Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02290/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th April 2019	**On 10th May 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SR
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S. Bisson, Counsel instructed on behalf of the Appellant
For the Respondent: Mr E. Tufan, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellant is a national of Sri Lanka. He appeals with permission against the decision of First-tier Tribunal (Judge Lawrence) ("FtTJ"), promulgated on the 3rd May 2017 dismissing his appeal against the decision to refuse his protection and human rights claim.

2. Following the dismissal of his appeal, grounds of appeal were issued for permission to appeal but on 31 May 2017 the First-tier Tribunal refused permission. On renewal, the application for permission was refused also by a judge of the Upper Tribunal (see the decision dated 14 September 2017).

3. An application was made to challenge the refusal of permission by way of judicial review and on 2 January 2018 and order was made by Mr Justice Supperstone who granted permission to apply for judicial review on the grounds that he considered that the claim raised an arguable point of principle, namely, whether in light of the decision of *VT (Article 22 Procedures Directive -Confidentiality) Sri Lanka* [2017] UKUT 368, promulgated on 19 July 2017, the FtTJ was entitled to place any or any significant weight on the results of the verification of documents by the TID. The order made reference to CPR 54.7A(9) and that if the Upper Tribunal or any interested party sought a hearing of the substantive application it must make its request for such a hearing no later than 14 days after service of the order granting permission. It also recorded "if no request for hearing is made, the court will make a final order quashing the refusal of permission without a further hearing".

4. It does not appear that any substantive application followed and therefore the refusal of permission was quashed.

5. Permission to appeal was granted on the 16th March 2018 by Mr CMG Ockleton, Vice-President of the Upper Tribunal as follows:

> "Permission is granted in the light of the decision of the High Court in this case. The parties are reminded that the upper Tribunal's task is that set out in section 12 of the 2007 Act."

6. It is as a result of that grant of permission that the appeal comes before the Upper Tribunal. The grounds advanced by the appellant are those originally provided, and Mr Bisson, Counsel and behalf of the appellant, relies upon the grounds which formed the application before the High Court. He submitted that the judge erred in law by placing weight on the DVR obtained by the respondent. He submitted that the method in which the verification was undertaken undermined the weight that could be attached to such a document. The respondent had instructed RALON (a branch of the immigration services at the BHC in Colombo) to provide the court documents and arrest warrant to the TID, who the appellant had claimed were the ones responsible for his ill-treatment. Therefore, the weight attached to such a report would have to be seen in the light of how

the document was obtained and who it was obtained from. Mr Bisson relied upon the decision in *VT* (as cited).

7. He further submitted that it had not been clear what information had been provided to the TID or whether it had been redacted and written requests were made from the appellant's solicitors (see letter 24th of July 2016 and at S140).

8. He further highlighted differences between the factual circumstances in VT and the case of this appellant and that the case number xx/xxx/8/xxx on the appellant's document appeared to be consistent with the number used for the TID and therefore, the only evidence that undermined the document was the verification report from the TID.

9. As to the remainder of the grounds, he submitted that other supporting relevant evidence had not been assessed when reaching an overall holistic view of the appellants credibility and whether the events as claimed had taken place.

10. Mr Tufan and behalf of the respondent relied upon the Rule 24 response in which it was stated that as the appeal had been adjourned at the appellants request the documents submitted must be checked by the respondent, the respondent had taken steps to verify the documentation. Furthermore, there was nothing to suggest that the appellant could be identified if it had been found that no case exists under the reference number provided. If there was no such case, there has been no process identified in the grounds to establish why or how the authorities could link non-existent case to the appellant.

11. He was not able to inform the court what information had been sent to undertake the enquiries but submitted that in light of the decision in *PA (protection claim, respondent's enquiries, bias)*[2018] UKUT 337, there was no general requirement on the respondent to obtain the consent of an applicant before making an enquiry about the applicant in his country of origin (contrary to VT). He therefore submitted that it was open to the judge to consider the verification report in the light of the evidence. Furthermore, at paragraph 17 the judge considered the medical report in detail.

Decision on the error of law:

12. Having had the submissions of the advocates and in the light of the issues raised in the papers before the Tribunal, I am satisfied that the decision of the FtTJ demonstrates the making of an error on a point of law. I shall set out my reasons for reaching that conclusion.

13. The core of the appellant's claim was that his father was a prominent member of the LTTE and also that his brother had membership of that organisation. In October 2009 he claims to have been arrested for a period

of four days, suffered ill-treatment and released on the payment of a bribe. It was also stated that he was arrested for a second time in 2010 and was released on reporting conditions but that he had left the country on 8 March 2010.

14. In support of his claim the appellant provided a number of documents which he stated that emanated from Sri Lanka which include court papers and an arrest warrant from the TID. The respondent thereafter sought to authenticate those documents. It appears that a request was made by the appellant solicitors to check those documents and the Rule 24 response makes reference to the hearing being adjourned for that purpose. Consequently, the reply received in the form of a DVR was that the documents were found to be “not genuine” and it was recorded that the reference xxxxx was “not relevant to the TID.”

15. The FtTJ consider the documentary evidence provided by the appellant in the light of the DVR. The judge stated that the meaning of the contents of the DVR were “not clear” but that as the document stated no case had been filed by the TID it fundamentally undermined the appellant’s claim to have been arrested and detained. It is of note that the appellant’s representatives had sought clarification as to what documents had been sent for authentication which the judge appeared to resolve a paragraph 12 however, as recorded at paragraph 13, the solicitors were also concerned that the respondent sought authentication of documents from the TID as opposed to the court and to the lawyer who had provided a certified copy.

16. The judge considered the issue and observed that a better enquiry would have been with a third-party and not with an “interested party” such as the TID or a lawyer. Notwithstanding those reservations the judge reached his decision that as the appellant had not provided further evidence, he attached weight to the DVR and then concluded at paragraph 16 that the claim was a “concoction” an rejected his claim of being arrested.

17. At paragraph 17, the judge dealt with the expert medical report in very short terms stating “I find the evidence does not survive anxious scrutiny. I find the appellant’s case is built on falsehood and I find no more told the truth to Dr than he did to the respondent or the Tribunal.” No reference was made to the contents of that report or the opinion reached.

18. I am satisfied that the decision demonstrates material errors of law. Dealing with the issue of the DVR, it is plain that the judge expressed some reservations that the TID was not independent and therefore the inference raised from that is that this may affect the weight attached to the issue, although that was not directly articulated. The judge did not have the advantage of the later decision of the Upper Tribunal in VT (as cited) which had been promulgated two months after the judge’s decision. There is also now a later decision of PA (set out above). Those decisions

provide helpful guidance when dealing with the issues raised in this appeal.

19. As the decision sets out, Article 22 of the 2005 Procedure Directive sets out a number of provisions relating to the collection of information which are then transposed into the Immigration Rules at paragraph 3391A. On the facts of the claim was that the TID who provided the source information for the DVR were the authorities the appellant feared, given the warrant was issued under the Prevention of Terrorism Act. At paragraphs 86-92, the Upper Tribunal in VT make it plain that they were concerned as to the method of enquiry with the TID and that the current method risks breaching the prohibition in Article 22 and therefore would be unlikely to produce reliable evidence relating to the authenticity of the document in question (see paragraph 91). Whilst in that case the TID had no record of the case number, the UT found that given the concerns about the reliability of the evidence from an alleged act of persecution who may have motive to undermine a protection claim, they could place no weight on the evidence.

20. When applied to the present appeal, Mr Tufan was not able to inform the court what information had been given to the TID and whether his name had been given. Both applicants agree that it was not known what was sent. Mr Bisson submitted that in light of the information in VT (which the judge did not have available) there was evidence relevant to this appeal which set out the correct number for the court xxxx/xxx/8/xxxx and could be seen as corresponding to the TID. He submitted that the only issue then was the information in the DVR itself and whether it could be reliable.

21. In the light of the decision of VT, which I accept the judge did not have the advantage of, there are nonetheless errors in the overall assessment of the documents and in particular the reliability and weight that could be attached to the DVR. Questions still remain unanswered as to what information was sent to the country for the purposes of the verification.

22. I am satisfied that the judge erred in his findings at paragraph 11 and 15 in the assessment of the weight and accuracy of the DVR report. This also is relevant to a further issue raised in the grounds. At paragraph 16 the judge rejected the core of the appellant's claim based on the DVR report. However, there was other supporting evidence which required assessment before reaching, that conclusion. At paragraph 17-18, the judge dealt with the report of the psychologist instructed who had reached an opinion that the appellant had been suffering from PTSD. The judge rejected the report on the basis that it was based on what the appellant had told him. The judge went on to state at [18] that the evidence did not survive anxious scrutiny and that the appellant's case is built on "falsehood" and that he did not tell the truth to the Tribunal or to the psychologist.

23. Detailed guidance was given in JL (China) about the preparation of medical reports for the First-tier Tribunal, as summarised in the headnote. The

opening words are: "Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a Tribunal judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53]))." The headnote also states: "The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23])." And "Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them".

24. I cannot accept the submission made by Mr Tufan that the judge comprehensively considered the report at those paragraphs. There was no assessment of the content of the report. At B15 a conclusion was reached by observing the appellant's clinical presentation (see paragraphs 9596) and the symptoms that was seen by the psychologist was said to be "difficult to feign". The psychologist also considered other possibilities and whether or not this was a false allegation (see paragraphs 99 – 102). However, no assessment was made of those issues.

25. Furthermore, the conclusions on the appellant's credibility were made before considering that evidence. I would accept that a judge has to start somewhere in analysing the evidence however, I am satisfied that that the adverse assessment of credibility was made before properly considering the medical evidence and that this is an error of law (see Mibanga v SSHD [2005] EWCA Civ 367). Other documentary evidence was provided which included documents from lawyer who attached the certified copies which was relevant to making an overall holistic assessment of credibility, along with the medical evidence.

26. No finding was made also on the appellant's evidence that after the verification report the TID visited his home (see paragraph 6 of the updated witness statement exhibited at P54).

27. For those reasons, I am satisfied that the errors identified in the grounds are made out. As those errors go to findings of fact and analysis of evidence, I set aside the decision and do not preserve any of the findings.

28. As to remaking the decision, given the nature of the errors I accept the submission made by Mr Bisson and Mr Tufan that further evidence will be required and further clear findings made, including updating evidence relevant to the appellant's circumstances. Both advocates submit that the appeal should be remitted to the First-tier Tribunal.

29. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in

this Tribunal. That reads as follows:

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

30. Thus, I have reached the conclusion that it is appropriate to remit it to the First-tier Tribunal for a fresh decision on all matters. In the light of the diagnosis set out in the report, consideration should be given to the guidance given in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is remitted to the First-tier Tribunal for a fresh hearing.

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Signed Upper Tribunal Judge Reeds

Date 9/5/2019

Upper Tribunal Judge Reeds