

IN THE UPPER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBERS) JR/1484/2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

A.O.L. (Philippines)

Applicant

-and-

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

FINAL ORDER

Before the Honourable Mrs Justice Thornton DBE, sitting in the Upper Tribunal (Immigration & Asylum Chamber) at Field House, 15-25 Bream's Buildings, London EC4A 1DZ.

UPON considering the hearing bundle and the skeleton arguments from Counsel for the Applicant and Counsel for the Respondent;

AND UPON hearing from Counsel for the Applicant and Counsel for the Respondent at a hearing on 16 June 2022.

IT IS ORDERED THAT:

1. The application for judicial review is granted for the reasons set out in the judgment.
2. The Respondent's decision to refuse to accept the Applicant's further submissions of 17 September 2021 as a fresh protection claim pursuant to ¶353 of the Immigration Rules be quashed.
3. The Applicant to have 28 days to submit any further evidence or representations following the sealing of this order;
4. The Respondent to make a decision, in accordance with the judgment of the court, on the Applicant's application within three months thereafter, absent special circumstances and subject to further investigation;
5. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) no one shall publish or reveal the name or address of AOL who is the subject of these proceedings or publish or reveal any information

which would be likely to lead to the identification of AOL or of any member of AOL's family in connection with these proceedings.

6. The Respondent is to pay the Applicant's reasonable costs of the claim, to be assessed if not agreed.
7. The Applicant's publicly funded costs are to be subject to detailed assessment
8. Neither party sought permission to appeal to the Court of Appeal and, having considered this issue myself as I am required to do by rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008, I refuse to grant permission as there are no properly arguable points of law raised on the facts of the case.

BY ORDER OF THE COURT

21 July 2022



Case No: JR/1484/2021

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breems Buildings
London, EC4A 1WR

14/07/2022

Before:

THE HON. MRS JUSTICE THORNTON DBE

Between:

THE QUEEN
on the application of
A.O.L. (PHILIPPINES)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Rudolph Spurling
(instructed by Duncan Lewis), for the applicant

Benjamin Seifert
(instructed by the Government Legal Department) for the respondent

Hearing date: 16th June 2022

J U D G M E N T

Mrs Justice Thornton DBE:

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Introduction

1. The Applicant, a national of the Philippines, seeks judicial review of the Respondent's decision, dated 19 September 2021, that further submissions relating to her asylum claim did not amount to a fresh claim, pursuant to paragraph 353 of the Immigration Rules.
2. The key evidence in this regard is a warrant of arrest, purportedly issued by a regional trial court in the Philippines, dated 27 August 2021, ordering the Applicant's arrest for the crime of rebellion. The evidence was provided to the Respondent in support of the Applicant's claim that there is a real risk of persecution if she returns to the Philippines. The decision maker acting on behalf of the Secretary of State rejected the document as unreliable evidence, to which little or no weight could be attached.
3. The Applicant submits that, in considering the document, the decision maker failed to direct his mind to the question of whether an immigration judge could rationally conclude that it discloses grounds for considering that the Applicant faces a real risk of persecution on return to the Philippines. Instead, the decision maker restricted his assessment to the Secretary of State's view of the document.
4. In response, the Secretary of State submits that the decision letter expressly sets out the correct legal test; the decision maker considered the warrant carefully; the errors include a fundamental and repeated error in the spelling of the country name ('Philippine') and the document would never persuade an immigration judge to come to a different view from the view arrived at by the Secretary of State.

Factual Background

5. The Applicant's immigration history is lengthy, dating back to 2009 when she applied for and was granted entry clearance as a Tier 4 (General) Student. On 18 May 2016, she made an initial asylum claim on the basis that she feared persecution and imprisonment upon returning to the Philippines due to money she owed to the Philippine bank. Her claim was rejected by the Secretary of State, by letter dated 16 November 2016.
6. The Applicant made subsequent submissions regarding her asylum claim asserting that she has a fear of persecution upon her return to the Philippines because her husband is believed to have been involved with the National People's Army (NPA) and she is viewed as the wife of a rebel and accused of financially supporting the NPA. Her submissions included an email from her sister warning her that she would be in trouble with the state authorities if she returned. Her submissions were refused as a fresh claim by letters dated 8 July 2021 and 25 August 2021, on the basis she had failed to provide any objective evidence to support her assertions.
7. The Applicant submitted further submissions by letter dated 17 September 2021, including the warrant for her arrest. The Secretary of

State refused the submissions as amounting to a fresh claim by letter dated, 19 September 2021, the key extracts of which provide as follows:

Further submissions

12 Your further representations in relation to your client's asylum and medical health have been carefully considered under paragraph 353 of the Immigration rules and within the guidance of WM (DRC) and AR (Afghanistan) [2006] EWCA Civ 1495. For the reasons set out in this letter, it is not believed this taken together with the previously considered material, create a realistic prospect of success before an Immigration Judge.

...

14 In the recent correspondence, you reiterate that your client's husband was affiliated with the NPA and she is being accused of funding the rebellion. It is noted that you failed to provide any material evidence to demonstrate that your client's husband has been involved with the NPA. You provide a warrant of arrest dated 27 August 2021 as evidence that your client is being sought after by the authorities for rebellion. However, for the following reasons, little to no weight can be attached to the document:

- The reliability of the document is questionable due to the inconsistencies identified in comparison to other Philippine warrant of arrest documents. For example, the document states "THE PEOPLE OF THE PHILIPPINE", when looking at other warrant of arrest documents this is written as "PEOPLE OF THE PHILIPPINES", or "THE PEOPLE OF THE PHILIPPINES", it is not clear why this error would be made on an official document. Also, the use of punctuations in other arrest warrant documents do not correlate with what is presented in the document you provide. This shows a lack of consistency between the warrant of arrest document you have provided to other Philippine arrest warrant documents, casting doubt on the legitimacy of the document.*
- The layout of the document also appears abnormal as some words in the document look doctored such as "FOR REBELLION". Further the document states that authorities are "commended to arrest..." rather than "commanded" adding further to the doubt of the validity of the document. It is noted that there is 'certified true copy' stamp on the document, however, not much else can be discerned from this due to the stamp fading out. It cannot be established that this was made by a trusted authority and as a result does not confirm the validity of the document.*

15 For these reasons, applying the guidance in the case of Tanveer Ahmed, when the document you have now submitted is considered in the round with the rest of your client's claim, little to no weight can be attached to it. It is therefore not accepted the document carries any evidential weight in relation to the core elements of your client's claim, her supposed imputed political opinion or accusation that she has

financially supported the NPA. It follows that the document is also not accepted as reliable evidence in support of your client's claim of the likelihood of being exposed to a real risk of persecution or harm on grounds of being considered as the wife of a rebel or accused of funding the NPA.

8. The Applicant applied for judicial review of the decision.
9. For the purposes of these proceedings, the decision maker subsequently provided a witness statement annexing seven examples of arrest warrants and explaining the decision-making process as follows:

4 In considering the Applicant's arrest warrant dated 27 August 2021, I viewed various Philippine arrest warrants to ascertain the authenticity of the document. These arrest warrant examples were obtained via multiple internet's sources which include Yahoo News, CNN Philippines, and NPR. To ensure careful adequate consideration was given, I further sought to identify arrest warrant examples specific to the region (Exhibit 3 and 4), year of service (Exhibit 3), and accusation (Exhibit 7).

5 Upon review of the examples, I accepted that there is no universal format for the arrest warrants. I considered the possibility that each presiding Judge or Regional trial court could have their own structure of drafting warrants. However, I identified commonalities that were shared across all the examples I reviewed and noted that these commonalities were not present in the Applicant's arrest warrant dated 27 August 2021 for the reasons mentioned below.

6 Firstly, all the arrest warrants that I viewed would state "THE PEOPLE OF THE PHILIPPINES" or "PEOPLE OF THE PHILIPPINES", whereas the Applicant's arrest warrant stated, "THE PEOPLE OF THE PHILIPPINE". The error is emphasized especially as the header of the document correctly states "REPUBLIC OF THE PHILIPPINES. Please see enclosed exhibits 1 to 7.

7 Secondly, there was the absence of punctuations that were identified across all arrest warrants viewed. In particular, there are a set of punctuations that follow the 'plaintiff' and accused section of the warrant. I found that on each warrant I viewed there was a comma after the plaintiff had been stated and a comma and full stop after the accused had been stated. (See exhibits 1 to 7). In addition, in all the arrest warrants viewed where "criminal case number" is abbreviated, it was always written as "CRIMINAL CASE NO", this punctuation is also missing in the warrant received from the Applicant (see exhibits 2, 4, 6 and 7).

8 I further examined the general layout of the document and it appeared to me to be doctored, especially when looking at the top section of the warrant where the wordings appear out of place. However, I admit I did not consider the possibility of this being a result of the way the document may have been photocopied/handled.

9 Finally, the address stated in the arrest warrant differs to the address that was provided to the Home Office by the Applicant. The address on the warrant is Purok 2, Barangay Rizal, Monkayo, Comval Province. The address provided to the Home Office since 2009 and reconfirmed in 2021 is 12 Sto.Nino Street, Lanang Executive Homes, Davao, Philippines. It was not clear why the court would state the Applicant's address on the warrant as Purok 2, especially when the Applicant is confirmed to have resided since 2 Sto.Nino Street as her Philippines address since 2009.

10 I discussed my findings with the OSCU duty manager, and we agreed that taking the discrepancies identified as a whole and the evidence provided in the round, we could attach little weight to the document. Following my discussion with the duty manager, I drafted my decision letter maintaining removal.

10. Permission to apply for judicial review was refused on the papers by an Upper Tribunal Judge on the basis that:

"These grounds for review are in reality only a disagreement with the outcome of the applicant's further submissions. The respondent's doubts about the reliability of the arrest warrant are neither perverse nor Wednesbury unreasonable"

11. Permission was subsequently granted on a renewed application with the reasons given as follows:

"The applicant has produced evidence to support her claim to fear of persecution including an arrest warrant. Permission is granted because it is at least arguable that the respondent's consideration of the new material failed to comply with the requirement of anxious scrutiny and, in addition, there is arguably a realistic prospect of success in an appeal to the first-tier Tribunal given the lower standard"

The law

12. The criteria by which further representations from a failed asylum seeker fall to be treated as a fresh claim are set out in paragraph 353 of the Immigration Rules. To amount to a fresh claim, the submissions have to be 'significantly different from the material that has previously been considered'. The submissions will only be significantly different if the content:

- has not already been considered; and
- taken together with the previously considered material, created a realistic prospect of success notwithstanding its rejection.

13. The second limb of the test was considered by the Court of Appeal in (WM(DRC) v SSHD [2006] EWCA Civ 1495). The task of the Secretary of State is to consider whether the new material, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. The Secretary of State's judgment in this regard

will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. In this respect, the test that an application has to meet before it becomes a fresh claim, is 'somewhat modest'. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of the Secretary of State must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution.

14. As regards the task of the Court; the Secretary of State's decision as to whether a fresh claim exists is only capable of being impugned on Wednesbury grounds. When reviewing a decision of the Secretary of State, the Court must ask firstly, whether the Secretary of State asked herself the correct question? The question is not whether the Secretary of State herself thinks that the new claim is a good one or should succeed but whether there is a realistic prospect of an Immigration Judge, applying the role of anxious scrutiny thinking that the applicant will be exposed to a real risk of persecution on return. The Secretary of State can treat her own view of the merits as a starting point for that enquiry; but it is only a starting point in the consideration of a question that is distinctly different from the Secretary of State making up her own mind. Secondly, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the Court cannot be satisfied that the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision. In R(TK) v SSHD [2009] EWCA Civ 1550, a realistic prospect of success was put as meaning only a prospect of success which is more than fanciful.

Home Office guidance on further submissions

15. The Home Office guidance for caseworkers on further submissions is contained in the Asylum and human rights policy instruction *Further submissions*, Version 9.0, published 19 February 2016. It provides as follows at page 20:

"If the material has not previously been considered, caseworkers must assess whether the new material, taken together with material previously considered, creates a realistic prospect of success. The question is whether the issues raised are at least arguable and could lead an Immigration Judge to take a different view...."

Consideration includes old and new material

Caseworkers must consider all the available evidence when deciding whether there is a realistic prospect of success at appeal. Where further submissions are based wholly or partly on new evidence, this must not

be considered in isolation, but must be considered in conjunction with the material previously submitted. The question is whether in light of all the evidence available, the new material could persuade an Immigration Judge-in other words whether it is arguable notwithstanding rejection."

(Underlining is Court's emphasis)

Analysis

16. There was no disagreement between the parties as to the factual background or the law.
17. It was common ground that the first limb of the test in paragraph 353 of the Immigration Rules is satisfied in that the arrest warrant had not previously been considered.
18. It was also common ground that there is no error of law in the decision maker examining the arrest warrant, reaching a conclusion on its (un)reliability on behalf of the Secretary of State and providing reasons for that assessment.
19. The core dispute between the parties was whether the decision maker went further, as required by case law and internal Home Office guidance and considered whether an immigration judge might reach a different view on the evidence.
20. In this regard, Counsel for the Secretary of State points to the express, and correct, citation of the legal test in the decision letter at §12 (*...For the reasons set out in this letter, it is not believed this taken together with the previously considered material, create a realistic prospect of success before an immigration judge (emphasis added)*).
21. I accept that the test is correctly set out in the decision letter. I am not however persuaded that the test was engaged with. The witness statement before the Tribunal explains the decision-making process. At paragraph 8 the decision maker admits that, having formed the view that the document was doctored, he did not consider the possibility of this being a result of the way the document may have been photocopied or handled. At paragraph 10 he explains that he discussed the findings with the OSCU duty manager and 'we agreed that taking the discrepancies identified as a whole and the evidence provided in the round, we could attach little weight to the document. Following my discussion with the duty manager, I drafted my decision letter maintaining removal' (emphasis added). There is no indication that the author of the statement or the OSCU duty manager considered whether an immigration judge might reach a different view on the evidence.
22. Counsel for the Secretary of State submitted that it is apparent from the reasoning in the document that the conclusion reached by the author was that the arrest warrant could never have persuaded a tribunal to come to a different view. In this regard, he highlighted the fundamental nature of a repeated error in the spelling of the country in question.

23. However, the seven arrests warrants exhibited to the witness statement differ in layout, format, font and style. Having reviewed them, including warrants from the relevant region of the Philippines, the decision maker accepted that there was no universal pro-forma for the arrest warrants. The absence of a pro-forma document gives rise to the prospect of human error in its drafting, particularly given, as emerged during the hearing, there are two official languages in the Philippines (English and Filipino). This raises the prospect of an author drafting in a second language. There was therefore a basis on which a first-tier Tribunal judge, applying anxious scrutiny, could take the view, without acting irrationally, that the warrant discloses grounds for considering the Applicant will be exposed to a real risk of persecution on return, given the lower standard of proof in asylum claims (*'a reasonable chance, 'substantial grounds for thinking', 'a serious possibility'...* Sivakumuran, R (on the application of) v Secretary of State for the Home Department [1987] UKHL 1). I accept that the position might well have been different had the arrest warrants been produced on a pro forma template, but that is not the case here, as the decision maker accepted.
24. The fact that the decision maker identified other arrest warrants which do not contain mistakes may indicate that the warrant in this case was not drawn up by the same person(s) who drew up the seven warrants exhibited to the witness statement. It does not, however, go as far as to mean that an error on the face of the warrant under scrutiny is necessarily fatal to its reliability, given the surrounding circumstances explained above.
25. Accordingly, applying the test in WM (DRC) v SSHD, I am not satisfied that the Secretary of State addressed the question of whether there is a realistic prospect of an Immigration Judge, considering the arrest warrant and applying the role of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. Accordingly, it is necessary to grant the application for review of the decision.

Decision

26. For the reasons set out above, the claim for judicial review succeeds.