OUTER HOUSE, COURT OF SESSION

[2019] CSOH 93

P376/19

OPINION OF LORD ARTHURSON

In the petition of

TARA KAZADI MBUYI-BIUMA (AP)

Petitioner

for

JUDICIAL REVIEW

of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 28 January 2019 refusing permission to appeal to itself

Petitioner: Winter; Gray & Co
Respondent: Pirie; Office of the Advocate General

19 November 2019

Introduction

[1] The petitioner was born on 21 October 1982. She is a national of the Democratic Republic of Congo ("DRC"). She claimed asylum on 6 September 2016. The respondent refused her asylum claim on 3 March 2017. The respondent had accepted the petitioner's nationality and further accepted that she had been a member of a political party, the National Union for Federalist Democrats ("UNDEF"). Following sundry procedure, the petitioner's appeal came before the First-tier Tribunal ("the FtT"). By decision dated

27 November 2018, the FtT refused the petitioner's appeal. The petitioner sought permission to appeal from the FtT. By decision dated 14 December 2018, the FtT refused such permission. The petitioner duly applied directly for permission to appeal to the Upper Tribunal. In a decision dated 28 January 2019, the Upper Tribunal refused permission to appeal to itself. That decision of the Upper Tribunal is the subject of the petitioner's challenge in the present petition.

[2] The sole question for the court at the substantive hearing on the petition was whether the Upper Tribunal had materially erred in law in determining on 28 January 2019 to refuse to grant the petitioner permission to appeal against the decision of the FtT dated 27 November 2018. At an earlier permission hearing in the currency of the present proceedings the second appeals test was decided by the Lord Ordinary and this accordingly did not require to be re-litigated at the substantive hearing. In all of these circumstances, and having regard to the dicta of the Court in *HH* v *Secretary of State for the Home Department* 2015 SC 613 at paragraphs 14 and 15, this court accordingly required at the substantive hearing to exercise the restricted jurisdiction of reviewing the legality of the decision of the Upper Tribunal on an application for permission to appeal, in this case under reference to the only remaining specific ground insisted upon by the petitioner, namely ground 1, arising from the various grounds of appeal which were put before the Upper Tribunal in the petitioner's original application for permission. Consideration of that remaining ground therefore provided the framework for the discussion at the substantive hearing in respect of the said exercise, namely the review of the legality of the Upper Tribunal's decision on the petitioner's application for permission.

[3] The issue arising in that extant ground of appeal focused upon the contended failure by the respondent to verify certain documentary evidence, the details and purported import

of which I will turn to shortly. It was a matter of concession on the part of the respondent that she did not carry out any investigation into the reliability of any of these documents. It was further not in issue that the gravamen of the petitioner's application to the FtT against the respondent's refusal of her asylum claim was that her political activities for the UNDEF party would place her at real risk in the event of her return to the DRC.

Submissions for the petitioner

[4] Counsel for the petitioner, under reference to *PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2015] 1 WLR 1322, per Fulford LJ at paragraphs 29 to 31 and 41 to 42, noted that, notwithstanding adverse credibility findings at first instance made against the applicant, the Court of Appeal in that case nevertheless allowed the applicant's appeal, remitted the case to the Upper Tribunal for a rehearing and made observations concerning the obligation upon a national authority to investigate documentation in certain exceptional circumstances. Counsel further referred to the dicta of the Extra Division in *AR* [2017] CSIH 52 at paragraphs 31 and 33 to 35, which was also a case in which there were adverse credibility findings and the applicant's appeal was allowed. The Court observed in that case at paragraph 35 that even in circumstances in which concerns over the veracity of a claimant's account may be so clear cut that the decision-maker is driven to rejection of apparently authentic supporting documents, nevertheless some consideration may be expected by the court to be given to easily available routes to check authenticity, the decision-maker requiring to stand back and view all of the evidence in the round before deciding which evidence to accept and which to reject.

[5] The documents founded upon on behalf of the petitioner before the FtT comprised two translated letters from a named barrister dated 30 January 2017 and 11 April 2017. Each

letter was reference headed in respect of the petitioner's case against the ANR, being the intelligence agency of the DRC, and was signed by the barrister. The second letter in addition provided two telephone numbers together with the barrister's bar registration number and the page number in the court directory for 2016/17 in which the name of that barrister could be located, along with website details. Also in the second letter the barrister advised that the relevant entry in the website of the bar association stated that he had been practising since 13 November 1985. In this letter the author briefly described the manner in which he had been informed of what he described as a "search warrant" issued against the petitioner, and further advised that, regarding the proceedings which resulted in the search warrant being obtained, the author had been given a copy of that document by ANR staff when he attended to seek the release of the petitioner's mother following her arrest and transfer to the ANR. The first letter had in fact referred not to a "search warrant" but to the issue of an "All Ports Warning" by the national intelligence agency dated 24 August 2016. This was the document referred to in the second letter, it can be reasonably inferred, as the "search warrant". The All Ports Warning document was annexed to the first letter, and was available before the FtT in translation. It bore a date, 24 August 2016, and location, Kinshasa, and appeared in the form of a memorandum to certain numbered organisations or persons. It appeared to bear the official stamp of the department of domestic security and was signed by the head of the department of domestic security of the ANR, who was named in the document. The document contained an instruction referred to as a "permanent All Ports Warning", and referred to the petitioner by name and to the petitioner's party membership.

[6] Counsel for the petitioner observed that, while the FtT in its decision letter of 27 November 2018 had accepted the petitioner's party membership, nevertheless, in its

reasons for refusing her appeal, in section 9 of its decision letter, adverse credibility findings in respect of the petitioner's contentions concerning risk had been expressed in detail, all in the absence of any attempt by the decision-maker to undertake a verification exercise. Counsel contended that such an exercise, had it been attempted, could well have led to a reversal of the said adverse credibility findings once all of the available evidence was viewed in the round in due course by the FtT. The verification point having been focused in detail in ground one of the grounds of appeal to the Upper Tribunal, the briefly expressed decision of the Upper Tribunal dated 28 January 2019 on permission disclosed on the face of it no real engagement with this point. The documentation to be verified originated from an experienced lawyer who had provided his bar credentials and details and whose bona fides had not been challenged. These documents were central to the contention advanced on behalf of the petitioner in respect of risk; the documents were capable of uncomplicated verification; and, in the fact specific circumstances of the petitioner's claim, the unchallenged bona fides of the third party source of the documents, namely the barrister, tipped the balance in favour of generating an obligation upon the national authority, here represented by the respondent, to carry out the exceptional course of undertaking a straightforward verification exercise. The failure of the Upper Tribunal to engage with this point, which had been clearly raised in the grounds of appeal, in these circumstances constituted a material error of law and called for the reduction of the challenged decision of the Upper Tribunal.

Submissions for the respondents

[7] Counsel for the respondents submitted in the generality that the Upper Tribunal had not erred in law in failing to give permission. The only route to verification proposed on

behalf of the petitioner was to the effect that the respondent should contact the purported author of the documents. No evidence had been produced with the ground of appeal advanced to the Upper Tribunal in respect of what the lawyer would say if he was to be so contacted, and of course, the point having not been taken before the FtT, no findings are recorded by the FtT in respect of what would have happened had he been thus contacted.

[8] Under reference to *Tanveer Ahmed* v *Secretary of State for the Home Department* [2002] Imm AR 318, per Collins J at paragraphs 32 and 37, counsel submitted that it was for an individual claimant to show that a document which was sought to be relied upon was indeed reliable. Counsel noted the observations of Collins J at paragraph 30 concerning the requirement to differentiate between form and content, in terms of which, by inference, counsel submitted that a decision-maker required to ask (i) whether the writer or author of a document was actually who he or she purported to be, and (ii) whether what was written in the document, by way of its contents, was actually true. Referring to the dicta of Lloyd Jones LJ in *MA (Bangladesh)* v *Secretary of State for the Home Department* [2016] EWCA Civ 175 at paragraphs 24 to 31 and 42 to 45, counsel submitted that in the great majority of cases no duty to investigate documents founded upon arose. Counsel accepted that if two conditions, namely (i) centrality to the request for protection and (ii) resolution by a simple process of enquiry, were duly satisfied, it may however then be necessary for a national authority to embark on verification. In any event, counsel submitted that there was nevertheless no obligation upon a national authority to make further enquiries if there was compelling evidence to the effect that an applicant's claim for asylum was not genuine: *MA (Bangladesh), supra*, per Lloyd Jones LJ at paragraph 45. Counsel further submitted that the dicta in *PJ (Sri Lanka), supra,* and *AR, supra,* founded upon by the petitioner were in effect obiter, these cases not being directly related to a lack of investigations carried out by the

respondent, but instead being reasons cases. In the whole circumstances, counsel contended, the petitioner's case was one of the great majority of cases in which no duty to investigate arose.

[9] Turning to the documents themselves, counsel accepted that the bona fides of the barrister author of the documents had not been challenged before the FtT, but noted observations in the FtT decision in respect of which some doubt had been cast upon the reliability of that barrister, a point of inconsistency arising at paragraph 9.11 of the decision letter and a point of implausibility at paragraph 9.12 thereof. While it was clear that the All Ports Warning was central to the petitioner's case, counsel submitted that on the material before the Upper Tribunal on permission, a simple process of enquiry could not conclusively resolve the issue of the reliability of the All Ports Warning, and, further, if a duty to investigate did arise, the failure by the respondent to carry it out was immaterial in terms of outcome to the decision of the FtT. Counsel developed these submissions in this way. The barrister was not himself the author of the All Ports Warning; accordingly, even if the barrister could confirm in an acceptably reliable manner how he had obtained this document, there was no material before the Upper Tribunal to confirm that it had been actually written by its purported author, nor indeed, significantly, that its contents were true. In any event, if error was to be established in this case, counsel submitted that any such error was irrelevant as to outcome. The FtT had not given the All Ports Warning weight in its assessment on the basis that the FtT had not been put in a position to understand what that document was actually telling them. The document being thereby unexplained, a failure to verify it could not be said to be material to the disposal of the petitioner's case. On this point counsel referred to the dicta of Lord Neuberger at

paragraph 51 in *Holmes-Moorhouse* v *Richmond upon Thames London Borough Council* [2009] 1 WLR 413.

[10] Finally, dealing briefly with the barrister's letters themselves rather than the central matter of the All Ports Warning, counsel again submitted that no duty to investigate these documents arose on the facts of the case, and that in any event this material was of limited probative value. The relevant material content in the letters amounted to hearsay from unspecified people, and the terms were too vague to be of assistance. The letters required to be read in translation, and there was a problem with accuracy in respect of the word "interrogation" in the fourth paragraph of the first letter, and indeed the petitioner herself had stated in oral evidence before the FtT, as narrated in paragraph 9.4 of the decision letter, that this word should properly have been translated as "invitation".

Discussion and decision

[11] While a duty upon a national authority to verify documents founded upon by an applicant can only be said to arise exceptionally, that does not necessarily mean that exceptional circumstances in and of themselves require to be established before such a duty can be engaged in this way. In keeping with the general approach to be adopted in asylum cases, the relevant evidence requires to be viewed holistically, and indeed the entirety of the available evidence will require to be established. The All Ports Warning dated 24 August 2016 annexed to the first letter from the barrister must be regarded as a document of potentially very high significance in respect of the petitioner's claim for protection, which claim of course lies at the heart of her asylum request. The date on that document is consistent with the dates referred to in the barrister's first letter. The events of August 2016 as set out in section 8 of the FtT decision letter do not appear to be inconsistent with the

barrister's letters or indeed with the All Ports Warning document of 24 August 2016 itself. The party membership of the petitioner in and of itself is in addition not in issue in this case. The mistranslation of the word "interrogation/invitation" was a matter raised by the petitioner herself, and I do not regard it at all as a material point against the authenticity of the documents in these circumstances. In short, the third party source of the documents purports to be a barrister of some experience, who has given multiple points of contact and of reference for his professional status in the letters, and, although points of reliability raised in the decision of the FtT were noted by counsel for the respondent, he very fairly accepted that the bona fides of the barrister had not itself been challenged in respect that, as he put matters, no question of bad faith arose on the barrister's part in this case. This in my view places the petitioner's case on its facts in close proximity to the facts pertinent to the documents founded upon in *PJ (Sri Lanka), supra*, as expressed in some detail by Fulford LJ at paragraph 41.

[12] The documents founded upon by the petitioner and in respect of which she calls for verification by the respondent, plainly lie at the centre of her request for protection, and in view of the contact details and sources referred to therein in respect of the third party author of the letters, it appears to me that a simple process of enquiry would resolve any question of the reliability and authenticity of that source, namely the barrister himself. In terms of the veracity of the material, I have reached the view that all of the evidence, including the documentary evidence, ought properly to have been considered in its entirety in this case, and that a proper approach would require, on that material, consideration of a duty to verify. Matters of veracity pertaining to the documents will accordingly be part of the whole picture viewed by the decision-maker in the vital exercise of the consideration of all of the evidence in the round, adopting such a holistic approach. In my opinion a duty to

investigate at least arguably arises in this case, given that the criteria of centrality and simplicity of process are comfortably established in a particular context in which the documents themselves have as their provenance a third party source who is on the face of matters a lawyer of considerable experience whose bona fides is expressly unchallenged on behalf of the respondent. The letters indicate that there is an ongoing case involving the petitioner and the ANR. The All Ports Warning of 24 August 2016 expressly relates to the party membership of the petitioner. The manner in which it was obtained has been described in some detail in the second letter from the barrister. Given the holistic approach desiderated in the authorities on these matters, I am not satisfied that the materiality point contended for by counsel for the respondent has been made out on the specific facts of this case. The All Ports Warning in particular, in and of itself, fortified by the terms of the barrister's letters, goes directly to the question of risk for the petitioner in respect of any future return by her to the DRC, and that at a potentially high level. In these circumstances the following observation of the Court in *AR*, *supra*, at paragraph 35, obiter or otherwise, must surely in my view be in point:

> "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 in the proper disposal of the appeal."

[13] It is clear that the All Ports Warning in the petitioner's case requires to be viewed as being at the centre of her request for protection and as pointing plainly to what could well be considered to be a significant risk for her on any future return to the DRC. In the whole circumstances, accepting once more that the obligation to verify arises exceptionally, I am of

the opinion that such an obligation arguably arises on the particular facts of the petitioner's case. It being accepted that no attempts to verify having to date been instigated on behalf of the respondent, it is clear that the duty which arises here has not been discharged, and that accordingly an arguable error of law arises which in turn requires this court to provide relief for the petitioner by way of the remedy of reduction of the challenged decision of the Upper Tribunal dated 28 January 2019.

Disposal

[14] Having identified a material error of law on the part of the Upper Tribunal in its decision of 28 January 2019, I propose to sustain the second plea in law for the petitioner, to repel the third and fourth pleas in law for the respondent, and to pronounce an order reducing the decision of 28 January 2019. All questions of expenses are, meantime, reserved.