OUTER HOUSE, COURT OF SESSION

[2021] CSOH 10

P122/20

OPINION OF LORD DOHERTY

in the cause

AR (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP (for Maguire, Solicitors, Glasgow)
Respondent: Maciver; Office of the Advocate General

27 January 2021

Introduction

[1] In this petition for judicial review the petitioner seeks reduction of a decision by the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") which refused the petitioner's application for permission to appeal to the UT against the First-tier Tribunal (Immigration and Asylum Chamber) ("the F-tT")'s dismissal of his appeal against removal directions. On 9 September 2020 Lord Brailsford granted permission to proceed. The matter came before me for a substantive hearing.

[2] The petitioner is a Pakistani national. He claimed asylum on 21 June 2013 on the ground that he was homosexual and that he would face a real risk of persecution in Pakistan

were he to be returned. That claim now has a very long history. The first 4 years of that history are described in *AR* v *Secretary of State for the Home Department* [2017] CSIH 52, at paragraphs [2]-[25]. In brief, on 13 October 2015 the F-tT dismissed the petitioner's appeal against the respondent's removal directions. On 14 January 2016 the UT refused the petitioner's appeal. The petitioner appealed to the Court of Session, having been granted permission to appeal by the Court of Session. On 4 August 2017 an Extra Division of the Inner House quashed the UT's decision and remitted the petitioner's appeal to the F-tT for determination by a judge who had had no previous involvement in the case (*AR* v *Secretary of State for the Home Department*, *supra*). The F-tT heard the appeal on 30 May 2019, and on 27 June 2019 it issued its decision dismissing the appeal.

[3] In view of the fact that the petitioner has claimed asylum, I have anonymised this opinion. That exercise has extended to anonymising certain features of the First Information Report ("FIR") (see infra) which would be likely to assist in identifying him, namely the police station where the FIR was prepared (which I shall refer to as "[x]") and the FIR number (which I shall refer to as "[y]"). For the same reason, I have anonymised the name of the record keeper in the Document Verification Report mentioned below. I shall refer to him as "[z]".

The hearing before the F-tT

[4] The petitioner gave evidence through an interpreter. He lodged a report dated 5 November 2018 prepared by Dr Fraser Morrison, Consultant Clinical Psychologist. Dr Morrison was of the view that the petitioner suffered from a generalised anxiety disorder. At the outset of the hearing his counsel invited the F-tT to treat the petitioner as a vulnerable witness, and he suggested that questions should be as focussed as possible. The

F-tT noted (paragraph 4.2) that at one point during his evidence the petitioner indicated he was losing his concentration. As a result, the hearing was adjourned for 15 minutes.

[5] The petitioner's evidence was that he is a homosexual; that he began engaging in homosexual relations with older males when he was a boy growing up in Pakistan; and that in adulthood he had frequent homosexual relations with a variety of men. He maintains that in February/March 2003 he was charged by the police with having unnatural carnal relations after he and an 18 year old man, M, were seen by police having sex in a field. They were taken to [x] police station in Multan where they were beaten and the petitioner was charged. A friend of the petitioner bribed a policeman, and with the policeman's assistance the petitioner escaped from custody while in transit from the police station to court. He returned home, but his family had read a newspaper report of the incident and they disowned him. The petitioner sold one of his kidneys to finance travel to the UK. An agent arranged the sale and the travel. He took a flight from Lahore, but he had turned back from the airport more than once on days when he was booked to fly because of police presence. He arrived in the UK on 1 January 2004 on a 1 year work permit visa. In 2010 he applied for leave to remain under the legacy scheme. His asylum claim was made 3 years later. In Scotland, while he had disclosed that he was gay to a close friend T, generally he had not been open about his sexuality. Nevertheless, he had gone to gay clubs in Glasgow since about 2013 when funds had permitted. He produced a membership application form for 40 Fox Street and a typed letter bearing to be from the manager there confirming he had been a member since August 2013. He also produced a weekend pass for Pipeworks (valid for 1-3 July 2015).

[6] T's evidence was that he had known the petitioner for 10 or 11 years. After a couple of years the petitioner had confided to him that he was gay. T confirmed that to his

knowledge the petitioner had attended gay clubs in Glasgow. T had regularly dropped him off at 40 Fox Street. He had gone with him to Pipeworks.

[7] The F-tT had a good deal of documentation before it. In support of his account the petitioner relied on an FIR said to have been prepared by the police at [x] police station; on court documents relating to his prosecution in Pakistan on the charge described in the FIR; and on a newspaper report dated 31 March 2003. The petitioner explained that a friend in Pakistan had obtained and sent him the FIR, the court documents, and the newspaper report in about 2013. The petitioner also relied upon two reports prepared by Waheed Ahmad, Advocate of the High Court in Lahore.

[8] A translation of the FIR indicated that it was dated 2 March 2003 and numbered [y]; and that it recorded a complaint against the petitioner by M's father that the petitioner had sodomised M against his will. It narrated that M's father and others had witnessed this and had taken the petitioner to [x] police station, but that the petitioner had later tricked the police and escaped. Box 3 of the FIR contained the entry: "Brief details of the offence… P.P.C. 377". The petitioner insisted that it was the police who had seen the incident, not M's father. In so far as the FIR suggested the latter, it was not correct. M's father may have bribed the police to complete the FIR in those terms.

[9] Translations of the court documents indicated that they appeared to be court interlocutors, signed by a magistrate, relating to a criminal prosecution by the state against the petitioner. They were dated 3 April 2003, 18 April 2003, 3 May 2003, 17 May 2003 and 31 May 2003. The interlocutor of 3 April 2003 recorded the presentation and registration of "criminal case [y] dated 02-03-2003 u/s 377 PPC" against the petitioner and summoning him to attend on 18 April 2003. The interlocutor of 18 April 2003 recorded that the petitioner was absent when the case was called; that "the report is abscondance"; and that the petitioner

"be summoned vide bailable warrant of arrest surety Rs. 10,000/- for 03-05-2003." The interlocutor of 3 May 2003 indicated that when the case called the petitioner was absent. On that occasion the petitioner was summoned "vide non bailable warrant of arrest" to be arrested by and to be presented at court by a police officer from [x] on 17 May 2003. On 17 May 2003 the petitioner was absent when the case called. The police officer from [x] was directed to appear at court on 31 May 2003 to explain why he had not presented the petitioner at court. On 31 May 2003 when the case called the petitioner was absent. The court was informed that the petitioner had absconded due to fear of arrest. The petitioner was declared to be a perpetual absconder, confiscation of his property was directed, and the case file was "consigned to the record room be (*sic*) produced before the court as and when accused is arrested".

[10] A translation of the newspaper report indicated it was an article from a Multan daily paper dated 31 March 2003. It reported the petitioner's commission of the offence on 2 March 2003, his arrest, and the fact that he had not remained in police custody. The first headline suggested that he had escaped, but the second headline and the text of the article indicated that the police had released him. The petitioner's evidence was that similar information had appeared in the press at the time of the incident, which is how his family knew of it by the time he reached home.

[11] The first report prepared by Mr Ahmad was dated 12 January 2019. It indicated that having homosexual relations is a crime contrary to section 377 of the Pakistan Penal Code and is punishable by a sentence of up to life imprisonment. It stated that under Hudood laws the punishment for homosexual sex is death by stoning. It noted that in 2013 the Washington-based Pew Research Centre found that of 39 countries studied Pakistan was the

least accepting of homosexuality, with 87% of those surveyed saying homosexuality should not be accepted by society.

[12] Mr Ahmad's supplementary report dated 13 March 2019 dealt with the FIR and the court documents. Mr Ahmad sent instructions to a colleague practising in Multan (which is more than 200 miles from Lahore). The report stated:

> "5. My Colleague from Multan Miss Mahjabeen Advocate Randhawa Bhutta Law Chambers on my request visited [x] Police Station in Multan for the verification of FIR no. [y].
>
> 6. Miss Mahjabeen also visited Court for verification of court documents which was provided by [the petitioner].
>
> 7. AS per her letter dated 01-03-2019 the FIR registered against [the petitioner] and the court papers are genuine documents. Her letter is attached as Annexure A with this report."

Annexure A was a letter dated 1 March 2019 from Miss Mahjabeen to Mr Ahmad which stated:

> "Dear Mr Ahmad,
>
> I can confirm your instructions to verify a FIR report that has been produced by [the petitioner] to the authorities in the UK.
>
> I visited the [x] Police Station in Multan, Pakistan to verify a FIR report dated 2nd March 2003, and FIR number [y].
>
> I can also confirm that I physically visited the police station on 25th February 2019 and asked to see the FIR report dated 2nd March 2003, and FIR number [y].
>
> When the said FIR was requested the record keeper produced that same FIR which was held in their file of records.
>
> I can confirm that the FIR is genuine and held in the records of [x] Police Station, Pakistan.
>
> I further confirm that the offence cited on the FIR I saw was that of the original FIR produced by [the petitioner] under s 377 of PCC (Pakistan Penal Code).
>
> After examining the FIR I can confirm that it is genuine and the relevant records are held in [x] police Station.

> In addition to this I can also confirm that after verifying with the courts that the court case against [the petitioner] is also still pending.
>
> If you require any further information please do not hesitate to contact me."

[13] The respondent lodged a Document Verification Report dated 21 August 2017 ("the DVR") on the FIR. The report was prepared by an Immigration Liaison Adviser at the British High Commission, Islamabad. The report noted:

> "I called the record Keeper of [x] Police Station Multan and provided him the FIR number and date. The record Keeper after checking the record confirmed that details of FIR Number [y] of 02/03/2003 of [x] Police Station Multan provided does not match to the details in the records of [x] Police Station Multan, he confirmed that the copy of FIR Number [y] dated 02/03/2003 of [x] Police Station Multan provided by the applicant is non-genuine.
>
> He further added that FIR Number [y] of [x] Police Station Multan is not dated 02/03/2003 but is in fact dated 31/07/2003 in the police station records; the offence is not section 377 of PPC (*Pakistan Penal Code)* as claimed but the offence in police records are section 13-20-65 (*recovery of illegal arms*).
>
> In light of the above information the copy FIR Number [y] of 02/03/2003 of [x] Police Station is verified as Non Genuine."

The F-tT's decision

[14] At paragraph 5 of its decision the F-tT noted that the petitioner claimed international protection in terms of the Refugee or Person in Need of International Protection Regulations 2006, and also claimed that he was entitled to Humanitarian Protection. It further noted:

> "The burden is on the Appellant to show as regards his protection appeal that returning him will expose him to a real risk of an act of persecution for a reason set out in section 6 of the 2006 Regulations; as regards his Humanitarian Protection Appeal that he has shown substantial grounds for believing he would face a real risk of serious harm as defined by paragraph 339C of the Immigration Rules, or a real risk of a breach of his protected human rights.
>
> The standard of proof is to the lower standard namely 'a reasonable likelihood' or 'a serious possibility'.

…

> Lord Justice Buxton stated in the case of GM (Eritrea) and others -v- SSHD [2008] EWCA Civ 833: 'the burden of showing that he has a well-founded fear of persecution falls on the applicant, but the standard that he has to meet is not a demanding one. Its most convenient expression is in terms of a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country: R-v- Home Secretary Eritrea p Silvakumaran [1988] 1 AC 958 at page 994F per Lord Keith of Kinkel.'
>
> It is that standard which I apply to the issues upon which the burden falls on the appellant."

In relation to persecution, the F-tT quoted paragraphs 12-16 of Lord Hope of Craighead's judgment in *HJ (Iran)* v *Secretary of State for the Home Department* [2011] 1 AC 596.

[15] The F-tT did not find the petitioner's account to be credible, and it dismissed the appeal. It drew attention to various matters all of which could be said to bear upon credibility. It referred to matters on which the evidence had been either vague, or difficult to follow, or in respect of which the petitioner's evidence had been unsatisfactory. It attached significance to the fact that there was no statement or other evidence from the witness in Pakistan who had obtained the FIR, the court documents, and the newspaper report. It drew attention to internal inconsistencies in the evidence of the petitioner, and in the evidence of T; and to inconsistencies between their evidence. It found that between 2004 and 2013 the petitioner's lifestyle had evinced no indication that he was gay. That was in sharp contrast to the picture which he painted of being a very sexually active homosexual in Pakistan who had many partners. The F-tT concluded that the petitioner was not gay, and that he only began to claim that he was in order to bolster his asylum claim. The gay club evidence had been manufactured to the same end.

[16] The F-tT dealt with Mr Ahmad's supplementary report and the annexed letter at paragraph 19 of the decision. The crux of its conclusions were:

"19.1 … On a straight-forward construction of the letter dated 01-03-2019, the Advocate simply verifies that the police station records hold an FIR report dated 2nd March 2003 bearing FIR number [y]. In my judgement there is no discussion by the Advocate of any source document which she might have studied to check against records held in Pakistan; and so, I am unable to give the opinion material weight in the appeal.

19.2 The author of the letter of 01-03-2019 goes on to say: 'I further confirm that the offence cited on the FIR I saw was that of the original FIR produced by [the petitioner] under section 377 of the PCC (Pakistan Penal Code)'; but again, there is no detailed discussion of any study or comparison of documents undertaken by her. For aught known, the document seen by the Advocate may have been in a different format and with a different content; and yet mentioned section 377.

19.3 The author of the letter of 01-03-2019 then states; 'After examining the FIR I can confirm that it is genuine and the relevant records are held in [x] Police Station'; but the 'FIR' mentioned previously is the FIR produced by the record keeper in Pakistan. If the author intended to refer to 'the original FIR produced by [the petitioner]', she does not expressly state that; …; she does not go into any detail about the format or contents of the document seen by her; and she does not give any detail of the comparison which she undertook so as to reach the conclusion that the source document from [the petitioner] is a replica of the original documents seen at [x] Police Station.

19.4 The Advocate opines 'In addition to this I can also confirm that after verifying with the courts that the court case against [the petitioner] is also still pending.' In grammatical terms the author appears to use a 'conjunction' to connect actions by saying 'after verifying' certain matters; but then does not specify the action or time which arises after the verification. However, on a reasonable construction, the author may be saying that she verified with the courts that the court case against [the petitioner] is still pending. However, there is no detail given of any steps taken in the methodology of verification. So, there is no mention of the court which is seized of the case, no mention made of the arrangements to secure access to material held at court about the case, no mention of discussion with agents who might have appeared at court for either party to the case; and no mention of research undertaken to inform the author of the details of the case which she was expected to research on any visit to the courts.

19.5 I note that neither Waheed Ahmed (*sic*) or Mahjabeen explain whether it is normal to see a self-contradictory account within a FIR …; or why one original FIR might give rise to two translations which differ in material respects as noted above… I note that there is no explanation for the absence of court interlocutor relating to the date on which the appellant was due to be in court; but managed to escape police custody. I note that there is nothing said about the obvious spelling error in the use

> of the word 'magistrate' which someone analysing court documents for authenticity would be bound to comment upon. I note that although the respondent's DVR is dated 21/08/2017 and appears in RB2 lodged on 26 October 2018, neither Waheed Ahmed nor Mahjabeen have enquired directly with Record Keeper [z] (mentioned expressly in the DVR) what he makes of the contents thereof.
>
> 19.6 I conclude that the report of Waheed Ahmed and the supplementary report with its letter are of limited weight in the … appeal."

In contrast, the judge concluded in relation to the DVR:

> "16.26 The contents of the DVR give me cause to doubt the authenticity of the FIR produced by the appellant."

At paragraph 27.1 he continued:

> "27.1 I weigh in the balance of assessing the appellant's claim to the lower standard of proof that the respondent produces material which does not support the claim [16.4 and 16.25]."

Paragraph 16.25 described the contents of the DVR. Paragraph 16.4 stated:

> "16.4 The process or procedure in which FIRs are generated in Pakistan is referred to at RB3 – p23 of 40 in the CPIN for Pakistan. At 15.1.2 it is reported that 'it is relatively simple to fraudulently produce police-issued FIRs using existing FIR book numbers… the existence of an FIR does not therefore constitute evidence that the described events actually occurred.'"

The application to the F-tT for permission to appeal to the UT

[17] An application to the F-tT for permission to appeal to the UT required to be made within 14 days of the decision being issued to the petitioner. The last date for making an application was 10 July 2019. The petitioner's solicitors maintain that on 9 July 2019 they faxed an application for permission to the F-tT. Part B of the application form IAFT-4 contained a box for providing reasons why an application was made late. The solicitors entered "N/A" in that box. On about 25 July 2019 they discovered that the F-tT had not received the faxed application. They emailed the application to the F-tT on that date. On 20 August 2019 the F-tT refused permission to appeal. Its reasons stated:

> "The application is out of time, an issue which has not been addressed. As such, I find there are no special circumstances which merit an extension of time. Accordingly the application is not admitted."

The F-tT went on to indicate that even if time had been extended the application would have been refused because the grounds of appeal did not disclose an arguable error of law.

The application to the UT for permission to appeal

[18] Revised grounds of appeal were drafted to accompany an application to the UT for permission to appeal. However, on 23 September 2019 the petitioner's solicitors completed a form IAFT-4 (a form provided by the F-tT for an application to it for permission to appeal) rather than a form IAUT-1 (the form the UT made available for an application to it for permission). The contents of both forms are very similar. It was not obligatory for an applicant for permission to use either form, as long as the application was in writing (Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), rule 21(3)) and it complied with the other requirements of rule 21. The box in Part B of the form submitted was left blank. However, a covering email explained:

> "We herewith enclose duly completed IAFT-4 form and supporting documents for your information. We further advise that an initial appeal was lodged on 9th July 2019 via fax however this was not received by the tribunal due to an Administrative Error, the appeal was then lodged again on 19th July 2019 via email. We request that this appeal be treated as an in-time appeal."

The covering email, form and grounds of appeal were then emailed *per incuriam* to the F-tT's email address instead of the UT's email address. However, the F-tT forwarded the application to the UT, who treated the application as having been made to it.

[19] The petitioner advanced five grounds of appeal. Ground 1 was that the F-tT had erred in law because it had assessed the evidence in a compartmentalised way which failed to look at matters in the round. Ground 2 was that the F-tT had erred in law in assessing the

documentary evidence - in particular the FIR, the court documents, the supplementary report and annexed letter, and the DVR. It had given inadequate reasons for attaching no significant weight to the supplementary report and annexed letter. The court documents were central to the appeal and they ought to have been verified by the respondent in the circumstances. The F-tT had erred in law in failing to recognise that. Ground 3 was that the F-tT had acted in a procedurally unfair manner because it had founded on criticisms that the evidence of the petitioner and T lacked detail and contained inconsistencies, when it had not explored those matters with the petitioner and T and given them the opportunity to answer them. Ground 4 was that the F-tT had failed to assess, or to adequately assess, whether the petitioner's anxiety may have caused or contributed to the F-tT's perception that there were inconsistencies, or lack of detail, or omissions in his evidence, or may have explained the manner in which he gave evidence. Ground 5 was that the F-tT erred in law in miscellaneous further specified respects.

[20] On 20 January 2020 the UT refused permission to appeal, holding that none of the grounds of appeal disclosed an arguable error of law by the F-tT. The UT made no reference to the fact that the F-tT had not admitted the application to it for permission to appeal. The UT did not indicate whether or not it had admitted the application to it for permission to appeal.

The substantive hearing

Admission of the application

Counsel for the petitioner's submissions

[21] Mr Winter submitted that the petitioner had complied with the requirement in rule 21(7)(a) of the Rules. The covering email of 23 September 2019 had explained the

circumstances in which the application to the F-tT for permission to appeal had been late. The UT ought to have decided whether the application to it for permission to appeal ought to be admitted, but it had not done so. It required to decide that matter even if the covering email of 23 September 2019 had not been forwarded to it by the F-tT. On either scenario, it ought to have considered whether it was in the interests of justice that the application to it for permission ought to be admitted (rule 21(7)(b)). If the UT decided to refuse to admit a late application it required to send a written notice to that effect to the petitioner (rule 22(1)). Reference was made to *NA (Bangladesh)* v *Secretary of State for the Home Department* [2016] EWCA Civ 651, per Clarke LJ at paragraphs 12-23; *Bhavsar (late application for PTA procedure)* [2019] UKUT 00196 (IAC), at paragraph 55; *Ahmed (rule 17; PTA; family court materials)* [2019] UKUT 00357 (IAC), at paragraph 33; *R (Onuwu)* v *First Tier Tribunal (IAC) (extension of time for appealing: principles)* IJR [2016] UKUT 00185 (IAC), paragraph 13. Here, the UT had not sent such a notice to the petitioner. Moreover, the UT can waive any procedural irregularity (*Smith (appealable decisions; PTA requirements; anonymity)* [2019] UKUT 00216 (IAC), at paragraph 51; rules 2 and 7 of the Rules). If any of the petitioner's substantive grounds was/were well founded, the UT's decision should be reduced and the whole matter remitted to a differently constituted UT to consider (i) whether the application for permission to appeal should be admitted; and, if so, (ii) whether permission to appeal should be granted.

Counsel for the respondent's submissions

[22] Counsel for the respondent accepted that the UT had not addressed the issue of admission of the application. However, that failure would be a live issue only if one or more of the substantive grounds of appeal was/were well founded. If they were not, the UT's

error would be immaterial. In the event that the UT's decision was reduced and the application was remitted back to the UT, it would be for the UT to decide whether it is in the interests of justice that the application should be admitted.

The merits of the application

Counsel for the petitioner's submissions

[23] Mr Winter's oral submissions focussed on three matters.

[24] First, the F-tT had erred in law in its approach to the FIR, the court documents, Mr Ahmad's supplementary report, and the respondent's DVR. The F-tT had effectively dismissed the supplementary report, but its reasons for doing so were inadequate *et separatim* unreasonable. The F-tT had not given the supplementary report, the FIR, and the court documents the anxious scrutiny which they ought to have received. The FIR and the court documents were central to the appeal. In the whole circumstances, and particularly in light of the terms of the supplementary report, the respondent ought to have undertaken a verification check of the court documents (*PJ (Sri Lanka)* v *Secretary of State for the Home Department* [2015] 1 WLR 1322, paragraphs 11-12 and 29; *AR* v *Secretary of State for the Home Department, supra,* at paragraphs [31] and [35]). If the court documents were genuine they would confirm the petitioner's account. The F-tT erred in law because it failed to recognise the respondent's failure to verify the court documents and to assess the import of that failure for the appeal. In light of Miss Mahjabeen's letter, and of the fact that it knew that her evidence was based on her inspection of the FIR at the police station whereas the author of the DVR had not inspected the FIR, the F-tT erred in dismissing the former and in giving material weight to the latter.

[25] Second, the F-tT had taken a compartmentalised approach to the evidence, instead of considering it in the round: *AM (Afghanistan)* v *Secretary of State for the Home Department* [2018] 4 WLR 78, at paragraph 19(a). It had failed to give proper consideration to the factors which favoured the petitioner, and it had concentrated instead very much on criticisms which could be made. It had not given the evidence anxious scrutiny. On a fair examination of the F-tT's approach it had not in fact kept in view the low threshold which the petitioner had to overcome. The language of the decision (eg paragraphs 15.3, 16.26, 17.3, 18, and 24.1) very much suggested that the correct test had not in fact been applied (*cf MF, Ptr* [2020] CSOH 84).

[26] Third, the F-tT failed to have due regard to the evidence relating to the petitioner's anxiety when assessing his evidence (*cf AM (Afghanistan)* v *Secretary of State for the Home Department*, *supra*, at paragraphs 19(a), 21(c), 33 and 34).

[27] Each of these matters gave rise to an arguable error of law. The UT erred in law in failing to recognise that.

Counsel for the respondent's submissions

[28] Mr Maciver submitted that neither the respondent nor the F-tT had questioned the credibility or *bona fides* of Mr Ahmad and Miss Mahjabeen. The thrust of the F-tT's decision was that it was not clear from Miss Mahjabeen's letter that the FIR which she was shown by the record keeper was the same FIR upon which the petitioner relied; and that what she said about the court case was so vague as to be of very little assistance. On the other hand, the DVR was clear and the F-tT attached material weight to it. The F-tT had given adequate reasons for reaching those conclusions. They were conclusions which it had been entitled to reach. In the circumstances it had not been incumbent upon the respondent to attempt to

verify the court documents; and it had not been incumbent upon the F-tT to proceed on the basis that the respondent was in breach of any such obligation. In any case, even if the respondent ought to have attempted to verify them, the only consequence of her failing to verify would be that it would not be open to her to challenge their authenticity (*PJ (Sri Lanka)* v *Secretary of State for the Home Department*, *supra*, paragraph 31). However, the respondent had not called the court documents into question. It was the F-tT which questioned them. It had been entitled to reject them for the reasons which it gave.

[29] Mr Maciver submitted that the contention that the F-tT had taken a compartmentalised approach to the evidence was ill-founded. It had properly considered the evidence in the round. The language of the decision in the present case did not to give rise to concerns that the correct tests had not been properly applied (*cf MF, Ptr, supra*).

[30] The F-tT had made appropriate adjustments to take account of the petitioner's psychological state. The psychology evidence did not support the contention that any of the features of the petitioner's evidence upon which the F-tT founded may have been caused or contributed to by his anxiety.

[31] The petitioner had not identified any arguable error of law in the F-tT's decision. The UT had not erred in law in deciding that the grounds of appeal disclosed no such error.

Decision and reasons

[32] In order to obtain reduction of the UT's decision the petitioner requires to show that the UT erred in law in a material respect. Sometimes an error of law can be apparent on the face of the UT's decision, in which case it is usually unnecessary to look at the underlying decision of the F-tT in order to demonstrate the error. However, in other cases the suggestion may be that the UT's error in law was that it failed to recognise that the

grounds of appeal disclosed one or more arguable errors of law by the F-tT on a material matter: see, eg, *Khodarahmi* v *Secretary of State for the Home Department* [2020] CSIH 45, at paragraph [5]; *Waqar Ahmed & others* v *Secretary of State for the Home Department* [2020] CSIH 59, at paragraph [9].

[33] In the present case the petitioner maintains that the UT erred in law in a number of material respects. One of those errors was that, although the F-tT had not admitted the application to it for permission to appeal, the UT failed to decide the question whether the application to it for permission should be admitted. The remaining errors of law are all said to be failures by the UT to recognise that the grounds of appeal disclosed one or more arguable errors of law by the F-tT on a material matter (or material matters).

[34] I can deal briefly with the submission that the UT erred in law in failing to decide whether the application to it should be admitted. It ought to have been clear to the UT from the F-tT's reasons for its decision of 20 August 2019 that the F-tT had refused to admit the application to it for permission to appeal. In my opinion, whether or not the email of 23 September 2019 had been forwarded by the F-tT to the UT, the UT required to decide whether the application to it ought to be admitted or not. In my opinion its failure to decide that question was an error of law. However, that error would be immaterial unless the petitioner is right that the UT ought to have recognised that the grounds of appeal disclose an arguable error of law by the F-tT on a material matter.

[35] I turn then to the grounds of appeal. In *AR* v *Secretary of State for the Home Department*, *supra*, the court observed:

> "[35] We remind ourselves of the need to examine the facts with care (sometimes referred to as 'anxious scrutiny'), and of the low standard of proof applicable in cases of this nature. We are persuaded that these factors have been given insufficient weight and attention in the more recent decisions. We recognise that there may be cases where the concerns over the veracity of a claimant's account may be so clear-cut that the decision-maker is driven to rejection of supporting documents,

> even though on their face they appear to be authentic; but even then, given what is at stake, we would expect some consideration to be given to easily available routes to check authenticity. There is no question that these documents are at the centre of a request for international protection. The decision-maker should stand back and view all of the evidence in the round before deciding which evidence to accept and which to reject, and on the proper disposal of the appeal."

[36] In my opinion it remains the case that the FIR and the court documents are central to the appeal. If they are genuine, then the petitioner's account that he was apprehended and charged in connection with committing a homosexual act is truthful. That would be the context in which all of the other evidence would require to be assessed.

[37] Moreover, in my view there is a clear nexus between the FIR and the court documents. The interlocutor of 3 April 2003 recorded the presentation and registration of "criminal case [y] dated 02-03-2003 u/s 377 PPC" against the petitioner, *viz* the case described in the FIR. All of the court documents bear to relate to the petitioner's prosecution for the offence described in the FIR. If the court documents are genuine that would support the petitioner's account that he was apprehended and charged in connection with a homosexual act. It would also provide a very strong indication that the FIR is indeed a genuine document.

[38] Presumably mindful of the expectation which the court had expressed that some consideration be given to easily available routes to check authenticity, the respondent obtained the DVR relating to the FIR; but she did not attempt to verify the court documents. For his part, the petitioner obtained the supplementary report from Mr Ahmad.

[39] In my opinion it is fair to say that the F-tT effectively dismissed the supplementary report and Miss Mahjabeen's letter. The thrust of the dismissal was that it was not clear from Miss Mahjabeen's letter that the FIR which she was shown by the record keeper was the same FIR upon which the petitioner relied. For present purposes it suffices to say that in my opinion it is eminently arguable that that was a wholly unreasonable construction of the

supplementary report and the letter; and that, on any fair reading of them, Miss Mahjabeen confirmed that the FIR report upon which the petitioner relies is in the same terms as the FIR report which she was shown by the record keeper at the police station. In my judgement, it is equally arguable that to suggest otherwise, as the F-tT did, was a failure to exercise anxious scrutiny. Accordingly, in my opinion it is arguable that the F-tT's approach to the evidence about the FIR in the supplementary report involved an error of law in respect of a material matter. In failing to recognise that, the UT erred in law in a material respect.

[40] In reaching that conclusion I do not overlook the fact that the F-tT attached material weight to the DVR. However, if the F-tT had not made the suggested error in relation to the supplementary report and the letter there would have been evidence from a credible source that the FIR which the petitioner relied upon was genuine. In my opinion, on that scenario it cannot be said that the F-tT would necessarily have preferred the evidence in the DVR to Miss Mahjabeen's evidence; or, if it did prefer it, that it is clear that there would have been good reasons for doing so. One of the factors which might be relevant to that issue is that Miss Mahjabeen's evidence was based on having seen the FIR at the police station, whereas the author of the DVR had not seen it but had obtained his information second hand in the course of a telephone call. The latter process might be thought to involve greater scope for confusion or misunderstanding than the former. Another relevant factor may be Miss Mahjabeen's evidence that she had confirmed with the court that the case against the petitioner was still pending. I recognise, of course, that the F-tT was not inclined to attach any real weight to that piece of evidence because of its brevity and its vagueness. While the F-tT may have taken the same view of it even if it had not fallen into the suggested error concerning Miss Mahjabeen's evidence relating to the FIR, I am not persuaded that it is inevitable that it would have done so. Its assessment of the court documents might well

have been very different if its starting point had been that there was credible evidence suggesting that the FIR was genuine. Evidence as to the genuineness of the FIR would tend to point to the genuineness of the court documents, and vice versa.

[41] In my opinion it is also arguable that the respondent ought to have verified the court documents. As already observed, the FIR and the court documents were central to the appeal. I can understand that the respondent may have thought that, since the DVR indicated that the FIR was not genuine, and there was a clear nexus between the FIR and the court documents, verifying the latter was superfluous. That strategy was always a risky one, depending as it did upon the DVR being accepted. However, once the supplementary report became available it became even riskier. The supplementary report came from a credible source which bore to confirm that the FIR was genuine and that there was a pending court case against the petitioner. In view of the competing reports about the FIR the issue whether or not the court documents were genuine assumed even greater significance. By that stage, at the very latest, in my opinion the circumstances had become sufficiently exceptional to impose an obligation upon the respondent to attempt to verify the court documents (*cf PJ (Sri Lanka)* v *Secretary of state for the Home Department*, *supra*, Fulford LJ at paragraphs [30]-[31]). In my view it is arguable that the F-tT erred in law in failing to recognise and take account of the import of the respondent's failure to do that. The issue was plainly a material one: the veracity of the court documents was central to the pursuer's claim. In failing to recognise that arguable error of law on the part of the F-tT the UT erred in law in relation to a material matter.

[42] I am not impressed by the submission that the respondent did not challenge the authenticity of the court documents; and that therefore, even if the respondent was in breach of an obligation to verify them, the only consequence was that she could not impugn

them; and that the F-tT was free to make of them what it would without making any allowance for the respondent's failure. In my opinion it is disingenuous to suggest that the respondent did not challenge the authenticity of the court documents. She cannot reasonably be described as having adopted a neutral position in relation to them. The stance which she took was that the FIR was not genuine, and that the whole story of the crime and its prosecution was false.

[43] I am also persuaded that the F-tT's approach to the assessment of the evidence was arguably defective, largely because of the two arguable errors of law which I have already identified. I think it is arguable that the result was that the F-tT did not stand back and view all of the evidence in the round, applying anxious scrutiny and balancing the factors which were in favour of the petitioner, before it decided which evidence to accept and which to reject, and the proper disposal of the appeal. In my view the UT erred in law in not recognising that the grounds of appeal disclosed that arguable error of law on the part of the F-tT.

[44] I am not persuaded that it is arguable that the F-tT erred in law by failing to have due regard to the evidence relating to the petitioner's anxiety when assessing his evidence. Nor am I persuaded that it is arguable that the F-tT acted in a procedurally unfair way (a matter raised in the grounds of appeal but not advanced in oral argument); or that ground of appeal 5 discloses any further arguable and material error of law on the part of the F-tT.

[45] It follows that in my opinion the UT erred in law in failing to recognise that the grounds of appeal disclosed arguable errors of law on the part of the F-tT in relation to material matters. The UT also erred in law in failing to determine whether the application to it for permission to appeal ought to be admitted. In view of the former errors, the latter error is material. The UT's decision should be reduced. It will then be for the UT to

consider afresh the application for permission. That consideration ought to be by a UT judge who has had no previous involvement in the case. The UT will require to decide whether it is in the interests of justice that the application for permission should be admitted. One of the factors relevant to that assessment will be whether the UT considers that the grounds of appeal disclose an arguable error of law, or arguable errors of law, on the part of the F-tT. If the application is admitted, the grant or refusal of permission will depend on whether the UT is satisfied that the grounds of appeal disclose an arguable error of law, or arguable errors of law, on the part of the F-tT.

Disposal

[46] I shall sustain the petitioner's second plea-in-law, repel the respondent's fourth plea-in-law, and grant decree of reduction of the UT's decision of 20 January 2020. I shall reserve meantime all questions of expenses.