OUTER HOUSE, COURT OF SESSION

[2020] CSOH 60

P50/20

OPINION OF LORD TYRE

In the petition of

DY (Assisted Person)

Petitioner

for

Judicial Review

Petitioner: Winter; Drummond Miller LLP
Respondent: McKinlay; Office of the Advocate General for Scotland

11 June 2020

Introduction

[1] The petitioner is a citizen of El Salvador who claimed asylum on 13 December 2018. He claimed to be at real risk in El Salvador of physical harm by members of a criminal gang who wanted him to re-enlist in the army in order to steal weapons and ammunition for their use. The respondent accepted that the petitioner had done a period of military service, but refused his claim for asylum. The petitioner appealed to the First-tier Tribunal (FtT). By decision dated 29 August 2019 the FtT refused the appeal. The petitioner made an application to the FtT for permission to appeal to the Upper Tribunal, which was refused. He then applied to the Upper Tribunal for permission to appeal. That application was also refused. The petitioner has now brought the present petition for judicial review, seeking

reduction of the Upper Tribunal's decision refusing permission and an order remitting the case to the Upper Tribunal for reconsideration of his application for permission to appeal. In view of Covid-19 restrictions, the substantive hearing was conducted remotely by video conference.

The FtT's decision

[2] The FtT's decision does not contain the terms of the respondent's decision letter, or a narrative of the petitioner's oral evidence, or a summary of the parties' arguments. Instead the factual background is set out in the form of a chronology derived partly from oral evidence, partly from the petitioner's preliminary information questionnaire and written witness statement, and partly from documents relied upon by the petitioner in support of his claim. It is not in dispute that there are inconsistencies within and among these sources of evidence. It is therefore difficult to discern exactly what factual narrative the FtT was invited by the petitioner to accept as accurate. So far as can be gathered, it consisted of at least the following matters.

[3] In February 2011, when he was aged 20, the petitioner began a period of compulsory military service. In about September or October 2011, he was assigned to a unit whose task was to provide security at a maximum security prison. While there he served under a Major Juan Luis Zelaya Medrano. At some date a prisoner named Isidro was released from the prison. Isidro ordered the petitioner to steal guns and ammunition for use by his gang. The petitioner refused. Isidro then demanded that the petitioner leave the army to prevent him from disclosing the gang's plan. The petitioner was subsequently moved to another base. He completed his military service and was discharged. In his oral evidence to the FtT he stated that he had left the army in 2013.

[4] In 2018, the petitioner received a telephone call from Isidro ordering him to re-join the army in order to steal weapons and ammunition for the gang. On 2 December 2018 Isidro telephoned and threatened to kill him if he did not obey the instruction. Isidro went to the petitioner's mother's house to demand an explanation for the petitioner's failure to obey. He threatened to kill members of the petitioner's family. On 12 December 2018 the petitioner and his wife were sleeping at his uncle's house when Isidro and five gang members arrived. On the same day the petitioner flew with his family to the United Kingdom, where he claimed asylum and humanitarian protection. Later that day a man told the petitioner's mother in law that the gang did not want to see the petitioner or his family in the area again or they would be killed.

[5] By letter dated 9 May 2019, the respondent refused the petitioner's claim for asylum and humanitarian protection. The petitioner appealed to the FtT.

[6] In support of his appeal, the petitioner produced two reports: an expert report on El Salvador and its gangs written by an emeritus professor at the University of South Florida, Tampa, USA, with a specialisation in political violence and human rights abuses in El Salvador; and a report on the petitioner's mental health by a chartered clinical psychologist. Also produced were three documents in Spanish, with certified English translations, concerning the petitioner's military service:

- Document 1 was an excerpt, certified as genuine by the commander of the 5th Military Unit, from that unit's logbooks, bearing to show (i) that the logbook for the period from 20 August 2010 to 13 October 2011 recorded that on 11 February 2011, the petitioner was enrolled for a period of 12 months' compulsory military service, and (ii) that the logbook for the period from

14 October 2011 to 19 March 2013 recorded that on 31 July 2012 the petitioner was discharged for completing his compulsory military service.

- Document 2 was a signed and sealed letter dated 13 February 2019 entitled "Confidential - Armed Forces of El Salvador" from Juan Luis Zelaya Medrano, designed as Major of Artillery, Military Staff Graduate, in the following terms:

> "THE UNDERSIGNED: Commander of the Nonualco Task Force Unit; I certify that [the petitioner], who was enrolled in the 5th Military Unit of the Armed Forces of El Salvador, based in the City of Cojutepeque, Cuscatian Region, as an Army Soldier, was placed under my supervision to provide security for the maximum security Prison located in the Municipality of Zacatecoluca, La Paz Region, between 30th September 2011 and 7th February 2012, displaying exemplary conduct when carrying out the duties assigned to him. The foregoing is true to the data which has been checked, to be delivered to whom it may concern."

In the certified translation the word "Medrano" was omitted from the signatory's name.

- Document 3 was a signed and sealed letter dated 31 June 2019, entitled "Confidential - Republic of El Salvador - Armed Forces of El Salvador - Joint Chiefs of Staff - Military Detachment Number Five" and bearing various insignia, from Juan Luis Zelaya Medrano, this time designed as "Licenced Head of Artillery of General Staff - Commander of the 1st Company Task Force/Nonualco", in the following terms:

> "THE UNDERSIGNED: Company Commander of the Nonualco Task Force: Hereby certifies that [the petitioner] was discharged from Military Detachment No 5 of the Armed Forces of El Salvador, as a trained soldier, from 14 OCT 2011 until 09 MAR 2013.
>
> Furthermore, I hereby state: that during the period covered from 30 September of the year 2011 until 07 February of the year 2012, he was assigned under my care to provide security services in the maximum security Penal Centre located in the municipality of Zacatecoluca in the Department of La Paz.

> I note the soldier, [the petitioner], has shown me that he cannot return to our country as his life would be in danger due to crime."

[7] The FtT judge found that the petitioner's account had not been proved to the lower standard of proof applicable to claims for international protection as a refugee and for claims of prospective breaches of human rights. Paragraphs 9.1 to 9.37 of the FtT's decision contain an analysis of the evidence and in particular of anomalies and inconsistencies noted by the judge. The judge's conclusions are summarised at paragraph 9.38. The first six sub-paragraphs of paragraph 9.38 relate *inter alia* to the three documents set out above, and state (omitting cross-references):

> "In my judgment:
>
> (1) the dates between which the appellant carried out his military service are inconsistent; and the date on which he was recognised by a prisoner and the date on which he later resigned are inconsistent; the date of leaving the army is inconsistent; the date of refusal to accede to Isidro's demands is inconsistent;
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> (2) the documents bearing to be issued by the military lack specific detail about the appellant's circumstances;
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> (3) the appellant invites a construction of the terms of documents which is not supported on the language used therein; the appellant made reference to 'normal' work which is not supported by the documents produced in appeal;
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> (4) the documents bearing to be issued by the military though said by the appellant in oral evidence to have been signed by the same author, show the author as holding a different rank and title in respective letters; and the translation appears to be inaccurate;
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> (5) the appellant's oral evidence about asking for confirmation of his status in the army is inconsistent with the document produced; and there is a lack of detailed evidence which might have gone some way to explain evidence before me;
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> (6) the documents said by the appellant in oral evidence to have been issued by the same office, and the same officer and from the same organisation within the military are in quite different formats without reasonable explanation; and are not supported by evidence of the context in which they were issued; …"

[8] Having summarised his conclusions in relation to the remainder of the evidence, the judge continued (paragraph 9.39):

> "For the reasons set out above (in the detailed reasons plus conclusion) I am not persuaded to the appropriate standard of proof that the appellant's account is founded in fact. I have taken into account the Chartered Clinical Psychologist's opinion that the appellant considers his memory to be much poorer than before; but I am not persuaded that poor memory would be likely to give rise to the inconsistencies and absence of detail mentioned above. In my judgement, had the account been true then there would not have been such inconsistency and such lack of detail. I have not been persuaded that I should attach any material weight to the expert's report because I conclude that it is wanting in the manner mentioned above. The supporting documentation produced in appeal is either inconsistent with other evidence or lacks detail or is inaccurate; and therefore, I am not persuaded that I can attach any material weight to the contents thereof. The brother's evidence lacks support from a source which might reasonably be expected; and to a material degree is founded on evidence about the appellant's time as a security guard at prison (the letter is purportedly issued as part of Isidro's series of encounters principally with the appellant) which I have not been persuaded is true. I am not persuaded in these circumstances that I can attach material weight to his evidence."

[9] For these reasons the judge concluded that the petitioner had not established to the appropriate standard of proof that he had a well-founded fear of persecution in El Salvador, or that he was a refugee, or that he qualified for a grant of humanitarian protection, or that on return to El Salvador he was at risk of conduct likely to breach articles 2 and 3 of the European Convention on Human Rights. The appeal was dismissed.

The Upper Tribunal's decision

[10] The petitioner's application to the FtT for permission to appeal having been refused, he applied for permission to the Upper Tribunal, on the following grounds:

> "**Ground 1 - errors in relation to the documentary evidence**
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> The FTT erred in law by misapplying the law. Documentary evidence was produced which claimed the appellant had been in the military as he claimed. When assessing these documents the FTT has erred by failing to recognize that the Home Office had not sought to verify them. They were clearly central to the claim and it has not been said that they were not easily verifiable. As such the failure of the Home Office to

verify same results in the FTT not being able to impugn those documents (*PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2015] 1 WLR 1322 at paragraphs 30-31). Such an error is material in light of the FTT's material findings in relation to those (see paragraphs 9.1, 9.4-9.9, 9.12-9.18, 9.23, 9.38(1), (2) and (4)-(6)). *Separatim* the FTT erred in law as it failed to recognize that no thought had been given to routes by which the documents could be easily verified (*AR* [2017] CSIH 52 at paragraph 35 per Lord Malcolm). As such the FTT erred in law.

Ground 2 - expert report

The FTT erred in law:

(i) by interpreting the expert report as one would a statute which is an inapt approach in an asylum claim as opposed to reading the report in a common sense manner (paragraphs 9.10-9.11, 9.29-9.30, 9.38(3) and (7) of the FTT's decision);

(ii) by misapplying the law at paragraph 9.33 and 9.38(8) by re-characterising the evidence based on its own perception of reasonability which is the wrong approach (*KB & AH (credibility-structured approach) Pakistan* [2017] UKUT 00491).

Ground 3 – failure to give reasons

The FTT failed to give adequate reasons in relation to the following:

(i) at paragraph 9.21 the FTT states it is difficult to understand why the gang would want [him] to give up his military service. However the FTT records the explanation at paragraph 9.20. It is not clear why such a position is difficult to understand in light of the explanation given;

(ii) at paragraph 9.39 the FTT states that it is not persuaded that poor memory would be likely to give rise to the inconsistencies. That conclusion appears to be based on the reason that had the account been true then there would not have been such inconsistency. However that is an inadequate reason where the entire purpose of the psychological report was to show the reason for any discrepancy may be the appellant's memory issues. If it is an adequate reason such a reason is irrational or perverse."

It is common ground that no argument was presented to the FtT in respect of a failure by the respondent to verify the authenticity or reliability of the documents referred to in the first ground of appeal.

[11] The Upper Tribunal refused permission to appeal. The reasons given by the Upper Tribunal judge were:

> "Whether or not the Respondent had sought to verify any of the documents relied upon to show the Appellant had been in the military, the main reason that these were not accepted was not that the documents themselves were not considered to be genuine, but that they were inconsistent both between the documents themselves and with the Appellant's claims. In these circumstances, any express consideration of whether they had been verified by the Respondent would not arguably be material to the outcome of this appeal.
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> Although it is arguable that the First-tier Tribunal erred in paragraph 9.10 by analysing part of the expert report from a grammatical perspective, the other paragraphs relied upon in support of the second ground of appeal do not identify any such arguable error in approach to the evidence or analysis of it. Cogent reasons are, save for the analysis in paragraph 9.10, given for the weight to be attached to the expert evidence and the extent to which it supports the Appellant's account. In particular, it is noted that the expert evidence does not cover certain issues and is in some respects inconsistent with the claim. It is not arguable that the First-tier Tribunal has re-characterized the evidence based on a perception of reasonability, there is a permissible analysis of plausibility only.
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> When the decision is read as a whole, adequate and cogent reasons are given as to why it is dismissed, with findings which were open to the First-tier Tribunal on the evidence before it. It is not arguable that there was a lack of adequate reasons in paragraphs 9.21 and 9.39 and in any event, in the context of the decision as a whole, this could not arguably be material."

Argument for the petitioner

[12] On behalf of the petitioner, it was accepted that the second and third grounds of appeal were not themselves of sufficient materiality to justify reduction of the Upper Tribunal's decision, and so attention focused on the first ground. It was submitted that the mere fact that there were inconsistencies between the documentary evidence and the petitioner's own evidence to the FtT did not absolve the respondent of any duty of verification incumbent upon it. The leading cases on the duty to verify were *PJ (Sri Lanka)* and *AR*, referred to above, in both of which there had been inconsistencies and yet the decision of the Upper Tribunal had been reduced. Verification could relate both to authenticity of a document and to the credibility of its source. Even where authenticity was not in issue, verification could strengthen the credibility of the applicant's evidence.

[13] In the present case the three military documents were central to the petitioner's case, and their authenticity and reliability could be checked by a simple process (cf *Singh* v *Belgium*, 2 October 2012, ECtHR). It had been the respondent's duty firstly to consider whether any inconsistencies could be resolved by a simple process and, secondly, in the circumstances of this case, to proceed to verify their authenticity and reliability. Without that process having been carried out, the documents could not be impugned by the FtT. In fact the FtT had founded upon the inconsistencies as a reason to reject the petitioner's evidence. The Upper Tribunal had erred in failing to hold that the FtT's conclusions in the first six sub-paragraphs of paragraph 9.38 of its decision required to be re-assessed.

[14] In relation to the respondent's argument that failure to verify had not been raised by the petitioner before the FtT, this argument should not be entertained because it had not formed part of the Upper Tribunal's reasoning when refusing leave to appeal. In any event, if the argument was entertained, it should be rejected. It had been open to the petitioner to take the verification point on appeal to the Upper Tribunal. The point was obvious and had a strong prospect of success (cf *R* v *Secretary of State for the Home Department, ex p Robinson* [1998] QB 929 at 946). Aside from *Robinson*, the court had a discretion to allow the point to be taken (cf *RJG* v *Secretary of State for the Home Department* [2016] EWCA Civ 1042). There was no unfairness to the respondent; it was a point of law notice of which had been given in the grounds of appeal.

[15] In relation to the second ground of appeal, the Upper Tribunal ought to have noted that the FtT had failed to give proper weight to material in the expert report which was supportive of the petitioner's evidence, and had failed to give adequate reasons for regarding the expert report as unsupportive. As regards the petitioner's refusal to co-operate with Isidro when first asked to steal weapons, there could be an explanation for

why the gang took no action against him at the time. The Upper Tribunal ought to have noted that the FtT had applied its own perception of reasonableness; there had been a real possibility that the Upper Tribunal would reach a different conclusion. In relation to the third ground of appeal, the Upper Tribunal had failed to explain why it considered that the FtT decision was adequately reasoned.

Argument for the respondent

[16] On behalf of the respondent, it was submitted, firstly, that the Upper Tribunal had been correct to hold that the first ground of appeal did not disclose any arguable error of law. The reason the FtT had not felt able to place reliance on the documents was not that it was concerned about authenticity but rather because they contained inconsistences within themselves and with the petitioner's account. Seeking verification would have made no difference to the FtT's assessment.

[17] Secondly, it was submitted that any error of law by the Upper Tribunal was immaterial for two reasons. The first reason was that the verification argument had not been advanced before the FtT. The point was not readily discernible and obvious (cf *Robinson* above) and the FtT had had no duty to consider whether the respondent had been under a duty of verification. Although it was accepted that the court had a discretion to allow the point to be taken now, it should not do so because the appeal had proceeded on the basis that authenticity was not in issue. The second reason was that in the circumstances there had, in any event, been no duty incumbent on the respondent to verify these documents. There was no general duty on the respondent to seek to verify documents submitted: *Tanveer Ahmed* v *Secretary of State for the Home Department* [2002] Imm AR 318, paragraph 36. It was a necessary condition for the existence of any duty on the respondent

to investigate that (i) the documentation was at the centre of the request for protection, and (ii) a simple process of inquiry would conclusively resolve its authenticity and reliability (*PJ (Sri Lanka)* (above), paragraph 30; *MA (Bangladesh)* v *Secretary of State for the Home Department* [2016] EWCA Civ 175, paragraph 30). Such a duty would arise only exceptionally. The conditions were not met by the documents in the present case. The documents did not emanate from an unimpeachable source, and the petitioner had failed to establish that a simple process of inquiry would conclusively resolve their authenticity and reliability.

[18] The other two grounds of appeal did not raise any arguable error of law. The second ground amounted to no more than disagreement with the manner in which the FtT expressed aspects of its decision. Any arguable error of law was not a material error. There had been no basis upon which the Upper Tribunal ought to have granted permission to appeal. As regards the third ground, the Upper Tribunal had provided proper and adequate reasons for refusing permission.

Case law review

[19] I take as my starting point the decision of the Immigration Appeal Tribunal in *Tanveer Ahmed* v *Secretary of State for the Home Department* (above), a starred case in which the Tribunal made the following observations (at paragraphs 33-36) in relation to the authenticity and reliability of documentary evidence:

> "33. It is for the individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely.
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> 34. It is sometimes argued before Adjudicators or the Tribunal that if the Home Office alleges that a document relied on by an individual claimant is a forgery and the Home Office fails to establish this on the balance of probabilities, or even to the

> higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. There is no legal justification for such an argument, which is manifestly incorrect, given that whether the document is a forgery is not the question at issue. [The] only question is whether the document is one upon which reliance should properly be placed.
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> 35. In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing).
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> 36. There is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. Doubtless there are cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. In the absence of a particular reason on the facts of an individual case a decision by the Home Office not to make inquiries, produce in-country evidence relating to a particular document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office."

Those observations have been consistently applied in appeals in Scotland as well as in England and Wales.

[20] In *Singh* v *Belgium*, the petitioners objected to deportation to Russia because they feared repatriation to Afghanistan. In support of their case they produced various documents emanating from the UNHCR. The Belgian authorities treated the documents as having no convincing value because they would be easy to falsify. The European Court of Human Rights found, on the facts of the case, that because the documents were at the heart of the request for protection, rejecting them without checking their authenticity fell short of the careful and rigorous investigation expected of national authorities in an article 3 case, when a simple process of inquiry would have resolved conclusively whether or not they were authentic and reliable. In *MJ* v *Secretary of State for the Home Department* [2013] Imm AR 799, the Upper Tribunal considered whether the decision in *Singh* v *Belgium* was in

conflict with the approach followed since *Tanveer Ahmed*, and decided that it was not. The Tribunal observed (paragraph 50):

> "*Ahmed's* case does not entirely preclude the existence of an obligation on the Home Office to make inquiries. It envisages, as can be seen, the existence of particular cases where it may be appropriate for inquiries to be made. Clearly on its facts *Singh's* case can properly be regarded as such a particular case. The documentation in that case was clearly of a nature where verification would be easy, and the documentation came from an unimpeachable source. We do not think that [counsel] has entirely correctly characterised what was said in *Singh's* case in suggesting that in any case where evidence was verifiable there was an obligation on the decision maker to seek to verify. What is said at para 104 is rather in terms of a case where documents are at the heart of the request for protection where it would have been easy to check their authenticity as in that case with the UNHCR . . ."

[21] The above authorities were reviewed by the Court of Appeal in *PJ (Sri Lanka)*. Delivering a judgment with which the other members of the court concurred, Fulford LJ emphasised that there may be a number of reasons why in a particular case verification by the respondent might not be feasible or be unjustified or disproportionate. He continued (paragraphs 30-32):

> "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 inquiry 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 inquiry will conclusively resolve its authenticity and reliability: see *Singh* v *Belgium* given 2 October 2012, paras 101-105. I do not consider that there is any material difference in approach between the decisions in *Ahmed's* case 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.
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> 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 inquiry. 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 [be] 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 inquiries. 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 inquiries, and if the court concludes this requirement existed, it will resolve whether the Secretary of State sustainably discharged her obligation: see *NA* v *Secretary of State for the Home Department* [2014] UKUT 205 (IAC). If court finds there was such an obligation and that it was not discharged, it must assess the consequences for the case."

[22] These observations are important in emphasising the differing roles of the Secretary of State on the one hand and the court or tribunal on the other. Verification is a matter for the Secretary of State. Failure by the Secretary of State to carry out an appropriate process of verification in circumstances which require it has a particular consequence: the Secretary of State cannot challenge the authenticity of the document in the court or tribunal. But, as Fulford LJ observed, the court or tribunal is not required to order the Secretary of State to carry out a process of verification. Where an obligation to verify has not been discharged, the court or tribunal's duty is to "assess the consequences for the case".

[23] The duty of the court or tribunal was given further consideration by an Extra Division of the Inner House in *AR* v *Secretary of State for the Home Department*. The appellant in this case contested his removal to Pakistan on the ground that he would be persecuted on account of his homosexuality. In support of his claim he lodged a First Information Report being on the face of it a police record of his detention in Pakistan following an allegation of sodomy, a Pakistan newspaper article concerning the same matter, and documents in relation to his non-appearance in court in Pakistan. The FtT judge was not persuaded that the conditions set out in *PJ (Sri Lanka)* were met, because nothing had been produced by the appellant to establish the documents' provenance, and because such documents were frequently falsified. On appeal to the Upper Tribunal, the judge agreed that the duty on the

respondent to verify documents submitted by an appellant had not arisen in this case, and accordingly refused the appeal.

[24] Delivering the opinion of the Inner House, Lord Malcolm observed that the documents had the hallmarks of valid documents, and that although there was at least a possibility that they were fabricated, they were all easily verifiable, two of them being from an official source. He continued (paragraph 33):

> "The appeal in this court focused on two matters, namely (a) the treatment of the documents and (b) the evidence of the supporting witness. So far as the documents are concerned, we have mentioned that, on their face, they appear to be valid and authentic, for example, where applicable, being duly stamped and signed. They are supportive of the essentials of the petitioner's account of the events which led him to leave his family and homeland. [The Upper Tribunal judge] ruled that the authorities were under no obligation to verify the documents. Be that as it may, in our view it does not address the logically prior question, namely, did the First-tier Tribunal have and explain a sound basis for their rejection? If the answer to that question is no - the test set out in *PJ (Sri Lanka)* does not arise."

Again this passage emphasises the important distinction between, on the one hand, the possible existence of a duty on the Secretary of State to verify a document submitted by an applicant in support of a claim and, on the other hand, the role of the court or tribunal in assessing the weight to attach to such a document. The court's decision in *AR* was that the FtT had given no good reason for rejecting the documents; it followed that the Upper Tribunal had erred in law in concluding that the FtT had not erred in its approach to the documentary evidence or in giving it little weight. Once again, it will be noted that the court focused in the first instance upon the approach of the tribunal to the documentation rather than upon the existence or otherwise of a duty on the Secretary of State to verify its authenticity and/or reliability.

[25] Finally, mention should be made of the decision of the Court of Appeal in *MA (Bangladesh)* v *Secretary of State for the Home Department* [2016] EWCA Civ 175, which

concerned an asylum claimant who asserted that he had been convicted in absence of murder in Bangladesh because of his anti-government political activities there. In the FtT he had produced what purported to be a translation of a judgment by a district judge sentencing him to 12 years' imprisonment, together with letters from various lawyers in Bangladesh, and a letter (with certified translation) from the Bangladesh Ministry of Home Affairs confirming that the appellant was a fugitive for whom an arrest warrant had been issued. The FtT judge had refused to place any weight upon these documents because of discrepancies and inconsistencies with the appellant's evidence. Delivering a judgment with which the other members of the court agreed, Lloyd Jones LJ referred to *Tanveer Ahmed*, *Singh* v *Belgium*, *MJ* and *PJ (Sri Lanka)*. He accepted that, "considered at one level", the documents were at the centre of the request for protection. Nevertheless he held that the FtT's' decision was not open to challenge on the basis of *PJ (Sri Lanka)*. He observed (paragraphs 43 and 44):

> "43. Would a simple process of inquiry conclusively resolve the authenticity and reliability of these documents? It seems to me that cases will be rare in which a court could be completely confident that a simple process of inquiry will conclusively resolve the issue. In *Singh* it was adjudged that a request of UNHCR would have been extremely likely to resolve the issue in that case once and for all. By contrast, the documents in the present case may well prove difficult to verify.
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> 44. The approach formulated by this court in *PJ (Sri Lanka)* also requires a consideration of whether in all the circumstances of the particular case the Secretary of State was under an obligation to make enquiries into the authenticity and accuracy of the documents. In this context [counsel for the Secretary of State] placed great emphasis on the finding of [the FTT judge] that MA was a mendacious witness whom she comprehensively disbelieved. The judge was well placed to come to this conclusion for which, as we have seen, she gave detailed reasons unrelated to the contested documents. This may undoubtedly reflect on the authenticity of the documents on which MA seeks to rely. The process can, nevertheless, work in both directions and in a case where documents are eventually shown to be genuine, this may be capable of having an important impact on the assessment of the truthfulness of an appellant's case."

The focus is therefore again on the approach of the FtT to the documents relied upon, and on whether the FtT judge has given a sound explanation for declining to rely on ostensibly genuine documents in respect of which no process of verification had been carried out.

Decision

Ground of appeal 1

[26] In refusing to grant permission to appeal in the present case, the Upper Tribunal concluded that "any express consideration of whether [the three documents produced] had been verified by the respondent would not arguably be material to the outcome of this appeal". The basis for that conclusion was that the FtT's refusal to place weight on the documents was related mainly to inconsistencies rather than concerns regarding authenticity. I agree with the Upper Tribunal's conclusion, but for somewhat broader reasons. In my opinion both the ground of appeal and the Upper Tribunal's response to it fail to recognise the differing roles of the Secretary of State and of the tribunal, as emphasised in the authorities to which I have referred. If in the present case there was a duty to verify either the authenticity or reliability of any of the documents produced, that duty was incumbent upon the respondent, and not on the FtT. Nor, as the court observed in *PJ (Sri Lanka)*, was it for the FtT to order the carrying out of any investigations. As was made clear, the consequence of any breach of an obligation to undertake a proper process of verification was simply that it was not open to the *respondent* (as opposed to the FtT, as asserted in the ground of appeal) to impugn the authenticity of the documents.

[27] It is common ground that no point was taken before the FtT by the petitioner that the respondent was in breach of a duty to verify the documents. Indeed, there is nothing in the FtT's decision to indicate - and it was not submitted to me - that the respondent even

challenged their authenticity. In these circumstances, the question for the FtT, in my opinion, was not whether the respondent was in breach of a duty to verify the authenticity and/or reliability of the documents, but rather what weight it (the FtT) ought to attach to the documents, and to the information they contained, when assessing the evidence before it as a whole. It is apparent from the terms of paragraph 9.39 of the FtT's decision (see para [8] above) that the FtT did ask itself this question. That being so, the Upper Tribunal was in my opinion correct to hold that a ground of appeal asserting that the FtT erred in law by failing to recognise that the respondent had not sought to verify the documents, or by failing to recognise that no thought had been given to means of verification, was not arguable. Those were not matters that the FtT was obliged to address in the course of its assessment of the evidence.

[28] For those short reasons, the first ground of appeal falls to be rejected. I have, however, in the interests of fairness to the petitioner, given consideration to the question whether, as Lord Malcolm put it, the FtT had and explained a sound basis for declining to place weight on the documents. The petitioner had founded upon the documents as demonstrating (i) that he had carried out a period of compulsory military service (which was not in dispute), and (ii) the dates when his military service began and ended. I have set out the FtT's reasoning above. The Upper Tribunal's assessment was that the main reason why the documents were not accepted by the FtT was not that they were not considered to be genuine, but because of inconsistencies within the documents themselves and with the petitioner's other evidence. In so far as inconsistencies are characterised as the *main* reason for the FtT declining to attach weight to the documents, I am content to agree with the Upper Tribunal's assessment. They do not, however, appear to have been the FtT's only concern. Sub-paragraphs (4) and (6) of paragraph 9.38 of the FtT's decision (see para [7]

above) seem to me also to raise issues of authenticity: a difference in the author's rank and title is noted, as well as an apparent inaccuracy in translation and differences in the format of documents bearing to emanate from the same author and the same office. It is not entirely clear to me why the FtT regarded these matters as being of any significance, especially when authenticity does not appear to have been raised as an issue by the respondent; the inaccuracy in translation (consisting of omission of a word in the author's name) appears in particular to be wholly immaterial. If I had concluded that those matters contributed materially to the FtT's decision to attach no weight to the documents, I would have had concerns regarding the soundness of the basis for their rejection.

[29] I am, however, satisfied, reading the FtT's decision as a whole, that it was the inconsistencies that persuaded the FtT not to regard the documents as supportive of the petitioner's case. Those inconsistencies are summarised at paragraphs 9.1 to 9.3 of the FtT's decision: the petitioner in oral evidence stated that he had served in the army for 18 months until 9 March 2013; Document 1 certified that he served from 11 February 2011 until 31 July 2012; Document 3 appeared to state that he served from 14 October 2011 until 9 March 2013. In addition, Documents 2 and 3 stated that he had served under the author, Major Zelaya, at Zacatecoluca from 30 September 2011 until 7 February 2012. The significance of the date of discharge is in linking the petitioner's period of service to the alleged threats by Isidro. The FtT's conclusion at paragraph 9.39 was that the documents were either inconsistent with other evidence or lacked detail or were inaccurate, and that no material weight could be attached to them. Given the discrepancy in particular between the petitioner's evidence and the terms of Document 1, I consider that the FtT has provided an adequate basis for declining to rely on the documents as supporting the petitioner's claim.

[30] It is also not strictly necessary for me to decide, had I been persuaded that the test in *PJ (Sri Lanka)* fell to be applied, whether the respondent was in breach of a duty to undertake a proper process of verification of the documents. However, as the point was argued I shall express my view on it. In my opinion no such duty arose for the following reasons.

[31] Firstly, the documents cannot reasonably be described as being central to the petitioner's case, in the sense in which that expression is used in cases such as *Singh* v *Belgium* and *PJ (Sri Lanka)*. The documents in those cases bore to emanate from official sources and demonstrated the very matters which were claimed by the respective applicants to make it dangerous for them to be deported: for example, in *PJ (Sri Lanka)*, the documents included a police report stating that the applicant was to be arrested on arrival for alleged involvement in a bombing. In contrast, the documents in the present case do not deal directly with the matter which the petitioner says would cause him risk of harm, namely violence by members of a criminal gang. They deal only with the period of his military service, which is no more than an element of the evidence which may or may not support his credibility in relation to the matter at the heart of his claims for asylum and humanitarian protection. None of the authorities cited above goes so far as to impose a duty to verify documents produced in such circumstances.

[32] Secondly, and more importantly, the present case differs from those cited above in that the petitioner is insisting on verification not because the documents are, *ex facie*, clearly supportive of his case but in order to attempt to resolve inconsistencies which might appear to render them unsupportive. In the absence of any challenge by the respondent to their authenticity, the difficulty for the petitioner is that at least one of the documents (Document 1) is not consistent with his account of the timescale of his contact with Isidro.

He is, in effect, asserting that the respondent has a duty to carry out investigations in order to attempt to resolve discrepancies in his own supporting evidence. That, in my opinion, goes far beyond the circumstances, described as "exceptional", in which *Singh* v *Belgium* and *PJ (Sri Lanka)* impose a duty on the respondent to undertake a process of verification. Putting the matter at its lowest, the petitioner's argument falls foul of the condition that the verification process must not only be simple to carry out but also likely to be conclusive of the issue in the case.

[33] Finally in relation to the first ground of appeal I should note that the petitioner argued that the respondent should not be allowed to present any argument in these proceedings that did not form part of the Upper Tribunal's reasons for refusing permission to appeal. It was submitted that the respondent was accordingly precluded from arguing either that the petitioner's verification point could not be taken now because it was not taken before the FtT, or that the *PJ (Sri Lanka)* test was not met. Reference was made to *Absalom* v *Governor of HM Prison Kilmarnock* [2010] CSOH 109, referred to in *Enaburekhan* v *Secretary of State for the Home Department* [2020] CSOH 18 at paragraph 13. In my opinion this argument is misconceived. *Absalom* was concerned with a different question, namely whether the court could have regard to additional reasons given *by the decision maker* after his decision had been judicially challenged as irrational and erroneous in law. I am respectfully unable to agree with the view expressed in *Enaburekhan* that the point has force in relation to an argument *by* a *respondent* that an error of law by a decision maker was of no materiality because the outcome would have been the same even if the alleged error had not been made. In the context of challenges to refusal of permission to appeal, it is by no means unusual for the respondent to contend that the challenge should fail because the appeal was not arguable for reasons other than the one given by the judge when refusing permission.

Ground of appeal 2

[34] In my opinion there is no error of law in the Upper Tribunal's reasons for rejecting the second ground of appeal. The Upper Tribunal acknowledged that there was some force in the criticism of the FtT's treatment of the expert report as adopting an unduly grammatical approach in its analysis. On the whole, however, the Upper Tribunal correctly recognised that the FtT's principal reasons for declining to place reliance on the report were that it was insufficiently related to the particular circumstances of the petitioner and that in some respects the petitioner's account was not consistent with it. The points mentioned by the petitioner in argument amount to no more than disagreement with the FtT's treatment of minor points of detail.

[35] Nor, in my opinion, can the FtT's decision properly be regarded as a re-characterisation of the evidence based on its own perception of reasonableness. The point that the FtT was making in relation to Isidro's apparent absence of reaction to the petitioner's initial refusal to agree to steal weapons was that the petitioner's evidence did not accord with the expert evidence regarding the approach of gangs to "unfinished business". The Upper Tribunal was therefore correct to reject this criticism as unarguable.

Ground of appeal 3

[36] In the third ground of appeal it is contended that the decision of the FtT is inadequately reasoned in relation to two specific statements, the first being that it was difficult to understand why the gang would want the petitioner to give up his military service, and the second being that the judge was not persuaded that poor memory would be likely to give rise to the inconsistencies in the evidence. The Upper Tribunal held that when

the decision was read as a whole, adequate and cogent reasons had been given for dismissal of the appeal, with findings which were open to the FtT on the evidence before it. I agree. It has frequently been emphasised that the obligation on a decision-maker is to give reasons which are intelligible and adequate, and which enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. The reasons need refer only to the main issues in dispute, not to every material consideration: see eg *South Bucks District Council* v *Porter* [2004] 1 WLR 1953, Lord Brown of Eaton-under-Heywood at paragraph 36. The two matters identified in the third ground of appeal were matters of detail in respect of which no further explanation was required in order to comply with the duty incumbent on the FtT. In my opinion the Upper Tribunal correctly held that this ground was not arguable as no material error of law on the part of the FtT had been identified.

Disposal

[37] I shall accede to the respondent's motion to sustain the respondent's fifth and sixth pleas in law and to refuse to grant reduction of the Upper Tribunal's decision. Questions of expenses are reserved.