OUTER HOUSE, COURT OF SESSION

[2019] CSOH 84

P1111/18

OPINION OF LADY CARMICHAEL

In the petition of

HMD

Petitioner

For Judicial Review

of a decision of the Upper Tribunal (Immigration and Asylum Chamber) to refuse to grant the petitioner permission to appeal

Petitioner: Caskie; Drummond Miller LLP (on behalf of A J Bradley & Co)
Respondent: McIver; Office of the Advocate General

5 November 2019

Introduction

[1] The petitioner seeks reduction of a decision of the Upper Tribunal ("UT") refusing permission to appeal against a decision of the First-tier Tribunal ("FTT"). He is a citizen of Vietnam. He claimed asylum on the basis that he feared mistreatment as a victim of trafficking if returned to Vietnam, and also that he was at risk of persecution because he had been brought up Roman Catholic and practised his faith. His claim was refused, and he appealed to the FTT. The FTT dismissed his appeal. The FTT judge did not believe the petitioner's claim to be a victim of trafficking, or his claim that he was a Roman Catholic.

[2] The FTT refused the petitioner permission to appeal to the UT. He then applied to the UT for permission to appeal.

The grounds of appeal presented to the FTT

[3] The grounds of appeal to the FTT contained a first paragraph headed "Background", and, under the heading "Errors in law" further paragraphs numbered 1-13. The first two complained that the FTT judge considered the credibility of the petitioner by reference to his own account and inconsistencies in it, before then turning to a medical report by a Dr Maguire, and a report by Professor Bluth, who gave an opinion regarding conditions in Vietnam so far as relevant to the claims made by the petitioner.

[4] Paragraph 3 related to the FTT judge's approach to the relevance of a tattoo of a Vietnamese priest on the petitioner's chest, in the context of his claim to be a Roman Catholic. Paragraphs 4-7 made various criticisms as to the approach taken to particular aspects of the petitioner's account in paragraphs 27 and 28 of her decision. Paragraphs 8-12 all related to criticisms of the FTT judge's approach to the evidence about the petitioner's Roman Catholicism. Paragraph 13, finally, read: "The Judge has also failed to adequately consider the Expert Reports."

The grounds of appeal to the UT

[5] The first paragraph of the grounds of appeal to the UT read:

> "Reference is made to the original grounds of appeal. A copy is enclosed for ease of reference. These are relied upon."

Further paragraphs numbered 2-6 followed. Paragraph 7 read:

> "In any event, there are errors in the assessment of credibility, which were referred to in the original grounds of appeal. These grounds are relied upon."

The decision of the UT

[6] So far as material, the decision reads:

> "The grounds complain about the judge's approach to the medical evidence; it is argued that she reached negative credibility findings and then considered and rejected the two reports.
>
> That is a misrepresentation of the judge's findings and conclusions. She makes it plain at the outset that she considered all the evidence in its totality before making any findings and that it was all considered in the round (at 25). She also starts her findings confirming that she has considered the evidence provided by the appellant throughout the asylum process (at 27). She proceeds as part of her findings to identify issues with the medical evidence and also notes that the appellant had made no mention of any scarring until January 2018 when he made a statement. It is not, therefore, arguable, that the judge misdirected herself. No arguable error of law has been shown."

Summary of submissions

[7] The petitioner submitted, first, that the reasons disclose that the UT did not consider all of the grounds of appeal, including those brought before the FTT and incorporated by reference into the grounds before the UT. Several of the grounds of appeal were simply not mentioned at all in the reasons. The UT erred in law in failing to consider those grounds of appeal, all of which were arguable.

[8] Second, the reasons given for refusing permission focused on complaints made by the petitioner about the approach of the FTT judge to credibility. Those reasons themselves disclosed error of law on the part of the UT. The grounds of appeal to which they related were arguable. The petitioner did not expand in submissions in relation to the merits of all of those grounds of appeal. Mr Caskie did, in accordance with his note of argument, which he adopted, make submissions in relation to the merits of some of those grounds of appeal. In relation to others, he simply submitted that they had not been dealt with by the UT.

[9] The respondent contended that, with one exception, in relation to which Mr McIver made a concession in the course of the substantive hearing, the complaints made by the petitioner about the approach of the FTT judge were without foundation.

[10] The respondent's focus in the course of the substantive hearing was on whether any error on the part of the Upper Tribunal was material. The respondent submitted that it was not, because there were parts of the FTT judge's decision in which she considered, whether, assuming that the petitioner was credible, he would be at risk if returned to Vietnam. Those parts of her decision had not been challenged before the UT, and they were not challenged in the present petition.

[11] Mr Caskie submitted in response that the Court ought not to attempt to assess whether the FTT judge had made a material error of law. That task had been assigned by Parliament to the UT. The UT had erred in refusing permission, and the whole task of assessing whether the FTT judge had made a material error of law ought to be carried out by the UT.

The respondent's concession

[12] The FTT judge was not satisfied that the petitioner was a genuine believer in the Catholic faith, or that he would intend to follow that religion if he returned to Vietnam. The FTT judge gave a variety of reasons for that conclusion. In support of his claim to be a practising Roman Catholic, the petitioner provided evidence about a recent tattoo on his chest of Diep Buu Trong. I understand that to be a reference to Father Francis Xavier Truong Buu Diep. The petitioner believed that Diep Buu Trong had performed miracles for him. He believed that prayers he had rendered to Diep Buu Trong had been answered. The FTT judge discounted this passage of evidence as supporting the petitioner's claim to be a

Roman Catholic, because, she said, he had "chosen to place his faith in someone other than Jesus, the Virgin Mary or any of the recognised saints in whom followers of Catholicism place their faith". Mr McIver conceded that this passage in her reasoning could not be supported. He submitted that the circumstance that practising Roman Catholics sometimes pray for the intercession of individuals not yet canonised ought to have been taken into account to her in assessing the significance of the petitioner's faith that Diep Buu Trong had been responsible for his prayers being answered.

Did the UT err in law?

[13] The reasons given by the UT do not disclose any consideration at all of a number of the grounds which were before the FTT and which were expressly relied on, of new, before the UT. There is no indication, for example, that it considered any of the grounds before the FTT which dealt with the FTT judge's treatment of the petitioner's claim based on his Roman Catholicism. The UT need not in all cases give reasons for refusing each ground of appeal individually. Different grounds of appeal may in substance address the same matters. There may be cases in which some claimed errors of law are not material unless another is found established. If that latter claimed error is not deemed arguable, it will be pointless for the UT to consider permission in relation to all of the others. Refusal of permission may be made in very short form, so long as the reasons disclose why the matter was decided as it was and what conclusions were reached on the principal and controversial issues of importance: *South Bucks District Council and another* v *Porte*r *(No 2)* [2004] 1 WLR 1953 at paragraph 36.

[14] In this case, however, I infer that the UT did not consider any grounds other than those focused in paragraphs 2-6 of the grounds of appeal to the UT. That was an error of

law. It was a failure to exercise the jurisdiction with which it had been entrusted by Parliament in relation to considering applications for permission to appeal. The respondent submitted that some of the grounds had already been addressed by the FTT, that the UT was entitled to rely on that, and that no purpose would have been served by its repeating the conclusions of the FTT. That submission is wrong in principle. Parliament has provided two opportunities for an unsuccessful party to seek permission. That party is entitled to have his application considered independently by each of the FTT and the UT. He must be able to tell from the reasons given, even if they are stated briefly, that each body has exercised its jurisdiction. If the UT had considered all the grounds and reached the same conclusions as the FTT, and for the same reasons, it could simply have said that it had done just that. The respondent's submission on this matter is also undermined by the concession made in relation to one of the grounds of appeal before the FTT.

[15] At least one of the grounds of appeal was arguable. The respondent conceded in the course of the substantive hearing not only that it was arguable, but that it had correctly identified an error of law on the part of the FTT judge. Even without considering for myself the arguability of any of the grounds of appeal before the UT, other than the one to which the concession related, I am, therefore, satisfied that the UT erred in law.

[16] I require to consider whether the UT made a material error or errors in law. Mr Caskie submitted that I should not consider whether any error on the part of the UT in relation to the grounds of appeal before it was material. He submitted that if I were to consider that matter, I would be, in effect, usurping the function of the UT. Having identified an error of law on the part of the UT, I ought simply to reduce the decision of the UT so that the whole matter could be considered by the UT. I do not accept that submission as correct. I am bound to carry out an assessment of whether the errors of law I have

identified were material errors of law: *Ashiq v Secretary of State for the Home Department* 2015 SC 602, paragraph 23.

[17] Before turning to that matter, I consider for completeness the petitioner's arguments which were not the subject of concession. These relate, first, to the arguability of the grounds which the UT considered and rejected, and, second, to the arguability of the grounds (other than the one that was the subject of concession) which were not considered by the UT.

Failure to deal with the evidence in the round

[18] The petitioner complained that the FTT judge had considered the credibility of the petitioner's account and reached a conclusion adverse to him before considering whether any of the other material before her, and in particular a medical report, supported his credibility. It was not disputed that to do that would be an error of law: *HE (DRC – Credibility and Psychiatric Reports)* [2004] UKIAT 00321, paragraph 22; *Mibanga* v *Secretary of State for the Home Department* [2005] EWCA Civ 367, paragraphs 30-32.

[19] The UT addressed this complaint and rejected it in its decision.

[20] The FTT judge at paragraph 27 of her decision set out an extensive list of factors that she considered relevant to the credibility of the petitioner. She set out further factors in paragraphs 28 and 29, and in paragraph 29 wrote:

> "I do not find the [petitioner] credible and do not accept he has told the truth about how he came to make his journey to the United Kingdom or his explanation for the scarring on his body or that there is a gang of traffickers who would seriously harm him should he return to Vietnam."

At paragraph 30 she went on to give reasons for attaching little weight to a medical report provided by a Dr Maguire in relation to the scarring on the petitioner's body. It is in part

because she structured her decision in that way that the petitioner asks me to infer that she did not consider all of the evidence relative to the credibility of his claim to be a victim of trafficking in the round.

[21] The petitioner criticised the approach the FTT judge had taken to Dr Maguire's report. Mr Caskie submitted that the FTT judge should have taken into account in assessing the credibility of the petitioner the opinion of Dr Maguire that there were few possible causes for the petitioner's scarring other than the trauma the petitioner had described. Dr Maguire's report included the following: "[The petitioner's] injuries satisfy the criteria to meet Istanbul Protocol Class C injuries."

[22] The Istanbul Protocol is a set of guidelines issued by the United Nations, and is also known as *The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. A reference to class C injuries is a reference to paragraph 187 of the protocol. That paragraph sets out terminology by means of which a physician may express the degree of consistency between a lesion and the explanation for it provided by the patient. It is in these terms:

> "187. The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:
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> (a) Not consistent: the lesion could not have been caused by the trauma described;
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> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
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> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
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> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

> (e) Diagnostic of: this appearance could not have been caused in any way other than that described."

[23] It is a legitimate function of medical practitioners, within the area of their expertise, to offer an opinion about the consistency of their findings with an asylum seeker's account of the circumstances in which scarring was sustained, not limited to the mechanism by which it was sustained: *KV (Sri Lanka)* v *Secretary of State for the Home Department* [2019] UKSC 10, paragraphs 20-25.

[24] The FTT judge wrote:

> "The medical report prepared by Dr Maguire is of limited assistance. Dr Maguire is experienced in accident and emergency medical care with no indication he has worked in the field of trauma, other than as it manifests itself in accident and emergency cases, of scarring in accordance with the Istanbul Protocol or mental health issues. The account of the events leading up to the [petitioner] being in the United Kingdom, and since he arrived, have several discrepancies to those the [petitioner] has provided directly to his solicitor, the Home Office, and the Tribunal. The psychological effects narrated are the [petitioner's] own observations and not those of the doctor. The doctor provides no explanation as to how the injuries on the [petitioner's] body meet Class C in terms of the Istanbul Protocol. The Istanbul protocol refers to what a medical examiner would consider when assessing whether or not a person has been subjected to physical or sexual torture.
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> > 'The distinction between physical and psychological methods is artificial. For example, sexual torture generally causes both physical and psychological symptoms, even when there has been no physical assault. The following list of torture methods is given to show some of the categories of possible abuse. It is not meant to be used by investigators as a checklist or as a model for listing torture methods in a report. A method-listing approach may be counter-productive, as the entire clinical picture produced by torture is much more than the simple sum of lesions produced by methods on a list. Indeed, experience has shown that when confronted with such a "package deal" approach to torture, perpetrators often focus on one of the methods and argue about whether that particular method is a form of torture.'
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> The protocol then provides a list of injuries and the like that can be an indication of torture having taken place, one of which is '(c) Burns with cigarettes, heated instruments, scalding liquid or a caustic substance.' To conclude a person has been tortured would require specialist medical knowledge as otherwise any scarring from burns with cigarettes could be caused in a number of different ways. The doctor's examination found the scars on the [petitioner's] body to be consistent with burns

> injuries as described by the [petitioner] but does not make any finding as to whether there could have been other causes which is implied when scarring is no more than consistent with an appellant's account. Thereafter the doctor provided his impression of [the petitioner's] account of events referring briefly to the scars but with no basis for the remainder of the conclusions he reaches in his brief paragraph at the bottom of page 4 of his report. Finally, the report remains unsigned and the declarations therefore cannot be relied upon in the absence of the signature of the doctor and his absence from the hearing to confirm the contents of that report are from his own findings. I therefore, place little evidential weight on the medical report."

[25] The following matters arise. The passage quoted by the FTT judge is from paragraph 144 of the Istanbul Protocol. One reading of this paragraph of the FTT judge's decision is that she thought that the sub-paragraph (c) that she was quoting was the "Class C" referred to in Dr Maguire's report. Dr Maguire's report, where it records his findings on examining the petitioner, repeatedly describes areas of scarring "consistent with", rather than "highly consistent with", burn injuries. That is surprising in the light of his earlier reference to class C injuries. It raises a question as to what he meant by that reference.

[26] The petitioner referred to *KV (Sri Lanka)* v *Secretary of State for the Home Department*. In that case a doctor had opined that his clinical findings were highly consistent with the claimant's account of torture, and that the other hypothesis, which was of wounding which was self-inflicted by proxy (SIBP) – that is, inflicted by another at the claimant's invitation in order to manufacture evidence – was unlikely. Self-inflicted injury was inherently unlikely.

[27] The petitioner also submitted that the FTT judge had not been entitled to take the approach she did to the circumstance that the report was unsigned. She had not been entitled to reject the report on the basis that its author did not have the requisite expertise. It was not obvious why a specialist in emergency medicine should not be suitably qualified to comment on whether scarring was consistent with burn injuries.

[28] I deal first with the circumstance that the report was unsigned. There are Practice Directions relative to the provision of expert reports in proceedings before the FTT. One of the issues in *Secretary of State for the Home Department* v *MN and KY* 2014 SC (UKSC) 183 was the extent to which expert evidence could be accepted in a form not prescribed by the Practice Directions. Lord Carnwath said this:

> "35. In the civil courts, flexibility on such matters is routinely accepted under modern practice. For example, in *Rogers* v *Hoyle (Secretary of State for Transport and International Air Transport Association intervening)* [2014] EWCA Civ 257, the Court of Appeal confirmed the admission of a report by a body known as Air Accident Investigation Branch, one objection having been that it failed to comply with mandatory rules (CPR Pt 35) relating to expert evidence. In support of a flexible approach to the rules, Christopher Clarke LJ cited (*inter alia*) *Sunley* v *White (Surveyors & Estate Agents) Ltd* [2003] EWCA Civ 240, in which:
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> > '… this court regarded as admissible a draft soil report issued by a company although the report was unsigned, provisional and did not carry the name or qualifications of the author. These were matters which Clarke LJ, with whom Longmore LJ agreed, treated as "essentially going to weight"' (para 44).
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> 36. Such considerations apply with equal or greater force before tribunals. Thus the Court of Appeal has warned tribunals against rejecting expert evidence merely because a witness is not available for cross-examination. In *Singh (Tarlochan)* v *Secretary of State for the Home Department* [2000] Imm AR 36 Buxton LJ said, at para 43:
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> > '… In the way in which this sort of inquiry is necessarily conducted in front of a Tribunal, it is only rarely going to be the case that evidence is given by persons actually appearing in front of a Tribunal rather than by reference to the reports of persons of greater or lesser weight - Amnesty International, the United Nations Commission on Refugees and the Canadian body used in this case …'
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> 37. So here, it is inappropriate for general questions relating to Sprakab, its methodology and the presentation of its reports to be re-litigated constantly in separate FTT hearings, with inevitable inconsistency of outcome. The Upper Tribunal were right in *RB* to address those issues. Subject to appropriate safeguards, they were entitled in my view to find no objection of principle to the admission of the Sprakab reports, whether because they were in the name of an organisation rather than an individual, or in general for failure in other respects to comply with the practice directions. This discussion makes it unnecessary to consider in more detail issues (i), (iii), (iv); the short answer is that none of them points to any overriding objection to evidence in this form. As Lord Eassie said, in a passage to which Mr Lindsay took no objection:

> '… in the end one naturally has to consider whether, in substance, the tribunal in question has been provided in the case before it with expert evidence which the tribunal can be satisfied is based upon an appropriate and adequate expert knowledge, given with the neutrality required of the expert, unencumbered by views falling outwith his field of expertise.' (para [57])."

[29] The absence from a document of a signature may in some cases leave a tribunal with little or no confidence that its contents are genuinely to be attributed to the individual said to be responsible for it, or that its author is willing to confirm its truth and accuracy. The circumstance that evidence is not in the prescribed form in all respects is a matter that can legitimately go to the weight the tribunal affords it. It other cases the absence of a signature could indicate that a document, such as an expert report, is not in its final form, and has not been fully revised to the satisfaction of its author. It would be wrong to say that an unsigned report "cannot be relied on", as a matter of principle. The lack of signature is a matter that goes to weight.

[30] The case of *KV* can be distinguished. The disposal of the appeal in *KV* turned on the evidence in that case. The doctor had considered both the hypothesis offered by the claimant, and the alternative of wounding SIPB, and offered an opinion as to the likelihood of each. A notable feature is that there was evidence that if the claimant's wounding was SIBP, the wounds on his back could have been inflicted only under anaesthetic and so he would have needed assistance from a person with medical expertise prepared to act contrary to medical ethics. There is nothing comparable by way of explanation or reasoning in the medical report that was before the FTT in this case.

[31] The structure of the decision, which I have already described, gives cause for concern that the FTT judge considered the credibility of the petitioner without taking into account the medical evidence. I have not relied on her assertion at paragraph 25 that she considered

the evidence in the round. The question is whether, on a fair reading of her decision as a whole, it is arguable that she failed to do so. In paragraph 27e she wrote:

> "I … find he has fabricated the reason for the scarring in an attempt to embellish has claim to have been trafficked."

In paragraph 29 she wrote:

> "I … do not accept … his explanation for the scarring on his body."

I note that it is not entirely clear whether she was satisfied that he had cigarette burns but not that they were inflicted in the way he described, or whether she was not satisfied that the lesions on his body were caused by cigarette burns.

[32] In this case what the medical report offered was an opinion that supported the contention that the petitioner had been burned with cigarettes. As I have already observed, its content was different from that of the medical evidence in *KV*. The present case also falls to be distinguished in a similar respect from *Mibanga*. The location of certain of the scars in that case – under the penis – was thought by the court to indicate that it was at first sight unlikely that they were the result of illness or disease rather than torture.

[33] It is true that the FTT judge, as the UT noted, identified "issues with" the medical evidence. The FTT judge was entitled to consider the extent of Dr Maguire's expertise in relation to injuries inflicted by means of torture, although it is not clear why he should be unqualified to give an opinion that particular injuries were caused by cigarette burns. I have identified what may be a mismatch between Dr Maguire's reference to "Class C injuries" and his use of the phrase "consistent with". The FTT judge's decision, however, in turn produces some uncertainty as to what she understood by the reference to "Class C injuries", and to that extent is unsatisfactory. She did, however, correctly, identify the circumstance

that Dr Maguire in the part of his report relating his findings only described the injuries as "consistent with" the mechanisms of injury narrated by the petitioner.

[34] Although the FTT judge used the expression "cannot be relied upon in the absence of … signature", she did not actually leave the content of the report out of account altogether, but determined to accord it little weight. I note, however, that the language she used – "cannot be relied upon in the absence of the signature of the doctor and his absence from the hearing to confirm the contents of that report are from his own findings" – indicates that she was concerned that the report contained material that did not derive from the findings of the doctor. That suggests a concern on her part that there had been fabrication either by the doctor or some other unnamed individual of part of the report. Other than the absence of signature she provides no basis for that concern, which would be a concern about serious misconduct on the part of the clinician or some other person responsible for bringing the report to the FTT.

[35] In summary, the structure of the decision raises a concern that the FTT judge did not consider the evidence in the round, and reached a view about the credibility of the petitioner before considering whether any of the material in the medical report was capable of lending support to his credibility to any extent, then turning, separately, to consider the medical evidence and find it of little assistance. The way in which she approached the medical report, in particular the reference to Class C injuries, and the absence of signature of the report, does little to dispel that concern, and I conclude that the ground of appeal dealing with this matter did raise an arguable point of law.

Account of arrest

[36] One of the factors founded on by the FTT judge was that the petitioner had given a false account of his arrest. She wrote:

> "He has denied being arrested at Nail Express in Northwich when the fact is this happened and cannot be disputed. He claims he was arrested in Worcester which is nearly 100 miles away."

[37] The petitioner's complaint was formulated in the petition in the following way:

> "At paragraph 28 the Judge indicates the petitioner had provided false evidence of a matter that could not be denied. In fact, the Judge misrecorded the evidence which was not that he had not been arrested at a specific place but rather he had not worked there. That error undermines the Judge's credibility finding."

A similar complaint had appeared in paragraph 7 of the grounds of appeal presented to the FTT and then re-presented to the UT.

[38] The petitioner's immigration history as set out in the Conclusive Grounds Consideration Minute includes the following:

> "On 13/12/2013 you were encountered by immigration officers working illegally within Hollywood Nails, 1-5 Market Road, Doncaster, DN1 1LS. You were subsequently detained.
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> …
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> On 29/11/2016 you were encountered by Immigration Officers working illegally within the premises of Nail Express, 62 High Street Northwich, CW9 5BE, you were subsequently arrested and conveyed to Middlewich custody where an interview was conducted. You were subsequently detained."

[39] The petitioner gave an account of his arrest in 2016 in his statement dated 10 March 2017. He gave an account of moving into his friend's house in Worcester in March 2016. He said that he had gone to a birthday party in Manchester and had returned to his friend's house the following day, and that he was arrested then. He referred to his partner and son living in "Worchester". The discrepancy between his mention of Worcester and the record as to his arrest in Northwich was referred to in the Conclusive Grounds Consideration

Minute at page C8 of the bundle that was before the FTT. The FTT judge also had a statement dated 22 January 2018. In it the petitioner gave an account of being encountered in a nail bar in Northwich, but said that he had not been working there.

[40] The FTT judge did not misrecord evidence, but referred accurately to evidence that was before her in the form of the petitioner's own signed statement dated 10 March 2017. The UT did not err in failing to identify an arguable error of law in relation to this matter.

Letter from Rev Joseph Walsh

[41] The petitioner produced a handwritten letter on what appears to be the writing paper of St Andrew's Metropolitan Cathedral, Glasgow. It is dated 22 January 2018 and reads:

> "This is to say that [...] [address] attends our Church on Sundays, & this would cover the past 9 or 10 months. Yours faithfully, (Rev) Joseph Walsh. "

[42] The FTT judge wrote:

> "The [petitioner] did ask the priest to write a letter for him confirming his attendance although he had not asked anyone from the Cathedral to come to the hearing to speak on his behalf. The [petitioner] said he attended church but did not know the priest's name as he would arrive, sit in the congregation and leave. If the [petitioner] did not make himself known to the priest at any time, it is difficult to understand how the (Rev) Joseph Walsh would know the [petitioner's] name or that he attended the church."

[43] It appears from this passage that the FTT judge accepted that the letter had been requested from, and came from, a priest at the Cathedral. She did not accept that its contents could be relied upon. She must be taken to be suggesting that the priest wrote the letter without a proper basis for having done so. The petitioner's complaint is that she took this approach and did not give adequate reasons for it. The petitioner submitted that an obvious explanation, rather than dishonesty or negligence on the part of the author of the

letter, was that the priest would have recognised the individual by appearance from his regular attendance, and learned his name when approached with the request for the letter.

[44] I accept that it is arguable that the FTT judge did not give adequate reasons for her conclusion in relation to the letter from the priest.

Wrong standard of proof

[45] The petitioner complains that at paragraph 27(k), (o) and (p) the FTT applied the wrong standard of proof. At sub-paragraphs (k) and (o) she refers to particular historical aspects of his account as "unlikely". She referred to another aspect of his account as to past events as "doubtful". The petitioner submitted that this amounted to an error of law under reference to *Kaja* v *Secretary of State for the Home Department* [1995] Imm AR 1. The decision in *Kaja* was considered, and other relevant authorities reviewed in *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449. Brooke LJ, at [page], said the following

> "In the present public law context, where this country's compliance with an international convention is in issue, the decision-maker is, in my judgment, not constrained by the rules of evidence that have been adopted in civil litigation, and is bound to take into account all material considerations when making its assessment about the future.
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> This approach does not entail the decision-maker (whether the Secretary of State or an adjudicator or the Immigration Appeal Tribunal itself) purporting to find 'proved' facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen.
>
> For the reasons much more fully explained in the Australian cases, when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes,

> on what may sometimes be somewhat fragile evidence, that they probably did not occur."

[46] It follows that the FTT judge ought not to have excluded from her ultimate assessment of the evidence matters regarding the petitioner's account of past events unless she had no real doubt that they did not occur. The degree of probability of the occurrence of past events is no more than a relevant factor to be taken into account in deciding whether there is a well-founded fear of persecution: *MA (Somalia)* v *Secretary of State for the Home Department* [2010] UKSC 49, paragraph 17. It is, however, a relevant factor. An expression of view as to the degree of probability in relation to a past event will not necessarily indicate an error of law. I do not read the FTT judge's decision as indicating that she excluded from her consideration matters that she regarded as unlikely. She simply narrated that she regarded them as unlikely or doubtful. They were among a long list of considerations relevant to credibility that she expressed in a variety of ways before expressing a conclusion.

[47] I therefore conclude that the UT did not err in law in failing to identify an arguable point of law in this regard.

Was any error on the part of the UT material?

[48] Mr McIver submitted that any error on the part of the UT, including that relative to the treatment of the evidence about the petitioner's tattoo, was immaterial. Even if the petitioner was a Roman Catholic, and practising his faith, the FTT had found that he would not be at risk of persecution in Vietnam for that reason, by reference to the content of an expert report by Professor Bluth lodged by the petitioner in the FTT proceedings. The FTT judge had also made findings that, *esto* the petitioner's account were true, the details were not such as to bring him into the category of debtors or child workers identified by

Professor Bluth so far as the claim based on trafficking was concerned. I refer to these findings as the "*esto*" findings.

[49] For the petitioner to succeed, he would have to demonstrate that the UT made a material error of law. An error will be material if there is a real possibility that, had it not occurred, the outcome would have been different: *Tesco Stores Ltd v Dundee City Council* 2012 SC (UKSC) 278, Lord Reed, paragraph 31. The errors of law already identified would be material only if there were a real possibility that the UT would have granted permission to appeal, notwithstanding the content of the FTT judge's findings on the alternative basis that the petitioner was credible and reliable. Those findings are not challenged in the petition. The petitioner does complain that the UT erred in law in failing to consider properly all of his grounds of appeal.

[50] As I have already mentioned, the grounds of appeal to the FTT contained a first paragraph headed "Background", and, under the heading "Errors in law" a further 13 numbered paragraphs. Most of them make detailed criticisms of specified aspects of the FTT judge's approach. The final paragraph reads, "The Judge has also failed to adequately consider the Expert Reports."

[51] The petitioner's application to the UT for permission then sought to incorporate the grounds in the application to the FTT. The further grounds advanced to the UT make further references to the expert reports. Those references are all criticisms of the FTT judge's approach to the reports in the context of her assessment of credibility. None of the grounds of appeal refers specifically to paragraphs 39-44 of the FTT judge's decision, which is the passage containing the "*esto*" findings.

[52] Mr Caskie responded to this chapter of submissions from the respondent by submitting that I should read and consider paragraph 5.4.6 and the following paragraphs of Professor Bluth's report, which relate to the treatment of Roman Catholics in Vietnam.

[53] It is for the petitioner to demonstrate a material error of law. In the context of this case, I have to consider whether the petitioner has demonstrated that there is a real possibility that the UT would have granted permission if it had considered all the grounds of appeal before it, identified the arguable errors of law already mentioned, and had gone on to read and consider the "*esto*" conclusions of the FTT judge.

[54] The grounds of appeal contain a reference, albeit one in general terms, to the FTT judge's treatment of the expert reports, one of which was that of Professor Bluth.

[55] The "*esto*" findings of the FTT judge so far as based on Professor Bluth's report are confused and confusing. Paragraphs 43-45 relate to the claim based on the petitioner's Roman Catholicism. The first sentence of paragraph 43 is predicated on the conclusion that the petitioner is not credible, and is, therefore, not a conclusion on the alternative basis that he is credible and reliable. Paragraph 45, again, is predicated on the lack of credibility of the petitioner.

[56] Parts of paragraphs 43 and 44 are based on information that is discernible from Professor Bluth's report, or represent legitimate comment about his report in the context of the evidence of the petitioner. The final sentence of paragraph 44, however, is:

> "There is no indication in the expert report that someone practising the faith at that level would come to the adverse attention of the authorities."

That sentence is not necessarily easy to reconcile with passages in Professor Bluth's report such as these:

> "Todd Nettleton, director of Media Development for Voice of the Martyrs, said that 'most government leaders certainly consider Christianity a "Western" religion and

> see it as a threat to communist rule or even a form of espionage from the West designed to undermine their power.' There are many reports about the harassment and persecution of Catholics, which includes damage to property, arrests and deaths.
>
> …
>
> A report cited Father Phan Van Loi that many practical activities of the Catholic church are limited or forbidden by the regime's decrees. Religious organizations are not recognized as legal entities. The government controls the recruitment, ordination, and assignment of the clergy, he said. It also strictly controls travel abroad of church members and clergy. It even creates fake religious organisations such as the so-called Committee for Solidarity of Vietnamese Catholics to control the activities of religious organisations. According to a statement by the Lantos commission, 'More recently, the 2013 Government Decree 92 banned all religious, cultural, and traditional activities – even when conducted in private homes – unless they are registered, pre-approved, or officiated by a government entity.' For this reason the fear by the appellant that he could be at risk from the authorities for his religious practices is justified.
>
> …
>
> It is confirmed by many other accounts, such as cited in the sources referred to above, that there is continuous harassment against Catholics and other religious groups involved in so-called unauthorised religious activities which are considered a threat to the social order. This harassment can include beatings, torture, imprisonment or death. There is a serious risk that the appellant will experience persecution in Vietnam due to his religious faith and practices."

[57] Taking these matters into account, I have concluded that there is a real possibility that, had the UT considered all of the grounds of appeal to it in the way it ought, it would have granted permission to appeal. I am satisfied that there is a real possibility that the UT would not have regarded the "*esto*" findings by the FTT judge as demonstrating that the arguable errors of law by her, identified above, were not material.

Disposal

[58] I therefore sustain the plea-in-law for the petitioner and reduce the decision of the Upper Tribunal refusing permission to appeal.