EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 54
P835/19

Lord Malcolm
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal

by

HUSSAIN MUBARAK AL-ENEZI and ANOTHER

Petitioners and Appellants

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners and Appellants: Winter; Drummond Miller LLP (for Latta & Co, Glasgow)
Respondent: Maciver; Office of the Advocate General

21 August 2020

[1] In this appeal under section 27D(2) of the Court of Session Act 1988, the petitioners ("the appellants") challenge the decision of the Lord Ordinary to refuse to grant permission for their petition for judicial review to proceed. The appellants, who are brothers, claim to be undocumented Bidoons from Kuwait and to be entitled to asylum and to international protection on the basis of that particular status. The Home Office does not dispute that undocumented Bidoons are, in principle, entitled to such protection, but it does not accept

that the appellants genuinely are members of the stateless Arab minority group referred to as Bidoons.

[2] A significant feature of the present case is that it has been before the First-tier Tribunal (FtT) on two occasions for consideration of the appellants' claims. After the first of those hearings the appellants successfully appealed to the Upper Tribunal (UT), which remitted the case to the FtT, whilst preserving certain negative credibility findings against the appellants. They related to one aspect of their claim, namely that they had been involved in an illegal demonstration in Kuwait and thereafter had been unlawfully detained and tortured by the Kuwaiti authorities. The second aspect of the appellants' claim was based simply on their contention that they held the status of undocumented Bidoons. It was in relation to that part of the claim that the case was remitted to the FtT to be reheard.

[3] The Lord Ordinary held that the petition for judicial review had no real prospect of success and that, in any event, there was no compelling reason why the case should be allowed to proceed. In the light of the recent decision of the Inner House in *PA v Secretary of State for the Home Department* [2020] CSIH 34, it is for this court to decide for itself whether there is a real prospect of success, while affording the Opinion of the Lord Ordinary due respect. The issue is one that depends to a significant degree on impression, informed by experience (*PA* para [33]).

[4] In support of the appeal to this court against the Lord Ordinary's ruling, Mr Winter focused his oral submissions on the treatment by the second FtT judge in his decision of the evidence of a witness led in support of the appellants' contentions that they were undocumented Bidoons. Counsel contended that the UT had erred in law by failing to give adequate reasons for its decision that the FtT judge on the second occasion had properly weighed all the evidence in the case, including the evidence of that particular witness.

[5] To consider this submission it is necessary to go back to look at what happened at the second FtT hearing. The witness in question, Mohammed Assi Al-Enezi, provided two written statements and gave oral testimony, which was subject to cross examination. The FtT judge summarised the evidence of this witness at paragraph 9 of his decision. He recorded that the witness claimed to know the appellants well. They were all from the same neighbourhood in Kuwait. The witness claimed to be in a position because of his familiarity with the appellants to confirm that they truly were undocumented Bidoons. He spoke also to having attended the demonstration with the appellants in Kuwait. It is important to note that the witness had previously given evidence at the first FtT.

[6] At paragraph 17 of his decision the second FtT judge said the following:

> "The starting point for my consideration must be the decision of First-tier Tribunal judge Gillespie dated 9 October 2017. Said judge heard the evidence of the Appellant's (*sic*) and from Mohammed Assi Al-Enezi. He also had two unsigned statements before him. Judge Gillespie concluded 'having considered the totality of the evidence I am not persuaded that they can be trusted as witnesses to the core claim namely, that they are undocumented Bidoons who fled Kuwait as a direct result of their involvement in a demonstration 18 February 2014'. Although said remarks are directed against the Appellants it obviously has implications for the credibility of Mohammed Assi Al-Enezi notwithstanding that he had been found credible by an Immigration Judge in a different context. Upper Tribunal Judge Macleman by way of a decision of 15 October 2018 found the following:
>
> 'The decision of the First-tier Tribunal is set aside. The case is remitted to the First-tier Tribunal. The adverse findings of Judge Gillespie regarding the Appellants' part in a demonstration and subsequent ill-treatment and experiences, stand, subject to the usual "Devaseelan" principles. Nothing adverse stands as to whether the Appellants are undocumented Bidoons'."

[7] The reference in this passage to the 'Devaseelan' principles is to the case of *Devaseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1. One principle states that the findings of the first FtT are always to be taken as the starting point by the second FtT. They are an authoritative assessment of the applicant's status at the time they were made. However, facts arising since the first decision or facts which the first FtT did not take

into account can legitimately be considered by the second FtT. We did not understand Mr Winter to submit that these principles were of any direct relevance for the purposes of his argument.

[8] Mr Winter submitted that it was not clear why the second FtT judge considered there to have been "implications" for the evidence of Mohammed Assi Al-Enezi arising from Judge Gillespie's findings. The second FtT judge failed, according to Mr Winter, to recognise that the first FtT judge had not addressed the question of the appellants' status as undocumented Bidoons. That was the very error which the UT had identified in deciding to uphold the appeal to a limited extent and remit the case to the FtT for a re-hearing.
Mr Winter further submitted that even if it was correct to read the second FtT judge's decision as holding that he had rejected the evidence of Mohammed Assi Al-Enezi, the judge had failed to explain, to an adequate and sufficient extent, why he had done so. Moreover, the adverse credibility findings made against the appellants had been allowed to sway the assessment of the evidence of the witness to a degree that was unfair and unjustified. These errors in turn rendered erroneous the reasoning of the UT and the manner in which it expressed its refusal of leave to appeal.

[9] On behalf of the Secretary of State for the Home Department, Mr Maciver acknowledged that the second FtT judge had made no express finding about the evidence of Mohammed Assi Al-Enezi in so far as he supported the appellants' claims to be undocumented Bidoons, but it was implicit from his decision, read as a whole, that he had found the witness not to be credible and reliable on this aspect.

[10] The Lord Ordinary considered the UT's treatment of this issue to be, as she put it, "reasonably clear" from the following passage in its decision refusing leave to appeal from the second FtT:

> "The grounds appear to misunderstand that negative credibility findings as to the appellants' attendance at a demonstration and their claim to have been mistreated as a result were preserved. The judge was entitled to take that into account, weighing the evidence as a whole, as it is clear was done, in assessing the overall credibility of the claim to be undocumented Bidoon."

[11] In our opinion, the submissions advanced on behalf of the appellants must be rejected. We reach this conclusion essentially for the reason that the Lord Ordinary gave, namely that the UT was correct to hold that the second FtT judge had properly evaluated the totality of the evidence before him.

[12] In our view, the second FtT judge correctly understood that the previous negative credibility findings against Mohammed Assi Al-Enezi had to be carried forward to the second FtT. He made this clear in paragraph 17 of his decision. The second FtT judge must be taken to have rejected the evidence of Mohammed Assi Al-Enezi; although there is no express finding to that effect, it is implicit in his overall conclusion on the case. We consider that the judge was entitled to disbelieve Mohammed Assi Al-Enezi's evidence concerning the appellants' alleged status as undocumented Bidoons in Kuwait. Whether to believe or to disbelieve him was a question of fact for the second FtT judge to make up his own mind about, having regard to all the evidence before him.

[13] In our opinion, the passage we have quoted from paragraph 17 of the second FtT judge's decision shows that he considered the credibility of Mohammed Assi Al-Enezi in the light of the other evidence in the case, including the evidence given by the appellants themselves. We note in this connection that the second FtT judge gave cogent reasons for finding the appellants' claims to be undocumented Bidoons to be incredible: they knew little about the recent history of the Bidoons in Kuwait; their evidence about the demonstration in 2014 was implausible; and there were inconsistencies in their accounts about how they came to leave Kuwait and in regard to conditions at the airport.

[14] Having recognised that the first FtT judge had rejected the appellants' accounts, it was reasonable for the second FtT judge to take the view that this finding had implications for the evidence of Mohammed Assi Al-Enezi. The witness had spoken at both tribunal hearings to the same matters as the appellants, including their alleged attendance at the demonstration. The second FtT judge did not go so far as to say that the evidence of the witness fell automatically to be rejected because of any of the previous findings in the case or because of his assessment of the appellants' evidence. In our view, the second FtT judge correctly applied the *Devaseelan* principles by taking the findings of the first FtT judge as his starting point, including in respect of the evidence of Mohammed Assi Al-Enezi. Inevitably, the previous findings had negative implications for the credibility of the witness at the stage of the second FtT.

[15] Reading the decision of the second FtT judge fairly and as a whole, we can find no fault with his approach. In particular, we can identify no error of law in his reasoning or conclusions on what were quintessentially issues of fact.

[16] Having reached that view about the approach of the second FtT judge, it follows that there was no error of law on the part of the UT in refusing leave to appeal and that its reasons were adequately expressed in the passage we have cited above.

[17] We conclude that the appellants do not have a real prospect of success on the point which formed the focus of Mr Winter's arguments before us.

[18] As to the other grounds of challenge advanced in the petition, we find ourselves in complete agreement with the Lord Ordinary that none of them has a real prospect of success.

[19] Having reached these conclusions, we need not go on to consider whether there is any compelling reason to allow the petition to proceed. We agree with the Lord Ordinary, for the reasons she gave, that there is no such reason.

[20] We shall adhere to the interlocutor of the Lord Ordinary and refuse the appeal. We shall reserve all questions as to expenses.