Upper Tribunal
(Immigration and Asylum Chamber)

VT (Article 22 Procedures Directive - confidentiality) Sri Lanka [2017] UKUT 00368 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 14 March 2017 &	
28 April 2017	

Before

UPPER TRIBUNAL JUDGE O'CONNOR

UPPER TRIBUNAL JUDGE CANAVAN

Between

V T

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Jegarajah, Counsel instructed by Duncan Lewis Solicitors

For the Respondent: Mr B. Rawat, instructed by the Government Legal Department

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

(i) There is no general duty of inquiry upon the examiner to authenticate documents produced in support of a protection claim. There may be exceptional situations when a document can be authenticated by a simple process of inquiry which will conclusively resolve the authenticity and reliability of a document.

(ii) There is a general duty of confidentiality during the process of examining a protection claim, including appellate and judicial review proceedings. If it is considered necessary to make an inquiry in

the country of origin the country of asylum must obtain the applicant's written consent. Disclosure of confidential information without consent is only justified in limited and exceptional circumstances, such as combating terrorism.

(iii) The humanitarian principles underpinning Article 22 of the Procedures Directive prohibit direct contact with the alleged actor of persecution in the country of origin in a manner that might alert them to the likelihood that a protection claim has been made or in a manner that might place applicants or their family members in the country of origin at risk.

(iv) The humanitarian objective of the Refugee Convention requires anyone seeking to authenticate a document produced in support of a protection claim to follow a precautionary approach. Careful consideration should be given to the duty of confidentiality, to whether an inquiry is necessary, to whether there is a safer alternative and whether the inquiry is made in a way that does not give rise to additional protection issues for applicants or their family members. Disclosure of personal information should go no further than is strictly necessary. Whether an inquiry is necessary and is carried out in an appropriate way will depend on the facts of the case and the circumstances in the country of origin.

(v) Failure to comply with the duty of confidentiality or a breach of the prohibitions contained in Article 22 does not automatically lead to recognition as a refugee, but might be relevant to the overall assessment of risk on return.

DECISION AND REASONS

1. This appeal raises issues relating to the duty of confidentiality and the proper scope of inquiries to authenticate documents during the examination of a protection claim.

Background

2. The appellant is a citizen of Sri Lanka who entered the UK on 29 September 2014 with entry clearance as a Tier 4 (General) Student Migrant, which was valid until 30 October 2017. He claimed asylum on 24 November 2014. The respondent refused the application on 30 December 2014. First-tier Tribunal Judge Telford dismissed the appeal in a decision dated 03 February 2015. On 27 February 2015 Upper Tribunal Judge Southern concluded that the First-tier Tribunal decision disclosed an error of law because the First-tier Tribunal Judge failed to appreciate that an adjournment application was made to enable time for further enquiries relating to evidence from Sri Lanka. The decision was set aside and the appeal remitted for a fresh hearing in the First-tier Tribunal.

3. First-tier Tribunal Judge Chana re-heard and dismissed the appeal on 16 March 2015. The appellant appealed to the Upper Tribunal. In a decision dated 23 July 2015 Upper Tribunal Judge Gleeson and Deputy Upper Tribunal Judge Mahmood ("the panel") concluded that the First-tier Tribunal decision involved the making of an error of law because the judge failed to give adequate reasons and erred in rejecting the evidence produced by the appellant from a lawyer in Sri Lanka because she had already found his account was not credible.

4. The panel set aside the decision and directed it to be remade in the Upper Tribunal. The appeal was delayed while the parties made inquiries and sought to produce further evidence from Sri Lanka. The appeal was eventually relisted for hearing before this panel.

5. The appellant attended the hearing and gave evidence with the assistance of a Tamil speaking interpreter. He was asked questions about his reasons for claiming asylum. The relevant details of the evidence given by the witness are incorporated into our findings of fact.

6. We have considered the appellant's grounds of appeal, the oral and documentary evidence, the skeleton arguments and oral submissions as well as the reasons given for refusing the application before coming to a decision in this appeal.

Legal framework

Basic principles

7. The 1951 Refugee Convention is interpreted in European law through Council Directive 2004/83/EC ("the Qualification Directive"). The Directive is transposed into law in the UK through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the Qualification Regulations") and the Immigration Rules.

8. The third recital of the Qualification Directive makes clear that the Refugee Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

9. The courts have repeatedly recognised the humanitarian nature of the Refugee Convention and have emphasised the need to treat it as a 'living instrument' that must be interpreted in a purposive way. Lord Hope confirmed this principle in R v Special Adjudicator ex parte Hoxha [2005] UKHL 19:

"6. No-one questions the broad humanitarian principles which underlie the Convention. The social and humanitarian nature of the problem of refugees was expressly recognised in the preamble to the Convention. So too was the fact that it was the express wish of all states to do everything within their power to prevent the problem from becoming a cause of tension between them. …

7. As a result of the amendments which it made to article 1A(2) of the Convention, these two instruments now provide the cornerstone of the international legal regime for the protection of refugees: see paragraph (3) of the preamble to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Directive"). These are to be seen as living instruments, to which the broadest effect must be given to ensure that they continue to serve the humanitarian principles for whose purpose the Convention was entered into."

10. The burden of proof is on an asylum applicant to show that he or she has a well-founded fear of persecution for one of the five reasons outlined in the Refugee Convention i.e. race, religion, nationality, membership of a particular social group or political opinion. The standard of proof has been described as a 'reasonable degree of likelihood', a 'serious possibility', 'substantial grounds for thinking' or a 'real risk' of serious harm: see R v SSHD ex parte Sivakumaran [1988] Imm AR 147. The reason why there is a low standard of proof is because of the serious nature of the potential consequences of return.

Establishing a claim

11. In Karanakaran v SSHD [2000] Imm AR 271 the Court of Appeal considered the earlier Tribunal decision in Kaja v SSHD [1995] Imm AR 1 and summarised it as follows:

"53. It is clear that the majority was influenced by the notorious difficulty many asylum-seekers face in "proving" the facts on which their asylum plea is founded. In many of these cases, they said, the

evidence will be the applicant's own story, supported in some instances by reports from organisations like Amnesty International. The stress generated by the nature of an asylum claim and the possible consequences of refusal, complemented by the highly formalistic atmosphere of interview or court, made the task of evaluating the evidence more complex. This did not mean that there should be a more ready acceptance of fact as established as more likely than not to have occurred. On the other hand, it created a more positive role for uncertainty. It would be a rare decision-taker who was never uncertain about some aspects of the evidence, particularly where, unlike civil litigation, evaluation was often concerned only with one version of the "facts". To say that it is only the facts established as more likely than not to have occurred on which the "reasonable likelihood" must be based would be, they said, to remove much of the benefit of uncertainty conferred on an applicant through Sivakumaran .”

12. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (December 2011) explains some of the reasons why an asylum seeker might have difficulty producing evidence.

“196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”

13. Article 4 of the Qualification Directive (reflected in paragraphs 339J-L of the immigration rules) outlines how the facts and circumstances of a claim should be considered.

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant's statements and all documentation at the applicant’s disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant’s activities since leaving the country or origin were engaged for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;

(d) the general credibility of the applicant has been established.

Assessing documentary evidence

14. In Tanveer Ahmed (documents unreliable and forged) Pakistan * [2002] UKIAT 00439 the Tribunal outlined possible considerations when assessing what weight can be placed on documentary evidence produced in support of a protection claim.

“31. It is trite immigration and asylum law that we must not judge what is or is not likely to happen in other countries by reference to our perception of what is normal within the United Kingdom. The principle applies as much to documents as to any other form of evidence. We know from experience and country information that there are countries where it is easy and often relatively inexpensive to obtain "forged" documents. Some of them are false in that they are not made by whoever purports to be the author and the information they contain is wholly or partially untrue. Some are "genuine" to the extent that they emanate from a proper source, in the proper form, on the proper paper, with the proper seals, but the information they contain is wholly or partially untrue. Examples are birth, death and marriage certificates from certain countries, which can be obtained from the proper source for a "fee", but contain information which is wholly or partially untrue. The permutations of truth, untruth, validity and "genuineness" are enormous. At its simplest we need to differentiate between form and content; that is whether a document is properly issued by the purported author and whether the contents are true. They are separate questions. It is a dangerous oversimplification merely to ask

whether a document is "forged” or even "not genuine". It is necessary to shake off any preconception that official looking documents are genuine, based on experience of documents in the United Kingdom, and to approach them with an open mind.”

15. The Tribunal confirmed that it is for the individual applicant to show that a document is reliable. Whilst recognising that the burden of proof to show forgery would lie on the respondent, the Tribunal cautioned against too much emphasis on the question of whether a document is forged. A document should not be viewed in isolation. The decision maker should look at all the evidence in the round. As to whether there is a duty on the Home Office to make inquiries about documents produced in support of an asylum claim the Tribunal said:

“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.”

16. In MJ (Singh v Belgium: Tanveer Ahmed unaffected) Afghanistan [2013] UKUT 00253 the Tribunal concluded that the decision of the European Court of Human Rights in Singh v Belgium (No: 33210/11) did not justify departing from the general principles outlined in Tanveer Ahmed . The Tribunal in Tanveer Ahmed envisaged that there might be cases where it is proper for inquiries to be made. Singh v Belgium was such a case where verification of documents was straightforward and from an “unimpeachable source” (UNHCR).

17. In PJ (Sri Lanka) v SSHD [2014] EWCA Civ 1011 the Court of Appeal considered the scope of the Secretary of State’s duty to examine a protection claim in the context of evidence from Sri Lanka. The evidence consisted of letters and attached court documents from Sri Lankan lawyers, who were said to have made inquiries on behalf of the appellant. The appellant also produced copies of the Bar Association of Sri Lanka (BASL) membership cards of the lawyers who were involved. The Court of Appeal considered what was said in Tanveer Ahmed , Singh v Belgium and MJ (Afghanistan) . Lord Justice Fulford made the following findings:

“29. In my judgment, there is no basis in domestic or European Court of Human Rights jurisprudence for the general approach that Mr Martin submitted ought to be adopted whenever local lawyers obtain relevant documents from a domestic court, and thereafter transmit them directly to lawyers in the UK. The involvement of lawyers does not create the rebuttable presumption that the documents they produce in this situation are reliable. Instead, the jurisprudence referred to above does no more than indicate that the circumstances of particular cases may exceptionally necessitate an element of investigation by the national authorities, in order to provide effective protection against mistreatment under article 3 of the Convention. It is important to stress, however, that this step will frequently not be feasible or it may be unjustified or disproportionate. In Ahmed’s case… the court highlighted the cost and logistical difficulties that may be involved, for instance because of the number of documents submitted by some asylum claimants. The inquiries may put the applicant or his family at risk, they may be impossible to undertake because of the prevailing local situation or they may place the UK authorities in the difficult position of making covert local inquiries without the permission of the relevant authorities. Furthermore, given the uncertainties that frequently remain following attempts to establish the reliability of documents, if the outcome of any inquiry is likely to be inconclusive this

is a highly relevant factor. As the court in Ahmed's case observed, documents should not be viewed in isolation and the evidence needs to be considered in its entirety.

30. Therefore, simply because a relevant document is potentially capable of being verified does not mean that the national authorities have an obligation to take this step. Instead, it may be necessary to make an 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 …. I do not consider that there is any material difference in approach between the decision 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."

18. In MA (Bangladesh) v SSHD [2016] EWCA Civ 175 Lord Justice Lloyd Jones clarified what was said in PJ (Sri Lanka) about the circumstances in which a duty to investigate might arise.

"29. The statement in PJ (Sri Lanka) (at [29]) that "the circumstances of particular cases may exceptionally necessitate an element of investigation" does not, to my mind, lay down a legal requirements that a case must be "exceptional" before such a duty can arise. Rather, I take Fulford LJ to be describing the situation in which such a duty will arise only exceptionally. In the great majority of cases no such duty will arise.

30. PJ (Sri Lanka) permits an approach which is sequential in nature. In determining whether the circumstances of a particular case may necessitate an investigation, national authorities may first consider whether a disputed document is at the centre of the request for protection before proceedings to consider whether a simple process of inquiry will conclusively resolve its authenticity and reliability. If these conditions are satisfied it may be necessary for a national authority to make an enquiry to verify a document. It does not necessarily follow, however, that such a duty will arise; the judgment in PJ (Sri Lanka) makes clear that the evidence, including the documentary evidence, must be considered in its entirety. If the court or tribunal concludes that there was such a duty, it will proceed to consider whether it has been discharged and, if not, it must assess the consequences for the case."

The Procedures Directive

19. Council Directive 2005/85/EC ("the Procedures Directive") introduced a minimum framework of procedures for granting and withdrawing refugee status. As with the Qualification Directive, the UK has not adopted the recast Procedures Directive (2013). Article 22 of the 2005 Procedures Directive sets out the following provisions relating to the collection of information:

Article 22

For the purposes of examining individual cases, Member States shall not:

(a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum;

(b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin.

20. The provisions are transposed in paragraph 339IA of the immigration rules.

339IA. For the purposes of examining individual applications for asylum

(i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant, and

(ii) information shall not be obtained from the alleged actor(s) of persecution that would result in their being directly informed that an application for asylum has been made by the applicant in question and would jeopardise the physical integrity of the applicant and their dependants, or the liberty and security of their family members still living in the country of origin.

21. The parties were unable to refer the Tribunal to jurisprudence from the Court of Justice of the European Union (CJEU) relating to Article 22. The only case that touches on it is the Supreme Court decision in R v McGeough [2015] UKSC 62. In that case the Supreme Court considered Article 22 of the Procedures Directive in the context of criminal proceedings in the UK. An application was made during Mr McGeough's trial for information he supplied when he made a protection claim in Sweden to be excluded from the evidence. In view of the fact that Swedish law allowed for disclosure of information in unsuccessful asylum cases, and Mr McGeough was likely to be aware of the fact when he provided the information, the judge admitted the evidence, which formed the basis of his conviction for membership of a proscribed organisation.

22. The Supreme Court in McGeough found that it was self-evident that there was a need to encourage asylum applicants to feel able to make full disclosure to the relevant authorities, but this did not give rise to an inevitable requirement that the information must be preserved in confidence in every circumstance. The court made clear that such information should not be disclosed to those who persecuted an applicant. The injunction against such disclosure was contained in Article 22 of the Procedures Directive and was specifically related to the process of examining an individual protection claim. In that case the appellant's protection claim was examined and the application refused. The trigger for confidentiality under Article 22 was not present on the facts of the case. The court concluded that the trial judge was right to refuse the application to exclude the evidence.

The UNHCR advisory opinion

23. Signatory States to the 1951 Refugee Convention undertake to co-operate with the UNHCR and to facilitate it in its duty to supervise the application of the provisions of the 1951 Convention (Article 35). Paragraph 358C of the Immigration Rules recognises the supervisory role of the UNHCR in relation to individual applications. The UNHCR shall be provided with information relating to an individual applicant if the applicant agrees to the information being disclosed.

24. On 31 March 2005 the UNHCR issued an "Advisory opinion on the rules of confidentiality regarding asylum information". The UNHCR began by emphasising the importance of the general principle of confidentiality in a protection claim. The right to privacy and the need for confidentiality is especially important to an asylum seeker whose claim is likely to suppose a fear of persecution by the authorities in the country of origin and whose situation could be jeopardised if protection of information is not ensured. Bearing those concerns in mind, the State which receives a protection claim should refrain from sharing any information with the authorities of the country of origin and from informing the authorities in the country of origin that a national has presented a protection claim. This applies regardless of whether the country of origin is considered by the authorities of the country of asylum as a "safe country of origin" or whether the claim is considered to be based on

economic motives. The authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin and conclude that it will not result in human rights violations. The UNHCR observed that these principles are reflected in the Procedures Directive.

25. The advisory opinion says the authorities must seek in advance the written consent of an asylum seeker if they want to check personal data in the country of origin. If an asylum seeker considers that compelling information might be obtainable from the country of origin, and that this could only be obtained through disclosure of personal information, he or she may occasionally request the authorities of the country of asylum for help in obtaining such evidence. In the opinion of UNHCR confidentiality is required until a final decision is taken on an individual case, including during administrative or judicial review proceedings. If an asylum seeker has voluntarily disclosed their identity and the fact that they have made a protection claim through public statements, in the view of UNHCR, this may not be interpreted as an explicit waiver of confidentiality.

26. While there is a general rule against sharing information with the country of origin the disclosure of certain confidential information to the country of origin without the consent of the applicant may be justified in limited and exceptional circumstances, such as combatting terrorism. In circumstances where a person is found not to be in need of international protection, and has exhausted available legal remedies, the authorities in the country of asylum may share limited information, even without consent, in order to facilitate return. Disclosure should go no further than is lawful and necessary to secure readmission and there should be no disclosure that could endanger the individual or any other person, including the fact that the person applied for asylum.

27. The UNHCR summed up the advice with the following conclusions and recommendations.

“25. UNHCR shares the legitimate concern of States to clearly distinguish between persons who need international protection and those who have no valid claim for refugee status. It is a State’s prerogative, and in fact its duty, to make a determination on refugee status based on all available evidence presented in the case. Human rights standards prescribe the State’s obligation to protect the right to privacy of the individual and its inherent protection against information reaching the hands of persons not authorized to receive or use it. The possible risks to the individual asylum-seeker caused by information reaching the wrong people, but also the detrimental effect of misuse of information to the asylum system as a whole are very serious in nature. Consequently, strict adherence to the fundamental principles and refugee protection is vital, and exceptions should only be allowed under well-defined and specific circumstances.

Summary of recommendations

- If the authorities responsible for assessing an asylum claim, whether administrative or judicial, deem it necessary to collect information from the country of origin, such requests must be couched in the most general and anonymous terms, and should never include names or data by which the asylum seeker or his or her family could be identified in the country of origin. Such authorities however must not communicate with entities in the country of origin of the claimant (whether governmental or non-governmental) to verify or authenticate declarations or documents provided by the asylum-seeker.

- Confidentiality requirements apply throughout the asylum procedure, including judicial review.

• If research is conducted on an individual case to verify a fact or a document, the written consent of the individual has to be sought in advance, unless, exceptionally, a legitimate overriding security interest is at stake."

Analysis of the legal framework

28. The basic legal framework outlined above will be familiar to those involved in preparing, presenting and assessing protection claims. The area needing some analysis, which has been subject to less scrutiny by courts and tribunals, is the nature of the duty of confidentiality and the scope of Article 22 of the Procedures Directive.

29. We find that the Supreme Court decision in McGeough is of limited assistance in interpreting how Article 22 should be applied in the context of assessing a protection claim. The crux of the case related to whether information provided during the examination of a protection claim should have been admitted in a criminal trial. The court made clear that the prohibitions contained in Article 22 focus on the process of examining an individual protection claim. The court thought it "obvious" that information relating to a claim should not be disclosed to an alleged actor of persecution.

30. It is necessary to put the provision in context before considering the wording. The humanitarian objective of the Refugee Convention underpins the legal regime contained in the Qualification and Procedures Directives. Any action that is taken in examining an asylum claim that might place a person or their family members at risk, or that might enhance an existing risk, must be avoided because it would defeat the purpose of the Refugee Convention.

31. The purpose of the Procedures Directive is to introduce a minimum framework of standards within the European Union on procedures for granting and withdrawing refugee status. Article 4 of the Qualification Directive provides guidance on how a claim should be assessed. The Procedures Directive sets out more detailed provisions relating to the procedures for making and examining a protection claim.

32. As recognised in McGeough , Article 22 applies for the "purposes of examining individual cases". Confidentiality is of the utmost importance during the process of examining a protection claim. An applicant must feel able to provide relevant information without fear that it might be disclosed to the alleged actor of persecution. Breaches of confidentiality during an inquiry in the country of origin could give rise to additional risk to the applicant or to other people connected to the claim in the country of origin.

33. The provisions contained in sub-paragraphs (a) and (b) of Article 22 set out two separate prohibitions on Member States during the process of examining a claim. The first prohibition contained in sub-paragraph (a) relates to disclosure of information by the Member State to alleged actors of persecution. The second prohibition contained in sub-paragraph (b) relates to obtaining information from the alleged actor of persecution. While it would not be difficult to imagine circumstances in which disclosure of information could be made in the process of obtaining information from the alleged actor of persecution, the separation of the two provisions makes a clear distinction between disclosure of information and the risks that might be associated with the process of obtaining information.

34. We conclude that the reference to 'direct' disclosure of personal information or the fact that a person has made a protection claim must relate to direct contact with the alleged actor of persecution and not solely to disclosure of specific information. The provision must be read in the context of the

overall humanitarian objective of the Refugee Convention. Any direct contact made “in a manner” that might lead the alleged actor of persecution to conclude that a person is likely to have made a protection claim, or in a way that might give rise to additional risk, is likely to engage the prohibition under Article 22. Whether direct contact with the alleged actor of persecution has been done in a way that is prohibited by Article 22 will depend on the nature of the inquiry and the circumstances of each case.

35. On behalf of the appellant it was argued that the remedy for a breach of confidentiality under Article 22 is to grant refugee status. The respondent states that her general policy is to do so if an inquiry verifies a document as genuine.

36. The wording of Article 22 does not include a remedy for a breach of the provision. It cannot be right that a breach of a procedural requirement would give rise to recognition as a refugee if the evidence shows, as a matter of fact, that a person does not have a well-founded fear of persecution. To do so would undermine the purpose of the Refugee Convention. A parallel can be drawn with the duty to endeavour to trace family members of unaccompanied asylum seeking children under Article 19 of the Council Directive 2003/9/EC (“the Reception Directive”). In KA (Afghanistan) v SSHD [2013] 1 WLR 615 the Court of Appeal found that failure to comply with the duty did not lead to a successful outcome in a claim. Careful consideration will need to be given to the facts of each individual case. The failure to discharge the duty might be relevant to judicial consideration of a protection claim.

37. A breach of confidentiality to the alleged actor of persecution might give rise to additional risk to an applicant. This could be ameliorated by a grant of status but would not protect those who might be associated with the claim in the country of origin. Anyone making an inquiry in the country of origin, whether on behalf of an appellant or the respondent, should be vigilant about the duty of confidentiality and the need to avoid risk. Careful consideration should be given to whether an inquiry is necessary, and if it is, whether it can be made in a way that complies with the principles of the Refugee Convention.

38. We draw together the following principles relating to the assessment and authentication of evidence produced in support of a protection claim from the legal framework outlined above.

(i) The Refugee Convention is the cornerstone of the international protection regime. The humanitarian principles of the Convention underpin the provisions outlined in the Qualification Directive and the Procedures Directive.

(ii) The standard of proof is low because of the serious nature of the potential consequences of return. It creates a ‘more positive role for uncertainty’.

(iii) Where possible, an asylum applicant must make a genuine effort to substantiate his or her claim, although it is recognised that an applicant might have difficulty in producing evidence to support the claim.

(iv) The overall burden of proof is upon the asylum applicant, but there is also a duty on the examiner to assess the relevant elements of the application according to the principles outlined in Article 4 of the Qualification Directive.

(v) Documentary evidence produced in support of a protection claim forms part of a holistic assessment. The principles outlined in Tanveer Ahmed (documents unreliable and forged) Pakistan * [2002] UKIAT 00439 should be considered when assessing what weight can be placed on documentary evidence.

(vi) There is no general duty of inquiry upon the examiner to authenticate documents produced in support of a protection claim. There may be exceptional situations when a document can be authenticated by a simple process of inquiry which will conclusively resolve the authenticity and reliability of a document.

(vii) There is a general duty of confidentiality during the process of examining a protection claim, including appellate and judicial review proceedings. If it is considered necessary to make an inquiry in the country of origin the country of asylum must obtain the applicant's written consent. Disclosure of confidential information without consent is only justified in limited and exceptional circumstances, such as combatting terrorism.

(viii) The humanitarian principles underpinning Article 22 of the Procedures Directive prohibit direct contact with the alleged actor of persecution in the country of origin in a manner that might alert them to the likelihood that a protection claim has been made or in a manner that might place applicants or their family members in the country of origin at risk.

(ix) The humanitarian objective of the Refugee Convention requires anyone seeking to authenticate a document produced in support of a protection claim to follow a precautionary approach. Careful consideration should be given to the duty of confidentiality, to whether an inquiry is necessary, to whether there is a safer alternative and whether the inquiry is made in a way that does not give rise to additional protection issues for applicants or their family members. Disclosure of personal information should go no further than is strictly necessary. Whether an inquiry is necessary and is carried out in an appropriate way will depend on the facts of the case and the circumstances in the country of origin.

(x) Failure to comply with the duty of confidentiality or a breach of the prohibitions contained in Article 22 does not automatically lead to recognition as a refugee, but might be relevant to the overall assessment of risk on return.

Summary of the evidence

Summary of the appellant's case

39. The appellant says that he is at risk on return to Sri Lanka for reasons of attributed political opinion. His father was a well-known member of the LTTE. He says that his family lost contact with his father when they relocated to Colombo in 2008. He is presumed to be dead. The appellant does not claim to have been a member of the LTTE or that he carried out activities in support of the LTTE. He claims that in January 2014 he went to collect a paternal uncle from the airport in Colombo. His uncle is a French citizen. His mother told him that his uncle was a member of the LTTE before he moved to France. Over the next two weeks he drove his uncle around Colombo and waited outside while he visited various friends. He drove his uncle to the airport at the end of his visit.

40. The appellant says that the police came to his house on 15 February 2014. He was arrested and taken to Wellewatte police station where he was questioned by CID officers. He was asked who his uncle met with during his visit. The appellant does not claim he was ill-treated during this detention. Later the same day he was released on the condition that he reported to the police station every two weeks. When he returned home his mother contacted an uncle in Switzerland who advised him to leave Sri Lanka. His mother took steps to contact an agent to arrange for him to leave the country.

41. The appellant continued to report to the police station until he was detained on 06 June 2014. He was fingerprinted and his ID card was taken away. He does not describe any ill-treatment at this

stage. The appellant says that he was accused of being a terrorist and was taken to court on 10 June 2014. The court remanded him in custody for 15 days to allow the Terrorist Investigation Division (TID) to make further inquiries. He was taken to the TID in Pettah. The appellant says that he was questioned about his family associations, including his father's and his uncle's links to the LTTE. The appellant says that he was beaten in detention. His mother came to visit him. She arranged for a lawyer to assist him.

42. The appellant says that he appeared in Court 8 at the Colombo Chief Magistrate Court on 24 June 2014. An attorney represented him at the hearing ("Mr D"). The appellant was released on bail on a recognisance of 200,000 Rupees. He says that he was required to report every Sunday and was told to return to court on 17 October 2014. On the evening of his release two men, who he believes were members of the LTTE, came to his home and warned him not to disclosed any information about the meetings. The agent assisted him to obtain a UK student visa and helped him to pass through the airport. He arrived in the UK on 29 September 2014 with leave to enter that was valid until 30 October 2017. He claimed asylum on 24 November 2014.

43. During the course of the initial application and subsequent appeals the appellant has produced a number of documents in support of his claim. In a letter dated 15 December 2014 to the appellant's previous solicitor, his lawyer in Sri Lanka, Mr D, confirmed that he appeared on behalf of the appellant in a bail application on 24 June 2014. Mr D said that he could provide a certified copy of the court file but he needed three weeks to obtain the court records.

44. In a letter dated 23 December 2014 Mr D said that he had obtained certified copies of the records. He confirmed that the appellant was arrested on 06 June 2014 and was taken to the TID on suspicion of aiding and abetting the LTTE. He was subsequently produced before the Colombo Magistrate Court on 10 June 2014 and cited the case number. Mr D confirmed that the appellant was remanded in custody until 24 June 2014 when he represented him in an application for bail. He was granted bail with conditions to report to the TID every Sunday and was required to return to court on 17 October 2014. When the appellant did not attend court on that date the magistrate issued an arrest warrant against him. Mr D attached a certified copy of the court records, which provided information that was consistent with Mr D's summary of events.

45. The appellant's previous solicitor tried to obtain a copy of Mr D's Bar Association of Sri Lanka (BASL) identity card. In correspondence dated 23 December 2014 an associate, Mr J, wrote to say that Mr D was out of the country "due to higher education" and confirmed that he was now handling Mr D's cases. Mr J provided a copy of his BASL ID card. In an email to the appellant's previous solicitor dated 06 February 2015 Mr D apologised for not being available when they made the request for a copy of his ID card. He attached a copy to the email.

46. The appellant produced a certified copy of an arrest warrant that is said to have been issued at the Colombo Chief Magistrate Court on 18 October 2014. The translation states that the warrant was issued because the appellant failed to attend court. The Officer in Charge at the TID was directed to arrest the appellant and produce him before the court. The name of the magistrate was not clear to the translator. The certified copy of the warrant was signed and countersigned by an additional registrar, but again, the name is not clear.

47. In response to inquiries made by the respondent, in which the TID confirmed that it had no record of the case number, the appellant's previous solicitor asked Mr D to obtain further documents from the Chief Registrar or the Magistrate to confirm that there was a case recorded under the relevant case number. Mr D was also instructed to ask the Chief Registrar to explain the procedure for

obtaining a certified copy of the court file. In a letter to the appellant's solicitor dated 07 November 2016 Mr D attached a copy of his correspondence to the registrar at the court dated 02 November 2016, a copy of the response from the Chief Registrar at the Chief Magistrate Court and an up to date copy of his BASL ID card

48. The letter from the Chief Registrar, K.R.S. Ranaweera, is dated 04 November 2016. The registrar confirmed that he or she had been Chief Registrar for about seven years. The letter states that a case was filed by the TID in Court 8 and was recorded as a pending case. The registrar confirmed the name of the suspect and that a warrant was issued on 17 October 2014. The registrar stated that Mr D made an application for a certified copy of the case records on 18 December 2014. Magistrate

R S issued a certified copy of the full case record on 23 December 2014. The registrar attached a copy of Mr D's written request from the records, which appears to contain a handwritten endorsement approving the request and a court seal. The letter goes on to outline the procedure for obtaining certified copies of case records, which must be done by way of a written motion by an attorney. The application should be addressed to the registrar, who would then forward the application to a magistrate for approval.

49. The appellant's previous solicitor instructed another attorney ("Mr R"), to provide authentication of the certified court records obtained by Mr D. In a letter dated 07 November 2016 Mr R stated that the court record provided by the appellant's solicitor was a true and genuine copy of the record filed at the Colombo Magistrate Court. He confirmed that Mr D obtained a certified copy of the file on 23 December 2014. He stated that he was able to verify the information through the court registrar, Mrs S. V. Mr R provided a copy of his BASL ID card.

Summary of the respondent's case

50. The respondent accepts that if the claim is taken at its highest the appellant is likely to have a well-founded fear of persecution if returned to Sri Lanka. However, she argues that the appellant has not given a credible and consistent account and asserts that the documents produced in support of the application are unreliable. Verification checks undertaken by the British High Commission (BHC) in Sri Lanka undermine the documents produced in support of the claim.

51. The respondent refused the application in a decision date 30 December 2014. The respondent noted that the appellant produced a number of documents in support of his student visa application which indicated that his father was still alive. A bank statement in the names of his parents was verified as genuine. He also provided documents in support of the visa application, which showed that his father sold land. The respondent considered his claim that the agent helped him to obtain these documents, but noted that during the asylum screening interview the appellant also stated that both parents lived in Sri Lanka [qu.9.7].

52. The respondent took into account the court records obtained by Mr D. She noted that the BHC in Colombo reported that forged documents are readily available in Sri Lanka. Although the court record stated that the appellant was arrested in connection with his uncle's activities, and mentioned that his uncle was a French national, it did not mention that his uncle entered Sri Lanka on a forged passport as outlined by the appellant in interview [qu.20]. The appellant did not mention in interview that his father was a high ranking LTTE member as stated in the court record. The respondent considered it implausible that the appellant could have been severely beaten on his feet and then walked down to the ground floor of the TID to see his mother as claimed in interview. It was not credible that, having forced him to confess, he was asked to sign a blank piece of paper. Nor was it plausible that his ID

card would be confiscated but not his passport. The respondent took into account the fact that the appellant did not claim asylum on arrival at the airport in the UK. For these reasons, she did not accept the appellant's account of past events and concluded that he would not be at risk on return.

53. The evidence produced by the respondent falls into two categories. Firstly, a series of letters from the 2 nd Secretary (Migration) at BHC in Colombo outlining general information about the nature of inquiries made by the BHC to authenticate documents produced in support of a range of immigration applications, and in particular, the way in which inquiries are made in relation to specific types of documents produced in support of protection claims ("the general evidence"). Secondly, several pieces of correspondence and formal Document Verification Reports (DVR) relating to inquiries made in relation to the documents produced by the appellant ("the individual evidence").

54. The general evidence was prepared over a period of time. An initial letter from the 2 nd Secretary (Migration) dated 03 July 2015 outlines concerns about abuses involving 'attorney letters' from Sri Lanka. Since January 2014 the BHC checked 80 cases. 30 cases were associated with attorney endorsement documents in the form of letters or credentials. It is not clear whether those inquiries related solely to protection claims or other types of immigration applications. In seven cases the attorney confirmed that they wrote the letter, but when verified separately with the police stations or courts that purported to issue the warrants, they were found to be false. In four cases the attorney confirmed that the letter was written by them, but there were no other documents provided to verify the claims. There were six cases where the attorney's credentials were found to be false and in eleven cases they were unable to contact the attorney despite repeated attempts to verify the letters. In only two cases did the attorney confirm that the letters were not issued by him. The BHC asserts that this shows that the "vast majority" of letters provided by Sri Lankan attorneys that it verified were "not credible". Where there are no supporting documents to verify what is said by an attorney the BHC is inclined to be cautious about accepting assertions made in letters purporting to be from Sri Lankan attorneys.

55. In a letter dated 28 February 2017 the 2 nd Secretary stated that it was his personal view that the majority of attorneys registered with BASL engage in their professional honourably and act in accordance with the oaths of allegiance they have sworn. He acknowledged that members of the Sri Lankan legal profession have often shown great bravery and integrity in carrying out their duties and in trying to improve their country. However, it remained the case that documents purporting to be warrants of arrest or court records were often submitted with letters of support from attorneys in Sri Lanka or those claiming to be attorneys. The BHC in Colombo made complaints to BASL about several attorneys. The letter included details of some of the complaints and the outcome of disciplinary proceedings conducted by BASL. It is not necessary to set out the details of those individual cases here save to note that none of the disciplinary proceedings relate to attorneys named in the evidence in this case.

56. In a letter dated 02 November 2015 the 2 nd Secretary provided further information about the nature of the verification checks undertaken by the BHC with the assistance of a team in RALON (Risk and Liaison Overseas Network). RALON is said to be a subsidiary of the Home Office, which works to reduce cross-border crime into the UK, including human trafficking by detecting and sharing intelligence on potential criminal activity at ports of entry, exit and transit. The 2 nd Secretary stated that since June 2014 verification was carried out in 130 Sri Lankan asylum cases. It is the practice of the BHC to redact the personal information from the document so that the individual cannot be identified. They only ask about the document and not the person who is the subject of the document. They do not reveal the reason for the inquiry. The BHC might make inquiries on various matters

including forced marriage cases, criminal cases, forced adoption/missing children, fraud, trafficking and visa verifications.

57. The letter from the 2 nd Secretary goes on to say that the BHC never discloses the grounds for the inquiry. In almost all asylum cases the documents that the BHC verifies are either Sri Lankan court or police documents. The verification method has been, in most cases, to attend the police station or court that purported to issue the document and to ask them to check their records for a case bearing the reference number on the redacted document. The officer in charge of the police station or the court registrar will check the record while they wait. In cases where the court or station is geographically too distant to travel to the BHC is able "to use our relationship with the Sri Lankan police to verify redacted documents by fax through the head of Interpol in Sri Lanka". He considered this useful because they would receive written confirmation regarding the veracity of the document.

58. In November 2015, the BHC was aware of only two cases where the documents appeared to be genuine although inquiries were ongoing in one of those cases. In other words, it was thought that in 98.5% of cases the documents were not genuine. The 2 nd Secretary went on to observe that many of the cases appeared to involve those who had been in the UK for some time on Tier 4 student visas issued between 2009-2012 before making a protection claim. He speculated that the submission of court and police documents was likely to be an attempt to give credibility to a protection claim that would otherwise appear contrived.

59. In a subsequent letter dated 15 November 2016 the BHC in Colombo confirmed that since July 2014 the team verified 355 documents that were submitted in protection claims from Sri Lankan applicants. Of the 218 cases 88% were deemed false (191 cases). In the 12% of cases where verification indicated that the document was likely to be genuine (26 cases) a grant of protection was "generally the outcome". The other 117 documents did not include police or court documents. The 2 nd Secretary confirmed that the process of verification was unchanged since his letter dated 02 November 2015. He asserted that the process was in accordance with the principles outlined in paragraph 339IA of the immigration rules. Because 88% of the case numbers given on police or court documents did not relate to a real case the government of Sri Lanka is not able to learn the identity of those people. The use of redactions and non-disclosure of the reason for the verification means that the government of Sri Lanka is never told that a person has claimed asylum.

60. The general evidence sets out nature of the document verification process carried out by the respondent through the BHC in Colombo. The respondent has also produced evidence relating to specific inquiries made in relation to this particular case. The process of inquiry is summarised by the 2 nd Secretary in a letter dated 15 November 2016. The BHC received a request to verify the warrant of arrest in August 2015. A member of his team contacted the TID by fax because it was the authority to whom the purported warrant was directed. The warrant was redacted to omit any reference to the individual and faxed to the TID. The TID confirmed by telephone that they had no record of the warrant. The information was included in a DVR prepared by RALON on 14 August 2015. On 23 August 2015 the TID provided written confirmation that there was no record of the arrest warrant. Copies of the letter to the TID, the redacted warrant and the TID written response are included in the evidence.

61. The 2 nd Secretary observed that it might be suggested that the authorities in Sri Lanka have a vested interest in misleading his team when they make verification inquiries. He believed that there was no evidence to support such a claim. He was not aware of any case where the authorities deliberately misled the BHC. He noted that in the faxed reply from TID they confirmed the arrest

warrant in one case, which indicated that the TID provided truthful answers. Although there was one case where they were given incorrect information they were satisfied that it was unintentional.

62. The respondent made her own inquiries in response to further evidence produced by the appellant which was said to be from the Chief Registrar of the Colombo Chief Magistrate Court, K.R.S Ranaweera. In a letter dated 16 November 2016 the 2 nd Secretary outlined the nature and outcome of the inquiries and attached a copy of a DVR dated 15 November 2016, which outlined the same information. The DVR stated that a representative from RALON met with the Chief Registrar of the Colombo Chief Magistrate Court on 15 November 2016 and presented a redacted copy of the arrest warrant for verification. The DVR stated that they spoke to the Chief Registrar, Mrs Chamila Wikramatunga. She was not aware of a registrar by the name of K.R.S Ranaweera.

63. The DVR goes on to say that the Chief Registrar noted that the court reference was missing the relevant court house number. The last digit should indicate the court e.g. A11111/11/1. The spelling on the stamp was incorrect. The circular day stamp is only placed on the warrant once it is executed. Because the complainant was the TID she said that the relevant court house should have been Court 8, where most TID cases are heard. The Chief Registrar told the respondent's representative to meet with the registrar for Court 8. The DVR stated that the respondent's representative met with the registrar for Court 8 who referred the warrant to the Chief Clerk for the court. The Chief Clerk checked the day book and confirmed that there was no record of a warrant being issued on 17/10/2014 with the reference number given. The Chief Clerk then referred the respondent's representative to the police post to check whether the warrant number existed. The police post told the respondent's representative that the only reference number that matched the one listed on the warrant related to a case recorded in Court 6. The case related to a monetary fraud in the name of another person. There was no record of a warrant being issued in that case.

64. In a further letter dated 06 March 2017 the 2 nd Secretary stated that his team received verbal confirmation from the Registrar for Court 6 that "the documents were not genuine" but had trouble obtaining a written response. A member of his team met with the Registrar on 28 February 2017. The Registrar provided a written response, which was translated from Singhalese by a member of his team. The Registrar was shown a copy of the redacted arrest warrant that was said to have been certified by the court for Mr D on 23 December 2014. The letter from the Registrar at Court 6 is dated 28 February 2017. The Registrar stated that the arrest warrant submitted for verification under the reference given could not be confirmed because they were unable to find a corresponding case record. The Registrar went on to state that the date and the court stamps on the arrest warrant "do not correspond to the date and court stamps used by this court".

Decision and reasons

65. We have considered whether the appellant has made a genuine effort to substantiate his protection claim, including whether his account is coherent and plausible and does not run counter to specific or general information relevant to the case.

66. We find that there is nothing inherently implausible about the core elements of the appellant's claim. The fact that the government of Sri Lanka might have an adverse interest in those it perceives to be a threat to the integrity of Sri Lanka as a single state is consistent with the background evidence and the most recent country guidance decision in GJ and others (post-civil war: returnees) Sri Lanka [2013] UKUT 00319. If the claim is found to be credible the respondent accepts that the appellant is likely to have a well-founded fear of persecution in Sri Lanka.

67. The appellant does not claim to have been active for the LTTE in the past and does not claim to have carried out political activities in the diaspora in the UK. His claim to be of adverse interest to the authorities relies on his association with his father and paternal uncle, who are said to have been active LTTE members in the past.

68. The appellant has provided little detail about his father's activities in Sri Lanka. This aspect of his claim does not appear to form a central plank of the case, but is said to be relevant to his perceived profile in the eyes of the Sri Lankan authorities. We bear in mind that the appellant says that he last saw his father in 2008, when he was around 14 years old. Given his young age we would not necessarily expect him to have detailed knowledge of his own about his father's activities. Nevertheless, it forms an important part of the evidence relied upon by the appellant to show that his family background is known to the authorities. There is nothing to suggest that the appellant no longer has contact with family members who might know more about his father's activities. Even though this issue forms part of his claim no further information has been provided regarding his father's position in the LTTE.

69. The appellant asserts that he lied in the application for entry clearance as a Tier 4 student. In interview the appellant suggested that his parents were sponsoring the application. His mother was the main sponsor, but he made clear that his father sold some land to help finance his studies in the UK. He produced evidence to support his assertions, including a bank statement in his parents' names and evidence to show that his father sold land in June 2014. The appellant says that the agent advised him to lie to obtain a visa. Although we accept that it is possible that a genuine refugee might need to use deception or obtain false documents in order to secure his escape, the appellant has not provided a satisfactory explanation as to why he appeared to suggest that both parents were living in Sri Lanka at the asylum screening interview. Even if he had good reason to lie about his father's whereabouts in the entry clearance application, by the time he claimed asylum, he had no reason to do so given that his father's activities for the LTTE formed one aspect of his claim. The fact that the appellant indicated that both parents were in Sri Lanka in the entry clearance application and in the screening interview does tend to undermine his claim that his father has been missing, presumed dead, since 2008.

70. There is nothing inherently implausible about the fact that the appellant's uncle might have had previous LTTE connections given the history of the Sri Lankan conflict. His account of the time he spent driving his uncle around Colombo on a two-week visit is vague and lacks detail. The appellant says that he found out about his uncle's LTTE connections through his mother. Even though his association with his uncle forms the central reason for his arrest the appellant has been unable to provide much detail about his uncle's history. It is reasonable to suppose that other relatives, such as his mother, might be able to provide him with more detailed information. Although the appellant claims that his uncle was arrested after he dropped him off at the airport, it became apparent during cross-examination that the appellant and his family did not try to contact his uncle's family in France after his arrest and made no effort to find out what happened to him.

71. The appellant's account of events, beginning with the first detention on 15 February 2014, and ending with his release on bail on 24 June 2014, has been internally consistent regarding the key events and is broadly consistent with the information contained in the certified copies of the court record and the arrest warrant produced in support of his claim. It is not disputed that detention would attract a real risk of ill-treatment amounting to persecution in light of the background evidence relating to the treatment of suspects in Sri Lanka. At the core of the claim is the reliability of the documents said to have been produced and verified by attorneys in Sri Lanka.

72. Both parties compiled evidence relating to these documents. It is clear from the initial correspondence from the appellant's previous representatives to Mr D that they took steps to obtain evidence in support of the claim at an early stage of the process. Mr D's letter dated 15 December 2014 states that he was instructed by email on 20 November 2014. His further letter dated 23 December 2014 and the certified copy of the court records and the arrest warrant were available shortly before the respondent took a decision on 30 December 2014. The evidence shows that his legal representative forwarded the documents to the respondent on 24 December 2014, but there is no consideration of the evidence in the decision letter.

73. The fact that evidence was obtained through 'lawyer to lawyer' correspondence does not mean that it should be accepted without question. The fact that the process of obtaining the evidence is more apparent is a matter that lends more weight to the evidence, but the overall reliability of the information provided by an attorney in Sri Lanka must still be subject to scrutiny. The general evidence produced by the respondent from the BHC in Colombo, and the details of disciplinary proceedings conducted by BASL in relation to the conduct of several attorneys in other cases, shows that a number of similar letters purporting to be from Sri Lankan attorneys have been shown to be unreliable. The overall context of the figures provided by the 2 nd Secretary is somewhat unclear. We do not know what proportion of protection claims are thought to require further inquiries in Sri Lanka or whether the cases involving the provision of 'attorney letters' form a large or small proportion of the overall number of protection claims from Sri Lanka. Nevertheless, the background evidence relating to Sri Lanka shows that corruption is widespread and the use of false documents is a possibility. Possible permutations could range from genuine letters from qualified attorneys, false letters purporting to be from qualified attorneys, letters that purport to be from an attorney whose credentials cannot be verified and the possibility of corrupt and fraudulent practice by an attorney.

74. In this case the key evidence produced by the appellant is the certified court records and a certified copy of the arrest warrant. This was supplemented with a letter from the Chief Registrar and further inquiries made by another attorney, Mr R.

75. The evidence from the court was introduced through correspondence from Mr D. Although a copy of his BASL ID card was not initially available, Mr D provided a copy of the card by email dated 06 February 2015 and a copy of his new BASL ID card was provided at a later stage. His credentials have not been questioned. No doubt they could be readily checked by BASL if there was any question mark about his qualification as an attorney.

76. On the face of it the documents are consistent with one another. Taken alone, and in the absence of any information relating to the court procedures, the documents are broadly consistent with the appellant's account of events. The reference number for the case brought against the appellant is the same on each of the documents and in the correspondence from the various attorneys. It takes the format of a letter, followed by five numbers followed by a two-digit number, which would appear to reflect the year e.g. A11111/11. Mr D's correspondence requesting a copy of the court records, the certified court records, the arrest warrant and subsequent correspondence said to be from the Chief Registrar of the Chief Magistrate Court in Colombo all state the same reference number.

77. On the face of it the details contained in the certified copy of the court records would also appear to be consistent with the central elements of the appellant's account. The record states that the Chief Inspector of the TID was investigating a complaint. The appellant is named. The record states that he was arrested by the Wellawatta police on 06 June 2014 and handed over to the TID on suspicion of aiding and abetting the LTTE and being a member of the LTTE. The record goes on to state that he

joined a French national (giving the name of his uncle) and had taken steps to “organize the LTTE Organization”. It was alleged that the appellant used his car for LTTE activities. The car was impounded by the TID. It reports that the appellant’s father is a high ranking LTTE officer. The record states that the TID was seeking a remand order under the Prevention of Terrorism Act. The record shows that he was remanded until 24 June 2014. On that date the record goes on to state that the suspect was represented by Mr D and names the officer who appeared on behalf of TID. Consistent with the appellant’s evidence, the record notes that he was released on conditional bail on a recognisance of 200,000 Rupees with reporting conditions. A final record for 17 October 2014 states that the suspect was absent and an ‘open warrant’ was issued for his arrest.

78. A certified copy of the arrest warrant was produced with the copy of the court record. The warrant stated the appellant’s details and was directed at the Officer in Charge of the TID. The reason for the issue of the warrant was “failure to attend court”. The Officer in Charge was authorised to arrest and produce the appellant. The original copy of the warrant appears to be in a standard format with individual details such as the case reference and the details of the subject entered by hand. The warrant is sealed with a round stamp with a hand-written date of 23 December 2014. The same seal and date is found on the certified copy of the court records as well as the arrest warrant. The seal has not been translated, but given that this was the date that Mr D says he obtained a certified copy, we find that it is reasonable to infer that the seal is likely to indicate certification of the copy.

79. The appellant says that he left the country with the assistance of an agent. He says that his mother contacted an agent after he was released from detention in February 2014, but no further information is provided as to why he did not leave the country sooner. It was only after his arrest, detention and subsequent release on bail some four months later that any discernible action was taken to make arrangements for the appellant to leave the country. He already had a valid passport. The entry clearance application was not made until around six weeks after his release on bail. No explanation has been given as to why it took so long to make the arrangements if the agent was instructed in February 2014. However, we note that the applicant left Sri Lanka promptly after the visa was issued on 23 September 2014. The fact that he travelled through the airport without being stopped is not a matter that undermines his claim to be of interest to the authorities. He says that he passed through with the assistance of the agent. The arrest warrant was not issued until sometime later. The Tribunal in GJ (Sri Lanka) recognised that it is possible to make such arrangements given widespread corruption.

80. We have also considered whether the timing of the appellant’s asylum claim is a matter that might undermine his general credibility. The appellant entered the UK on 29 September 2014 and claimed asylum on 24 November 2014. Although a genuine refugee might be expected to seek protection as soon as possible, we do not consider that a delay of two months damages the credibility of the claim. The appellant says that he entered the UK and took advice before making a protection claim. His student visa was valid for three years. This is not a case where he waited until his visa was about to expire. In the context of a three year visa his application was made quite promptly.

81. As noted above, the documents produced by the appellant are generally consistent with one another in terms of dates, reference numbers and other information relating to the substance of the claim. However, there are some matters on the face of the evidence that call into question the reliability of Mr D’s claim to have made inquiries with the court in December 2014.

82. The evidence produced by Mr D suggests that he made a written application to the court for a certified copy of the court records on 18 December 2014. He says that he received a certified copy of

the records on 23 December 2014. His correspondence to the appellant's previous legal representatives enclosing the records is dated the same day. The original correspondence did not include a copy of Mr D's BASL ID card. It is not clear when the appellant's representatives made a request for Mr D's BASL ID card. Another attorney, Mr J, responded to a request for the card in a letter dated 23 December 2014. This was the same day Mr D purported to send the evidence to the appellant's legal representatives. Mr J said that he was handling Mr D's cases because "now a day he is not in the Island due to his higher education". Mr J provided a copy of his BASL ID instead. The suggestion that Mr D was not in Sri Lanka in or around the time he says he obtained the court records in December 2014 is repeated in a later email from Mr D dated 06 February 2015. He stated: "Actually I handed over all my cases to Mr [J] to handle due to absence in Sri Lanka. At that time he was not able to contact me to obtain the Identity card copy."

83. This evidence appears to show that Mr D was not in Sri Lanka when he purported to make a request for a certified copy of the court records in December 2014. No further detail is provided to explain how the records were obtained if that was the case. Even if Mr D handed over his cases to Mr J to deal with this does not explain why a qualified attorney would send written and signed correspondence in Mr D's name. If Mr J had conduct of the case we would expect him to make those inquiries in his own name. It is a weakness on the face of the evidence. The fact that there are two pieces of evidence to indicate that Mr D was not in the country when he says he made the request for a certified copy of the court records calls into question how the inquiry was made. This point gives rise to doubts about how the documents were produced. Taken alone, we do not place significant weight on it because it was not put to the appellant to answer at the hearing.

84. Other evidence has been produced by the respondent that also calls into question the reliability of the documents produced by the appellant. The most notable is a direct inquiry to TID regarding the authenticity of the arrest warrant. The respondent states that a redacted copy of the warrant was sent to TID. The only redaction from the warrant is the appellant's name and address. The respondent has produced a copy of the letter that was sent to TID on 10 August 2015. The letter is on BHC headed paper with an additional header saying "Immigration Enforcement". The BHC asked the Director of the TID to verify the authenticity of four arrest warrants. The reference numbers are listed. No other information was given about the purpose of the request.

85. The TID response is dated 25 August 2015. The response lists the same four reference numbers. Next to three of them, including the reference number in this case, it states "Not relevant to TID". In the fourth case TID stated that the case was relevant but the suspect had been released and the case closed. TID did not request a warrant in that case.

86. We take into account the fact that the BHC takes steps to redact personal information from documents it seeks to verify and does not make reference to the purpose of the inquiry. These safeguards might protect people who may have submitted false documents in support of a claim because if there is no genuine record of an arrest warrant TID would not be able to identify the person. But this method of inquiry would not protect those who have a genuine arrest warrant issued against them. The identity of the person will be known to TID from the reference number whether the copy of the warrant is redacted or not.

87. Although the BHC is careful not to disclose the reason for the inquiry, and seeks to authenticate a wide range of documents relating to different types of applications, it is difficult to see what other sort of inquiry might require the BHC to verify the authenticity of an arrest warrant with a specialist terrorism branch of the police. The letter headed "Immigration Enforcement" informs the Sri Lankan

authorities that the inquiry relates to an immigration matter. The Sri Lankan authorities are well aware of the fact that the UK is a destination country for asylum seekers. It seems to us that there is at least a reasonable likelihood that the Sri Lankan authorities would infer from the request to authenticate an arrest warrant that “has been submitted to our offices in the UK”, that the person is likely to have made a protection claim. If nothing else, the Sri Lankan authorities may not have been aware of the location of the person who is the subject of the warrant, but would now know that they have made some form of immigration application in the UK.

88. The BHC in Colombo believes that a large proportion of documents produced in support of protection claims are false or unreliable. No doubt this is a frustrating problem for the respondent when trying to assess a large number of protection claims. The UNHCR advisory opinion recognised that a state might have legitimate concerns about distinguishing between those who need international protection and those with no valid claim to refugee status. However, the authorities in the country of asylum must comply with the duty of confidentiality and the prohibitions outlined in Article 22 during the process of examining a protection claim.

89. The general legal principles we outlined above should be applied before deciding to make an inquiry with an alleged actor of persecution. The overriding principle to bear in mind is the humanitarian purpose of the Refugee Convention. The general method of inquiry in this case protects the personal information of those who have produced unreliable documents in support of a protection claim but genuine applicants would not be protected by this process. The respondent asserts the genuine cases are fewer in number, but that does not release the respondent from her duties. Given that the respondent does not know which applicant is genuine or not before making the inquiry with TID, the process used at the current time is prohibited by Article 22.

90. There is no suggestion that any of the evidence produced by the respondent has been prepared in bad faith, but that does not mean that it should not be assessed in the same way as any other piece of evidence. We must consider what weight can be placed on a document emanating from an alleged actor of persecution. The BHC genuinely believes that the Sri Lankan authorities have been honest in verifying documents, but it is at least possible that the authorities might have a motive to deny the existence of a warrant if they had a strong interest in arresting a person. The fact that TID have confirmed a document in one case does not mean that weight can be given to the information provided in response to every verification request.

91. In summary, the current method of inquiry with TID risks breaching the prohibitions in Article 22 and is unlikely to produce reliable evidence relating to the authenticity of the document in question.

92. On the face of it the fact that TID had no record of the case number in this case would tend to undermine the credibility of the document, but given our concerns about the reliability of evidence from an alleged actor of persecution who may have a motive to undermine a protection claim, we can place little weight on the evidence from TID.

93. The duty of confidentiality relates to any type of inquiry. If an applicant has given consent other types of inquiry might produce more reliable evidence. On behalf of the appellant it was accepted that alternative inquiries with the courts or attorneys in Sri Lanka were of less concern. Whether it is appropriate to identify safer forms of inquiry will depend on the evidence relating to the country of origin. In some countries the evidence might show that the judiciary is not independent and is inextricably bound to the alleged actor of persecution. In countries where there is in general an independent judicial system the inquiry is less likely to be characterised as a ‘direct’ inquiry with the

alleged actor of persecution. In this case the background evidence shows that there are some problems within the Sri Lankan court system, but generally it is said to be independent.

94. We have considered what weight can be placed on the inquiries made by both parties at the Chief Magistrate Court in Colombo. On the face of it the letter produced by the appellant from the Chief Registrar, K.R.S. Ranaweera, is consistent with the series of documents produced in support of the claim. The reference number is consistent and the date when the certified copies of the court records were obtained. The correspondence shows that this document is said to have been obtained by Mr D, who wrote to the registrar on 02 November 2016.

95. Perhaps because there is a question mark over the process of Mr D's inquiries the appellant produced a further letter from another attorney, Mr R, dated 07 November 2016. We find that we can place little weight on this letter. Although his qualification as an attorney is supported by a copy of his BASL ID card, the letter provides such limited information about the nature of his inquiry that it is of little use. He states that the court registrar, Mrs S. Veeraseegara, confirmed that Mr D obtained a certified copy of the court file on 23 December 2014. No further information is provided as to how Mrs Veeraseegara checked the records to verify the information. For these reasons, we find that the letter from Mr R doesn't take the evidence any further than the existing letter from K.R.S. Ranaweera.

96. The respondent's inquiries at the Chief Magistrate Court appeared to focus solely on the arrest warrant. Given that the document contains the same case reference as the certified copies of the court file, it is reasonable to assume that if there were court records they could be verified. In any event, the two pieces of evidence are inextricably linked together. The certified copy of the court record gives details of the warrant that is said to have been issued after the appellant failed to attend a hearing on 17 October 2014.

97. There is no suggestion that the respondent's representative who attended the Chief Magistrate Court on 15 November 2016 to make further inquiries might have acted in bad faith. The DVR sets out a record of the inquiries, but it is somewhat limited because the record is in note form. The DVR states that the respondent's representative met with the Chief Registrar, Mrs Chamila Wickramatunga.

98. We give weight to the fact that the information obtained during the inquiry came directly from the Chief Registrar. She is in a position to provide accurate information about the procedures at the court. We consider that the Chief Registrar is a reliable source of information relating to the proper referencing of case numbers. She was shown a redacted copy of the arrest warrant, but the same reference number is repeated throughout the series of documents produced by the appellant. She observed that the reference number was not in the correct format because it did not contain the last digit, which indicates the court room number e.g. A11111/11/1.

99. The information provided by the Chief Registrar is consistent with the appellant's claim that his case was heard in Court 8. She confirmed that cases brought by TID are usually heard in that court. However, when the respondent's representative was directed to the Chief Clerk at Court 8, who checked the day book, there was no record of a warrant issued on 17 October 2014 with that reference number. The DVR provides sufficient information to outline the nature of the inquiry at Court 8. The fact that there is no record of a warrant being issued in connection with the reference number on 17 October 2014 is a matter that seriously undermines the reliability of the document.

100. We find that the evidence from the registrar at Court 6 has little relevance to our assessment in circumstances where the appellant has always claimed that his case was brought in Court 8. The

letter from the registrar at Court 6 noted that the court stamps used on the warrant did not correspond to the court stamps used by the court. It is not clear whether this refers to the court stamps generally used in the Chief Magistrate Court or for Court 6. Given the limited information we cannot place much weight on this comment, but it does cast some doubt on whether the arrest warrant conforms with the format used at the Chief Magistrate Court.

Conclusions

101. We bear in mind that the standard of proof is low because of the serious nature of the potential risk on return. The appellant has given a generally consistent account that is plausible in the context of the background evidence. The appellant has repeated the course of events in 2014 consistently, but the background to the account is rather vague even though it seems likely that the appellant could have obtained further information about the activities of his father and uncle from other family members. On the face of it the series of documents produced by the appellant show that he made a genuine effort to substantiate his claim. The credibility of his account hinges very much on the reliability of those documents.

102. We note that the series of documents produced by the appellant are generally consistent with one another. We have found that there are some question marks about the process of inquiry made by Mr D. The combination of evidence showing that he was likely to be outside the country at the date he claimed to be applying for certified copies of the court records is a matter that tends to undermine the documents. Given that this was not put to the appellant we have not placed weight on the point, but we have taken it into account in so far as it forms one part of other evidence that tends to undermine the reliability of the documents.

103. The series of evidence produced by the appellant is tied together by the same case reference and court number. If it was the only evidence produced in this appeal it might have been sufficient to discharge the low standard of proof even if there were some doubts about the evidence. However, the respondent has made inquiries to authenticate the documents. The outcome of those inquiries significantly undermines the reliability of the evidence produced by the appellant.

104. We find that the evidence from TID is unreliable and that the routine process used for making such inquiries with the TID is prohibited by Article 22 because it could place genuine applicants at risk. The evidence from TID is not the only evidence relied upon by the respondent. The process of inquiry at the Chief Magistrate Court does not appear to involve direct contact with an alleged actor of persecution in the context of the background evidence relating to Sri Lanka. The evidence produced by the respondent seriously undermines the whole series of documents produced by the appellant.

105. Albeit the inquiry concentrated on the arrest warrant, the appellant’s evidence relies on the same case reference number throughout. The information obtained directly from reliable sources at the Chief Magistrate Court shows that the reference number is incomplete and does not relate to any case brought in Court 8 or any other court in the complex. The only similar reference related to a completely different case. The day book for Court 8 had no record of a warrant being issued by the court on the date given on the warrant. Although we find the response from TID unreliable, the outcome of that inquiry was consistent with the inquiry made at the court.

106. We have considered whether there is room for uncertainty given the low standard of proof. In another case the evidence might be more evenly matched. However, in this case the evidence produced by the respondent is sufficiently strong to give little room for doubt. The inquiries made at

the Chief Magistrate Court were sufficiently clear and thorough to undermine the credibility of the central aspects of the appellant's claim.

107. We conclude that the documents produced by the appellant are unreliable. Taken with the other matters that give rise to doubt about the credibility of his account identified above, we conclude that the appellant has failed to establish on the low standard of proof that his account is credible. As such, he has failed to show that he would be at risk on return on Refugee Convention, Humanitarian Protection or Human Rights grounds.

108. The fact that the respondent sent a redacted copy of an arrest warrant that has been proven to be unreliable to TID is unlikely to lead to identification of the appellant or a breach of Article 22. The remedy for a breach of Article 22 is not a grant of refugee status if there is insufficient evidence to show that the appellant has a well-founded fear of persecution.

DECISION

The appeal is DISMISSED

Signed  Date 19 July 2017

Upper Tribunal Judge Canavan