Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/06548/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 14 June 2017	**Decision & Reasons promulgated on 23 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

VJ
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person.
For the Respondent: Mr Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Obhi ('the Judge') promulgated on 19 January 2017 in which the Judge dismissed the appellants appeals on protection and human rights grounds.

2. The appeals of two other appellants, given reference PA/06550/2016 and PA/06551/2016, were declared invalid as no right of appeal arose in relation to the decisions affecting the recipients of the respondent's notices.

Background

3. The appellant was represented before the First-tier Tribunal by Mr Norman of counsel. The first date allocated to hear the Error of Law hearing was Friday, 7 April 2016 at Field House in London. A fax was received from the appellant's previous solicitors seeking an adjournment to facilitate availability of counsel which was refused. A letter of 8 March 2017 from the appellant's current solicitors sought an adjournment of the hearing due to the second appellant's expected date of delivery, 30th April. This request was again refused as adequate time was said to be available to allow the appellant to instruct alternative counsel.
4. On 22 March 2017, the current solicitors wrote advising they had received a refusal that appeared to relate to a request made by the original solicitors rather than in response to their request based upon the second appellant's pregnancy. The application was refused by a Duty Judge on 23 March 2017. On 27th March 2017, the current solicitors, who indicated they had been instructed since 8 March 2017, wrote to the tribunal asking for an interpreter to attend the hearing on 7 April as the first appellant would attend the hearing without a representative and required linguistic assistance.
5. The hearing of 7 April 2017 had to be adjourned as no interpreter was booked, it been assumed that as this was an initial hearing and the appellant was represented, an interpreter was not required.
6. The hearing was transferred to Birmingham for 14 June 2017 in respect of which a further letter was received from the appellant's current solicitors, dated 12 May 2017, requesting a Georgian interpreter and again confirming the appellant would attend the hearing without a representative. The appellant attended today in person and was assisted by a Tribunal appointed interpreter. The appellant confirmed he was aware of the correspondence and the fact the solicitors were not attending that he was intending in person. No further application to adjourn was received from the appellant solicitors.
7. The first appellant is a national of Georgia born on 11 December 1987. The second appellant is the first appellant's wife who was born in January 1988 and the third appellant their daughter born in July 2006 and therefore aged 10 ½ years at the date of the hearing before the First-tier Tribunal.
8. The first appellant's immigration history was noted in the decision in which it is stated he applied for a visit Visa to enter the United Kingdom which he did lawfully although failed to leave when the visa expired on 14 March 2014. An asylum application made on 13 September 2014 was refused and a challenge to the refusal dismissed on appeal. The appellant became appeal rights exhausted on 4 January 2016. On 26 May 2016, further representations were made in relation to the asylum claim which was refused on 8 June 2016. It is the appeal against that decision that came before the Judge.

9. Having considered the available evidence the Judge sets out findings of fact at [16] to [29] which can be summarised in the following form:

i. The decision of the previous Tribunal is the proper starting point in which it was accepted the appellant's claim did not engage the 1951 Refugee Convention and was limited to claims under Articles 2 and 3 [16].

ii. The previous judge accepted the appellant's account of past events and noted the first appellant had been arrested and tried in 2009 and released from prison in 2012 and that during the period of his detention there had been a change in the government in Georgia. As a result, the regime in power at the time of the appellant's difficulties fell and individuals, named as Davit Akhalaia and Bacho Akhalaia were charged with abuse of power, convicted and sentenced to imprisonment, leading to finding regime change meant the appellant would no longer be at risk [17].

iii. The appellant's credibility was also found to be damaged by virtue of Section 8 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 as the appellant had not sought asylum at the earliest opportunity, for the reasons set out in [18] of the decision under challenge.

iv. The current claim is on essentially the same grounds although it was submitted the claim has also been bought under the Refugee Convention as the claim involved the Akhalaia brothers which placed a "political spin" on the matter. The Judge concluded that it was difficult to see how it can be said that the appellant is a political refugee based on the same facts as before when it was accepted that the Refugee Convention was not engaged [20].

v. The claim is based on a business dispute and the fact his business partner has connection with others who are connected to the government does not turn it into a political dispute [21].

vi. The connections with those in the government are more to do with the claim there is no sufficiency of protection rather than the appellant being at risk of persecution as a result of political views that he holds [21].

vii. The question in the appeal is whether the situation is such that there is a risk to the first appellant because of the influence of his former assailants, namely the Akhalaia brothers [22].

viii. An expert report written by Robert Chenier opines the brothers still retain influence because of the system of patronage and the fact a number of people will owe their jobs to Bacho Akhalaia. It is suggested the first appellant is likely to be at risk of persecution from the organised criminal gangs who attacked him previously and was not confident there will be State protection from the authorities.

ix. The expert noted Bacho is in prison and Davit in Greece where he has successfully fought extradition to Georgia, although their father is an MP and there are large patronage group of clients in Georgia who it was presumed will carry out their wishes [22]. The Judge however noted that Mr Chenicer made a number of assumptions in his report.

x. Although Mr Chenicer claims the brothers continue to have power because of their influence he is not able to say how or why they would be interested in the appellant, or how the appellant's former business partner could invoke their influence whilst they are detained or not available. It is not claimed there is a dispute with the Akhalaia brothers directly but that his former business partner was able to rely on them because of his association with them. It was found to be speculative to suggest that criminal gangs associated with the appellant's former business partner who look to their contacts in the government for legitimacy could continue to pose a risk to the appellant whilst those contacts are in prison and the former government that they belonged to is no longer in power [24].

xi. Factual information in Mr Chenicer's report is no different to that which was considered by the previous Tribunal. The only 'new' information is his view that the Akhalaia brothers could, through their contacts, get the appellant and that there would be an assumption the appellant was trying to regain his shares because that is something he did before, although the Judge did not accept this was fresh information or that the previous Tribunal would have viewed the risk to the appellant differently if the report had been available [25].

xii. Reports of killings of another individual as a result of the business dispute and the pursuit of a journalist were noted but no connection between those cases and that of the appellant was made out [25].

xiii. The appellant fears criminal attack and the possibility of being arrested and abused in prison as he was when the Akhalaia brothers were free but that cannot happen now as it is a different government and one that sought to put an end to such behaviour [25].

xiv. Mr Chenicer noted that criminal gangs have reach all over Europe and therefore the UK would not necessarily be able to protect the first appellant who the Judge found had been the victim of a criminal gang [25].

xv. The Article 8 claim was comprehensively dealt with in the previous decision [26] in which the circumstances of the appellants are discussed.

xvi. The appellant's older child is at primary school and about to move to secondary school and lives in a close and loving family. The child wrote a letter to the Judge. She is a happy and well-adjusted little girl whose best interests are met by her remaining with her family who could support to any change in her circumstances [27].

xvii. The appellants cannot satisfy the requirements of the Immigration Rules. There are no circumstances warranting a finding the decision is proportionate outside the Rules weighing up the interests of the family members against the public interest [28].

10. Permission to appeal was granted by another judge of the First-tier Tribunal. The operative part of the grant being in the following terms:

2. Whilst neither of the two alleged errors of law purportedly identified is necessarily or obviously well-founded or unanswerable, the first of these, namely that the learned First-tier Tribunal Judge did not give adequate reasons for the rejection of the expert opinion tended, is at least reasonably arguable. The second is more contentious and appears to put unfair strain on the words used by the Judge but perhaps cannot be dismissed out of hand at this stage.

11. The appeal is opposed by the Secretary of State who in her Rule 24 response writes:

3. The grounds of appeal primarily allege that the FtTJ failed to give adequate reasons for rejecting the expert report of Mr Chenicer. It is submitted that the Judge did give anxious scrutiny to this report from [22] – [25]. At [25] the Judge finds that there is nothing new factually in the report since it was presented to the previous Tribunal except the undated report contains his opinions and that the gang could get to the appellant and the assumption that the appellant will try to regain his shares. The Judge after careful consideration finds that the report holds no new information that would now view the appellant at risk and also goes on to consider a report of a killing related to business but found this had no relation to the appellant's case.

4. This is a thorough and well detailed determination. The Judges considered all the evidence as a whole and it is submitted that the grounds are without foundation. See **VHR (and meritorious ground) Jamaica [2014] UKUT 00367**. The Judges not required to particularise every piece of evidence is found in VHR (and meritorious grounds) Jamaica [2014] UKUT 00367 (IAC). At paragraph 24 the Upper Tribunal referred to McCombe LJ in VW (Sri Lanka) [2013] EWCA Civ 522 which said: "regrettably, there is an increasing tendency in immigration cases, where a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with then others and then to use this as a basis for saying the judges decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to the judge's findings of fact".

5. The grounds have no merit, merely disagree with the adverse outcome of the appeal without identifying any arguable material error of law. The Judge considered all the evidence that was available to him and came to a conclusion open to him based on that evidence and the rules, on the lower standard and does not disclose any error.

Error of law

12. Dr Chenicer is known to the Tribunal as he has prepared reports in several cases, but was found by Mr Justice Collins to have produced a speculative report on Ukraine in *Venediktov v SSHD [2005] EWHC 2460 (Admin)*, which is an issue commented upon in relation to assumptions made by the expert in the report at [22] of the impugned decision.

13. The issue of the treatment of expert evidence has been the subject of a number of decisions of the senior courts including in *NA v UK Application 25904/07 [2008] ECHR 616* in which it was said that "in assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they are compiled, the

consistency of their conclusions and that corroboration by other sources are all relevant considerations."

14. In *Pajaziti v SSHD [2005] EWCA Civ 518* the Court of Appeal said that adjudicators were not to select a particular evaluation of an expert's report, without placing it side by side with other expert evidence (in this case a CIPU report), in order to make a qualitative assessment and arrive at a balanced over view of all the material. At very least adjudicators had to explain why they preferred one source of expert evidence over another. Matters that had to be taken into account included the standing of the expert, the sourcing of the expert's material and the logical cogency of the arguments

15. In *AAW (expert evidence - weight) Somalia [2015] UKUT 673 (IAC)* it was held that a failure to comply with the Senior President's Practice Direction may affect the weight to be given to expert evidence. Any opinion offered that is unsupported by a demonstration of the objectivity and comprehensive review of material facts required of an expert witness is likely to be afforded little weight by the Tribunal. In particular, a witness who does not engage with material facts or issues that might detract from the view being expressed risks being regarded as an informed advocate for the case of one of the parties to the proceedings rather than an independent expert witness.

16. The appellant submits that greater weight should have been given to the report of Mr Chenicer whose report explains the situation in Georgia since the appellant left that country. It was submitted the change in government did not change the situation as the people who threatened him and his family still hold high-ranking positions and have friends they can turn to. It was also submitted that whilst Georgia may on the outside appear to be a normal place, it is not true, and the environment there poses a real threat to the appellant and his family as per the evidence he sought to rely upon.

17. The appellant refers to how he was treated in prison and tortured and how those he fears tried to take his business from him and inflicted physical abuse upon him.

18. When pressed to be clear on what basis he was asserting the Judge had erred in law, the appellant agreed that what he was saying was that the Judge was wrong. When asked why he thought the Judge was wrong the applicant stated the Judge should have placed greater weight upon the expert report and that had he done so the appeal would have been allowed.

19. In response, Mr Mills noted the judge granting permission to appeal referred to two alleged errors of law the second of which has no arguable merit as the Judge properly applied the *Devaseelan* principles to the decision, noting carefully the earlier decision of the First-tier Tribunal, the new evidence being relied upon by the appellant, and made findings that were reasonably open to the Judge concerning the impact of that evidence.

20. Mr Mills submitted that in relation to the first ground, namely the Judge failing to give adequate reasons for rejecting the expert's report, the real issue was whether the content of the report was sufficient such that the Judge was bound to find that the appellant was at risk on return.

21. The Judge was fully aware of the arguments that had been advanced and I find a reading of the determination shows the evidence made available was considered with the required degree of anxious scrutiny. Indeed, the challenge is not to the manner in which the evidence was considered but whether the conclusions reached are adequately reasoned.
22. There are concerns noted by the Judge in relation to the appellant's case including finding the appellant did not explain how the people who harmed him in the past, who are now in prison without influence, could cause him a degree of harm sufficient to warrant a grant of international protection now.
23. There are a number of experts dealing with various countries and aspects relating thereto in this jurisdiction, some of whom are so well-regarded that gaps in source material which ordinarily will be expected to support an opinion contained in a report are excused as it is accepted the author of a report has particular knowledge of the point in hand. In relation to Mr Chenicer, it was submitted there has been comment and criticism in other decisions that he speculates to fill in background evidence and gaps in his knowledge. Mr Mills referred to the case of *TD (Albania)* and submitted that on three occasions now, in country guidance cases, there had been speculation in absence of evidence which the Judge found had also occurred in relation to this case too. It is not a case in which the Judge can be found to have said that Mr Chenicer made up the connections, as any such criticism is wholly unwarranted, but rather that the content of the report is speculative in relation to those the appellant fears presenting a real risk that they could harm the appellant, which is neither shown to be rational nor adequately reasoned as presented.
24. The appellant's reply was that having read the report he considers he will be at risk on return and that the report should be followed.
25. It is clear watching and listening to the appellant making his submissions that he has a subjective fear that if returned to Georgia he will be at risk of suffering the type of ill-treatment that he has suffered in the past. There is comment in the reports of the appellant having a drug problem and being on methadone although it is not known if that was a situation prevailing before the Upper Tribunal. What was clear is that the appellant appeared somewhat anxious.
26. This is, however, not the hearing of the appeal on its merits as that was the exercise conducted by the Judge who concluded that the appellant had failed to establish a real risk sufficient to engage the United Kingdom's obligations under the protection provisions or, in relation to Article 8 ECHR, that the decision was not proportionate.
27. Not only did the Judge consider the evidence with the required degree of anxious scrutiny, the Judge has also given adequate reasons for findings made. As such the weight the Judge chose to give to the evidence was a matter for the Judge. It has not been made out that the Judge misunderstood, misrepresented, ignored, or failed to understand the expert report or other material made available relating to country conditions. The Judge was aware of the difficulties the appellant had experienced in the past in Georgia and the reality of life within Georgian society. The Judge was aware of the previous decision rejecting the appellant's protection claim and the finding that he faced no real risk on

return, and adequately dealt with what was referred to as the "new" evidence, which did not justify a departure from the previous findings as per the *Devaseelan* principles. The conclusion of the Judge is that even if the appellant has a subjective fear of return, such fear is not objectively justified.

28. The appellant has failed to make out in both his written and oral evidence and submissions received and considered, that the Judge has made an error of law material to the decision to dismiss the appeal.

29. Accordingly, as the appellant was advised at the hearing, the Upper Tribunal has no authority to remake the decision which shall stand. A desire for a different outcome or disagreement with the Judge's assessment of the evidence and the weight to be given to that evidence does not, per se, establish arguable legal error.

Decision

30. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

31. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 22 June 2017