EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 19
P192/21

Lady Paton
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LADY PATON

in the Appeal

by

MARIWAN QUADIR HASSAN

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 4 August 2020 refusing permission to appeal to itself

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

19 April 2022

[1] The appellant is an Iraqi Kurd born on 3 September 1981. He arrived in the UK on 4 October 2016 with his partner Kazhal Mohammed Saeed ("K"). He sought asylum on the

ground that, if returned to Iraq, he would be at risk of an honour killing because of his relationship with K. His application was refused.

[2] After that refusal, the appellant was unsuccessful in appeal procedures before a First-tier Tribunal ("FtT"), and, having lodged further submissions, before a second FtT. Permission to appeal against the decision of the second FtT was refused by the FtT and by the Upper Tribunal ("UT") on 4 August 2020. The appellant then raised the present petition for judicial review of the decision of the UT dated 4 August 2020, refusing permission to appeal to itself. After an oral hearing on 3 August 2021, the Lord Ordinary refused the appellant permission to proceed with the petition. The appellant now appeals that ruling on the basis that the Lord Ordinary erred in law. Although formally the challenge is directed to the decision of the UT, the practical focus of the appeal is the second FtT's treatment of K's evidence. K gave evidence, both written and oral, at the second FtT hearing, but had not given any evidence at the first FtT hearing.

The appeal

[3] 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.

[4] 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 SC 515; 2020 SLT 889, paragraph [33]). We must decide for ourselves whether the petition has a real prospect of success.

K's evidence

[5] At the first FtT hearing before Judge Green on 19 May 2017, neither the appellant nor K gave oral evidence. The appellant relied upon a brief witness statement dated 15 May 2017. Judge Green concluded at paragraph 14 of the determination:

> "On the evidence provided, I am not satisfied that the Appellant has established that he would be at risk of serious harm at the hands of his partner's family if he was to return to the IKR and live in Erbil … I am simply saying that the Appellant has not discharged the burden of proof …"

[6] At the second FtT hearing on 21 January 2020, both the appellant and K gave oral evidence (including adopting their witness statements). K was by then the appellant's wife, their marriage having taken place on 16 January 2020. K's evidence confirmed the hostility shown by her family to both herself and the appellant on the basis that she had disgraced her family by consorting with someone of lower status. She spoke of an attack by her family on the appellant, causing stab wounds; the powerful position of her family; and the risk that if she and the appellant were returned to Iraq, they would be traced by her family and subjected to honour killings.

[7] At that second FtT hearing, the appellant also relied upon a medical report by Dr Dignon concerning an examination of the appellant on 21 November 2019. Dr Dignon confirmed that injuries to the appellant's forearm and thigh were consistent with his account of being stabbed by K's family, although they were also consistent with his having had an accident.

[8] In addition, the appellant relied upon the terms of an undated letter from his brother, warning of threats from K's family.

The guidance in *Devaseelan*

[9] Where evidence was not led at a first FtT, but is subsequently led at a second FtT, the following guidance has been given in the authoritative decision of *Devaseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1, paragraphs 40 and 42:

> "(4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection. An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility …
>
> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. We think such reasons will be rare …"

***Devaseelan* and the second FtT**

[10] The guidance in *Devaseelan* was applied by the second FtT in its determination promulgated on 25 March 2020 (dated 10 March 2020). After setting out the parties' submissions in paragraphs 31 to 38, the FtT noted in paragraph 39 that:

> "39. In this appeal the appellant seeks to depart from findings [in] fact made in a previous decision. Such a situation is governed by the very detailed and specific guidance given by the IAT in *Devaseelan* v *Secretary of State for the Home Department* [2002] UKIAT 702, [2003] Imm AR 1."

[11] After quoting relevant passages from *Devaseelan;* noting that the first FtT did not have the benefit of hearing oral evidence from the appellant (having only his brief witness statement); and making one or two further preliminary observations, the second FtT in paragraphs 44 to 48 stated:

> "44. Applying the *Devaseelan* guidelines, my starting point when considering this claim must be that the appellant failed to establish in 2017 [i.e. before the first FtT] that he was at risk of persecution or inhuman or degrading treatment.
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> **Assessment of credibility**
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> 45. It has been accepted that the appellant is from Iraq, but his claim to be at a real risk of persecution from non-state actors on account of his relationship with the lady who is now his wife was not accepted. Credibility is in issue in this appeal.
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> 46. I bear in mind that I can and should take account of facts that have happened since Judge Green's determination was promulgated. I bear in mind also that facts personal to the appellant that were not brought to the attention of Judge Green, despite being relevant to the issues before him, should be treated by me with the greatest circumspection. I had all the *Devaseelan* guidelines in mind when considering this appeal …
>
> 48. I considered all the evidence in the round …"

[12] The second FtT then assessed all the evidence – including K's evidence – in the round in the light of the guidelines in *Devaseelan*. Ultimately the FtT concluded, at paragraph 60:

> "60. Looking at all the evidence in the round, I find that the appellant has failed to establish even to the low standard required that he would be at risk of serious harm at the hands of his partner's family if he were to return now to the IKR. I consider that the conclusions reached by Judge Green in paragraph 14 of his determination stand good today. I accept that the appellant has scars on his arm and thigh that are highly consistent with the account he gives, but those scars could have been caused by another assault or as a result of accident."

[13] In his Note dated 24 August 2021, giving reasons for refusing permission to proceed, the Lord Ordinary also referred to *Devaseelan*, stating:

> "[17] … I consider that, when the second decision of the Ft-T is properly considered in its entirety, it cannot be said that the Ft-T has erred in its treatment of the petitioner's wife's evidence. It is apparent from the decision that that evidence has been dealt with appropriately in the light of the *Devaseelan* guidelines.
>
> [18] Furthermore, even if argument could be advanced to the effect that the Ft-T's treatment of this evidence had not been properly articulated, in my opinion such an argument falls far short of being strongly arguable with very high prospects of success required by section 27B(3)(c)."

Submissions for the appellant

[14] Counsel for the appellant submitted that the Lord Ordinary had erred in refusing permission to proceed. The UT had erred in law by failing to recognise that the second FtT had arguably erred in law in failing to have proper regard to K's evidence (cf paragraph 14 of *Alshammari* v *Secretary of State for the Home Department* [2021] CSIH 26). The second FtT gave no indication how K's evidence was viewed. K had not been "adding facts" in terms of *Devaseelan,* but rather "providing corroboration". Even if that argument was not accepted, counsel submitted that just because K's evidence had to be treated with the greatest circumspection in terms of the guidance in *Devaseelan* did not mean that the court did not have to determine the credibility and reliability of that evidence (an approach properly adopted in relation to the appellant's brother's letter). The second FtT's determination left one wondering how K's evidence had been dealt with: if not found credible and reliable, why not? If little weight had been given to it, why had that approach been adopted (bearing in mind that the first FtT had expressly commented at paragraph 14 that it would have been helpful to hear from the appellant's partner)? Some sort of finding about K's evidence was needed. If her evidence had been found credible and reliable, greater weight might have been given to the evidence of the doctor and the appellant's brother.

[15] Counsel accepted that no good reason had been given in evidence to explain why K's evidence had not been led at the first FtT. But an assertion by the second FtT that the evidence had been considered "in the round" did not resolve the error which had occurred (cf *S (AAS)* v *Secretary of State for the Home Department* 2011 SLT 1058 paragraph 60).

[16] It followed that the Lord Ordinary had erred in refusing permission to proceed. There was a real prospect of success, and the strongly arguable error in law taken with the truly drastic consequences for the appellant were he to be returned to Iraq satisfied the two

tests in section 27B. The Lord Ordinary's interlocutor of 3 August 2021 should be recalled and permission granted for the petition to proceed.

Submissions for the respondent

[17] Counsel for the respondent invited the court to refuse the appeal. The second FtT had made clear in paragraph 46 of its determination that all aspects of *Devaseelan* had been considered. Specific reference was made (appropriately) to proposition (4), but also to proposition (6) which was applicable in that K's evidence had been available to the appellant at the time of the first FtT hearing. No "very good reason" had been advanced for not leading her evidence at the first FtT hearing (proposition (7) of *Devaseelan*). Against that background, the second FtT properly considered all the evidence in the round, including K's two witness statements (which she had adopted in her oral evidence: paragraph 28). It was not necessary for the second FtT to narrate every aspect of her evidence which matched the appellant's evidence, or to give a detailed account of her evidence and its effect. Unlike the case of *Alshammari* (*supra*), K was not an independent witness, nor did she provide objective evidence. Applying the guidance in *Devaseelan*, the second FtT had been entitled to form the view that the appellant's claim, as now supported by K's evidence, had failed to persuade him.

Discussion and decision

[18] The sole issue relied upon before us was the assessment of K's evidence by the second FtT. While it was not disputed that the guidance in *Devaseelan* should be applied, it was submitted that K's credibility and reliability should have been fully and properly assessed. If her evidence was rejected, reasons should have been given. Counsel for the

appellant emphasised that were K's evidence to be accepted, it would provide significant support for the evidence of the appellant (concerning the hostile behaviour of K's family, including the stabbing of the appellant); the evidence of Dr Dignon in relation to the appellant's injuries; and the evidence provided by the appellant's brother's undated letter warning the appellant about K's family's threats to find and kill the appellant and K were they to return to Iraq.

[19] We consider that K's evidence (concerning the hostility shown by her family to both herself and the appellant; the family's powerful position; the physical attack upon the appellant as a result of which he suffered stab wounds; and K's fear that, were she and the appellant to return to Iraq, her family would be able to trace them and kill them) falls squarely within the type of evidence referred to in proposition (4) of *Devaseelan.* Accordingly the second FtT required to treat her whole evidence "with the greatest circumspection" unless there was some very good reason why her evidence was not led before the first FtT (propositions (4) and (7) of *Devaseelan*). No such reason was given. Applying the guidance in *Devaseelan,* the second FtT was entitled to assess K's evidence as a whole, weigh it up, add it to all the evidence to be considered in the round, and ultimately conclude that the tribunal was not persuaded. In a case such as this, it is not necessary for the second FtT to analyse, weigh up, and articulate every element of K's evidence and the reason why it was not accepted. The decision in *Alshammari* (*supra*) does not assist the appellant, as in that case an independent witness (not a spouse) was giving evidence before a first FtT, not a second FtT. We have found no error of law on the part of the second FtT in the assessment of K's evidence. It follows that the UT was correct to refuse permission to appeal and that the present application has no real prospect of success. In any event, the

case does not raise any important point of principle or practice and there is no other compelling reason to allow the petition to proceed.

Disposal

[20] For the reasons given above, we conclude that the test in section 27B(3) is not satisfied. We refuse the appeal. We reserve all questions of expenses.