Neutral Citation Number: [2020] EWCA Civ 612

Case No: C5/2019/1038

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
Deputy Upper Tribunal Judge Latter

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE NICOLA DAVIES DBE
and
LORD JUSTICE MALES

- -

Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
YAGNESH DEVANI	**Respondent**

- -
- -

Mr Nicholas Chapman (instructed by **the Treasury Solicitor**) for the **Appellant**
Ms Samantha Broadfoot QC and **Mr Raphael Jesurum** (instructed by **D.J. Webb & Co Solicitors**) for the **Respondent**

Hearing date: 12 February 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 2pm on Thursday 6 May 2020.

Lord Justice Underhill :

INTRODUCTION

1. This appeal has a complicated and unsatisfactory procedural history, which it is necessary to set out in some detail before we can get to the issues.

2. The Respondent, to whom I will refer as Mr Devani, is a Kenyan businessman. He has been in this country since some time in 2009 or 2010, though he has not at any material time had leave to remain.

3. In 2011 Kenya made an extradition request in relation to serious allegations of fraud against Mr Devani; and a further request, also in relation to fraud, was made in 2013. He challenged both requests, and there were prolonged proceedings in the Magistrates Court culminating in a decision dated 3 September 2014 dismissing his challenge. He appealed to the High Court. By a decision dated 11 December 2015 ([2015] EWHC 3535 (Admin)) a Divisional Court comprising Leggatt J and Sir Richard Aikens dismissed his appeal.

4. One of Mr Devani's grounds of challenge to his extradition was that prison conditions in Kenya were such that his return to face detention there, whether on remand or following any eventual sentence, would contravene article 3 of the European Convention on Human Rights. The Divisional Court found that prison conditions in Kenya generally were indeed not "article 3 compliant". But it upheld the District Judge's rejection of the challenge because the Commissioner of Prisons for Kenya and its Director of Public Prosecutions had written formal letters of assurance to the Home Office stating that Mr Devani would be detained in a particular prison in Nairobi, Kamiti prison, where the accommodation and facilities were article 3 compliant and where he would have a cell to himself: see paras. 165-167 of the judgment of Sir Richard Aikens.

5. On 16 February 2016, i.e. about two months after the Divisional Court's decision in the extradition proceedings, Mr Devani applied for asylum. The Secretary of State refused the application.

6. Mr Devani appealed to the First-tier Tribunal. His appeal was heard before First-tier Tribunal Judge Sullivan on 31 October 2018. He was represented by Mr Raphael Jesurum of counsel. The Secretary of State was represented by a Presenting Officer, Mr Wain.

7. At the hearing Mr Devani relied not only on the Refugee Convention but on a contention that, notwithstanding the assurances relied on by the District Judge in the extradition proceedings, the prison conditions in which he would be detained in Kenya would not be article 3 compliant. He claimed that equivalent assurances given in the case of a Mr Gilbert Deya, and on the basis of which he had been extradited to Kenya, had been disregarded. Mr Deya, who held himself out as an evangelist, was extradited to Kenya to face charges of child trafficking in connection with a "miracle babies" scam.

8. The evidence about Mr Deya's treatment on which Mr Devani relied was lodged only two days before the hearing, but it seems that Mr Wain did not object to its admission.

The evidence was of two kinds. One was a witness statement from Mr Deya's lawyer, a Mr Swaka. FTTJ Sullivan held that she could place no reliance on this, and I need say nothing more about it. The other was a print-out of a story dated 11 August 2017 on what appears to be a Kenyan news website and apparently written by a journalist. The story is headed "Insects keep on biting me, says Preacher Gilbert Deya at Kamiti prison". The relevant part reads:

> "On Thursday televangelist Gilbert Deya complained to the court that the authorities had ignored a deal to detain him in a self-contained cell and instead locked him up in a filthy dungeon with 11 convicts.
>
> Bishop Deya protested at the conditions at Kamiti Prison and accused the Government of not honouring an agreement between the British government and the Director of Public Prosecutions (DPP) that he be accorded special treatment while in prison.
>
> 'There was an agreement that he be given a special single room to himself but when he was taken to Kamiti, he was locked in an extremely dirty room with 11 other people. The room is full of insects which have been biting him ever since', his lawyer, John Swaka, told Chief Magistrate Felix Andayi.
>
> Deya cut a dejected figure, showing how his circumstances had changed in only six days from high-flying bishop of the Gilbert Deya Ministries in South London to an inmate in the dingy cells of Kamiti Prison, rubbing shoulders with some of the country's hardcore criminals.
>
> According to Deya, the jail conditions compelled him to fight extradition to Kenya since 2004, when his 'miracle babies' scandal was exposed.
>
> He complained that he had no access to a washroom and that the wardens only gave him a bucket to relieve himself. He produced the bucket he said he has been using in the prison cells to court as evidence.
>
> 'He stays with the waste bucket in his locked room throughout the night and in the morning, he is forced to wash it with his bare hands without soap or any detergent. When he complained, the officer in charge of the prison told him they could do nothing about it' said his lawyer, who argued that the conditions Deya has been subjected to do not reflect the agreement that he be treated with dignity while in detention in Kenya.
>
> However, senior assistant DPP Nicholas Mutuku denied knowledge of any such arrangement. He told the court that if Deya was not satisfied with the treatment, he should raise the matter when the hearing of the case begins.

> The magistrate said he could not do much to address the situation, only that the authorities should try to ensure that the cells meet international standards for prisons.
>
> ..."

I should note that the print-out is on two pages, with the break below the fifth paragraph. As appears below, the FTT Judge appears only to have seen the first page.

9. The FTT's decision was promulgated on 22 November 2018. The Judge dismissed the asylum appeal, but we are only concerned with her decision on the article 3 claim. As to that, having rejected Mr Swaka's evidence, she said, at paras. 48-49 of her reasons:

> "48. The news article at page 1 of the Appellant's bundle (only the first of two pages has been included), dated 11 August 2017, confirms that Mr Deya was being held at Kamiti prison. It sets out his complaint that, in breach of Kenyan assurances, he was being held in a dirty room with 11 other people. It refers to him appearing before a Chief Magistrate. The report is dated within one month of the High Court decision in *Deya*. Its contents suggest that it was written within 6 days of Mr Deya's return to Kenya. Based on this report and in the absence of anything on its face undermining its reliability and of any evidence from the Respondent challenging the contents of the report I find that on return to Kenya Mr Deya was held in shared prison accommodation for 6 days, in breach of assurances which had been given by the Kenyan government.
>
> 49. The High Court in *Devani* was satisfied in 2015 on the basis of Kenyan assurances that the Appellant would not be held in conditions breaching Article 3 of the 1950 Convention. In light of the subsequent evidence relating to Mr Deya I find that there is a real risk that on return to Kenya the Appellant would not be held in keeping with the Kenyan assurances given to the High Court but would be held in conditions breaching Article 3 of the 1950 Convention."

10. Those findings necessarily meant that Mr Devani's appeal, so far as it was based on article 3, should have succeeded. However, the Judge's formal "Notice of Decision" reads:

> "51. The Appeal is dismissed (Article 3 only)
>
> 52. The Appeal on asylum grounds is dismissed.
>
> 53. The Appeal on Article 2, 6 and 8 grounds was not pursued by the Appellant."

It was common ground before us (though not below), and is in my view obvious, that the word "dismissed" in para. 51 was simply a slip by the Judge and that she meant to

write "allowed". This unfortunate slip is the root cause of the procedural complications that have ensued.

11. Mr Devani believed, on the authority of a decision of the Upper Tribunal called *Katsonga* to which I will have to return, that it was not open to him to apply to have the Judge's error corrected under the relevant slip rule (which is rule 31 of the Tribunal Procedure (First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014), and that instead he had to appeal to the Upper Tribunal. An appeal was duly filed on 11 December 2018, taking the single point that FTTJ Sullivan's decision as recorded at para. 51 did not correspond to the findings in paras. 48-49.

12. Although the Secretary of State was content with the ostensible decision of the FTTJ, she[1] was obviously not content with the decision which Mr Devani was contending that she *meant* to make. If his appeal succeeded, the result would be that that intended decision would be substituted unless she challenged it. The Secretary of State could not appeal, because she was the ostensible winner; but she could provide a "response" under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 stating that she wished to uphold the decision on the basis that the evidence relied on by Mr Devani did not entitle the FTT to go behind the conclusion of the Divisional Court on the reliability of the assurances.[2] She did not file any such response.

13. Permission to appeal was granted by the FTT on 2 January 2019, and the appeal was heard before Deputy Upper Tribunal Judge Latter on 7 February. Mr Devani was represented by Ms Samantha Broadfoot QC, leading Mr Jesurum. The Secretary of State was represented by a Presenting Officer, Mr Tufan. Mr Devani lodged a short skeleton argument developing the single ground of appeal. There was no skeleton argument from the Secretary of State.

14. We have been supplied with a transcript of the hearing, although unfortunately there are substantial passages which the transcriber was unable to hear. It is necessary that I should summarise the parties' submissions.

15. Ms Broadfoot, who opened the appeal, began by making short submissions to the effect that there had been an obvious slip and that the appeal should be allowed by the UT substituting the order which the FTT had evidently intended to make. DUTJ Latter intervened to ask Mr Tufan if he agreed that FTTJ Sullivan had intended to allow the appeal. He said that he did not. Ms Broadfoot then continued with her submissions. Notwithstanding the absence (at that point) of any challenge to paras. 48-49 of the FTT's decision, she made the point that it was not open to Mr Tufan to challenge the findings in them since the Secretary of State had neither appealed nor provided a rule 24 response. However, she went on to explain the background to those paragraphs and to commend the substance of the Judge's reasoning in them.

16. Mr Tufan in his submissions in response embarked directly on a challenge to the reasoning and findings in paras. 48-49 of the FTT's reasons. His essential submission

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[1] For convenience I will refer to the Secretary of State throughout by the gender of the current incumbent.

[2] This summary of her procedural options was in fact contentious before us, but, as discussed below, I am satisfied that it is correct.

was that the newspaper article was a wholly insufficient basis for "going against" the decision of the Divisional Court. DUTJ Latter raised with him the question whether the Secretary of State could have appealed or put in a rule 24 response. He said that as the (ostensible) winner the Secretary of State could not appeal; unfortunately, because of the defects in the transcript, it is impossible to identify what if anything he said about rule 24.

17. In her reply submissions Ms Broadfoot repeated more fully her objection to the Secretary of State seeking to challenge the reasoning in paras. 48-49 in the absence of any cross-appeal or rule 24 response. However, she did not suggest that she was unable to deal with the challenge; and in fact she proceeded to address it substantively. She submitted that the only question was whether the Judge's finding was perverse and that it plainly was not: there was nothing to suggest that the news report was unreliable. She also said that no challenge to its reliability had been advanced in the FTT.

18. DUTJ Latter reserved his decision. By a decision and reasons promulgated on 27 February 2019 he allowed the appeal and substituted a decision that Mr Devani's original appeal be allowed, on article 3 grounds only, on the basis that that was what FTTJ Sullivan plainly intended. As regards Mr Tufan's challenge to her substantive reasoning, he said, at paras. 17-18:

> "17. I was at one stage concerned by whether the respondent had been put at a disadvantage by the fact that an appeal has been necessary as this error could not be put right under the 'slip rule' within rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, when an amended decision would have been issued giving rise to a right of appeal. At one point in his submissions Mr Tufan raised the issue of whether the respondent had been able to appeal because he was not the loser. That was the position under the Nationality, Immigration and Asylum Act 2002 governing the right to appeal to the Immigration Appeal Tribunal (see AN (only loser can appeal) Afghanistan [2005] UKIAT 97). However, those provisions were superseded by the coming into force of s. 11(2) of the Tribunals, Courts and Enforcement Act 2007 making it clear that any party to a decision has the right of appeal to the Upper Tribunal.
>
> 18. In the present case the respondent has not sought to challenge the decision by seeking permission to appeal, to maintain it on other grounds by filing a rule 24 notice setting out any grounds on which he seeks to rely or by filing a skeleton argument to challenge the substance of the judge's decision. I have also been referred to the recent reported decision in PAA (FtT: oral decision – written decision) Iraq [2019] UKUT 13, which, whilst dealing with a different issue, the effect of an oral decision given by the First-tier Tribunal inconsistent with subsequent written reasons, nonetheless confirms the importance of challenging a decision in accordance with the relevant procedure rules. No such challenge has been made."

In my view it is plain from that passage that DUTJ Latter decided that he should not consider the substantive challenge, and he did not do so. There was a suggestion before us that an earlier paragraph in his judgment constituted an implicit rejection of Mr Tufan's argument, but I am quite clear that that is not the case.

19. The Secretary of State appeals against that decision. She has been represented before us by Mr Nicholas Chapman of counsel. Mr Devani has again been represented by Ms Broadfoot and Mr Jesurum. I should note that in the FTT and the UT an anonymity direction was made, no doubt on the basis that Mr Devani had made an asylum claim. But there is in the particular circumstances of this case no conceivable prejudice to Mr Devani in the judgment not being anonymised, since his identity is known to the Kenyan authorities, and it would be wholly artificial to have to seek to disguise the fact that he is the same person who is the subject of the decisions in the extradition proceedings.

20. It is, as I have said, (now) common ground that the word "dismissed" in para. 51 of the FTT's decision was simply a slip and that the UT was right so to hold. The issues on this appeal concern the challenge which the Secretary of State wishes to make to FTTJ Sullivan's *intended* decision. As to that, the broad issues are:

    (1) whether it was an error of law for the UT to decline to consider that challenge; and

    (2) whether, if it was, we can determine that challenge ourselves; and, if so,

    (3) whether FTTJ Sullivan's findings in paras. 48-49 were open to her in law.

    I will deal with issue (1) in this judgment. Issues (2) and (3) are dealt with by Nicola Davies LJ. I respectfully agree with her conclusions. The result is that the appeal is allowed and that Mr Devani's appeal against the decision of the Secretary of State is dismissed.

ISSUE (1)

21. Although it is now, strictly speaking, water under the bridge, I wish to say by way of preliminary that I do not believe that it was necessary for Mr Devani to mount an appeal to the UT in order to have para. 51 of the FTT's decision corrected. The point is of some general importance.

22. Mr Devani's belief that the slip rule was unavailable and that he had to proceed by the appeal route was based on the decision of the UT (comprising the Vice President, Mr Ockelton, and UTJ Martin) in *Katsonga* [2016] UKUT 228 (IAC). In that case, like this, a judge in the FTT promulgated a decision which allowed the appellant's appeal on human rights grounds when it was clear from her reasoning that she meant to dismiss it. The Secretary of State applied to her to correct the decision, and she did so, apparently under the predecessor to rule 31. The UT allowed the appellant's appeal. At para. 8 of its reasons it set out the terms of rule 31, which reads:

> "*Clerical mistakes and accidental slips or omissions*
>
> 31. The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by -
>
> (a) providing notification of the amended decision or direction, or a copy of the amended document, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document."

It then continued, at paras. 9-10:

> " 9. There appears to be no clear authority on the meaning and use of the 'Slip Rule'. It is, however, instructive to consider the authorities on the meaning of CPR 40.12, allowing the Court to correct at any time 'an accidental slip or omission in a judgment or order'. Despite the width of the wording in the CPR, there is an important restriction on the power given by that rule. The power is there to enable a misprint to be corrected, or to make the judge's meaning clear: Bristol-Myers Squibb v Baker Norton Pharmaceuticals Inc [2001] EWCA Civ 414. The power cannot be used to change the substance of a judgment or order: further authorities are cited at CPR 40.12.1 in the White Book. It is because the judge can use the slip rule only to make his original meaning plain rather than to change his original decision, that the Civil Procedure Rules and the Tribunal's Procedural Rules contain no provision for consultation with the parties. Indeed it is difficult to see that the parties ought to have any input into the judge's expression of what he originally meant.
>
> 10. We do not think that the power under the slip rule enables a decision to be reversed at the instance of the losing party. Once a decision has been given in a particular sense it may be subject to setting aside under rule 32 or the appellate process. In all other respects, having made and sent out the decision, Judge O'Rourke was *functus*. …"

The (judicially drafted) headnote reads:

> "The 'Slip Rule', rule 31 of the First-tier Tribunal Procedure Rules, cannot be used to reverse the effect of a decision."

23. In my view *Katsonga* was wrongly decided, and the passage which I have quoted from the UT's reasons and, still more, the terms of the headnote are liable to mislead. The essential distinction to bear in mind in considering the application of the slip rule, in any of its legislative formulations, is between the case where the order in question does not express what the Court actually intended at the moment of promulgation and the

case where it does express what the Court intended at the time but it subsequently appreciates that it should have intended something different: see, most recently, para. 18 of my judgment in *AS (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 208, [2019] 1 WLR 3065 (p. 3071C). As I say there, how the distinction applies in a particular case may not always be straightforward, but the concept is clear. The proposition which the UT drew from the case to which it referred and from the White Book commentary, namely that the slip rule "cannot be used to change the substance of a judgment or order", is perfectly apt as a reference to the second of the two classes of case that I have mentioned; but it appears from the UT's actual decision that it understood it to mean that the slip rule could not be used in a case where the correction would produce a decision with the opposite effect to that promulgated. With all respect, that is simply wrong. In the case of a simple failure of expression – most obviously a straightforward slip of the pen – the error can and should be corrected even if it alters the outcome (as initially expressed) by 180°.

24. As it happens, we were referred to *Katsonga* in *AS (Afghanistan)*, and I approved the UT's observations in the last two sentences of para. 8: see para. 45 (p. 3078). But I added a footnote in the following terms:

> "My citation of *Katsonga* should not be taken as implying approval of the proposition in the judicially-drafted headnote that 'the "Slip Rule"… cannot be used to reverse the effect of a decision', which if taken out of context may be misleading. If, say, a 'not' were accidentally omitted from a declaration or injunction its correction might well reverse what would otherwise be the effect of the decision, but it is hard to see why it should for that reason be illegitimate: indeed it might be thought to be the paradigm of the kind of case for which the slip rule was required."

That remains my view.

25. Since the foregoing passage was drafted the Upper Tribunal (Immigration and Asylum Chamber) (comprising the President, Lane J, and UTJ Blundell) has promulgated a decision likewise disapproving what was said in *Katsonga*: see *MH (Iran) v Secretary of State for the Home Department* [2020] UKAITUR PA056462019, at paras. 57-80. I am pleased that our conclusions on this issue are to the same effect.

26. I turn to the substantive issue under this head, namely whether the Judge erred in law in declining to consider the Secretary of State's challenge to paras. 48-49 of the FTT's Reasons. His reason for taking that course was that she had failed to raise that challenge in accordance with "the relevant procedure rules": specifically, he referred to her failure (a) to appeal or (b) to provide a rule 24 response or (c) to serve a skeleton argument. Mr Chapman submitted that that was a misdirection: there was no obligation on the Secretary of State to take any of those steps.

27. I start with the alleged failure by the Secretary of State herself to appeal. I agree with Mr Chapman that there was no such failure. In my view Mr Tufan was quite right in his submission to DUTJ Latter (see para. 16 above) that that course was not open to her because she was (ostensibly) the winning party. As appears from para. 17 of his decision, the Judge acknowledged that that had once been the law, but he said that the

position was changed by section 11 (2) of the Tribunals, Courts and Enforcement Act 2007, which reads "Any party has a right of appeal, subject to subsection (8)[3]." Subsection (1) defines a right of appeal, so far as relevant, as a right of appeal to the UT on a point of law. I accept that on a literal reading subsection (2) could be construed as giving a right of appeal not only to a party against whom an order has been made but also to a party who has obtained, as regards that order, the exact outcome that they sought: although usually the winning party would have no wish to appeal, occasionally they may be dissatisfied with particular findings made by the Court or with aspects of its reasoning (the present case, if the slip rule were unavailable, would be an example albeit of a very specific kind). But for the winning party to have a right of appeal in such a case would be contrary to well-established case-law governing the position in the common law courts, which reflects important policy considerations; the authorities are well-known, and I need only refer to the commentary in para. 9A-59.3 of the White Book. It was not suggested to us that there was any reason why Parliament should have intended a different approach in the case of appeals to the Upper Tribunal. Ms Broadfoot sought to support DUTJ Latter's conclusion by reference to the decision of the UT in *EG and NG (Ethiopia)* [2013] UKUT 000143 (IAC), but that was not concerned with the present point at all. I am sure that section 11 (2) of the 2007 Act is intended to confer a right of appeal only against some aspect of the actual order of the FTT, and that the phrase "any party" must be read as referring only to a party who has in that sense lost.[4]

28. I turn to the Secretary of State's alleged failure to provide a response under rule 24. Rule 24 (as amended) is headed "Response to the notice of appeal" and reads, so far as material:

> "(1) **…**
>
> (1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.
>
> (2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received—
>
> (a) if an application for permission to appeal stands as the notice of appeal, no later than one month after the date on which the respondent was sent notice that permission to appeal had been granted;
>
> (aa)-(b) …
>
> (3) The response must state—

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[3] There is nothing relevant for our purposes in subsection (8).

[4] For the avoidance of doubt, I accept that in some cases a party may have won as regards part of the Tribunal's order and lost as regards another. They can of course appeal against the part of the order adverse to them.

> (a)-(c) …
>
> (d) whether the respondent opposes the appeal;
>
> (e) the grounds on which the respondent relies, *including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal*[5] [emphasis supplied]; and
>
> (f) …
>
> (4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.
>
> (5)-(6) …".

I will refer to the phrase in paragraph (3) (e) which I have emphasised as "the additional grounds provision".

29. DUTJ Latter evidently took the view that if the Secretary of State wished to uphold the FTT's (ostensible) decision to dismiss the appeal on the basis that her conclusion in paras. 48-49 was wrong, that was a ground "on which [she] was unsuccessful in the proceedings which are the subject of the appeal" and that she was obliged to identify it in a notice served under rule 24, by reference in particular to paragraph (3) (e).

30. Mr Chapman argued that rule 24 imposed no such obligation. His primary argument was that the effect of rule 24 was permissive only: paragraph (1A) says that a respondent "may" provide a response, not that they must. Accordingly the requirement in paragraph (3) (e) – and in particular the additional grounds provision – only applies in cases where the respondent chooses to provide a response in the first place. He noted the contrast with rule 52.13 (2) of the Civil Procedure Rules, which provides that a respondent's notice "must" be filed where the respondent wishes to uphold the decision of the court below on different or additional grounds.

31. On a literal construction of the rule that would appear to be right, but the result makes no sense. The point of the additional grounds provision is, evidently, that the appellant and the UT should know in advance of the hearing what matters will be in issue, but that can only be achieved if there is an obligation to provide a response in such a case. I also note the requirement of paragraph (4) that a respondent who provides a response out of time must seek an extension: that would seem to be empty if there were no circumstances in which a response was mandatory. In my view on a purposive construction the effect of rule 24 is that in a case where a respondent wishes to rely on a ground on which they were unsuccessful below they are under an obligation to

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[5] Mr Chapman submitted that the comma after the words "of the appeal" is redundant and potentially confusing. I agree, but the sense is clear enough: any response must identify any grounds on which the respondent was unsuccessful below but on which they intend to rely on the appeal to the UT.

provide a response. I am reinforced in that conclusion by the fact that Nugee J, sitting in the Upper Tribunal (Tax and Chancery Chamber), reached the same decision, albeit *obiter*, in *Acornwood LLP v Her Majesty's Revenue and Customs* [2016] UKUT 361 (TCC), [2016] STC 2317: see paras. 105-107 of his decision.

32. Mr Chapman argued that even if a purposive construction along those lines were to be adopted the obligation should only arise where the respondent wishes to rely on "legal grounds" on which they were unsuccessful below. He said that that was apparent from the way in which the case where the "additional grounds" situation is separately provided for in paragraph (3) (e), and also by the parenthesis "(in the case of an appeal against the decision of another tribunal)"[6]. The challenge to paras. 48-49 of the FTT's decision was not "on legal grounds". In so far as I understand the point, I cannot accept it. Any appeal to the UT must be on legal grounds in the sense that it asserts an error of law on the part of the FTT; and the challenge advanced by Mr Tufan to the conclusion in paras. 48-49 was essentially that it was perverse. That is a sufficient answer, but I should say that I do not in any event understand the significance attached to the separate reference to the additional grounds point or to the parenthesis.

33. Thus far, therefore, I do not accept Mr Chapman's submission. In my view rule 24 applied squarely to the situation with which we are concerned. However Mr Chapman argued that even if that were so the time for providing a response specified by paragraph (2) (a) had not yet expired. The date on which the Secretary of State was sent notice that permission to appeal had been granted was on 9 January 2019. The time limit accordingly expired on 9 February, but the appeal was heard on 7 February.

34. That point seems to be good as far as it goes, but I do not think it gets the Secretary of State out of the wood. Even if, because the appeal came on so soon after the grant of permission, no obligation under rule 24 itself arose, it remained necessary, in the interests of fairness and in accordance with the over-riding objective (see rule 2), for the Secretary of State to put Mr Devani and the Tribunal on notice in advance of the hearing that if Mr Devani succeeded in showing that FTTJ Sullivan intended to allow the appeal she would argue that that intended decision was wrong. That notice would most appropriately have been given by providing a rule 24 response sooner than the deadline under paragraph (2) (a), but it would have been acceptable for the point to be made in correspondence or, as the Judge said, in a skeleton argument. That was not done.

35. I therefore think that the Judge was right to find that the Secretary of State had failed to give proper notice of the challenge raised by Mr Tufan to the Judge's conclusions in paras. 48-49, albeit not for the full reasons that he gave.

36. It does not, however, necessarily follow that he was entitled to disregard that challenge. Whether to permit it to be pursued notwithstanding that failure was a matter for his discretion. Despite the reluctance of this Court to interfere with decisions of this character, and not without some hesitation, I have come to the conclusion that in the

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6 This was introduced by amendment: see para. 18 of the Tribunal Procedure (Amendment No. 2) Rules 2009. The reason for the amendment was not explained to us, but it appears to be a consequence of the UT being given jurisdiction to entertain appeals from decisions of the Transport Commissioners and the Charity Commission, which are not "tribunals".

particular circumstances of this case the discretion was wrongly exercised. This is essentially for three reasons:

(1) Although, as I have said, DUTJ Latter was right to find that the Secretary of State should have given notice of her attention to challenge the conclusions in paras. 48-49, her failure was of a less fundamental character than he believed. As analysed above, she was not, as he thought, in breach of any specific rule: the challenge could not have been brought by way of appeal, and the time limit under rule 24 had not expired.

(2) There was no suggestion that Mr Devani or his lawyers were put at any disadvantage by the absence of notice. Perhaps unsurprisingly, Ms Broadfoot anticipated that Mr Tufan would wish to challenge paras. 48-49 of the FTT decision and in her original submissions, while challenging his right to do so, she explained why they were in any event unimpeachable: see para. 15 above. When he did indeed advance such a challenge, in her response she dealt with the substance of it, albeit maintaining her objection: see para. 17. As I have said, she at no point suggested to the UT that she was unable to deal with the point because of the absence of notice; nor did she do so in her skeleton argument and oral submissions before us.

(3) The effect of refusing to consider the Secretary of State's challenge to this aspect of the FTT's decision was to leave in place, and unexamined, the finding of a first-instance tribunal that the formal assurances of a friendly state as to the treatment to be received by the subject of an extradition order could not be relied on. That is a very serious consequence of a purely procedural error, made in a very unusual situation. Given the absence of prejudice to Mr Devani and the public interest in an effective system of extradition, I do not think that it was a consequence which the UT should have been prepared to allow.

37. In summary, therefore, I think that the UT was wrong not to consider the Secretary of State's challenge to the FTTJ's findings at paras. 48-49 of her decision.

38. I would add two codas on the procedural aspect of this appeal.

39. First, the discussion of rule 24 at paras. 30-34 above, and also in Nugee J's decision in *Acornwood*, suggests that it may be worth the Tribunal Procedure Committee having another look at its drafting, and in particular at whether it should state more explicitly in what circumstances the provision of a response is mandatory. It may or may not also be desirable to cater for the situation where, as here, a hearing is fixed before the expiry of the time limited for filing a response.

40. Secondly, although we did not explore with Mr Chapman the reason why no notice of the Secretary of State's response was given to the Appellant in advance of the hearing, whether under rule 24 or otherwise, the likelihood must be that no-one really focused on what the case required until Mr Tufan actually picked up the case shortly before the hearing: if they had, the need for such notice to be given would have been obvious. I do not know what arrangements exist for considering in good time before a UT hearing what steps need to be taken by way of preparation, but the Home Office might wish to consider whether this was a one-off error (it is fair to say that the appeal came on pretty quickly) or whether it reveals some more systemic deficiency.

Lady Justice Nicola Davies:

41. I agree with the judgment of Underhill LJ in respect of issue (1).

ISSUE (2)

42. The issue is whether, given that the UT was wrong not to consider the Secretary of State's challenge to the FTT's intended decision, this Court can determine that challenge itself. In my view it can and should.

43. Pursuant to section 14(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") the court may set aside the decision of the UT having determined that an error was made on a point of law. In so setting aside, the court can remit the case to the UT (section 14(2)(b)(i) of the 2007 Act) or re-make the decision (section 14(2)(b)(ii) of the 2007 Act). It follows that there is a discretion as to whether the court remits or re-makes the decision. In this case:

    i) The decision relates to the making of an error of law by the FTT which this court is well able to deal with; and

    ii) In the circumstances of this case, remitting the case would be disproportionate, both in terms of the need to deal with the matter expeditiously and to avoid incurring further expense.

44. In re-making the decision the court may make any decision which the UT could make if the UT were re-making the decision or (as the case may be) which the other tribunal or person could make if that other tribunal or person were re-making the decision (section 14(4)(a) of the 2007 Act) and make such findings of fact as it considers appropriate (section 14(4)(b) of the 2007 Act).

ISSUE (3)

45. The issue here is whether the FTT's findings in paras. 48 to 49 were open to the Judge in law.

46. The online news article upon which the FTT Judge relied (para. 8 above) relates to the case of Mr Deya and the conditions in which he was allegedly held at Kamiti Prison.

47. At para. 41 of her reasons, the Judge referred to the assessment by the Divisional Court of the article 3 issues and Kenyan prison conditions in respect of Mr Devani. The relevant part of the Divisional Court judgment, which included the assurances given, is referred to at para. 4 above. The appellant has not appealed the Divisional Court decision, which was affirmed in *R (on the application of Deya) v Secretary of State for the Home Department*- [2017] EWHC 172.

48. In considering prison conditions in Kenya the FTT accepted that they are harsh, can be life-threatening and may breach article 3 (para. 43). The Judge was satisfied that Lord Ramsbottom had inspected the prison where the appellant would be held were he "to be held in compliance with the assurances given by the Kenyan authorities" (para. 44).

49. The Judge considered the assurances given in the case of Mr Deya and stated that she was satisfied that "specific assurances were given in the Deya case that on remand Mr

Deya would be housed in the special unit at Kamiti Maximum Prison, in a single cell which he would occupy alone…" (para. 46).

50. Having considered the online news article the Judge found that "In light of the subsequent evidence relating to Mr Deya I find that there is a real risk that on return to Kenya the Appellant would not be held in keeping with the Kenyan assurances given to the High Court but would be held in conditions breaching Article 3 of the 1950 Convention" (para. 9 above).

51. The issue for this court to determine is whether this unverified news report is capable of constituting a sound evidential basis sufficient to undermine the assurances, accepted by the Divisional Court, given by or on behalf of the Republic of Kenya in respect of Mr Devani.

Relevant case law

Ahmad & Aswat v Government of United States of America [2006] EWHC 2927 (Admin); [2007] HRLR 8

52. Two alleged terrorists resisted extradition to the United States ("US") on the basis that they would be treated as enemy combatants and tried by military tribunals which would not apply the principles of law and rules of evidence recognised in the US District Courts. The District Judge determined that the individuals' rights under the Human Rights Act 1998 would not be violated since Diplomatic Notes from the US assured the Secretary of State that the individuals would be prosecuted before a Federal Court and would be afforded all the customary rights and protections. Dismissing their appeal against the District Court's decision, Laws LJ at para. 65, referring to the appellant's argument that the US Government would not honour the assurances in the Diplomatic Notes, stated that it represented "a very serious allegation of bad faith" for which there was no justification on the evidence for "so grave a charge". At para. 101 Laws LJ made two observations:

> "The first is the starting-point: Kennedy LJ's observation in Serbeh that 'there is (still) a fundamental assumption that the requesting state is acting in good faith'. This is a premise of effective relations between sovereign States. As I have said the assumption may be contradicted by evidence; and it is the court's plain duty to consider such evidence (where it is presented) on a statutory appeal under the 2003 Act. But where the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess special force. The second obstacle is linked to the first. It is a general rule of the common law that the graver the allegation, the stronger must be the evidence to prove it. In this case it has been submitted that the United States will violate, at least may violate, its undertakings given to the United Kingdom. That would require proof of a quality entirely lacking here."

RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10

53. The Secretary of State had ordered the deportation of two Algerian individuals and one Jordanian on grounds of national security. They claimed that their deportation would violate article 3 ECHR as there was a real risk they would be tortured by the State authorities on their return. The Jordanian appellant also argued that he would not receive a fair trial pursuant to article 6 ECHR since the Jordanian military were likely to use information against him which had been extracted from witnesses by torture. The appeals to SIAC were dismissed. The Court of Appeal affirmed SIAC's decisions under article 3 but upheld the Jordanian's appeal on the grounds that evidence obtained by torture was likely to be used against him at his trial.

54. The House of Lords had to determine, *inter alia*, whether assurances provided by the Jordanian State that the deportee would not face a real risk of inhuman treatment could be relied upon where there was a pattern of human rights violations in that State. At para. 126 Lord Phillips noted that the assurances were agreed in principle at the highest level in discussions between the Prime Minister and the King of Jordan and between the Foreign Secretary and the Jordanian Foreign Minister. They had also been recorded in a formal Memorandum of Understanding ("MOU"), which was the subject of criticism by the appellant's counsel upon the basis that SIAC had given undue weight to the assurances in the MOU. Lord Phillips concluded that SIAC's decision in respect of the article 3 challenge was not irrational; however the MOU was not critical to this conclusion.

55. In reviewing the assurances given and relevant authorities, Lord Phillips stated (para. 114):

> "I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon. It is obvious that if a State seeks to rely on assurances that are given by a country with a record for disregarding fundamental human rights it will need to show that there is good reason to treat the assurances as providing a reliable guarantee that the deportee will not be subjected to such treatment. If, however, after consideration of all the relevant circumstances of which assurances form part, there are no substantial grounds for believing that a deportee will be at real risk of inhuman treatment, there will be no basis for holding that deportation will violate article 3."

Khan v Government of the United States [2010] EWHC 1127 (Admin):

56. The Divisional Court (Thomas LJ (as he then was) and Griffiths Williams J) heard the appeal of a British citizen against an extradition order requiring him to face trial for drug trafficking conspiracy offences in the United States. In dismissing the appeal, Griffiths Williams J stated (para. 23):

> "There is a fundamental presumption that a requesting state is acting in good faith and the burden of showing an abuse of process rests upon the person asserting such an abuse with the standard of proof on the balance of probabilities."

Aleksynas v Lithuania [2014] EWHC 437 (Admin)

57. In addressing the appellant's case that subsequent material demonstrated that assurances given by the requesting State could not be regarded as reliable, Jay J adopted the approach of Laws LJ in *Aswat* above, namely whether in all the circumstances, the court should accept the assurances as being in fact "effective to refute, for the purposes of the 2003 Act, the claims of potential violation of Convention rights and associated bars to extradition".

Ozbek v Government of Turkey [2019] EWHC 3670 (Admin)

58. In considering an appeal which raised issues regarding prison conditions in which the appellant would be held if extradited to the Republic of Turkey and the effect of an assurance provided by the Ministry of Justice, Dingemans LJ reviewed the relevant principles relating to assurances as follows:

> "22. Even where there is evidence that there is a real risk of impermissible treatment contrary to Art.3 of the ECHR the requesting state may show that the requested person will not be exposed to such a risk by providing an assurance that the person will be held in particular conditions which are compliant with the rights guaranteed by Art.3 of the European Convention on Human Rights. Such assurances form an important part of extradition law, see *Shankaran v India* [2014] EWHC 957 (Admin) at para.59.
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> 23. The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in *Othman v UK* (2012) EHRR 1 at para.188 and para.189 and those principles have been applied to assurances in extradition cases in this jurisdiction, see *Badre v Court of Florence, Italy* [2014] EWHC 614. The overarching question is whether the assurance is such as to mitigate the relevant risks sufficiently. That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities will make every effort to comply with the undertakings, see *Dean (Zain Taj) v Lord Advocate* [2017] UKSC 44; 1 WLR 2721 at para.36.
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> 24. The Court may consider undertakings or assurances at various stages of the proceedings, including on appeal, see *Florea v Romania and USA v Giese* [2015] EWHC 2733 (Admin), and the Court may consider a later assurance even if an earlier undertaking was held to be defective, see *Dzgoev v Russia* [2017] EWHC 735 at para.68 and para.87.

> 25. It is established that an assurance is not evidence. This is because it is a diplomatic assurance provided by the requesting state about the future treatment of the requested person."

Conclusion

59. The case law demonstrates:

    i) That the courts of England and Wales will, as a general rule, be reluctant to question the reliability of assurances provided by a requesting State in relation to prison conditions;

    ii) An argument that a foreign State will not honour assurances represents a very serious allegation of bad faith and the evidence required to displace good faith must possess "special force" (*Aswat* above);

    iii) There is no principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon; the issue is whether no reasonable tribunal, properly instructed as to the relevant law, could have reached the same conclusion on the evidence (*RB (Algeria)* above);

    iv) There is a fundamental presumption that a requesting State is acting in good faith and the burden of showing an abuse of process is on the person who asserts it, with the standard of proof being the balance of probabilities (*Khan* above).

60. Underpinning the scrutiny which a court brings to assurances and any conclusions to be drawn from them is the principle of international comity and the public interest in upholding an effective system of extradition.

61. In this case, specific assurances had been given by senior office holders in Kenya which were accepted by the Divisional Court. In considering this article 3 challenge a court should begin with the presumption that the Republic of Kenya was acting in good faith.

62. At the hearing Ms Broadfoot QC, on behalf of Mr Devani, submitted that a distinction may be drawn between an allegation of bad faith on the one hand and an inability to effectively uphold assurances on the other. Alleging that a State has made assurances which it knows it does not have the resources to uphold is, in my view, not materially different from alleging that the assurances are provided in bad faith.

63. The evidence before the Judge was an online news report. It is unverified and is no more than anecdotal evidence that Kenya had breached assurances in respect of another person. Mr Deya was, to put it no higher, a witness whose reliability was highly questionable. To the extent that the report was based on statements by Mr Swaka, Mr Deya's lawyer, he was a witness whose evidence had already been held by FTTJ Sullivan to be unreliable.

64. In my view, the weight to be attached to this news report is limited. It has no special force. It does not begin to provide the evidential weight required to undermine the specific assurances given by senior office holders in Kenya. To make the finding which she did, the Judge must have attached considerable weight to this report which it simply does not carry. In my judgment, it was an assessment of evidential weight which can only be described as perverse and as such represents an error of law. The article did

not undermine the specific assurances given by the Kenyan officials. They are assurances which have been accepted in order to meet the respondent's challenge that in extraditing Mr Devani his article 3 rights would be breached.

65. Accordingly, and for the reasons given, I would allow the appeal and would determine that Mr Devani's extradition to Kenya would not breach his article 3 rights.

Males LJ:

66. I agree with both judgments.