Upper Tribunal
(Immigration and Asylum Chamber)

PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 337 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2018	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE PITT

Between

PA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Seehra, Counsel, instructed by Hunter Stone Law
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

1. Respondent's inquiries in country of origin of applicant for international protection

(1) There is no general legal requirement on the Secretary of State to obtain the consent of an applicant for international protection before making an inquiry about the applicant in the applicant's country of origin. The decision in VT (Article 22 Procedures Directive – confidentiality) Sri Lanka [2017] UKUT 00368 (IAC) is not to be read as holding to the contrary.

(2) The United Kingdom's actual legal obligations in this area are contained in Article 22 of the Procedures Directive (2005/85/EC), as given effect in paragraph 339IA of the Immigration Rules. So far as obtaining information is concerned, these provisions prohibit making such an inquiry in a manner that would result in alleged actors of persecution being directly informed of the fact that that an application for international protection has been made, which would jeopardise the applicant's (or his family's) physical integrity, liberty or security.

(3) If information is obtained in a way that has such an effect, the fact that the applicant may have given consent will not affect the fact that there is a breach of Article 22.

2. Allegations of judicial bias

(1) An allegation of bias against a judge is a serious matter and the appellate court or tribunal will expect all proper steps to be taken by the person making it, in the light of a response from the judge.

(2) The views of an appellant who cannot speak English and who has had no prior experience of an appeal hearing are unlikely to be of assistance, insofar as they concern verbal exchanges between the judge and representatives at the hearing of the appeal. In particular, the fact that the judge had more questions for the appellant's counsel than for the respondent's presenting officer has no bearing on whether the judge was biased against the appellant.

(3) It is wholly inappropriate for an official interpreter to have his or her private conversations with an appellant put forward as evidence.

(4) As a general matter, if Counsel concludes during a hearing that a judge is behaving in an inappropriate manner, Counsel has a duty to raise this with the judge.

(5) Although each case will turn on its own facts, an appellate court or tribunal may have regard to the fact that a complaint of this kind was not made at the hearing or, at least, before receipt of the judge's decision.

(6) Allegations relating to what occurred at a hearing would be resolved far more easily if hearings in the First-tier Tribunal were officially recorded.

DECISION AND REASONS

A. Introduction

1. The appellant, a citizen of Bangladesh born in 1993, arrived in the United Kingdom with a visitor's visa, a few months after his 18th birthday.

2. The appellant's visa was valid until January 2012. On 19 February 2013, the appellant was arrested by the police for theft and on suspicion of being an overstayer. He was placed on reporting conditions.

3. On 5 April 2016, the appellant claimed asylum. He said that he had been a member of the BNP in Bangladesh and that in 2010 he had become President of the Union Chatrodol, as well as becoming a more active member of the party. After arriving in the United Kingdom, however, the appellant said he became less active in BNP matters. The appellant said that his family in Bangladesh were active with the BNP.

4. The appellant's claim to be in need of international protection stemmed, he said, from the fact that he was afraid that local members of the Awami League had had the police issue a warrant for the appellant's arrest; that they had issued threats against his family in order to ascertain his whereabouts; that as a result his brothers had to go into hiding in 2008 and his sister had to stop her studies; that in September 2011 Awami League members attempted to kill the appellant by hitting and stabbing him; and that he had been forced into hiding.

5. In connection with his protection claim, the appellant submitted documents said by him to have been obtained from Bangladesh. These included two First Information Reports (FIR) and two charge sheets, said to have been issued at a police station in Sylhet.

B. The respondent's decision

6. On 17 March 2017, the respondent refused the appellant's claim. So far as BNP activity was concerned, the respondent considered it inconsistent that the appellant should be highly active with the BNP in Bangladesh but less active after he had come to the United Kingdom. The appellant's

answer was that he had been constrained by financial difficulties. The respondent considered it inconsistent that, as a lifelong follower of the BNP, the appellant would stop engaging in BNP activities, once in the United Kingdom. The respondent noted that the appellant had given an additional reason for his lack of activities; namely, that if he were seen in a photograph in the media "it would be more destructive for my family". The respondent did not consider that this was a satisfactory explanation.

7. So far as being President of the Union Chatrodol was concerned, the respondent found the appellant's answers on this matter to be "vague and more about your brothers' involvement". The appellant could provide only limited information about his responsibilities as President.

8. Turning to the alleged attack from the Awami League, the respondent noted a number of inconsistencies in the appellant's account. The appellant said, on the one hand, that those witnessing the attack on him ran away due to their fear of violence but that they later returned, pushing his attackers away, who then apparently feared that they would themselves be tortured.

9. The appellant said that the Awami League had arranged for an arrest warrant in respect of the appellant to be issued before the attack on him. The respondent considered it inconsistent, if he was wanted by the police, that the appellant was able, as he had claimed, to "walk into a police station in order to lodge a [general diary] without being arrested and held for questioning".

C. The Document Verification Exercise and Report

10. As we have said, the appellant submitted to the respondent two FIRs. The first was numbered 23 and dated 10/01/2010. The second FIR was numbered 30 and dated 05/01/2011.

11. The two charge sheets submitted by the appellant were numbered 87 and dated 25/02/2010 and numbered 53 and dated 08/03/2011.

12. The British High Commission in Dhaka carried out a verification exercise in respect of the FIRs and charge sheets. On 23 October 2016, a member of the High Commission visited the officer in charge of a named police station in Sylhet. He introduced himself as an official of the High Commission and asked the officer in charge if he could verify the two FIRs and two charge sheets.

13. The officer in charge physically located the register and searched the records. The officer said that neither the FIRs nor the charge sheets existed on record.

14. The High Commission official then acted as follows:-

> "I requested to take a look at the FIR register, to which the OC permitted. From the register I discovered that on 06/01/2011 FIR No. 28 to 29 was filed. Furthermore, FIR No. 23 was filed on 06/01/2010.
>
> Similarly, the register showed on 05/01/2011 FIR No. 27 was filed and FIR No. 30 was filed on 07/01/2011.
>
> None of the names and dates in the documents submittrd by the subject matched the details contained in the register."

15. The respondent's letter of refusal made reference to the official's findings regarding the FIRs and charge sheets. They were found to be "false and non-genuine". The respondent considered that the fact the appellant had provided false documents as part of his claim "damages your credibility. In light of all the above findings it is considered that you have failed to provide a credible and consistent account with regard to this aspect of your claim. It is not accepted that the Awami League tried to kill you. This part of your claim has been rejected".

16. The respondent considered that the appellant's credibility had been further damaged by the fact that he had only claimed international protection after being detected and arrested as an overstayer in the United Kingdom. Indeed, the claim had been made over three years after that arrest. When asked why he had not claimed earlier, the appellant said: "I thought I need to prove that I am having problems in Bangladesh so it took some time for me to get these documents".

C. The appeal to the First-tier Tribunal

17. The appellant appealed to the First-tier Tribunal against the refusal of his protection claim. The grounds of appeal contended that he had provided "a credible statement. The respondent's assertion in relation to credibility of the appellant lacks details".

18. Counsel for the appellant provided a skeleton argument in connection with his appeal. The skeleton argument referred to a letter from the General Secretary of the BNP in the United Kingdom; some Facebook "screen shots" relating to the appellant; and various documents said to emanate from Bangladesh, including the general diary reports, charge sheets and First Information Reports (FIRs).

19. It was submitted that the appellant's account was "both internally and externally consistent with the objective evidence provided by the appellant, which refers to the assault on the appellant, the outstanding police warrants and charge sheets". The letter from the General Secretary of the BNP purported to confirm that the appellant and his family were members of that party and were politically active in Bangladesh. The letter also confirmed that the appellant was President of the Chatrodol Union.

20. The skeleton argument made reference to the Home Office's Country Information Guidance on Bangladesh of 2015, which outlined, amongst other things, "systematic corruption in the criminal justice system".

21. The decision which is the subject of the present appeal followed a hearing in the First-tier Tribunal on 19 October 2017 before a First-tier Tribunal Judge. He noted that the original hearing of the appeal, on 2 May 2017, had been adjourned in order to give the appellant an opportunity to challenge the findings of the Document Verification Report. Apparently, the appellant wanted to contact "sources in Bangladesh" for this purpose. At paragraph 4 of his decision, however, the First-tier Tribunal Judge found that there was "no evidence that the appellant had been active in seeking evidence from Bangladesh to challenge the DVR".

22. The judge heard oral evidence from the appellant. The appellant adopted his witness statement.

23. So far as the DVR was concerned, the appellant said as follows:-

> "53. I now would like to give my response to Home Office's allegations of fraudulent documents being submitted. I appreciate that the Home Office conducted a field visit to the relevant police station and found the documents to be not genuine. However what the document verification report (DVR) does not reveal is the sinister plan of Awami League.
>
> …
>
> 55. The Awami League does not want political cases to be known or found. My political colleagues and I have learned from discreet sources that the police have two types of records. One is for the general public and the other is for political opponents.
>
> 56. The reason the political cases are kept secret, is to show the world that we are not persecuted. In turn foreign governments will find that our cases are false which will compel the foreign governments to return us to Bangladesh and hand us over to the authorities."

24. The judge's findings concerning the international protection claim begin at paragraph 13 of his decision and run to paragraph 30.

25. The judge agreed with the respondent that certain answers the appellant gave regarding his alleged BNP involvement were vague. The judge categorised them as "platitudes" which were "common to any political party" (paragraph 15).

26. At paragraph 17, the judge noted the letter from the General Secretary of BNP UK. This asserted that the appellant "has been active in BNP politics in the UK 'since coming to the UK'". The judge was concerned about that assertion, since, if the writer of the letter had met or known anything about the appellant, he would have realised that the appellant had not previously been involved in BNP politics in the UK.

27. The judge noted various Facebook printouts relating to the appellant's alleged involvement with BNP politics. The judge found that every one of them post-dated the asylum interview, in which the appellant had been asked about his lack of interest in the BNP, since coming to the United Kingdom. The judge was not persuaded that the appellant was telling the truth about alleged Facebook activity which, he had said in evidence, pre-dated the asylum interview. The judge was, in particular, unpersuaded that the appellant's assertion that he did not realise evidence of this activity would be needed was credible (paragraph 18).

28. The First-tier Tribunal Judge dealt with the DVR report at the British High Commission, beginning at paragraph 21 of his decision. At paragraph 22, the judge noted what the appellant said in his witness statement on this issue. However, the judge noted that "the officers at the police station not only checked the sources themselves but also made the source available to the Officers from the BHC". Although Counsel for the appellant "submitted that I should not rely on the DVR report … she failed to support [this] with any authority or any citation of an authority" (paragraph 22).

29. The judge noted that he had been given an additional bundle, called "App 2", which the appellant said dealt with the appellant's response to the DVR report. This bundle included a document, at page 3, said to have been written to the appellant by someone in Bangladesh, which reads as follows:-

> "I am telling you like before. I cannot give any letter about your documents. You know I tell you last time, Bangladeshi government threatening everyone who help people with cases outside Bangladesh. If they catch me I will loose (sic) my certificate. I have no other income except my legal work.
>
> I am sorry don't ask me again. You can explain to court in London. It not possible help you more (sic). Whatever you say please don't mention my name. Too dangerous for me.
>
> Good luck".

30. The App 2 bundle was the subject of exchanges between the judge and Counsel:-

> "23. In support of his assertion that due to fear people in Bangladesh are unable to provide him with evidence to challenge the DVR (see: "App 2") (sic). Page 4 of the document is not translated. [Counsel] does not appear to have noticed that it is not translated. I asked the appellant if it is translated and he produced what purports to be the original translation (see: "App 2" page 4A). The relevant document in issue is at page 3 of "App 2". Ms Gill cross-examined the appellant as to when he received this document. The appellant said that he received it around the 5th of May 2017. However, on the top left hand corner the date it was transmitted by facsimile transmission is recorded as the '5/1/17'. The appellant accepted that he received it on the 5th January 2017. {Counsel] interjected to say that that is the date it was sent to the appellant. I asked [Counsel] not to intervene and that she does

have the opportunity to re-examine her client. Further, I reminded her that the appellant has actually accepted that the document was received by him on the 5th January 2017. There are a number of numbers running along the top of page 3 of "App 2" but the appellant's unequivocal evidence is that he received that document on the 5th January 2017, it deals with the VDR (sic) (dated 23.10.16 & 2.11.16); it was available at the last hearing but due to lack of time it was not disclosed. He subsequently contradicted this by saying he was advised by his Bangladeshi solicitors not to disclose it.

24. Ms Gill pursued the point. She asked the appellant that if the document was in his possession at the last hearing (2nd of May 2017) and the contents are true why was it not produced at that hearing. The appellant said there was a lack of time to produce and he further asserted he was advised not to disclose it. He was asked which solicitors asked him not to disclose. He said his solicitors in Bangladesh.

25. [Counsel] sought to re-examine the appellant on this point and in so doing she in effect ask him to repeat the contents of his latest witness statement (see "App 1" page 1-4). The appellant had already adopted this when [Counsel] opened the evidence by calling the appellant and asking him to adopt his witness statements."

31. The judge's findings on the international protection aspects of the appellant's appeal were as follows:-

"27. It is my finding, to the lower standard of proof, that the core of the appellant's claim is a fiction. It is not a well thought out fiction, but a fiction nevertheless. The account he presented in the AIR does not jel (sic) together. Leaving aside the age when he claims he became the president of the [Union], the appellant's failure to articulate clearly the aims and policies or the role he claims to have played for the BNP does not stand up to scrutiny, anxious or cursory. I observed and heard the appellant give oral evidence. His account of why he did not produce Facebook documents which predate the AIR changed with the space of seconds. It changed from experiencing difficulties in printing them to stating he did not think they were needed. I take both aspects of the appellant's performance, during the AIR and during his oral evidence. I find the appellant is not a truthful witness. Apart from his name and his date of birth I do not find the appellant told me the truth about anything else. Consequently, I find I am unable to attach any weight to the documents he relies on."

32. Having found that the appellant could not succeed in his human rights appeal, by reference to Article 8 of the ECHR, the First-tier Tribunal Judge dismissed the appeal. His decision was promulgated on 6 November 2017.

D. The grounds of appeal to the Upper Tribunal

33. The grounds of appeal accompanying the appellant's application for permission to appeal to the Upper Tribunal were settled by Counsel (not previously connected with the case) on 19 November 2017. The grounds were as follows:-

    (a) The judge failed to properly assess the appellant's risk given that the respondent "has now alerted the persecutors themselves of his asylum claim";

    (b) the judge "has failed to consider numerous pieces of documentary evidence provided and not applied anxious scrutiny";

    (c) the determination of the judge "is infected by judicial bias".

34. So far as ground (a) was concerned, the grounds cited the Upper Tribunal reported case of VT (Article 22 Procedures Directive – confidentiality) Sri Lanka [2017] UKUT 00368 (IAC), which was handed down in July 2017. The relevant part of the headnote of VT was set out as follows:-

    "(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."

35. At paragraph 10 of the grounds, it was asserted that VT held "that 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". Reference was made in this regard to paragraph 38(viii) of VT. This reads as follows:-

> "(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 combating terrorism."

36. The grounds went on to submit that the First-tier Tribunal Judge "has failed to consider the enhanced risk the appellant now faces given that the persecutors themselves have been alerted to a protection appeal in the United Kingdom. The failure to analyse this serious and substantial risk is a material error of law".

37. Ground (b) contended that the First-tier Tribunal Judge did not refer in any way to medical documentation, submitted by the appellant, which was said to "go to the politically motivated attack on him as well as accompanying photos". The same applied to news articles said to show external consistency, the "general diary" and "two extant arrest warrants in the appellant's name".

38. So far as the DVR was concerned, the grounds complained that this did not relate to "checks on the two arrest warrants provided by the appellant".

39. Ground (c) related to what was said to be the judge's behaviour during the hearing, which "would lead a reasonable bystander to perceive that she (sic) was biased". Reference was made to a witness statement, provided by Counsel who had represented the appellant before the First-tier Tribunal. It was alleged that the judge "did not allow permissible re-examination-in-chief of the appellant"; that the judge stated in open court "Thank God for that" when Counsel cut short her closing speech "once it became apparent … that the judge was destined to refuse the appeal as a result of bias"; that the appellant was "shaken and upset"; and that the judge's unacceptable behaviour was also perceived as such by the Home Office Presenting Officer and her colleague.

E. The response of the First-tier Tribunal Judge to the allegation of bias

40. Following the grant of permission by the First-tier Tribunal, Upper Tribunal Judge Dawson sought the observations of the First-tier Tribunal Judge in respect of the allegations made in ground (c). The judge provided a detailed response, the substance of which was set out in a memorandum, drawn up by Upper Tribunal Judge Dawson on 20 February 2018, and sent to the parties.

41. In his response, the judge set out why he considered that certain matters, upon which Counsel had sought to re-examine the appellant, did not arise out of cross-examination, which led the judge to seek to preclude Counsel from pursuing her line of questioning. However, in respect of the issue of whether the appellant had had contact with lawyers in Bangladesh, which was raised by Counsel in re-examination, the judge said he had indicated to Counsel that, if this line of questioning was to occur, he would permit the Presenting Officer to cross-examine on it. At that point, according to the judge, Counsel for the appellant said that she would "leave it", in response to which the judge invited her to "pursue it if you have to". The judge then further invited Counsel to deal with this and other matters, but she declined to do so. Given that the judge considered "her refusal to pursue troubling", the judge said he asked Counsel to pause while he made a note of the conversation, to which she said: "please do". The judge said that he found that reply of Counsel to be "impertinent and said so". The judge said that Counsel's response "was discourteous" and that "no member of the judiciary should countenance such behaviour".

42. The judge denied using the word "impertinent" more than once and he emphatically refuted the suggestion that he had said "Thank God for that". He did not consider the appellant had at any time to have appeared "shaken or upset".

43. The judge did not accept he had behaved in a "overly critical" fashion in noting various defects in Counsel's skeleton argument, including what he considered to be a significant error in the recording of the appeal reference.

44. The judge did not disagree with Counsel's contention that he had told her "This is not a conversation", during the course of her submissions. The judge said that Counsel had invited him to agree with her submission by saying "agreed?". The judge considered that it was "inappropriate for a Tribunal judge to indicate, during the hearing, whether he/she agreed with a legal, or any other, point either advocate [raised] in submissions", since that could be interpreted as giving an indication of the way the judge would be likely to decide the appeal.

45. The memorandum recorded the judge as dealing with a number of other issues, raised in Counsel's witness statement. Both the assertions and responses are in a similar vein to those described above.

F. Discussion

(a) The Document Verification Exercise

46. We deal first with ground (a). As we have seen, the case of VT played no part whatsoever in the submissions of Counsel before the First-tier Tribunal Judge. Given that VT is not a "starred" (that is to say, binding)

decision of the Upper Tribunal, this point is of some significance, notwithstanding that the First-tier Tribunal is, as a general matter, expected to follow reported decisions of the Upper Tribunal, whether starred or not.

47. It is necessary to set out, in detail, the relevant findings of the Upper Tribunal in VT. These preceded from the provisions of the Procedures Directive and from paragraph 339IA of the Immigration Rules, which is intended to give effect to Article 22 of that Directive.

48. The Upper Tribunal was also concerned with an advisory opinion given by UNHCR in March 2005, concerning the "Rules of confidentiality regarding asylum information".

49. The Upper Tribunal said the following:-

> "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.""

50. The Upper Tribunal's analysis of what it described as the legal framework was as follows:-

"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."

51. As can now be seen from a detailed reading of VT , it was wrong of the appellant in the present appeal to take out of context the sentence in paragraph 38(vii): "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". What is prohibited by Article 22(b) of the Procedures Directive and paragraph 339IA(ii) of the Immigration Rules is the obtaining of information in a manner that would result in alleged actors of persecution being directly informed of the fact that an application for international protection had been made by the applicant, which would jeopardise his or his family's physical integrity, liberty or security.

52. The Upper Tribunal's reference to requiring consent derived from the UNHCR's Advisory Opinion of 2005. That document is, as it says, advisory in nature. In order to determine the extent of the United Kingdom's actual legal obligations in this regard, it is necessary to concentrate on Article 22 of the Procedures Directive.

53. As can be seen from paragraph 34 of the decision in VT, the Upper Tribunal was not, in fact, of the view that any direct contact with alleged actors of persecution is prohibited. Furthermore, the Upper Tribunal was at pains to stress that the prohibition under Article 22 "will depend on the nature of the enquiry and the circumstances of each case".

54. It will also be evident that, even if the United Kingdom authorities were to obtain the express consent of the person concerned, a breach of Article 22 would still arise, if the ensuing direct contact would lead to one or more of the results described in Article 22(b).

55. For these reasons, it is wrong to interpret paragraph 38(vii) of VT as holding that consent is a legal necessity in all circumstances, or as implying that, if consent is given, there can be no question of a breach of Article 22.

56. With that in mind, we turn to the DVR in the present case. There is no indication in the report that the official from the High Commission gave the name or other personal details of the appellant to the police in Sylhet. The enquiry merely referred to numbered FIRs and charge sheets, each of which were said to have been issued on particular dates.

57. As the official discovered by his or her own inspection of the register, there was no FIR 30 dated 5 January 2011. FIRs 28 and 29 were not dated until the following day. FIR 23 had been filed on 6 January 2010, not 10 January 2010, as asserted in the document put forward by the appellant. The official also noted that none of the dates and names in the documents submitted by the appellant matched any of the details contained in the register.

58. Having regard to Article 22 and paragraph 339IA, it is manifest that the FIR exercise could not rationally be said to have created a risk to the appellant, if returned to Bangladesh.

59. That position is not affected by the point that, if the FIRs and charge sheets as produced had been genuine, then the official's enquiry of the police, made by reference to specifically numbered FIRs and charge sheets, would, of course, have led to the police being informed of the appellant's name and to the inference that the United Kingdom authorities were enquiring about the appellant, in the context of a likely claim by him to be in need of international protection from the authorities in Bangladesh.

60. The fact that, in this scenario, the documentation would have been verified as correct would, plainly, have materially supported the appellant's claim to a very significant extent. That is likely to have led to a different outcome for the appellant, irrespective of whether the risk might have increased as a result of the enquiry having been made. In any event, in those hypothetical circumstances, the respondent could be expected to have regard to that increased risk, in determining whether international protection should be granted to the appellant.

61. In an email dated 25 June 2018, dealing with the DVR in this case, the respondent has confirmed that it has never been normal practice for those conducting a verification to give the names of the person concerned. The email also states that, if the verification exercise were to be conducted

today, the official would now ask only to see the relevant register and would not give the authorities the FIR number. Thus, in the scenario discussed in paragraphs 59 and 60 above, there would have been no increased risk to the person concerned. For the reasons we have given, however, this has no impact on what happened in the present case.

(b) Alleged failure to consider evidence

62. So far as ground (b) is concerned, it is trite law that a judicial fact-finder does not have to refer expressly to each and every item of evidence. There was no indication in the decision of the First-tier Tribunal that any emphasis was placed by Counsel for the appellant upon the medical evidence or photographs, said to emanate from Bangladesh. In any event, the First-tier Tribunal Judge gave entirely sustainable reasons for finding that the core of the appellant's claim was false. The appellant had, unquestionably, seen fit to put forward documents that had been found as a result of the DVR exercise to be fakes. The appellant has not begun to show why, in the light of that striking fact, any other personal documentation he put forward should fall to be regarded as discharging the evidential burden. The fact that the appellant's account is said to be compatible with the background evidence, likewise, takes his case no further.

63. In addition, the First-tier Tribunal Judge was entitled to find as he did at paragraph 27, concerning other significant problems with the appellant's credibility.

(c) Alleged bias

64. We turn, finally, to ground (c).

65. As we have already noted, Counsel who appeared before the First-tier Tribunal Judge filed a witness statement, which accompanied the grounds of application for permission to appeal, stating what, in her view, occurred at the hearing. As we have also seen, the judge, upon the request of the Upper Tribunal, gave his written observations on the statement. These were communicated to the parties in February 2018.

66. At the commencement of the hearing before us on 26 June, Ms Seehra applied for an adjournment. She did so on the ground that Counsel had not provided a reply to the judge's observations. Ms Seehra did, however, tell us that she thought Counsel was nevertheless aware of those observations.

67. We were entirely unpersuaded by Ms Seehra's application. The judge's observations had been communicated approximately four months before the Upper Tribunal hearing. There had, accordingly, been ample time for

instructing solicitors to contact Counsel to enquire whether she had any reply to make to the judge's observations.

68. An allegation of bias against a judge is a serious matter. If it is made, the appellate court or tribunal will expect all proper steps to be taken by the person making it, in the light of a response from the judge.

69. In the present case, steps should have been taken, in advance of the Upper Tribunal hearing, to obtain a reply from Counsel or, at least, ascertain her stance, following sight of the judge's observations.

70. The failure is, in our view, compounded by the fact that on 22 June, only four days before the Upper Tribunal hearing, the appellant's solicitors filed a supplementary witness statement of the appellant, dated 21 June 2018, in which the appellant, apparently for the first time, comments upon what happened at the First-tier Tribunal hearing in October 2017.

71. In this statement, the appellant asserts that, when his Counsel wanted to speak to the judge, the latter told her to stop and "kept interrupting" her. Conversely, when the Presenting Officer was speaking "the judge allowed the HOPO to speak freely without any obstruction".

72. This caused the appellant to say the following:-

> "7. Immediately I felt that the judge was being more lenient to the Home Office. The judge appeared to be verbally scolding my barrister when she tried to advance further submissions to the court.
>
> …
>
> 12. It was very obvious that the judge sided with the Home Office from the beginning because there is very little reference to my documents or information I provided for the hearing made at the hearing. It may be more so because the judge did not allow [my] barrister to present my case properly to make an informed decision."

73. Leaving aside the fact that this witness statement was filed in breach of directions, it is manifestly problematic. It comes from someone who, on any rational view, had seen fit to put forward false documents in connection with a belated claim for international protection. The appellant's explanation that documents of this kind relating to political opponents are kept secret does not begin to deal with the outcome of the document verification exercise.

74. Even on its own terms, the appellant's statement sheds no relevant light on ground (c). The appellant, so far as we are aware, had no prior experience of substantive immigration tribunal hearings in the United Kingdom, when he attended the hearing in October 2017. Since the appellant required the assistance of an interpreter, it is, at best, doubtful how much he understood what was being said by the judge and the representatives.

75. In particular, the fact that the judge had more verbal interactions with the appellant's barrister than with the Presenting Officer tells us nothing of relevance. The appellant bore the burden of proof, which meant that it was for his Counsel to persuade the judge that the refusal of the appellant's protection claim should be overturned.

76. The statement describes an interaction that the appellant says he had with the interpreter. It is wholly inappropriate for a court or tribunal-appointed interpreter to have his or her private conversations with an appellant put forward as evidence; particularly if – as appears to be the case – the interpreter has not been told that this was to be done.

77. In the light of all this, it was wrong for the appellant to put forward this supplementary witness statement, as supportive of his allegation of bias against the judge.

78. At this point, we should state that those advising the appellant sought confirmation of their bias allegation from the Presenting Officer who appeared at the First-tier Tribunal hearing. In the event, a response was received, shortly before the hearing before us in June 2018; but, in the interests of fairness, we informed Ms Seehra and Mr Clarke that we would not take the response into account, given the limited opportunity that Ms Seehra had had to deal with it.

79. Having considered the judge's decision, Counsel's statement and the judge's observations, we are in no doubt that the appellant has failed to make good the allegation of bias against the judge. It is apparent that the judge was unimpressed by what he regarded (understandably) as a number of deficiencies in the way in which those acting for the appellant had prepared for the appeal hearing. The judge was also troubled by Counsel's approach to re-examination and, more particularly, in what he took to be her reaction to his observations on this matter. It is common ground that the judge accused Counsel of being "impertinent".

80. Overall, it is plain that the hearing was, at times, fractious. That does not, however, come close to demonstrating that the judge failed to afford the appellant a fair hearing.

81. Members of the Bar are expected to put their clients' cases fearlessly. As a general matter, if Counsel concludes during a hearing that the judge is behaving in an inappropriate manner, Counsel has a duty to raise that matter with the judge, there and then. In this way, the issue will, at the very least, be recorded in the judge's record of proceedings and, ideally, in the record of Counsel and/or his or her instructing solicitor.

82. The fact that an allegation of bias is not made until an application is filed for permission to appeal is not, of course, determinative of the issue. Each case must turn on its own facts and circumstances. The appellate court of tribunal may, nevertheless, be entitled to have regard to the absence of

any challenge at the hearing, or at least before receipt of the decision, in determining the allegation.

83. It is self-evident that the challenges of the present kind would be resolved far more easily if hearings in the First-tier Tribunal, Immigration and Asylum Chamber were officially recorded. The expenditure that would be required has to be set against the expense and delay inherent in having to deal with allegations of bias in the way that has been necessary in this case.

84. Although we are fully satisfied that the judge's decision is not tainted by bias, the judge does not escape criticism. In paragraph 5, dealing with the re-examination of the appellant, the judge said:-

> "I reminded [Counsel] … if she continues with a second attempt at examination-in-chief (after cross-examination had been concluded on the point) Miss Gill may seek a second chance at cross-examination. [Counsel] said she does not wish to take the matter further. I asked [Counsel] to pause whilst I recorded matters in my Notes and she said '*please do'*. It is very commendable of [Counsel] to permit me the opportunity to make notes."

85. That passage, we are sorry to say, is sarcastic. Sarcasm has no part to play in written judicial decisions.

G. Decision

86. For the reasons we have given, there is no merit in ground (a), (b) or (c). The appellant's appeal is, accordingly, dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated: September 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal

Immigration and Asylum Chamber