EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 55
P960/20

Lord Turnbull
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Appeal

by

AHT (AP)

Petitioner and Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for

Judicial review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 27 July 2020 refusing permission to appeal to itself.

Petitioner and Appellant: Forrest; Drummond Miller Solicitors
Respondent: Pirie; Office of the Advocate General

8 October 2021

Introduction

[1] In this appeal under section 27D of the Court of Session Act 1988, the Lord Ordinary's decision of 18 January 2021 (refusing permission for the appellant's judicial review to proceed) is challenged. The appellant is a 38 year old Sudanese national. He

arrived in the United Kingdom on 9 July 2009 and since then has been engaged in extensive litigation concerning his claim for asylum.

[2] The appellant's third appeal to the First-tier Tribunal was dismissed by decision dated 1 April 2020. An application for permission to appeal that decision was made, out of time, to the Upper Tribunal. On 27 July 2020 the Upper Tribunal refused that application on the basis that the appellant had failed to establish arguable merit in his challenge sufficient to warrant a grant of permission to appeal to the Upper Tribunal, and it was not therefore appropriate to extend the time within which an application for permission to appeal required to be made.

[3] That decision is the focus of the challenge in the present petition for judicial review. In his decision of 18 January 2021 the Lord Ordinary, having held an oral hearing, concluded that the petition had no real prospect of success. He refused to grant permission to proceed.

The appellant's claim for asylum

[4] The appellant's application for asylum was based on his and his brother's claimed involvement in Sudan with the Justice and Equality Movement (JEM), part of the anti-government Sudanese Revolutionary Front, and his claimed involvement with that organisation in the United Kingdom. He gave an account of having been arrested, detained and mistreated whilst in Sudan and of managing to escape. However, the appellant's account of events in Sudan was disbelieved by the immigration judge in his first appeal before the First-tier Tribunal in January 2011. It was accepted that this finding was not open to review.

[5] Furthermore, in overturning a decision of a second First-tier Tribunal, an Upper Tribunal decision in January 2018 held that there was nothing to mark the appellant out as

being a perceived threat by the Sudanese authorities and that even if he were subject to routine commonplace detention the threshold of serious harm was not reached. In arriving at that decision the Upper Tribunal had taken account of the country guidance case of *IM and AI (risks – membership of Beja tribe, Beja Congress and JEM*: (CG) [2016] UKUT 188 (IAC) (14 April 2016).

[6] The focus of the appellant's third hearing before the First-tier Tribunal was the evidence as to his continued involvement with the JEM in the United Kingdom. The immigration judge assessed that evidence at paragraphs 58 to 64 of his decision and concluded that the appellant had not established his claim to hold a position of responsibility within the JEM, or to have held the title of General Secretary in Scotland. He also noted that on the appellant's own evidence he had not been at any protests since May 2018. The judge therefore concluded that the appellant's situation in terms of risk on return had not changed in any significant way since the 2018 Upper Tribunal decision and he would not therefore face a real risk of persecution upon return.

[7] In arriving at his decision the First-tier Tribunal judge took account of the country guidance case of *IM and AI*. The appellant's submission before the Tribunal had been that this case did not apply to him. This was said to be because he came from Western Sudan and the import of the case was restricted to providing guidance in relation to the risk on return for those who had engaged in activity in opposition to the Sudanese regime and who originated from Eastern Sudan.

[8] In advancing this submission reliance was placed on evidence led from a country expert, Dr Peter Verney. The First-tier Tribunal judge took account of the five reports prepared by Dr Verney between January 2013 and January 2020 but rejected the submission on the basis that there was nothing in the country guidance case to indicate that it did not

apply to the appellant. In particular, there was no substance in the argument that it did not apply to him because he came from a different part of Sudan.

Refusal of permission by the Upper Tribunal

[9] In the appellant's application to the Upper Tribunal for permission to appeal he contended that the First-tier Tribunal had failed to take into account the report by Dr Verney concerning events in Sudan since 2018. It was also contended that the judge had erred in law in concluding that he was bound by the country guidance case of *IM and AI*. Based on the evidence of Dr Verney, the proposition was that the country guidance decision was wrongly decided and there was cogent evidence that there had been a significant change in country conditions.

[10] The Upper Tribunal considered that there was no arguable merit in any of the challenges taken against the First-tier decision. It concluded that the country guidance decision was binding upon the First-tier Judge unless evidence warranted a different finding. The judge's rejection of the appellant's claim took all material matters into account and was not shown to be outside the range of findings reasonably open to him on the evidence.

The petition for judicial review

[11] The petition for judicial review seeks to challenge the decision of the Upper Tribunal dated 27 July 2020 which found that the First-tier Tribunal had not erred in reaching its decision of 1 April 2020. The grounds of appeal relied upon in the present hearing are:

1. the conclusion that the country guidance case of *IM and AI* applied to the appellant was incorrect and constituted an error in law because the evidence of

Dr Verney was ignored insofar as he said that the application of the case was restricted to persons from eastern Sudan fearing return to that country; and

2. the error founded upon raised an important point of principle and there was a compelling reason why the decision should be reduced.

The Submissions

[12] The issue raised in this petition is in sharp focus and the competing submissions can be stated shortly.

[13] The appellant contends that the country guidance case of *IM and AI* sets out guidance in relation to the risk on return for those who originated from the east of Sudan, where IM had come from. The appellant originates from the west of Sudan and the submission was that *IM and AI* gave no guidance in relation to any risk which he would face on return.

[14] Dr Verney had given evidence as a country expert in *IM and AI*. In his report of 3 September 2019 he had identified that different considerations ought to apply as between people from eastern Sudan and those from western Sudan. His evidence before the First-tier Tribunal was that the country guidance case did not apply to persons such as the appellant who came from western Sudan.

[15] The decision in the country guidance case was accordingly not a proper comparison with the appellant's case. In any event, it was submitted that if an expert subsequently withdraws his evidence as given before the country guidance tribunal, or qualifies, or restricts the application of what he said, the decision no longer has authoritative status, or at least loses some of its authority. Dr Verney's evidence constituted strong grounds supported by cogent evidence for allowing the First-tier Tribunal judge not to follow the guidance given in *IM and AI*.

[16] On behalf of the respondent, it was noted that First-tier Tribunal judges are required to treat a country guidance determination as an authoritative finding on the country guidance issue identified in the determination. First-tier Judges must follow country guidance determinations unless very strong grounds supported by cogent evidence are adduced for their not doing so – Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal paragraphs 12.2 and 12.4, *R (SG (Iraq))* v *SSHD* [2013] 1 WLR 41.

[17] Dr Verney's evidence as to the proper interpretation of the country guidance decision was irrelevant, that being a matter of law for the court. The proposition that Dr Verney's evidence before the First-tier Tribunal could entitle the judge at that hearing to conclude that the country guidance was no longer authoritative was entirely misconceived. The appellant had failed to identify any part of the decision in the case of *IM and AI* which suggested that the guidance given did not relate to a returnee who came from his part of Sudan.

[18] There was no basis upon which it could be said that the First-tier Tribunal had erred in law and the Upper Tribunal had been correct in so holding. The petition did not raise an important point of principle and practice and there were no other legally compelling reasons for allowing the application to proceed.

Discussion and decision

[19] The country guidance case of *IM and AI* bears in its title to identify and prescribe guidance in relation to risks associated with membership of the Beja Tribe, the Beja Congress *and the JEM* (our emphasis). The first paragraph of the headnote makes it clear that guidance is being given in relation to the circumstances in which "a person" may be at risk

on return to Sudan. This is the country guidance issue identified in the determination. Paragraphs 8 and 9 draw a distinction between a claim based on events in Sudan and a claim based on events outside Sudan.

[20] The various reports provided by Dr Verney repeatedly seek to emphasise his opinion as to the plausibility and reliability of the appellant's account of having been detained and mistreated in Sudan. As late as his third report, dated 3 September 2019, he was continuing to reiterate this despite the fact that it had been settled as disbelieved by the decision of the First-tier Tribunal dated January 2011. He also continued to refer to the appellant's involvement with the JEM in the United Kingdom and the extent to which the Sudanese authorities would conduct surveillance on opposition groups based abroad. In the same report he criticises and disagrees with the First-tier Tribunal decision of January 2011 and he identifies what he calls "a serious misapprehension" in the decision of the country guidance Tribunal decision. In his report of 8 January 2020 Dr Verney criticises the Upper Tribunal decision of 2018 for failing to understand or take account of the behaviour of the Sudanese regime in various ways, he again asserts that the country guidance Tribunal seriously misunderstood aspects of the behaviour of the regime, and in effect asserts that the decision arrived at was wrong.

[21] Counsel for the appellant's submission was that a country expert witness who had given evidence before a country guidance tribunal is entitled to inform a subsequent tribunal that the country guidance decision was wrong, or was entitled to inform a subsequent tribunal as to the scope of that country guidance decision. He was however, unsurprisingly, unable to offer any authority in support of this proposition. It is, in our view, quite obvious that such evidence would be inadmissible. The proper interpretation of *IM and AI* is a matter of law for this court. It is not a matter upon which Dr Verney is

competent to give opinion evidence. Insofar as he purported to give such evidence it was clearly inadmissible.

[22] In any event, we are not satisfied that the premise of counsel for the petitioner's submission - *viz*. that the decision in *IM and AI* turned on Dr Verney's evidence – is well founded. Dr Verney was but one of a number of witnesses who gave evidence in that case. The tribunal considered a range of reports and documents prepared by various international organisations and took account of information provided by various embassies. The conclusions which the tribunal arrived at were based upon its assessment of the whole evidence led, including the extent to which any evidence was found to be of greater value, or to be worthy of more weight, than other testimony. We note, for example, that at paragraph 249 of the decision the tribunal rejected the approach adopted by Dr Verney in his reports concerning risk on return for failed asylum seekers and declined to include his evidence on this subject as part of the country guidance.

[23] On our reading of *IM and AI* the country guidance provided is not limited to those originating from specific regions of Sudan. At paragraph 209 onwards the Tribunal considered and analysed the evidence it had heard concerning the risk facing those involved in *sur place* activities, without applying any such distinction. The guidance section of the decision begins at paragraph 227 where the first statement made is:

> "There must be evidence known or likely to be known to the Sudanese authorities which implicates the claimant in activity which they are likely to perceive as a potential threat to the regime to the extent that, on return to Khartoum, there is a risk to the claimant that he will be targeted by the authorities. The task of the decision-maker is to identify such a person and this requires as comprehensive an assessment as possible about the individual concerned."

[24] The appellant *IM* was a member of the Beja Tribe of Sudan. In his case the Tribunal accepted that he had been an active member of the Beja Congress and an active member of

the JEM in the United Kingdom. He was treated as a credible witness whose activities were the genuine expression of his political beliefs. The Tribunal concluded that were the Sudanese authorities to have the facts about him, as they were found to be, then this would be sufficient to result in his being a target for the National Intelligence and Security Servic (NISS) and to place him at risk of serious harm. His asylum appeal was therefore allowed.

[25] In contrast, the appellant's evidence as to the extent of his involvement with the JEM was rejected. He had no other involvement beyond attending a demonstration in 2018. It was not accepted that he would be at risk upon return. In the lengthy history of the appellant's asylum claims, the risk he has consistently relied upon was based on his association with the JEM. He does not appear to have advanced a claim that he was at risk as a returnee on account of his geographical origin. Nor was our attention drawn to any passage within any of Dr Verney's reports which identified a particular risk factor for the appellant based on his area of origin. The First-tier Tribunal did not fail to have regard to Mr Verney's evidence. They had regard to it but they did not accept it. In our opinion there is no real prospect of the petitioner succeeding in showing that the First-tier Tribunal erred in law in rejecting the suggestion that Dr Verney's evidence gave rise to the very strong grounds supported by cogent evidence which would have been necessary to justify a decision not to follow *IM and AI*.

[26] Counsel for the appellant accepted that the appellant fell to be viewed as a failed asylum seeker, given that his various accounts of association with the JEM had been rejected. Advice concerning any risk facing failed asylum seekers is given in the case of *IM and AI* at paragraph 216 onwards. At paragraph 225 the Tribunal states:

> "It is our firm conclusion that a failed asylum seeker, including an individual that had been subject to investigation by the immigration authorities on return would not be at risk of further investigation by NISS on that basis alone."

[27] At paragraph 204 of the decision the tribunal explained what they concluded on the basis of the evidence given by Dr Verney in relation to supporters of the JEM.

> "What we do not take his evidence to mean is that every such supporter of JEM is at risk and the nature and scope of his activities is bound to be a proper subject of enquiry. Such a person may be at risk but to decide whether he is (or has established to the lower standard that there is a real risk of his being treated as such) requires an overall assessment of the case. This strikes us as moving away from a check-list of those at risk (with the exception of non-Arab Dafuris) to a much greater emphasis on a rounded assessment of all the material including the effect of positive or adverse credibility findings."

[28] That, it seems to us, is precisely the approach which the judge in the most recent First-tier Tribunal adopted. Having rejected the evidence relied upon by the appellant in the hearing before him he was bound to conclude that there was no risk to the appellant on return. There is no basis in Dr Verney's evidence, or any other reason to think that the appellant's geographical origin introduces any further risk factor. The Upper Tribunal was correct to reject the criticisms of the First-tier Tribunal decision.

[29] For these reasons we are satisfied that the Lord Ordinary's decision of 18 January 2021 was unimpeachable. He was correct to conclude that the petition had no real prospect of success, that the second appeals test was not satisfied, and that permission to proceed ought to be refused. The appeal will be refused.