Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05476/2015

THE IMMIGRATION ACTS

Heard at Manchester **Decision and Reasons Promulgated**
On 12 November 2015 **On 23 November 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

K S W K
ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms Target-Parker, Counsel
For the SSHD: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant because he has made an asylum claim. The appellant is a citizen of Sri Lanka who claimed asylum in the United Kingdom on 2 December 2014. This claim was refused by the SSHD on 16 March 2015 for reasons set out in a detailed letter of that same date.

Court documents

2. At the time that his asylum claim was refused the appellant had not provided the SSHD with court documents from Sri Lanka concerning him. These documents were provided by the appellant's solicitors in late May / early June 2015. It is important to set out the nature of these documents, which include a letter from a Sri Lankan lawyer, Mr Enanyake, to the appellant's solicitors dated 25 May 2015. This also attached a document stating that Mr Enanyake is a life member of the Bar Association of Sri Lanka. The letter from Mr Enanyake states that a case has been filed against the appellant at Colombo Magistrates Court and attaches a number of documents that appear to emanate from that court. Each of these documents is a copy (not an original) and contains a stamp from the court with a date of 21 May 2015. The relevant documents are summarised below.
   i. A document that appears to have been sent by the police to the court on 19 December 2015 reporting the anti-state actions of the appellant and requesting an arrest warrant for him.
   ii. A document dated 21 December 2012 from the court in which it states that it issues a warrant of arrest and orders that the warrant be sent to the Controller of Immigration and Emigration.
   iii. A warrant of arrest for the appellant issued on 21 December 2012 by the court;
   iv. A document from the court which provides a trial start date of 21 December 2012.

Procedural history / legislative framework relevant to verifying court documentation

3. This evidence was provided very late and a hearing before the First-tier Tribunal due to take place on 4 June 2015 was adjourned as a result of this.

4. At that hearing Counsel for the appellant relied upon a skeleton argument, which invited the SSHD to make enquiries so as to verify the documentation said to be at the core of his claim for protection. Reliance was placed upon PJ (Sri Lanka) v SSHD [2014] EWCA Civ 2011. This is an important decision where documents are relied upon in Sri Lankan asylum appeals. Fulford LJ held:

   > "29. 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."

Enquiries undertaken by the SSHD

5. No doubt in light of PJ the SSHD decided to conduct checks in Sri Lanka. In a letter dated 18 June 2015 the SSHD indicated that she had

conducted checks regarding the arrest warrant i.e. (iii) above. No explanation has been provided as to why checks were not undertaken regarding the other documents ((i), (ii), (iv) above) or the bona fides of Mr Enanyake and his enquiries with the court, or with the court itself. The SSHD's letter attached a documentation verification report (DVR) dated 12 June 2015 which concluded that the arrest warrant was not genuine. This was based upon a visit by an entry clearance assistant (ECO) at the British High Commission in Colombo to the Terrorist Investigation Department (TID), a branch of the Sri Lankan state that investigates terrorism. It is asserted by the ECO that the officer-in-charge said that the arrest warrant was not genuine for three reasons.

FTT hearing

6. All of the above information was available at the hearing before Judge Shimmin on 23 September 2015. Judge Shimmin was also provided with a copy of PV. Importantly, Judge Shimmin outlined the issues identified at the beginning of the hearing [33]. First, in relation to the appellant's *sur place* activities, the SSHD accepted that the appellant had started a Sri Lankan website in the UK but did not accept that anti-regime articles were posted on it. Second, the SSHD's representative also "*conceded that if the appellant was found to be credible in respect of the warrant for his arrest then he would be at real risk of serious harm on return to Sri Lanka*".

FTT findings

7. It is clear from the issues in dispute outlined by Judge Shimmin that the authenticity of the court documentation formed the centre of the appellant's request for protection in respect of his activities in Sri Lanka (i.e. his non *sur place* activities). Indeed the SSHD conceded that the genuineness of the court documentation was determinative of the asylum appeal. The judge attached limited weight to Mr Ekanayake's letter [49] and the court documentation generally [50]. The judge had serious concerns about the wisdom of the SSHD approach the TID as that might place the appellant at risk but decided in this case that the Sri Lankan authorities would simply see the appellant's attempts as a means to bolster an asylum claim [54].

8. The judge dismissed the appeal on the basis that the court documentation was not credible and the appellant did not publish any anti-state material on his website.

9. The appellant has appealed the judge's findings with permission.

Hearing before UT

10. At the beginning of the hearing I indicated a preliminary view to both representatives to the effect that the judge had erred in law in his analysis of the SSHD's enquiries regarding the court documentation in light of PV and in his approach to the court documentation. Mr Harrison agreed that the judge had materially erred in law in failing to

direct himself to and follow the guidance set out in PV, such that the decision should be set aside and remitted de novo to the First-tier Tribunal.

Error of law discussion

11. I am entirely satisfied that Mr Harrison was correct to concede the appeal for the reasons he provided. The judge simply did not address the issues raised in PV. He was obliged to do so in the circumstances of this case. It was accepted by both parties that the authenticity of the court documentation played a determinative role in the protection claim.

12. The judge failed to address the question of whether the SSHD was in breach of her duties to undertake a proper process of verification. This is a case in which the SSHD clearly accepted she had such a duty and sought to undertake enquiries in Sri Lanka. There has however been no explanation why those enquiries were restricted to the arrest warrant. The arrest warrant was one in a series of court documents that were provided by a Sri Lankan lawyer. There has been no explanation why the ECO did not check with the court whether these were genuinely issued documents. They were purportedly stamped by that court. The judge was correct to be concerned about the enquiries made with the TID [54]. The obvious source to check was the court yet there was a failure to do this without any explanation.

13. The judge attached little weight to the letter from the Sri Lankan lawyer without providing adequate reasoning for this. Contrary to the judge's finding there was mention of a trial date in the court documents. Further the SSHD did not appear to doubt the bona fides of the lawyer, just the arrest warrant.

14. Both representatives agreed that the key question for the judge was whether the court validly issued the four documents I have summarised above. The judge has dealt with that pivotal question briefly. He has indicated that because he was only provided with copies that he attaches limited weight to them. No consideration has been given to the lawyer's role in obtaining the documents or the possibility that the court may retain the original.

15. The court documents lie at the centre of the appellant's protection claim and it was incumbent upon the judge to provide adequate reasoning as to why they were falsely prepared. He has not done so. He has not even addressed the reasons offered in the DVR regarding the warrant (which appear to me difficult to follow).

Remittal

16. Both representatives agreed that the decision needs to be remade completely. I agree. The judge considered his adverse credibility points cumulatively [55] and it cannot be said that errors in approach to the court documentation have not infected the other credibility findings.

17. Both parties agreed with me that given the nature and extent of the factual findings that need to be remade, this should be done in the First-tier Tribunal. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the First-tier Tribunal.

Decision

18. The decision of the First-tier Tribunal involved the making of a material error of law. Its decision cannot stand and is set aside.

19. The appeal shall be remade by First-tier Tribunal de novo.

Directions

20. Both parties accepted that further enquiry was necessary and agreed the following directions:

    (1) The appeal shall be remade de novo by the First-tier Tribunal sitting in Manchester (TE: 2.5hrs) on the first date available. Sinhalese interpreter necessary.

    (2) A key issue to be determined is whether or not the Colombo Magistrate's Court in Sri Lanka genuinely issued the documents set out above at para 2. This is because it is accepted by the SSHD that if it did the appellant has a well-founded fear of persecution because of an imputed political opinion.

    (3) Before 31 December 2015 the appellant's solicitors shall file and serve:

        (a) a detailed original letter / email from Mr Ekanayake which clearly outlines the steps that have been taken to confirm that documents (i) to (iv) above were genuinely issued by the court and which addresses the concerns identified in the DVR;

        (b) clear supporting evidence that Mr Ekanayake is recognised as a practicing lawyer in Sri Lanka and authorised as such.

    (4) Before 12 February 2016 the SSHD shall file and serve a response to the above information together with any written evidence setting out the further enquiries in relation to all the court documentation available, undertaken in Sri Lanka.

    (5) 28 days before the hearing date the appellant shall file and serve a comprehensive indexed and paginated bundle including all evidence relied upon.

    (6) 14 days before the hearing the SSHD shall provide her response if necessary to any further evidence relied upon by the appellant.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:

13 November 2015