EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 29
P519/19

Lord Menzies
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the reclaiming motion from the interlocutor of the
Lord Ordinary dated 4 October 2019

in the petition of

AA

Petitioner and Reclaimer

for judicial review of a decision of the Upper Tribunal
refusing permission to appeal

Petitioner and Reclaimer: Caskie, Drummond Miller LLP
Respondent: McKinlay, OAG

5 June 2020

Introduction

[1] The petitioner is now 20 and a national of Somalia. He arrived in the United Kingdom in 2017 and sought asylum. The respondent refused his claim by letter dated 4 October 2018 ("the decision letter"). The petitioner was unsuccessful in his attempt to challenge that decision in the First Tier Tribunal (FTT). Subsequently he has been refused leave to appeal to the Upper Tribunal (UT). The relevant dates are as follows:

21 December 2018	FTT judgment
17 January 2019	FTT refusal of leave to appeal
12 March 2019	UT refusal of leave to appeal

[2] The petitioner then brought this petition for judicial review. Following an oral hearing, the Lord Ordinary concluded that the UT had not erred in law. It is that decision, dated 1 October 2019, that the petitioner now reclaims.

Background

[3] The petitioner's account of his background circumstances is as follows. He comes from the small island of Chula, also known as Julia, which is part of the Bajun group of islands. It lies off the coast of Somalia, is less than 2^{3} km in area, and has a population of about 300. He and his family are members of the Banjuni people.

[4] Before leaving the island, the petitioner formed an attachment to a local girl. Her family disapproved of the relationship. With the aid of his own family, the petitioner escaped from Somalia. It took him several months to reach the UK. He spent some time in Yemen and then in Cologne.

[5] On 24 July 2017 the petitioner applied for asylum on human rights grounds in terms of section 82 (1) of the Nationality, Immigration and Asylum Act 2002.

The FTT

[6] The petitioner contended that he would face three problems if he returned to Somalia. The FTT judge addressed each in turn.

Would he face reprisals from the girl's family?

[7] The FTT judge held that the petitioner would not face reprisals from the girl's family. He decided this ground on credibility. Having evaluated the evidence, he did not accept the petitioner's account of the alleged inappropriate relationship.

Would he be persecuted by Al Shaabab?

[8] The petitioner claimed that he would face persecution by a militant jihadist group, Al Shaabab. There were two competing sources of evidence. The petitioner founded on an expert report from Dr Faulkner, who stated that Al Shaabab might target him. The respondent relied on a Home Office Country Report *Somalia – Minority Claims.* Although dated June 2017, it referred to intelligence from five years before. It stated that Al Shaabab did not have a real presence on the Banjuni islands, although some residents were sympathetic to its cause.

[9] The FTT judge acknowledged that the country report was somewhat dated, but added that it was "the most objective available and I prefer it to the inferences drawn by Dr Faulkner", which "have little factual basis." The FTT judge also held that, if the petitioner required to return to Somalia, he could live in Mogadishu, where there is a Bajun community.

[10] Accordingly, the petitioner did not have a well-founded fear of persecution by Al Shaabab.

Would he be able to travel safely from Mogadishu to Chula?

[11] Dr Faulkner's report stated that it is unsafe to travel from Mogadishu to Chula. No doubt in light of that suggestion, counsel for the respondent took up this matter in cross

examination. She asked the petitioner whether his family could make arrangements to bring him by boat from Mogadishu to Chula.

[12] The petitioner's written submissions at the close of the FTT hearing indicate that counsel's question took him by surprise. They state that the difficulty of reaching his home island had never been disputed by the respondent because:

> "The evidence makes it abundantly clear that the [petitioner] would not be able to travel safely overall from Mogadishu to Chula."

[13] The FTT judge disagreed. While he accepted that this matter was not mentioned in the decision letter, he continued:

> "The first time that travelling to Chula becomes an issue is when the appellant intimated his expert report. Chula is an island. Mogadishu is a seaport. The appellant escaped from Chula and indeed Somalia by boat. In the circumstances it is a little surprising that Dr Faulkner did not mention the possibility of sea travel in his report. The appellant has confirmed that people did come from Mogadishu and it must assume that they came by boat. As shown by the productions relating to the Red Cross and the Red Crescent … the appellant has a reasonable prospect of being able to contact his family who would assist in facilitating his return. There are reasonable prospects of the appellant being able to return to Chula safely by sea."

[14] The FTT judge then expressly rejected any suggestion of procedural unfairness and added:

> "The appellant has had time to consider his position and provide written submissions. Had there been any substantive unfairness to the appellant the appellant's agent could have addressed me further on such prejudice."

Grounds of appeal to the UT

[15] The petitioner sought to argue four points before the UT:

(a) *Adverse credibility finding* The FTT failed to have regard to the 'Joint Presidential Guidance Note No 2 of 2010', which gives guidance to FTT judges in

respect of vulnerable witnesses and left out of account that the petitioner was only 18 when he gave evidence.

(b) *Procedural unfairness* By making a finding on a matter on which the petitioner did not have notice (safe passage from Mogadishu to Chula), the FTT did not give him a fair hearing.

(c) *Family assistance* There was no evidence of any contact between the petitioner and his family, so there was no proper foundation for the assumption by the FTT judge that they could assist him in securing safe passage to Chula.

(d) *Expert evidence* The FTT should have engaged to a greater degree with the expert reports and given more detailed reasons for preferring one to the other. It only gave cursory treatment to the petitioner's report.

Upper Tribunal

[16] The UT refused leave to appeal. Its decision reads as follows:

> "The applicant asserts the judge erred [in] leaving out of account when assessing the evidence the fact the appellant left Chula shortly after his 17th birthday before travelling to the UK via Yemen and Cologne which are said to be matters that directly impinge on the vulnerability of the appellant to which it is claimed the judge had no regard. The grounds assert procedural unfairness as a result of a lack of notice of a new issue, and a failure of the judge to take into account relevant matters. It is also said the judge erred in the treatment of the expert evidence. …
>
> The judge considered the evidence with the required degree of anxious scrutiny considering both written material and having the benefit of both seeing and hearing the appellant give his oral evidence. The judge sets out his findings of fact from [10] of the decision under challenge. The finding of no real risk on return as a result of his membership of the Bajuni community has not been shown to be infected by arguable legal error. It is not made out the judge incorrectly or unlawfully assessed the weight to be given to the appellant's evidence. It is not made out that the judge committed any procedural unfairness when assessing the issue of return by boat and nor is it made out the judge failed to take into account relevant aspects of the appellant's case. The judge is not required to set out every aspect of the expert report and it is not made out the treatment of the expert report in relation to internal flight

> was not the required standard. Whilst the appellant disagrees with the judge's assessment and clearly seeks a more favourable outcome to enable him to remain in the United Kingdom, it is not made out the judge's conclusions are not within the range of those reasonably available to the judge on the basis of the evidence provided. The weight to be given to that evidence was a matter for the judge. The appellant fails to establish that it is appropriate in all the circumstances to grant permission to appeal to the Upper Tribunal
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> The judge is not required to set out every aspect of the expert report and it is not made out the treatment of the expert report in relation to internal flight was not to the required standard."

Case at First Instance

[17] Before the Lord Ordinary, Mr Caskie argued that the UT had given inadequate reasons for its decision in relation to grounds (a) to (c). The Lord Ordinary disagreed. He held that the key passage in the UT decision:

> "[13] … discloses a process of reasoning whereby the UT has considered the grounds, and assessed these grounds by examining the FTT's decision. The UT has placed particular stress on the FTT having had the benefit, in relation to credibility, of seeing and hearing the petitioner. The UT has taken the view that the weight of evidence was a matter for the FTT. Having assessed the grounds against the FTT decision, the UT comes to the conclusion that the first three grounds are not made out. In my view, the reasoning of the UT, although brief, is sufficient for the purposes of an expert tribunal deciding a question of permission to appeal, and there is no reasonable prospect of success in arguing otherwise."

[18] The Lord Ordinary also rejected ground (d) on the basis that:

> "[16] … the FTT has made a discriminating decision about what evidence it prefers. It prefers the evidence of UNHCR observations to the evidence of Dr Faulkner. It does not do so unreservedly: it recognises the difficulty posed by the UNHCR evidence has been from 2012 and therefore dated. It balances various factors: (1) the UNHCR observations are somewhat dated (2) the objectivity of UNHCR observations (3) Dr Faulkner's report consists of inferences and (4) these inferences have little factual basis. The FTT balances all these factors in coming to its decision."

Issues before this court

[19] Mr Caskie altered the thrust of his submissions at the reclaiming motion. Instead of

focusing on inadequate reasoning, he contended that the UT erred in respect of the key matters. Taken individually and cumulatively he argued that they overcame the low hurdle of establishing a real prospect of success. We shall look at each proposition in turn.

[20] First, Mr Caskie argued that the UT had left a relevant matter out of account by failing to have regard to the petitioner's age and vulnerability at the time of giving his evidence. We see no force in this. Express reference to the Presidential Guidance is in itself not material. Absence of evidence does not mean evidence of absence. What is important is that the FTT judge respected the petitioner's position as a young and vulnerable witness and treated him accordingly. We conclude that he did so. In the course of his judgment, he states the petitioner's date of birth, mentions his lengthy journey here, his youth, and his health problems, together with his resilience and fortitude.

[21] Second, Mr Caskie maintained that the petitioner and his agents were taken by surprise in being asked whether his family could arrange safe passage to Chula. Mr Caskie said that it is well known that the seas around Somalia are subject to piracy. Had the possibility of the petitioner being transported by his family to Chula by boat been raised, Mr Caskie said that the views of an expert could have been sought.

[22] We fail to see how that taints the hearing. It was an obvious issue to explore and one which ought to have been anticipated, given that it was introduced by Dr Faulkner's report. But even supposing that the petitioner was taken unawares, any alleged unfairness disappeared when the FTT judge offered his representatives the opportunity to make further representations. We are unclear why that offer was not taken up.

[23] In addition, as Mr McKinlay pointed out, it was never disputed on behalf of the petitioner that he could be safely returned to Mogadishu, where there is a Bajun community. The FTT concluded (at para 17) that it would be reasonable for him to relocate to

Mogadishu. That in itself shows that even had there been any error of law regarding his return to Chula, such error was not material.

[24] Third, Mr Caskie argues that the UT took into account an irrelevant matter by deciding that the petitioner's family could assist him, without any evidence to that effect. We narrate in para 13 above the FTT judge's reasoning for arriving at his finding in fact. We see no basis in law to depart from that

[25] We are not surprised that Mr Caskie altered his angle of approach before this court. In our view, however, the Lord Ordinary was correct to hold that the UT did give intelligible and adequate reasons for its decision.

Conclusion

[26] We refuse the reclaiming motion and adhere to the interlocutor of 4 October 2019.