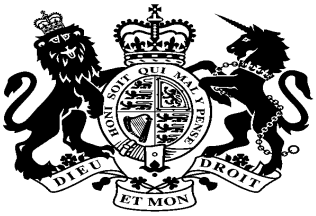

Upper Tribunal
(Immigration and Asylum Chamber)

PA/11180/2019
PA/11273/2019 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*
On 20 January 2021

Decision & Reasons Promulgated
On 3 February 2021

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

L A R & K T A

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: *Mr S Winter, Advocate, instructed by Jones Whyte LLP, Solicitors, Glasgow*
For the Respondent: *Mrs H Aboni, Senior Home Office Presenting Officer*

DETERMINATION AND REASONS

1. This determination is to be read with:

   (i) The respondent's decisions dated 5 November 2019.

   (ii) The appellants' grounds of appeal to the First-tier Tribunal.

   (iii) The decision of FtT Judge Clapham, promulgated on 24 April 2020.

   (iv) The appellant's grounds of appeal to the UT.

   (v) The grant of permission by the FtT, dated 27 May 2020.

   (vi) The note of argument for the appellants, dated 15 September 2020.

(vii) The respondent's submissions / rule 24 response dated 18 September 2020.

(viii) The note and directions by UT Judge Smith dated 29 October 2020, with a view to a remote hearing.

2. The technology enabled an effective remote hearing. There was no facility to record the hearing, but representatives agreed that was unnecessary.

3. The grounds, set out in some detail, are enumerated as (1) failure by respondent to verify documentary evidence; (2) "*Mibanga*" point, reaching adverse credibility finding at [68] prior to surveying all the evidence; and (3) plausibility, (i) – (vi). They are further expanded upon in the note of argument.

4. The grant of permission observed that error was contingent on whether it had been put to the FtT that this was an exceptional case in which the respondent was required to verify the documents adduced by the appellants. The note by UT Judge Smith states that the issue was not raised in the FtT and the UT will need to consider whether it was "*Robinson* obvious".

5. Mr Winter's submitted along the lines of the grounds and note. Mrs Aboni submitted that the respondent had not come under a duty of verification; the judge did not decide without considering all the evidence; and the rest of the grounds were only disagreement. I am obliged to both representatives for their assistance.

6. I reserved my decision.

7. To show that the respondent had a duty to verify documents from the lawyer in Iraq, Mr Winter founded firstly on *PJ (Sri Lanka) v SSHD* [2015] 1 WLR 1322, [2014] EWCA Civ 1011, where Fulford LJ, with whom the two other judges agreed, said:

> 29. In my judgment, there is no basis in domestic or ECHR jurisprudence for the general approach that Mr Martin submitted ought to be adopted whenever local lawyers obtain relevant documents from a domestic court, and thereafter transmit them directly to lawyers in the United Kingdom. The involvement of lawyers does not create the rebuttable presumption that the documents they produce in this situation are reliable. Instead, the jurisprudence referred to above does no more than indicate that the circumstances of particular cases may exceptionally necessitate an element of investigation by the national authorities, in order to provide effective protection against mistreatment under article 3 ECHR. It is important to stress, however, that this step will frequently not be feasible or it may be unjustified or disproportionate. In *Tanveer Ahmed* the court highlighted the cost and logistical difficulties that may be involved, for instance because of the number of documents submitted by some asylum claimants. The enquiries may put the applicant or his family at risk, they may be impossible to undertake because of the prevailing local situation or they may place the United Kingdom authorities in the difficult position of making covert local enquiries without the permission of the relevant authorities. Furthermore, given the uncertainties that frequently remain following attempts to establish the reliability of documents, if the outcome of any enquiry is likely to be inconclusive this is a highly relevant factor. As the court in *Tanveer Ahmed* observed, documents should not be viewed in isolation and the evidence needs to be considered in its entirety.
>
> 30. Therefore, simply because a relevant document is potentially capable of being verified does not mean that the national authorities have an obligation to take this step. Instead, it may be

necessary to make an enquiry in order to verify the authenticity and reliability of a document – depending always on the particular facts of the case – when it is at the centre of the request for protection, and when a simple process of enquiry will conclusively resolve its authenticity and reliability (see *Singh v Belgium* [101] – [105]). I do not consider that there is any material difference in approach between the decisions in *Tanveer Ahmed* and *Singh v Belgium*, in that in the latter case the Strasbourg court simply addressed one of the exceptional situations when national authorities should undertake a process of verification.

31. In my view, the consequence of a decision that the national authorities are in breach of their obligations to undertake a proper process of verification is that the Secretary of State is unable thereafter to mount an argument challenging the authenticity of the relevant documents unless and until the breach is rectified by a proper enquiry. It follows that if a decision of the Secretary of State is overturned on appeal on this basis, absent a suitable investigation it will not open to her to suggest that the document or documents are forged or otherwise are not authentic.

32. Finally, in this context it is to be emphasised that the courts are not required to order the Secretary of State to investigate particular areas of evidence or otherwise to direct her enquiries. Instead, on an appeal from a decision of the Secretary of State it is for the court to decide whether there was an obligation on her to undertake particular enquiries, and if the court concludes this requirement existed, it will resolve whether the Secretary of State sustainably discharged her obligation (see *NA (UT rule 45: Singh V Belgium)* [2014] UKUT 00205 IAC). If court finds there was such an obligation and that it was not discharged, it must assess the consequences for the case.

8. The other principal case on which Mr Winter relied was *AR v SSHD* [2017] CSIH 52, where Lord Malcolm gave the opinion of the Court:

> 35. We remind ourselves of the need to examine the facts with care (sometimes referred to as "anxious scrutiny"), and of the low standard of proof applicable in cases of this nature ... We recognise that there may be cases where the concerns over the veracity of a claimant's account may be so clear-cut that the decision-maker is driven to rejection of supporting documents, even though on their face they appear to be authentic; but even then, given what is at stake, we would expect some consideration to be given to easily available routes to check authenticity. There is no question that these documents are at the centre of a request for international protection. The decision-maker should stand back and view all of the evidence in the round before deciding which evidence to accept and which to reject, and on the proper disposal of the appeal.

9. *Robinson*, [1997] EWCA Civ 3090, is the leading case on when it may be an error of law for tribunals not to deal with a point which an appellant has not mentioned:

> 38. It is now, however, necessary for us to identify the circumstances in which it might be appropriate for the Tribunal to grant leave to appeal on the basis of an argument not advanced before the special adjudicator, or for a High Court judge to grant leave to apply for judicial review of a refusal of leave by the Tribunal in relation to a point not taken in the Notice of Appeal to the Tribunal.
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> 39. Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is

> readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious". Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do…

10. I apply the principles around the duty to verify, and around obvious points, to the facts of this case.

11. The FtT said at [75] about documents produced by the first appellants, including an arrest warrant, that she had "not sought to have these confirmed by the lawyer" since she had been in the UK and that "presumably this could have been a relatively straightforward matter". Not only for absence of such confirmation, but for reasons of discrepancies and implausibility, he was led to "question the provenance of this paperwork."

12. It has not been suggested that there is anything factually wrong with the judge's remark that it would have been relatively straightforward for the appellant, who has to make her case, to ask from the UK for confirmation from the lawyer.

13. The respondent's refusal reasons, and the FtT's reasons, were not only concerned with the lack of authenticity of the documents. The documents did go to significant aspects of the case, but it is far from clear that much of the uncertainty about the claims might have been removed by efforts to verify.

14. It is exceptional, not routine, for the duty to establish any part of the case to pass from the appellants to the respondent. The appellants might easily have put it to the respondent that theirs was such an exceptional case while their claim was being considered; in response to the refusal letter; in their grounds of appeal to the FtT; or in their submissions to the FtT. To spring this as a surprise at the hearing would have been unsatisfactory. It should not have been withheld until filing grounds of appeal to the UT. The appellants have had the same legal representatives throughout. No explanation has been advanced for advancing this allegedly obvious argument only as an afterthought.

15. Given the nature of this jurisdiction, tribunals are slow to penalise appellants for procedural failures or for the shortcomings of their representatives. However, ground 1 fails not only because it is advanced late, but because it is weak. The appellants have not shown that they should have benefited from an obvious point of Refugee Convention law with such strong prospects of success that the FtT was bound to take it in their favour, although it had never been raised.

16. Ground 2 does not fairly represent the decision. The judge says at [68] that she has major issues with the first appellant's credibility, but that is "notwithstanding the

various documents" which she will deal with later. That is not a conclusion against the appellant, followed by asking if the documents displace it; it is a consideration in the round. Matters must be considered in some order. It might deflect criticism to state a conclusion only at the end, but error can be shown only by reading a decision fairly and as a whole.

17. Ground 2 (vi) is directed against [78], where the FtT said there was "no official medical report". This is said to overlook that there was a report from a hospital in Kurdistan, and to show inadequacy of assessment, although it has not been specified how much further examination of that report might have taken the case.

18. Mrs Aboni suggested that the judge had in mind that nothing had been obtained in the UK, because she mentions the absence of any report on consistency of injuries and narrative in terms of the Istanbul protocol.

19. The judge might ideally have been more specific, but I think the submission for the respondent is correct. The matters to which the judge refers would be expected to appear in a report obtained in the UK for purposes of asylum proceedings, but not in hospital records from Iraq.

20. Beyond that, grounds 2 and 3 are simply insistence and selective disagreement on the facts, presented under legal headings. They do not show that the decision, read fairly and as a whole, contains any errors, or is a less than legally adequate explanation to the appellants why their claims have not been established.

21. The decision of the FtT shall stand.

22. An anonymity direction remains in place. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Hugh Macleman

21 January 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.