EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 42
P891/20

Lady Paton
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LADY PATON

in the petition

by

BA

Petitioner and Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for

JUDICIAL REVIEW
of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 11 August 2020 refusing permission to appeal to itself

Petitioner and Appellant: Winter; Drummond Miller LLP (for Latta and Co, solicitors, Glasgow)
Respondent: A. McKinlay; Office of the Solicitor for the Advocate General

10 August 2021

Introduction

[1] In this appeal under section 27D(2) of the Court of Session Act 1988, the Lord Ordinary's decision of 15 December 2020 (refusing to grant permission for the

appellant's judicial review petition to proceed) is challenged. The appellant claims to be at real risk of being trafficked or killed if she is returned to Nigeria. She seeks asylum on that basis. The Home Office does not accept that she has been the victim of trafficking, and has refused her claim.

[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 she 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 S.L.T. 889, para [33]).

[4] While the first ground of appeal in the petition for judicial review is based on an alleged error of law by the Upper Tribunal ("UT"), the second and third grounds focus upon the alleged 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 therefore agreed that it was necessary to examine not only the decision of the UT, but also the decision of the FtT.

Background

[5] The appellant was born on 6 January 1985. She is Nigerian. On 13 January 2017 she claimed asylum in the UK on the basis that she was at real risk of being trafficked (traded for commercial sexual exploitation) or killed as a punishment for disobeying traffickers if she

were returned to Nigeria. On 15 November 2018 the respondent refused her claim. She appealed to the FtT. The evidence before the FtT included the appellant's statements, a psychologist's report, a country information report, and the appellant's oral evidence.

[6] The appellant's account was that she worked in a restaurant in Edo city, Nigeria, for about 2 years. A female customer (known as "Mummy") offered her a better life working in a restaurant in Europe. The appellant was eventually persuaded, and in 2007, aged 22, she took the decision to leave Nigeria. She did not tell her parents. Prior to leaving Nigeria, she was taken to a native doctor who performed various voodoo rituals, including a curse and an oath, convincing her that, by the use of voodoo, they could control her actions, and that, if she failed to comply or if she ran away, she would be killed.

[7] The appellant then travelled from Nigeria to Italy (Verona and Bologna). All the travel arrangements were made for her. The appellant described finding herself forced to work as a prostitute. At one stage, she lived alone with Mummy in her house in Verona. When Mummy moved to Turin, the appellant remained in Verona.

[8] In 2013, the appellant was issued with a Nigerian passport. The appellant explained that the passport application was made by her traffickers, with her co-operation. She had travelled alone to Rome to assist in obtaining the passport.

[9] In 2016 the appellant accidentally became pregnant. One of her clients named Paulo offered assistance. The appellant explained that Paulo paid for and arranged a visa and flight tickets to London and onwards to Glasgow. The appellant described the difficulties of the journey, and ultimately her arrival in December 2016 at Helen Street police station in Glasgow. On 13 January 2017 she made a claim for asylum and humanitarian protection. As noted in para [1] above, her application was refused, and she appealed to the FtT.

The FtT decision and subsequent applications

[10] By decision dated 30 April 2020, the FtT refused her appeal. The FtT judge noted, amongst other things, inconsistencies in the appellant's statements; vagueness in significant aspects of her account; the absence in the psychologist's report of any discussion of the effect of voodoo upon the appellant; a lack of detail concerning the acquisition of a permanent resident permit in Italy; aspects of her account which seemed inconsistent with the claim that she was forced to live in Italy and forced to work as a prostitute (for example, being able to travel alone to Rome to apply for the Nigerian passport, and then having access to that passport); and her delay in claiming asylum on arrival in the UK. Having considered all the evidence, including the appellant's statements, her oral evidence, the psychologist's report, and the country information, the FtT was not persuaded that the appellant's account of having been trafficked to Italy, or of making her way from Italy to the UK, was founded in fact. The tribunal held that there was no entitlement to asylum or to humanitarian protection or to reliance upon the European Convention on Human Rights.

[11] The appellant then applied to the FtT for permission to appeal to the Upper Tribunal (UT). That application was refused. The appellant applied directly to the UT, for leave to appeal. On 11 August 2020 that application was refused. It is that decision of the UT which is the subject of the current petition for judicial review.

The UT decision dated 11 August 2020

[12] The UT decided that the FtT could not be considered to have erred by finding that the account provided by the appellant to the psychologist contained material discrepancies. Similarly the FtT was entitled to form the view that the psychologist did not engage with the question of voodoo. Nothing in the decision suggested that the FtT made adverse findings on

matters which had not been previously raised or should have been anticipated by the appellant and her solicitors. The claim of procedural unfairness was not sufficiently particularised. The FtT had given cogent reasons for finding that the appellant's account lacked credibility. The UT ultimately refused leave to appeal.

Petition for judicial review

[13] In October 2020, the appellant raised the current petition seeking judicial review of the decision of the UT dated 11 August 2020.

[14] By decision dated 15 December 2020, the Lord Ordinary refused to allow the petition to proceed, holding that there was no real prospect of success (section 27B(3)(b) of the Court of Session Act 1988). The Lord Ordinary further held that the petition did not raise any important point of principle or practice, nor was there "some other compelling reason for allowing the application to proceed" (section 27B(3)(c) of the 1988 Act).

Appeal against the Lord Ordinary's refusal

[15] The appellant appealed against the Lord Ordinary's refusal. In written grounds of appeal, three grounds are advanced.

First ground of appeal: wrong test

[16] The UT held that the appellant's grounds of appeal contained no material errors of law, whereas the correct test was whether the grounds contained any "arguable" material errors of law. As a result, the UT had applied the wrong test, and had acted in a procedurally unfair manner by deciding the merits of the appeal (as opposed to the *arguable* merits) without the benefit of oral submissions.

Second ground of appeal: the psychologist's report

[17] The psychologist's report diagnosed PTSD, a condition which gave a reasonable explanation for certain credibility issues, and also for any delay in the appellant's escape; but the FtT gave the report little weight. In particular, the FtT failed to read the report as a whole in terms of whether the psychologist had been aware of the voodoo element.

Third ground of appeal: credibility findings made without adequately evaluating the supportive country information

[18] The country information was broadly consistent with the appellant's account. For example, the information demonstrated what a powerful hold a voodoo curse had on trafficked persons, and that those controlling the appellant need not be in her proximity. The FtT made credibility findings without adequately evaluating the probative value of the evidence in light of the country information (*Horvath* v *Secretary of State for the Home Department* [1999] Imm AR 121 at pp 130-131).

Submissions in the appeal hearing

Submissions for the appellant

[19] On behalf of the appellant, Mr Winter submitted that the UT appeared to have applied the wrong test. In seeking to identify an argument which might have merit, the tribunal had made no reference to "arguability". Thus the tribunal had not carried out its statutory function in a legally correct manner. If that submission was well-founded, there had been a collapse of fair procedure in that the merits had been decided without hearing oral submissions (*PR (Sri Lanka)* v *Secretary of State for the Home Department* [2012] 1 WLR 73). There was a strongly arguable error on the part of the UT, which, when coupled with the

drastic consequences for the appellant in the event of refusal of permission, was such that permission to proceed should be granted.

[20] Presenting the second and third grounds of appeal together, counsel listed inconsistencies noted by the FtT, and submitted that there was a gap or *lacuna* in the FtT decision in that it did not consider whether such inconsistencies could be explained by the appellant's mental health and symptoms. The psychologist's report provided sufficient material to give a reasonable explanation. Reference was made to paragraph 3.14 (concentration difficulties); 3.25 (distress caused by reference to past events, and a tendency to avoid anything which would trigger memories); 4.9 (concern about the appellant's fitness to give evidence, which was relevant in the context of an asylum interview where inconsistencies had occurred); 4.3 (diagnosis of PTSD, depression and anxiety with reference to the appellant's experience of coercive control and traumatic events, all affecting the appellant's perception). While it was not suggested that the FtT judge had failed to take the report into account, he should have gone further and considered whether the mental health issues could explain inconsistencies. Contrary to the FtT's criticism of the report as lacking engagement with the issue of the voodoo curse, the report, read as a whole, demonstrated that the psychologist was well aware of the voodoo element. Reference was made to paragraphs 3.3, 3.4, 3.9, and 4.3 of the psychologist's report.

[21] The gap in the FtT's assessment of the evidence was enhanced when the psychologist's report was taken with the country information report. The two reports provided material which could explain the appellant's change of attitude in 2016, her failure to tell the police about her plight, the absence of detail in her account about her 9 or 10 years in Italy, and the reason why she had not escaped earlier. These matters could all be explained by the degree of coercive control exercised over the appellant. The FtT had taken both

reports into account, but had failed to read them in a holistic manner, and to give them appropriate weight.

[22] The second and third grounds were strongly arguable, and when taken with the truly drastic consequences which faced the appellant were she to be returned to Nigeria, amounted to a legally compelling reason such that the appeal should be allowed, and permission to proceed granted.

Submissions for the respondent

[23] Mr McKinlay for the respondent invited the court to refuse the appeal. No arguable error of law had been identified. In any event, the second appeals test was not satisfied.

[24] In relation to the first ground, the UT dealt with applications for permission to appeal on a regular basis. The test for permission was so familiar to the UT (an expert tribunal) that the inference that the correct test had not been applied because the word "arguable" was not expressly mentioned could not reasonably be drawn. An equivalent proposition might be that a Lord Ordinary had applied a "beyond reasonable doubt" standard of proof in a civil case instead of "on a balance of probabilities". Such a proposition would not be impossible, but some clear indication would be needed. On a proper reading of the decision, the correct test had been applied. It followed that there had been no defect in the procedure.

[25] The second and third grounds concerned issues of fact-finding and the weight to be given to the evidence. No error of law had been identified (such as a failure to have regard to relevant factors; a failure to give adequate reasons; an irrational finding, or a finding which was not open to the tribunal). Such an error was essential for there to be a legally compelling reason for an appeal. The appellant was simply attempting to re-argue the merits of the decision.

[26] It was clear from the decision that the tribunal had assessed credibility in the light of both the psychologist's report and the country information. The weight to be attached to evidence was a matter for the tribunal. The psychologist's report did not state that the appellant's condition might explain the inconsistencies. There was nothing in the report which explained or supported the claimed effect of the voodoo curse on the appellant. The country information report showed that people in Nigeria did suffer from voodoo experiences, but did not assist the appellant in proving that she had indeed had such an experience and had been coerced and controlled by voodoo.

[27] Counsel submitted that there was no real prospect of success, for all the reasons given above. This was not a case which cried out for the intervention of the Court of Session. The appeal should be refused.

Discussion and decision

First ground of appeal

[28] In our opinion, reading the UT's decision as a whole and in context, it is clear that the UT applied the correct test, namely whether any arguable error of law could be identified. The UT was acting in its sifting role, with a view to identifying any arguable ground of appeal which would result in permission to appeal followed by appropriate appeal procedure. The express use of the word "arguable" was not necessary. The UT did not determine the merits, as submitted by the appellant. Rather the UT carried out its proper sifting task seeking to identify any arguable error of law on the part of the FtT. It follows that there was no procedural unfairness. We are not persuaded that there is any merit in the first ground of appeal.

Second and third grounds of appeal

[29] We consider that the FtT gave full and careful consideration to the psychologist's report, the country information, and all other relevant factors, when assessing the appellant's credibility. The tribunal was entitled, for example, to form the view that there was a lack of detail about significant aspects of the appellant's claim; to note discrepancies in the account which she gave to the psychologist; to consider that there was an absence of discussion about the effect of voodoo in the particular circumstances of the appellant's case; and to take the view that country information might be broadly consistent with an applicant's account but nevertheless the applicant's claim should not succeed. The weight to be given to evidence, and ultimately the findings-in-fact made, were properly matters for the tribunal. We are not persuaded by either the second or the third Ground of Appeal.

Decision

[30] In the result, we agree with the Lord Ordinary that section 27B(3)(b) – the requirement that there is a "real prospect of success" – is not satisfied. For completeness we add that we are not persuaded that there is a legally compelling reason in terms of section 27B(3)(c).

[31] The appeal is refused. We reserve all questions of expenses.