OUTER HOUSE, COURT OF SESSION

[2022] CSOH 72

P298/22

OPINION OF LORD BRAID

In the Petition

KTT

Petitioner

for

Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 17 January 2022 refusing permission to appeal to itself

Pursuer: Winter; Drummond Miller LLP, as agents for Latta and Co Solicitors
Defender: Maciver; Scottish Government

4 October 2022

Introduction

[1] The issue raised by this petition for judicial review is whether the Upper Tribunal (UT) erred in law in refusing permission to appeal against a decision of the First-tier Tribunal (FtT), by failing to recognise that the FtT had arguably erred in law in refusing the petitioner's appeal against the refusal of his asylum claim. The petition is opposed by the Advocate General, as representing the Secretary of State for the Home Department.

[2] In deciding whether the UT erred it is necessary to look at the FtT's decision in order to ascertain whether it arguably erred in law: *Ahmed & Others* v *Secretary of State for the Home Department* [2020] CSIH 59, Lord Glennie at paragraph [9]. If it did arguably so err, the UT 's

failure to recognise same will itself be an error of law, resulting in its decision to refuse leave falling to be reduced.

Background

[3] The petitioner is a national of Vietnam. He arrived in the UK on 4 February 2017 and claimed asylum on 17 March 2017, maintaining that he was at real risk due to his political activities. One of his claims was that he had been arrested and detained by police for approximately 8 hours because he had thrown stones at police in the course of a protest. He said he had escaped from police custody with the help of a security guard and had subsequently fled Vietnam. He was a person of interest to the Vietnamese authorities were he to be returned.

[4] The petitioner's asylum claim was refused on 15 September 2017. His appeal against that refusal was in turn refused by the FtT on 17 November 2017. In particular, the FtT did not find the petitioner's claim to have escaped from police custody to be credible. He lodged further submissions in terms of rule 353 of the Immigration Rules. These were refused on 13 August 2018. Following a successful judicial review, the Home Office agreed to reconsider his further submissions. They were refused on 17 February 2021. The petitioner again appealed to the FtT. By decision dated 27 August 2021 (the decision against which the petitioner seeks permission to appeal) his appeal was refused. He then applied to the FtT for permission to appeal to the UT. For reasons not relevant to this petition the application was lodged late. The FtT refused to extend time to allow it to be received timeously and in any event refused permission by decision dated 25 November 2021.

[5] The petitioner then applied to the UT for permission to appeal. By decision dated 17 January 2022, the UT refused permission. It is that decision which is the subject of this

petition and which the petitioner wishes to have reduced. (In passing, I note that the UT did not explicitly deal with whether it was in the interests of justice for the application to be admitted, as it ought to have done. However counsel were in agreement that this was not a matter which need trouble this court, since if the petitioner is successful in having the UT's decision reduced, the UT will then be able to deal with that issue when considering, of new, whether to grant permission to appeal.)

[6] Central to the petitioner's further submissions and to his appeal to the FtT were two pieces of evidence which were not before the first FtT, viz, (first) a police summons dated 21 November 2016 (described as a 2nd copy) served on the petitioner which required him to attend at a police station on the following day to clarify an event in May 2015 when "you acted against officers in duty and gathered a large amount of people to disturb public order in Ha Tinh Province"; and (second) an expert report from Dr Tran Thi Lan Anh commenting on, among other things, the authenticity of the summons. Her view was that it was authentic, and at paragraph 1.2 of her report, she listed four cogent reasons as to why she had reached that view.

[7] The question of whether the FtT arguably erred is based upon its approach to, and treatment of, that evidence – which, were it accepted, would support the petitioner's claim that he was a person of interest to the Vietnamese authorities (whether or not he had escaped from police custody).

The reasoning of the FtT judge

[8] The starting point in considering whether the FtT judge arguably erred is to have regard to what the first FtT judge had said at paragraph 29 of his decision, quoted by the second FtT at paragraph 17:

> "[29] He claimed that he was arrested and detained because he threw stones at the police and detained for approximately 8 hours but was able to escape from custody with the help of a security guard. There appears to be no reason why the security guard would have assisted him. He has attempted to state that perhaps the security guard was acting for the authorities and helping him to escape so that he can also be charged with escaping custody. This is at best speculation, at worst simply a lie to attempt to resolve an inherent problem regarding his escape and that he could give no reason why he should be picked by the security guard to be assisted to escape".

Having noted that passage, the FtT judge then continued, at paragraph 18:

> "18. The judge in my view rightly rejected this claim, but taking it as made, he was in a very serious position as a result of defying police authority in escaping. In those circumstances I do not believe the police would issue a pro forma summons of the type he has produced. They would not be seeking clarification of the event on 15 May 2015, requiring him to attend voluntarily with the sort of warning endorsed on the summons (page 64 respondent's bundle). What rational basis would they have for believing he would respond to a summons served in this way or by leaving it with a neighbour? Furthermore, this is said to be the second such summons issued against him within 18 months with two attempts at service. I have to wonder on that basis when the police actually become serious in their activity. Given what he had allegedly done, the police would surely have arrested him on the spot and taken him into detention to continue where they had left off. The summons is left with a neighbour, he says, and she is conveniently able to pass it on to him in this country. I find that implausible."

(I observe in passing that the judge did not state merely that it was unlikely that the police would have acted in the manner claimed, but that would not have done so).

[9] The judge then dealt with the expert report at paragraphs 19 and 20 of his decision, as follows:

> "19. In regard to Dr Anh's opinion, she gives detailed consideration to the summons on several issues. She says it appears to be genuine and in the correct standard format. The address matches the local police station. The stamps appear to be genuine and she even describes how the government approved copper stamps are got. She says she has traced the person who signed the summons, Major Le Tien Dung, and that he is a genuine person within the police.
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> 20. But she does not comment (if she can) on the summons procedure itself, the fact that this is apparently the second one issued and which has not been responded to, and the appellant's improbable claim that it was left with his neighbour. She does not comment on whether documents of this nature can be obtained as a result of corruption within the police. Simply because a document looks genuine does not mean it has been authentically issued."

[10] On the question of any duty to verify the authenticity of the summons, the judge said this:

> "21. In considering the documents I am guided by the decision of the Upper Tribunal in *QC (verification of documents; Mibanga duty) China* [2021] UKUT 00033 (IAC). The decision of the Immigration Appeal Tribunal in *Tanveer Ahmed* [2002] UKIAT 00439 remains good law as regards the correct approach to documents produced in immigration appeals. The overarching question for the judicial factfinder will be whether the document in question can be regarded as reliable. An obligation on the respondent to take steps to verify the authenticity of the document relied upon by the appellant will arise only exceptionally (in the sense of rarely).
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> 22. *Tanveer Ahmed* confirms that a decision maker should consider whether a document is one in which reliance should properly be placed after looking at all the evidence in the round. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that the document is reliable. The decision maker still needs to apply the principle that in asylum and human rights cases it is for the individual claimant to show that a document on which he seeks to rely can be relied upon and the responsibility to consider the document in light of all the evidence looked at in the round. "

[11] As for the approach to be taken to a consideration of the further submissions, the FtT judge said:

> "23. In this case I also have to take into account in accordance with the decision in *Devaseelan*[1] that the first judge's decision should always be the starting point. It is the authoritative assessment of the appellant's status at the time it was made. Facts happening since the first judge's determination can always be taken into account by the second judge…"

[12] In paragraphs 24 to 29 of the decision the FtT judge discusses various aspects of the petitioner's evidence, commenting on certain inconsistencies, and aspects of the evidence which the judge found to be incredible and which he plainly did not accept. At paragraph 30, the judge draws the following conclusion:

> "30. Having considered the police summons and all the evidence connected with it including the previous judge's conclusions I find this has been brought into existence to bolster his claim and thereby undo his decision. In the circumstances I give it little

[1] *Devaseelan* v *Secretary of State for the Home Department* [2002] UKIAT 702

> weight and do not accept that there is an obligation on the respondent to have it verified."

[13] In summary, the FtT judge (as had the first FtT judge) found the petitioner's claim that he was wanted by police to be incredible, notwithstanding the summons, which he found to be unreliable.

[14] As the argument before me developed, it focussed on three discrete issues:

a. Whether the FtT erred by treating the first FtT decision as an *a priori* reason to reject the summons as genuine; and, linked to this, whether the FtT's reasoning betrayed a rejection of the summons as genuine before considering all of the other evidence, including the expert report.

b. Whether the FtT erred by failing to state what it made of the expert evidence.

c. Whether the FtT had erred in its approach to the failure of the Home Office to have verified the authenticity of the summons.

[15] However, all of these criticisms ultimately boil down to the single question of whether the judge erred in his approach to assessment of credibility and reliability.

Approach to credibility and reliability - the law

[16] First-tier Tribunal judges do not have an entirely free hand in assessing credibility and reliability in asylum cases. Various principles have been laid down by the courts so that issues of credibility and reliability are approached in a structured manner. It is a well-established principle (described as such by Ryder LJ in *AM (Afghanistan)* v *Secretary of State for the Home Department* [2018] 4 WLR 78, at paragraph 19), that credibility should be determined on a holistic assessment, it being an error of approach to come to a negative assessment of credibility and then ask whether that assessment is displaced by other

material. See also *AR* v *Secretary of State for the Home Department* [2017] CSIH 52 at paragraph 35, a decision of the Inner House, where it was said that 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". Further, care must be taken in rejecting a particular account because it is, in the view of the decision maker, implausible: see *KB & AH (credibility structured approach) Pakistan* [2017] UKUT 00491 (IAC) at paragraphs 28 and 30, referring to certain *dicta* of Neuberger LJ in *HK* v *Secretary of State for the Home Department* 2006 EWCA Civ 1037 at [28] to [30], in turn referring to *dicta* of Lord Brodie in *Awala* v *Secretary of State* [2006] CSOH 73. I take from these cases that a fact-finder is entitled to reject a story because it is implausible, provided that conclusion is arrived at on a proper, holistic, consideration of all the other evidence in the case, including expert evidence, and is based on reasonable inferences, rather than speculation or conjecture. The fact-finder must always bear in mind that actions which may appear implausible judged by Scottish standards might be plausible when considered within the context of an applicant's social and cultural background.

[17] Insofar as verification of documents is concerned, the law was recently summarised in *QC (Verification of documents; Mibanga duty) China* [2021] UKUT 00033 (IAC), in which the authorities were canvassed, including *PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2014] EWCA Civ 1011. An obligation to verify the authenticity of a document will arise only exceptionally (in the sense of infrequently) and then only where (i) the document is at the centre of the request for protection, (ii) there is a simple process of verification, which (iii) will conclusively resolve both authenticity and reliability (paragraph 24). The consequence of the Secretary of State's failure to undertake a proper process of verification where the obligation is found to exist is that she would then be unable

thereafter to challenge the authenticity of the document in question unless and until the breach is rectified by a proper enquiry (paragraph 25). A challenge to reliability would remain open. However, these cases must be read in light of *AR* v *Secretary of State for the Home Department*, above. Lord Malcolm, in delivering the judgment of the Inner House, said at paragraph 34 that where a document has not been verified, its reliability must nonetheless be assessed on a holistic basis, and any doubts about a claimant's account should not be used as an *a priori* reason to reject the document, which would give rise to the risk that supportive evidence is being wrongly excluded from the overall assessment. Further, while in that case the court recognised, at paragraph 35, 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 they appear authentic, it went on to observe that even in such cases, some consideration should be given to easily available routes to check authenticity, particularly in the context of documents which are at the centre of a request for international protection. Accordingly, the question of whether or not a verification check should be carried out, or what a decision-maker should make of a document which has not (but could have) been verified is perhaps more nuanced than *QC* and *PJ (Sri Lanka)* might suggest.

[18] Finally, in a further submissions case, such as the present, relevant guidance is also to be found in *Devaseelan* v *Secretary of State for the Home Department* [2002] UKIAT 702, paragraph 39. Various principles are set forth in that case, of which the first two were relied upon by the FtT judge in the present case. The first, at paragraph 39(1), is that the second adjudicator should take the decision of the first adjudicator as the starting point; the second, at paragraph 39(2), is that facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator and "[i]f those facts lead the second

Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it." (For completeness, I mention also the fourth principle, which might have been thought to be relevant here, namely, that facts personal to the appellant not brought to the attention of the first adjudicator, although relevant, should be treated with the greatest circumspection. However it was not referred to by the FtT judge and did not inform his approach to credibility; as such it was not founded upon by counsel for the respondent.)

[19] At least in a case, such as the present, where the first FtT judge has found a claimant to be incredible, there is an obvious tension between the approach in *Devaseelan* which requires the second judge to take the first decision as the starting point, the requirement to assess all of the evidence (including the new evidence which was not before the first judge) on a holistic basis. If the second judge takes as the starting point that the claimant is incredible, then there is at the very least a risk that a proper assessment of credibility will not be carried out having regard to all of the evidence, including that which was not before the first judge. At any event, there is nothing in *Devaseelan* which derogates from the requirement that the evidence be considered holistically.

Submissions for the petitioner

[20] The petitioner's criticism of the approach taken by the FtT judge was, first, that by referring to paragraph [29] of the first decision, and immediately following it with the observation that the judge had "rightly" rejected the claim, followed by the words "[i]n those circumstances", he had treated the first decision as an *a priori* reason to reject the claim. He had, at least arguably, reached a negative assessment followed by reasons not to displace it, contrary to the approach approved in *AM Afghanistan*, above. Further, he had

erred in his approach to implausibility by interposing his own view as to what was reasonable, before assessing other evidence including the expert report. As regards the treatment of the expert evidence, the judge had commented on the aspects of the expert's evidence which supported the petitioner in paragraph 19, and then on the negative aspects of that evidence in paragraph 20, but had then failed to state whether he accepted the expert's evidence or not. This was said to be a *lacuna* in the decision which arguably amounted to an error. Finally, he had erred in his approach to the need to verify the summons, which was central to the petitioner's claim and the authenticity of which could easily have been verified.

Submissions for the respondent

[21] The respondent submitted that there was no error in the FtT judge's reasoning read as a whole, and that, as he made clear at paragraph 23 of his decision, he had proper regard to the earlier FtT decision without treating it as dispositive in line with what was required by the first two principles set out in *Devaseelan*. His views about plausibility were reasonable, and did not amount to conjecture. As for the expert evidence, the FtT had given nuanced consideration to the expert's report and it was plain that the matters canvassed in paragraph 20 outweighed those in paragraph 19. No express finding about the expert's report was necessary. Nor was it necessary for the Home Office to have verified the authenticity of the summons, the circumstances here being very different from those cases where it had been held that a duty to verify had arisen.

Decision

[22] The UT was of the view that the FtT judge gave cogent reasons for finding that the disputed summons was not a reliable document, and superficially that may be so. However, a number of passages in the FtT decision might be said to leave the reader with the impression that those reasons included *a priori* doubts as to the petitioner's credibility and reliability; and, further, that the judge, in reaching the view that the petitioner was incredible, superimposed his own views as to how the Vietnamese police would proceed. While, as *QC* and *PJ (Sri Lanka)* make clear, the judge was entitled to form a view as to the reliability of the summons, it is arguable, having regard to the comments in *AR*, that in doing so he paid insufficient attention to the fact that the authenticity of the summons, which was a document central to the petitioner's claim, was easily verifiable, and that he dealt with the question of verification in an unduly perfunctory manner. Even if this is a case where the petitioner's claim was so incredible that the decision-maker felt driven to reject the summons as unreliable, *AR* would suggest that nonetheless the FtT judge ought to have given greater consideration to the ease of verification than he did, given that the summons was central to the petitioner's claim. Further, it is arguable that in deciding that the summons was unreliable, he took into account his *a priori* view that the petitioner was incredible and unreliable, which as was said in *AR*, gave rise to the risk that proper regard was not had to the summons in assessing the petitioner's credibility and reliability.

[23] The argument that the FtT judge erred in his approach to credibility and reliability is bolstered when one has regard to paragraph 18 of the decision. First it is unclear why he stated at the outset that the first judge had "rightly" rejected the petitioner's claim. It was unnecessary for him to make that comment, and it was not part of his function to decide whether or not the claim had been rightly rejected. No real comfort is given at paragraph 23

of the decision, relied upon by respondent as showing that the judge had correctly applied *Devaseelan.* In that paragraph the judge accurately summarises the approach required by *Devaseelan* but says nothing to reassure the reader that he has applied that approach. Second, in the remainder of paragraph 18, the judge appears to interpose his own view as to what is credible or reasonable, without first considering the other evidence. The basis for his belief that the police in Vietnam would not issue a *pro forma* summons of the type produced requiring the petitioner to attend at the police station voluntarily is unclear. The judge then expresses the view that the police would "surely" have arrested the petitioner on the spot and taken him into custody, but that is arguably conjecture. It is at least arguable that in making these comments the judge went beyond the application of his own common sense and entered the realm of conjecture or speculation as to how the police in Vietnam would proceed. It is arguable, having regard to the passages in the decision referred to, and reading the decision as a whole, that he has taken as his starting point that the claimant is incredible, giving rise to a risk that a proper assessment of the petitioner's credibility was not carried out having regard to all of the evidence, including the evidence of the summons and of the expert. In saying, as he did, that simply because a document looks genuine does not mean it has been authentically issued, the FtT judge arguably failed to take into account the converse, namely, that because some documents are issued corruptly does not mean that this one was.

[24] I consider that the foregoing arguments are reasonable, in light of the authorities, whether or not they ultimately succeed. That is sufficient to dispose of this petition. Since it is arguable that the FtT judge erred in his approach, the UT erred in failing to recognise that, and the decision of the UT refusing permission must therefore be reduced.

[25] For completeness, I will deal briefly with the other criticisms made of the FtT decision. As to whether the judge erred by failing to make a discrete finding about whether he accepted the expert's evidence or not, I do not consider that he did. It is plain both that the judge considered the expert report, and that he did not accept it, the negative comments in paragraph 20 in effect outweighing the positive ones in paragraph 19. As I have found, arguably the reasons he gave for not finding it to be reliable were coloured by his *a priori* view of the petitioner's credibility but that is a separate issue. The absence of a discrete finding as to what the judge made of the report was not of itself an error. Turning to the failure of the Home Office to verify the summons, I have already touched upon this. *AR* would suggest that this is a more nuanced issue than a consideration of *QC* and *PJ (Sri Lank)* would suggest. The problem is not so much that the Home Office failed to verify the summons, as that the judge approached consideration of the summons with the mind-set that the petitioner's claim was incredible, against a background where the summons was central to the petitioner's claim and its authenticity was easily verifiable.

Disposal

[26] For the reasons stated I will sustain the petitioner's second plea in law, repel the respondent's pleas in law and thereafter reduce the decision of the UT dated 17 January 2022 refusing permission to appeal. I will remit the matter back to the UT to consider of new whether permission ought to be granted.