EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 26
P27/20

Lady Paton
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY PATON

in the appeal

by

MR SAMI KAREEM ALSHAMMARI (AP)

Petitioner and Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

in Judicial Review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 14 October 2019 refusing permission to appeal to itself

Petitioner and Appellant: Winter; Drummond Miller LLP (for Katani & Co, Solicitors, Glasgow)
Respondent: Maciver; Office of the Solicitor for the Advocate General

30 April 2021

Introduction

[1] In this appeal under s 27D(2) of the Court of Session Act 1988, the petitioner challenges the decision of the Lord Ordinary dated 8 July 2020 to refuse to grant permission for his petition for judicial review to proceed. The petitioner claims to be an undocumented

Bidoon from Kuwait, and to be entitled to asylum and to international protection on that basis. The Home Office does not, in principle, dispute that undocumented Bidoons are entitled to such protection, but it does not accept that the petitioner is an undocumented Bidoon.

[2] In refusing permission to proceed, the Lord Ordinary was exercising the jurisdiction prescribed by section 27B(3)(b) and (c) of the Court of Session Act 1988. The Lord Ordinary could only grant permission if he was satisfied that the application had a real prospect of success, and, as the second part of the test, either (i) the application would raise an important point of principle or practice, or (ii) there is some other compelling reason for allowing the application to proceed. This is the "second appeals test", discussed in *Eba* v *Advocate General for Scotland* [2011] UKSC 29; 2012 SC (UKSC) 1; 2011 SLT 768.

[3] It is not necessary for this court to find that the Lord Ordinary erred in any way (*PA* v *Secretary of State for the Home Department* 2020 SLT 889, para [33]).

[4] While the question raised in the petition for judicial review is whether there has been an error of law by the Upper Tribunal ("UT"), the error of law contended for by the petitioner is the failure by the UT to recognise an arguable error of law on the part of the First-tier Tribunal ("the FtT") (cf para [9] of *Waqar Ahmed* v *Secretary of State for the Home Department* [2020] CSIH 59). Parties were therefore agreed that it was necessary to examine the decision of the FtT.

The issue for the court

[5] Many issues were explored and debated before the FtT and the UT, but the sole issue argued before us concerned the treatment of the evidence of one of the petitioner's two supporting witnesses, namely Naef Abdulla Al-shamari ("Naef"). Naef was the only

witness who could give evidence about the petitioner's claimed status as an undocumented Bidoon. The petitioner's contention is that Naef gave evidence vouching that the petitioner is an undocumented Bidoon, yet no clear assessment of that evidence was made by the FtT. The petitioner contends that if Naef's evidence was accepted as credible and reliable, then it corroborated the petitioner's evidence that he is an undocumented Bidoon. If, on the contrary, the evidence was not accepted as credible or reliable, the petitioner maintains that the FtT's decision should have given reasons explaining why that conclusion had been reached.

Naef's evidence

[6] Naef's evidence consisted of a witness statement and oral testimony at the FtT hearing, when he was cross-examined. There is no transcript of the oral evidence, but it may be helpful to set out the witness statement, which was as follows:

> "1. My full name is Naef Abdulla Al-shamari. My date of birth is 09 May 1977. I was born in Kuwait.
>
> 2. I am a recognised refugee and was granted Refugee status by Home Office as an undocumented Kuwaiti Bedoon.
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> 3. I first met Sami [the petitioner] at Shurai Alkadi Mosque, which is located at Block 1. We both lived at block number 7. We would both go to pray at Hateb Ibn Amr mosque in Block 7.
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> 4. Sami and I studied at the Shurai Alkadi Mosque. This is where people study informally - to receive an education - when you are an undocumented Bedoon. Anyone who is registered would go to school to study.
>
> 5. We would often play and spend time in a group with other people from the mosque. We met each other on a daily basis because we lived close to each other.
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> 6. We did not have the same privileges as people who were registered. We were not allowed access to health services, go to school, be issued with a driver's license, marriage certificate, find employment (within public or private sector).

7. I had to leave Kuwait because of the persecution of undocumented Bedoons.

8. I did not know Sami had left Kuwait and was living in UK until he called me out of the blue and said he was living in UK. I told him I was living in Glasgow.

9. We met up and spoke about our families and how our lives were for the past couple of years. We had discussed the fact that we had both claimed asylum. I advised him I was granted asylum.

10. I know Sami is an undocumented Bedoon because our lives were the same growing up in Kuwait. We both went to Mosque to study and this only happens when you are not documented. This also applies to other areas (discussed above) which his and my family both had.

11. I do not know why anyone would falsify a claim that they are an undocumented Bedoon given the clear disparity of how people are treated between [documented] and undocumented Bedoons.

I have given this statement in Arabic … with the assistance of Sami's legal representative. This statement has been read back to me in Arabic by the interpreter and has been approved by me. This statement has been signed by me at Glasgow on 6th May 2019."

The assessment of the evidence by the FtT

[7] The FtT analyses the petitioner's evidence at paragraphs 18 to 27 of its decision. Following the guidance given in *KB and AH (credibility-structured approach) Pakistan* [2017] UKUT 491 (IAC), the petitioner's evidence is examined under four headings, namely sufficiency of detail, internal consistency, external consistency, and plausibility. Amongst other things, the petitioner was found to have deliberately concealed the fact that he had made an application for a US visa in Baghdad based on an Iraqi passport, which passport he subsequently claimed was false (paragraph 23 of the FtT decision). He was found not to have harboured a fugitive friend as he had claimed (paragraph 24). He was found to have used a different name on a false Kuwaiti passport in order to enter the UK (paragraph 25).

[8] By contrast, no criticism is made in the FtT decision of Naef or his evidence. There is no suggestion that Naef behaved improperly or dishonestly. There is no suggestion that his evidence was false, or that it disclosed inconsistencies, or that it should be given little or no weight.

[9] The references to Naef and his evidence can be found in paragraphs 6, 7 and 26, and in the FtT's final conclusion on all the evidence at paragraph 28.

[10] Paragraphs 6 and 7 state:

> "6. The appellant and his witnesses Naef Abdullah Al-Shamari and Khaled Hamad Al Shammari gave their oral evidence through an interpreter. The language is Arabic (Middle Eastern).
>
> 7. The appellant and his witnesses adopted their witness statements and answered all the questions put to them."

[11] Paragraph 26 notes:

> "The evidence of Naef Abdullah Al-Shamari and Khaled Hamad Al-Shammari was broadly consistent with the account given by the appellant. [The decision then notes an inconsistency between Khaled's evidence and the appellant's evidence, but no inconsistency or criticism relating to Naef is suggested.]"

[12] Paragraph 28 concludes:

> "I have considered all the evidence in the case. I take account of the fact that it may be necessary for a genuine applicant for asylum to disguise his identity as part of a legitimate claim. I have given weight to the various issues in the case as I have indicated. The account the appellant has given is lacking in detail and while it is plausible there are aspects to it which I have described as curious. The main issue is inconsistency. The appellant attempted to obtain a US visa in March 2016 and denied this throughout the asylum interview process. I cannot regard this as anything other than a deliberate and sustained attempt to mislead the immigration authorities. The cumulative effect of this and the other issues I have identified lead me to conclude that the appellant is not a credible witness. I do not consider that I can rely upon the appellant's evidence and do not accept that he is an undocumented Kuwaiti Bidoon. I make no finding as to his true nationality as that is not required for the disposal of this appeal."

Discussion and decision

[13] The crux of the FtT's reasoning was that the petitioner's account should not be accepted because the FtT was satisfied that he had been untruthful in relation to certain matters. A potential difficulty with that approach in the present case is that in relation to the core issue - whether the petitioner was an undocumented Bidoon - there was evidence from Naef which corroborated the petitioner's account. Notwithstanding the petitioner's untruthfulness in relation to other matters, on the crucial issue Naef's evidence supported him. It is trite that parts of a witness's evidence can be untruthful or unreliable but other parts may be truthful and reliable (cf *Daoud* v *Secretary of State for the Home Department* [2005] EWCA Civ 755, Sedley LJ at paragraph 10).

[14] In our opinion there is an argument of some substance that the FtT erred in law, either by reaching a view in relation to the petitioner's credibility and reliability on the core issue without having proper regard to Naef's supporting evidence on that issue (cf *S (AAS)* v *Secretary of State for the Home Department* 2011 SLT 1058, Lord Bonomy at para [9]-[11]; *AR* [2017] CSIH 52, Lord Malcolm at para [36]); or by rejecting Naef's evidence as being incredible or unreliable without stating that conclusion or explaining the basis upon which it had been reached. There is also an argument of some substance that in failing to recognise the arguable error of law on the part of the FtT, the UT also erred in law.

[15] It follows that we consider that the test in section 27B(3)(b) is satisfied. There is a real prospect of persuading a judge at a substantive hearing that the UT judge erred in law, because he failed to recognise that there was an arguable error of law on the part of the FtT.

[16] We turn then to section 27B(3)(c). The petitioner does not suggest that the application would raise an important point of principle or practice (section 27B(3)(c)(i)).

He maintains that there is "some other compelling reason for allowing the application to proceed" (section 27B(3)(c)(ii)).

[17] In *PR (Sri Lanka)* v *Secretary of State for the Home Department* [2012] 1 WLR 73 at paragraph 23 the Court of Appeal identified the following observations of Lord Dyson JSC in *R (Cart)* v *Upper Tribunal (Public Law Project intervening)* and *R (MR (Pakistan))* v *Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663 at paragraph 131 as being among the main points which emerged from the judgments in *Cart, MR, and Eba*:

> " … the second limb of the test ('some other compelling reason') would enable the court to examine an arguable error of law in a decision of the FTT which may not raise an important point of principle or practice, but which cries out for consideration by the court if the UT refuses to do so. Care should be exercised in giving examples of what might be 'some other compelling reason', because it will depend on the particular circumstances of the case. But they might include (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to at para 99 as 'a wholly exceptional collapse of fair procedure' or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences."

[18] In *JD (Congo)* v *Secretary of State for the Home Department* [2012] 1 WLR 3273 Sullivan LJ delivering the judgment of the Court of Appeal observed:

> "22. We accept Mr Beloff's submission on behalf of PLP [Public Law Project] that it is important not to lose sight of Lord Dyson JSC's warning that 'Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case'. Undue emphasis should not be laid on the need for the consequences to be 'truly drastic'. Lord Dyson JSC was expressly giving two, non-exhaustive, examples. However, the second of his examples makes it clear that very adverse consequences for an applicant (or per Baroness Hale JSC, the 'extremity of consequences for the individual') are capable, in combination with a strong argument that there has been an error of law, of amounting to 'some other compelling reason'.
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> 23. While the test is a stringent one it is sufficiently flexible to take account of the 'particular circumstances of the case'…
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> 26. In our view para 36 of the *PR* case [2012] 1 WLR 73 is consistent with the *Cart* case [2012] 1 AC 663, indeed it would be surprising if it was not. As we read the judgment in the *PR* case, the court was emphasising the fact that, in the absence of a strongly arguable *error of law* on the part of the UT, extreme consequences for the

> individual could not, of themselves, amount to a free-standing 'compelling reason'. The court noted at para 36 that Baroness Hale and Lord Dyson JJSC had 'acknowledged the possible relevance of the extreme consequences for the individual'. It did not suggest that such consequences were irrelevant to the consideration of whether there was a 'compelling reason', it merely stated, in our view correctly, that absent a sufficiently serious legal basis for challenging the UT's decision, extreme consequences would not suffice.
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> 27. We have deliberately used the phrase 'sufficiently serious legal basis for challenging the UT's decision' because the threshold for a second appeal must be higher than that for an ordinary appeal - real prospect of success. How much higher, how strongly arguable the legal grounds for the challenge must be, will depend upon the particular circumstances of the individual case and, for the reasons set out above, those will include the extremity of the consequences of the UT's allegedly erroneous decision for the individual seeking permission to appeal from that decision. It may well be the case that many applicants in immigration and asylum cases will be able to point to the 'truly dire consequences' of an erroneous decision. As Mr Husain [senior counsel for an appellant] pointed out, a decision to remove an asylum applicant from the United Kingdom's jurisdiction to the place where he claims to fear persecution will be irreversible. Just as there is no case for applying a different test to applications for permission to appeal from the Immigration and Asylum Chamber of the UT (see Lord Dyson JSC at para 125 of the *Cart* case [2012] 1 AC 663), so also there is no reason to minimise the significance of the consequences of a decision in the immigration and asylum field merely because legal errors in that field are often capable of having dire consequences for appellants."

[19] We are mindful that if an appellant has lost twice in the tribunals system, that ought almost always to be the end of the road. It ought to be only in rare and exceptional cases that the court ought to conclude that there is a compelling reason for a further appeal or for judicial review. The circumstances ought to be such that they cry out for the matter to be looked at again by the court. The requirement of a compelling reason is a stringent one, but it is sufficiently flexible to take account of the particular circumstances of the case (*JD (Congo* v *Secretary of State for the Home Department, supra*, paragraph 23). It involves the court making an evaluative judgement.

[20] In the present case, we think that it is strongly arguable that the UT erred in law, all as discussed above. That brings us to the consequences for the petitioner if he is indeed an undocumented Bidoon and if he were to be returned to Kuwait. The country guidance in

NM (documented/undocumented Bidoon: risk) Kuwait CG [2013] UKUT 356 details the major difficulties and deprivations faced by undocumented Bidoons, and it is common ground that because of them undocumented Bidoons are at risk of persecution. We are conscious that undue emphasis should not be laid on the need for consequences to be "truly drastic" (*JD (Congo)* v *Secretary of State for the Home Department*, *supra* at paragraph 22). While it is not difficult to posit cases of persecution where the consequences are more extreme than in the present case, the consequences for the petitioner are nevertheless very serious and adverse. In our opinion the combination of the strongly arguable error of law and those serious adverse consequences for the petitioner were he to be returned constitute a compelling reason to allow the petition to proceed. They cry out for permission to be granted.

[21] In the result, we shall allow the appeal, recall the Lord Ordinary's interlocutor of 8 July 2020, and grant permission to proceed.