



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 51
P558/20

Lady Paton
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LADY PATON

in the Appeal

by

BFH (AP)

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 28 April 2020 refusing permission to appeal to itself.

Petitioner and Appellant: Winter; Drummond Miller LLP

Respondent: Maciver; Office of the Solicitor for the Advocate General

5 October 2021

Introduction

[1] In this appeal under section 27D(2) of the Court of Session Act 1988, the Lord Ordinary's decision of 11 December 2020 (refusing permission for the appellant's judicial review petition to proceed) is challenged. The appellant claims to be at real risk of

being the victim of a male honour killing if he is returned to Iraq. He seeks asylum on that basis. The Home Office does not accept that he is at real risk of harm, and has refused his claim.

[2] In refusing permission to proceed, the Lord Ordinary was exercising the jurisdiction prescribed by sections 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 S.L.T. 889, paragraph [33]).

[4] While the ground of appeal in the petition for judicial review (ground of appeal 1 sub-paragraphs (i) to (v)) is based on an error of law by the Upper Tribunal (“UT”), certain sub-paragraphs 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 paragraph [9] of *Waqar Ahmed v Secretary of State for the Home Department* [2020] CSIH 59). Counsel 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 1 October 1994. He is a citizen of Iraq. He arrived in the UK on 13 November 2018, and claimed asylum on the basis that he was at real risk of being the victim of a male honour killing if he were to be returned to Iraq in consequence of a forbidden relationship with a woman SB, the daughter of a prominent military official. On

23 August 2019 the respondent refused his claim. He appealed to the FtT. The evidence before the FtT included the appellant's statements, photographs, a report by Dr Fateh dated 6 November 2019 concerning honour killings in Iraq, country information notes dated August 2017 and February 2019, and the appellant's oral evidence.

[6] The appellant's account was that he ran a corner shop. He began a relationship with a female customer, BS. They kept their meetings and communications secret. After some time, the appellant's family approached BS's family seeking permission to marry. That was refused. The appellant described a continuing clandestine relationship, which he said led to his being attacked and beaten by a brother of BS and two companions. When he heard from BS that her father would kill him, he and his family decided that he should leave Iraq for his own safety. He left Iraq on 21 July 2018. He arrived in the UK on 13 November 2018 and made a claim for asylum and humanitarian protection. As noted in paragraph [1] above, his application was refused. He appealed to the FtT.

The FtT decision and subsequent applications

[7] By decision dated 4 February 2020, the FtT refused his appeal. The FtT judge accepted the opinion of Dr Fateh regarding the risks that can arise for men in Iraq as a result of honour killings; accepted that the appellant owned and operated a small grocer's shop; accepted that he met BS at his shop in October 2016 and began a relationship with her; and accepted that BS was the daughter of a senior military officer in the PUK. However in paragraphs 32 to 34 the judge concluded:

"32. ... Given the inconsistencies in the account provided by the appellant, and my adverse findings on credibility, I am unable to reach any conclusion as to whether or not her family were aware of this relationship.

33. I do not accept, even to the lower standard of proof, three important aspects of

the appellant's account. Firstly, that his mother and father and other family members approached SB's parents in late 2017 and early 2018, proposing marriage. I take this view due to the inconsistencies in the appellant's account of when those approaches were made and how many approaches there were. Secondly, that he was attacked by SB's brother and others. I take this view as he has given two very different accounts of this incident, including when it took place. Thirdly, that he was advised by SB that her father had become aware of their continued relationship and intended to seriously harm both of them. I therefore also reject his claim that he and his family fled Iraq in fear of his life, because of this threat. I take this view for three reasons. Firstly, I do not regard as credible the appellant's account that neither he nor SB had any discussion regarding going into hiding together or even establishing a means of maintaining contact. Secondly, his failure to take any steps following their separation to establish contact with her or to check whether she was safe. Thirdly, his claim that his family fled Iraq at around the same time as him is directly contradicted by the information he provided at the screening interview.

34. I have accepted the appellant was involved in a relationship with SB. I have accepted that she is the daughter of a military figure in the PUK. However, I do not consider the appellant is at any risk from KB [the father], should he be returned to Iraq. I therefore refuse his appeal on asylum grounds."

[8] Paragraph 35 then deals with the question of the appellant's passport, ID card or other Iraqi documentation, with which this appeal is not concerned, holding that there was no entitlement to humanitarian protection or to reliance upon the European Convention on Human Rights.

[9] The appellant applied to the FtT for permission to appeal to the Upper Tribunal (UT). That application was refused. The appellant applied directly to the UT. On 28 April 2020 that application was refused. It is that decision which is the subject of the current petition for judicial review.

The UT decision dated 28 April 2020

[10] The UT decided that it was open to the FtT to find that the appellant's evidence had been inconsistent in the important respects identified; that the documents tendered had plainly been taken into account by the FtT in reaching conclusions as to credibility; that it

was open to the FtT to draw an adverse inference from the fact that the appellant provided in his screening interview a detail which he subsequently omitted from his claim; that the findings reached by the judge were unarguably adequate to dispose of the appeal without a specific finding about SB's family's awareness; that the judge demonstrably bore in mind the evidence given by Dr Fateh; and that his finding that the appellant could return safely to Iraq was unarguably open to him. Permission to appeal was refused.

Petition for judicial review

[11] The appellant raised the current petition seeking judicial review of the decision of the UT dated 28 April 2020.

[12] By decision dated 11 December 2020, the Lord Ordinary noted that it was not suggested that the petition raised any important point of principle or practice. He 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), and that there was no "other compelling reason for allowing the application to proceed" (section 27B(3)(c) of the 1988 Act).

Appeal against the Lord Ordinary's refusal

[13] The appellant appealed against the Lord Ordinary's refusal. In written grounds of appeal, one composite ground is advanced, subdivided into five sub-paragraphs (i) to (v). The composite ground of appeal submits that "[t]here is a real prospect that the UT erred in law when refusing permission to appeal... by failing to recognise that the FtT had arguably erred in law as outlined in the petition". The arguments noted in the written grounds of appeal were presented at the appeal hearing.

Submissions at the appeal hearing

Submissions for the appellant

[14] On behalf of the appellant, Mr Winter submitted that the appeal should be allowed, the Lord Ordinary's interlocutor recalled, and permission to proceed granted. There was a real prospect of success, and a compelling reason for allowing the application to proceed in the form of strongly arguable errors of law, and truly drastic consequences for the appellant were he to be returned to Iraq. A legally compelling reason could be established if the reasons given by the UT were generic, suggesting that the UT had not adequately engaged with some or all of the grounds (*TJM, petitioner* [2015] CSOH 131).

[15] The first ground of appeal relied on a *lacuna* in the FtT's judgment relating to the medical documents. The documents disclosed that the appellant attended hospital and underwent an MRI scan of his right knee. The documents were *prima facie* evidence supporting the appellant's account of going to hospital, and should have been treated as such. The second ground of appeal was that there was no true inconsistency in the accounts concerning the whereabouts of the appellant's family: the appellant's position was that his family "were going to Iran", not that they "had gone to Iran". The third ground concerned case-law establishing that caution should be exercised wherever there was a discrepancy between what the appellant said at the screening interview, and what he said at later stages in the appeal procedure. The FtT had failed to exercise such caution. In relation to the fourth ground, as set out in the appellant's grounds of appeal, the FtT should have made a finding about whether or not the appellant's girlfriend's family knew about the relationship. The fifth ground concerned the inadequate treatment of Dr Fateh's report. The tribunal's final summary in paragraph 33 might become indefensible, depending on which (if any) of the above errors the court decided were well-founded. The appellant's submission was that the

UT had erred in law by failing to identify all or any of the above defects as being arguable errors of law on the part of the FtT.

Submissions for the respondent

[16] Mr Maciver 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.

[17] The first ground of appeal was a disagreement of fact. The tribunal had clearly taken the medical documents into account, but had found them of no assistance in reaching a view about the nature of the injuries, and how they had been sustained. Such a matter was one for the fact-finder. The UT had not erred in law in rejecting this ground. The second ground concerned discrepancies in the appellant's accounts concerning the whereabouts of his family. The appellant's accounts (given during the screening interview on 13 November 2018, the asylum interview on 26 July 2019, and the hearing before the FtT on 9 and 20 January 2020), contained plain inconsistencies. The FtT was entitled to rely on such inconsistencies, and had made no error of law. In relation to the third ground, it was accepted that where an interviewee answered questions at a screening interview (SCR), when tired and having travelled a long journey, a tribunal should be slow to criticise a lack of detail where more detail was offered at a later stage (*YL (rely on SEF) China* [2004] UKIAT 00145, para 19). However the present case was the opposite: details were offered at the SCR but departed from in later accounts. In those circumstances it was legitimate to compare the SCR with later accounts, and the UT had not erred in law. As for the fourth ground, the key issue was whether there was a real risk for the appellant. The FtT in paragraph 33 relied upon three separate threads leading to a conclusion that there was no such risk. In so doing, the FtT was carrying out a legitimate fact-finding exercise, which the UT was entitled to uphold.

The fifth ground had not been advanced with any force. The tribunal judge stated in terms that he took into account and accepted Dr Fateh's expert report, but did not find that report assisted in establishing the circumstances of the appellant's particular case. In upholding that approach, the UT had not erred in law. The appeal should be refused, and the court should refuse permission to proceed.

Discussion and decision

First ground: inadequate findings relating to the appellant's medical documents

[18] The FtT accepted the medical documents, and took them into account when making findings in fact. When deciding what had been established, the FtT was entitled to note limitations in the documents, namely that they did not assist in establishing what injuries were suffered, and how they came about. In so doing, the FtT was carrying out a proper fact-finding exercise. The FtT did not err in law. Nor did the UT err in law when rejecting this ground of appeal.

Second ground: no true inconsistency concerning the whereabouts of the appellant's family

[19] There were undoubtedly inconsistencies in the appellant's accounts concerning the whereabouts of his family. When making findings in fact, including making decisions about credibility and deciding what evidence to accept, what to reject, and what weight to give to evidence which was accepted, it was for the FtT to assess these inconsistencies, and to decide what to make of them. In so doing, the FtT made no error of law, nor did the UT when finding no merit in this ground of appeal.

Third ground: failure to exercise caution in relation to omissions or inconsistencies arising from the screening interview

[20] We accept that there is authority for the proposition that a tribunal should be slow to criticise a lack of detail at a screening interview (SCR) when more detail is offered at a later stage (see, for example, *YL (rely on SEF) China* [2004] UKIAT 00145, para 19). However the circumstances of the present case were different. The appellant offered certain details at the screening interview, but departed from them in subsequent accounts. In these circumstances we agree with counsel for the respondent that it was legitimate for the FtT to compare the account given at the screening interview with later accounts. We are not persuaded that there was any error of law on the part of the FtT, or on the part of the UT in rejecting this ground of appeal.

Fourth ground: whether a specific finding should have been made about whether the appellant's partner's family were aware of the relationship

[21] The crucial issue was whether the appellant faced a real risk of harm were he to be returned to Iraq. In paragraph 33 of its decision, the FtT found as a fact that there was no such risk, setting out the reasoning leading to that conclusion. The approach adopted by the FtT cannot be criticised. We have been unable to identify any error of law on the part of the FtT or on the part of the UT in rejecting this ground of appeal.

Fifth ground: inadequate treatment of Dr Fateh's report

[22] The FtT clearly accepted the guidance contained in Dr Fateh's report, and took that guidance into account when reaching a view based on all the evidence in the case. We have not been persuaded that the FtT's treatment was inadequate, or that any error of law has

occurred.

Postscript

[23] We note the appellant's position in sub-paragraph (vi) that if some or all of the grounds of appeal were held to be well-founded, there must be a re-assessment of the issue concerning the lack of a passport and identification documents.

Decision

[24] In our view, the arguments presented on behalf of the appellant have no merit. We are not persuaded that there was any error of law on the part of the UT. It follows that we are not satisfied that the application has a real prospect of success, or that the appellant has made out a legally compelling reason for allowing the application to proceed (*PR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 73 paragraphs 35 and 36). The requirements of section 27B(3)(b) and (c) have not been satisfied, and the appeal is refused.