that submission. At paragraph 552 of its reasons it found that if a person who was returned to Sri Lanka did express Tamil separatist views and that were to become known it was reasonably likely that they would be detained. (I should say that it is common ground that detention was effectively the gateway to a risk of persecution.) That finding was based at least partly on contextual factors itemised in paragraph 547 of the reasons. The Tribunal made it clear that it did not accept that activity in Sri Lanka would necessarily be treated in the same way as activity in the UK.

27. By ground 4B the Secretary of State contends that that finding was not reasonably supported by the evidence. I do not believe that that is arguable. There was explicit evidence that separatist political activities in Sri Lanka would not be tolerated at all: see for example paragraphs 53, 94 and 109 of the reasons. The Tribunal reviewed all of the evidence about the attitude of GoSL to separatism and concluded at paragraph 349:

> "Drawing all of the above together, we conclude as follows. The core focus of GoSL is to prevent any potential resurgence of a separatist movement within Sri Lanka which has as its ultimate goal the establishment of Tamil Eelam…whilst there is currently limited space for pro Tamil political organisations to operate within Sri Lanka, there is no tolerance of the expression of any avowedly separatist or perceived separatist beliefs." The Tribunal, therefore, made a clear distinction between "pro Tamil activity" and "activity which was avowedly separatist."

The conclusion at the end of that paragraph is clearly based on the evidence which the Tribunal had considered overall.

28. I should address three particular points advanced in support of this ground at paragraph 46 of the Secretary of State's skeleton argument.

29. First, she points to three pieces of evidence which she says show a degree of tolerance by GoSL of expressions of separatist opinion in Sri Lanka. All three refer to public commemorations taking place for Tamils who had died fighting for the LTTE, sometimes referred as "heroes" or "martyrs". One, though only one, of those pieces of evidence said in terms that those commemorations had in recent years been tolerated, although they were monitored by the authorities. That is not, however, the same as tolerating explicit expressions of support for separatism, and I do not consider it arguable that it undermines the Tribunal's conclusion to which I have referred. Ms Patel submitted that that material should at least have been addressed by the Upper Tribunal, particularly since it was contrary to the evidence of one of the expert witnesses to the effect that such commemorations of LTTE fighters would <u>not</u> be tolerated in Sri Lanka: that evidence <u>had</u> been recorded in the reasons. But since the evidence carries no real weight as regards the essential issue, for the reason that I have given, I do not accept the submission that the Tribunal was obliged to refer to it.

30. Second, the skeleton argument refers to a statement at paragraph 550 of the reasons that:

> "Whilst diaspora activities are clearly a source of hostility on the part of GoSL, the manifestation of separatist beliefs within Sri Lanka itself is highly likely to attract adverse attention and may, depending on the facts of the case, require less from an individual to prove that they would be detained."

The Secretary of State's argument is that the Tribunal's reference to "depending on the facts of the case" necessarily involves an acceptance that there would be a qualitative assessment of the significance of expression of separatist opinion in both Sri Lanka and UK. I do not accept that. To me, the plain meaning of the passage is that the Tribunal believed that the kind of qualitative assessment that would be applied to the expression of separatist opinion in the UK would not be applied in Sri Lanka. It was, as per its finding at paragraph 552, reasonably likely that in the latter case it would lead to detention.

31. Third, she comments on a different observation in paragraph 550 to the effect that:

> "The respondent's position appears to require an individual who would already be at risk from return under paragraph 356(7)(a) of *GJ* to then undertake yet further activities so as to replicate the same risk."

I confess to finding that point rather opaque, and I do not believe it is central to the Tribunal's reasoning. In any event, the Secretary of State's only comment on it in her skeleton is that it is "plausible that the GoSL employs consistent risk-based assessments of threat across the board". That goes nowhere. In one sense the point is obviously true, but there is nothing surprising in GoSL taking the view that pro-separatist activity at a given level in Sri Lanka poses a greater risk than a history of such activity at the same level in the UK. That is what the Upper Tribunal found, and that finding was in my view plainly open to it.

32. At paragraph 47 of her skeleton argument the Secretary of State contends that the contextual factors relied on in paragraph 547 of the reasons are incapable of rationally

supporting the finding at paragraph 552. Four particular points are relied on but none in my mind is capable of undermining the Tribunal's conclusion

33. The first point is that the Tribunal in *GJ* did not go quite as far as the Tribunal did in this case. That however is immaterial, since the Tribunal in *GJ* did not consider the application of *HJ (Iran)* at all.

34. The second point addresses the Tribunal's statement that:

> "Dr Nadarajah's evidence to us upon which we attach significant weight is that individuals would be at risk if they sought to undertake activities in Sri Lanka that they pursued in the United Kingdom and that there was 'zero' possibility of any organisation with an avowedly separatist agenda being able to operate in that country."

It is said that that refers only to the same activities as in the UK, many of which would probably be impossible in Sri Lanka anyway. But I cannot see how that undermines the Tribunal's point, which is the broader one that GoSL regards Tamil separatist activities with extreme hostility.

35. The third point is that there was evidence of what the skeleton argument calls "expression of separatist beliefs through commemorative events and/or demonstrations". I have already made the point that the events in question do not have to be equated with direct expressions of separatist belief.

36. The fourth point refers to the evidence of a witness who was a British citizen who had tried to open an office in Sri Lanka for an organisation which advocates Tamil separatism. It is said that his evidence shows that, although the office had been closed down by the Sri Lankan CID, the staff had not been detained. In fact the passage in question is to the effect that the CID said that "the people there" should go home, or they would "be taken with the CID". It is unclear who “the people” in question were or what they had done or said. In any event, it is hardly particularly encouraging that they were threatened with

detention. But the ultimate point is that the somewhat equivocal evidence of a single incident of this kind cannot undermine the Tribunal's factual conclusion based on a careful overall assessment.

37. In truth, all these types of point are examples of so-called "island-hopping". Where the Tribunal has given clear, detailed and cogent reasons for the conclusions which it has reached a viable appeal cannot be maintained simply by pointing to this or that snippet of evidence or argument and complaining that it is inconsistent with the Tribunal's conclusion or has not been properly addressed. The decision of the Upper Tribunal in this case is conspicuously thorough and cogent, and none of the points of detail raised by the Secretary of State would in my judgment have any prospect of undermining those conclusions.

The individual cases

38. In the case of both the individual appellants, the Tribunal found both that they had participated in *sur place* activities in a way which passed the "significant role" threshold as explained by it and that they would, if returned to Sri Lanka, wish, but for the threat of persecution, to express their separatist opinions (i.e. the *HJ (Iran)* ground). In both cases and in both respects, it acknowledged that its decision was not straightforward, not least, though not only, because the First-tier Tribunal had made adverse findings about the credibility of both appellants. However, it gave careful and fully articulated reasons for coming to the conclusions that it did, notwithstanding the various problems about the evidence.

39. By grounds 3, 5 and 6 the Secretary of State contends that the Tribunal's conclusions in each case, as regards both the significant role and *HJ (Iran)* points, betray errors of law. To some extent the grounds follow from the generic grounds which I have already considered but there are also challenges on the basis that the Tribunal's particular findings of fact in each case were not rationally open to it on the evidence.

40. To the extent that the challenges in the individual cases track the generic grounds, I need say nothing more about them. That is the case as regards ground 5.

41. To the extent that they depend on challenges to the Tribunal's fact-finding, on the face of it they cannot be pursued because this is a second appeal governed by CPR 52.7. The individual grounds raise no important point of principle or practice and there is no compelling reason for this court to hear them if the generic grounds are not going to proceed. However, Ms Patel reminded us that a more flexible approach to the second appeal test is appropriate in cases where the would-be applicant has succeeded in the First-tier Tribunal and where the Upper Tribunal has re-made the decision on a basis on which they have not had any prior appeal: see *JD (Congo) and Others v Secretary of State for the Home Department* [2012] EWCA Civ 327, [2012] 1 WLR 3273, at paragraphs 28 to 32. I accept that point. Even though this was a decision by an unusually experienced tribunal comprising a panel of three Upper Tribunal judges, I consider it right to consider the merits of grounds 3 and 6. Although I do not think it is appropriate to address them individually as might be necessary if the only issue was whether they had a real prospect of success.

42. In my judgment, neither ground nor any of their various sub-grounds has a real prospect of success. The points raised focus on a series of individual weaknesses in the appellants' cases before the Tribunal about the extent of their involvement in separatist activities in this country (ground 3) and about the genuineness of their belief in Tamil separatism and, relatedly, whether they would wish to express separatist beliefs if returned (ground 6). But the weaknesses in question are all points which the Tribunal itself acknowledged and which it specifically addressed in its reasons. I see no real prospect that this court would find that the conclusions which it reached were not open to it.

Procedural postscript

43. At paragraphs 76 to 77 of his judgment in *R (SG) (Iraq)*, to which I referred at the beginning of this judgment, Maurice Kay LJ expressed concern that where an application for permission to appeal was made in a country guidance case there could be serious delay before the application was determined and, if permission were given, before the

appeal was heard. That was obviously particularly undesirable in the case of a country guidance appeal because many cases in the First-tier Tribunal would be awaiting the outcome of the application or appeal. Part of the potential for delay arose from the fact that, under the rules as they then stood, if the application was refused on the papers the applicant would have the opportunity to require an oral hearing. In the state of the Court of Appeal lists as they were in those days that could typically involve a delay of very many months. In order to obviate that risk, Maurice Kay LJ said that henceforward all applications for permission to appeal in country guidance cases would be listed for an early oral hearing on notice to the respondent without first being considered on the papers.

44. Since then the rules governing applications for permission to appeal have changed. There is no right to renew an application which is refused on the papers: an oral hearing can only be directed if, exceptionally, the Lord or Lady Justice considering the application on the papers so directs. It is not therefore appropriate for there to be any automatic rule. (I should also say that at least for the time being there is no problem about dealing with applications for permission very expeditiously when required).

45. The practice as stated by Maurice Kay LJ thus requires some modification. Applications for permission to appeal in country guidance cases should continue to be treated expeditiously, but they will be considered on the papers by a Lord or Lady Justice as required by CPR 52.5(1). It will be for them to consider whether an oral hearing is required in accordance with paragraph (2) of the rule, and there will be no presumption in favour of such a hearing. Having said that, the special nature of a country guidance appeal is such that I would expect that in many or most cases an oral hearing, with the respondent directed to attend, will be regarded as the most appropriate way of dealing with the application.

Conclusion

46. I would, as I have said, refuse permission to appeal.

47. I will give permission for this decision to be referred to in subsequent proceedings, partly because of the question addressed in the procedural postscript but partly also because tribunals may find useful what I have said about the motivation issue - though I repeat that I have done no more than identify what I believe it is clear that the Upper Tribunal itself was saying.

48. The latter point apart, however, there should be no need to refer to this decision. I have only addressed the particular points raised by the application for permission to appeal, which covers by no means the whole of the issues decided. Even on those, it has not been necessary for me to attempt any comprehensive summary of the Upper Tribunal's reasoning. It is to the decision of the Upper Tribunal that the First-tier Tribunals should refer.

LADY JUSTICE ANDREWS:

49. I agree that the application for permission should be dismissed for the reasons given by my Lord. I would hope that the judgment delivered by my Lord will clear up any potential for misunderstanding of what the Upper Tribunal was saying on the question of motivation.

Order: Application dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge