EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 63
P876/20

Lady Paton
Lord Turnbull
Lord Woolman

OPINION OF THE COURT

delivered by LORD TURNBULL

in the appeal

by

COF (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 4 August 2020 refusing permission to appeal to itself

Petitioner and Appellant: Winter; Drummond Miller LLP
Respondent: G Middleton; Office of the Solicitor for the Advocate General

16 November 2021

[1] In this appeal under section 27D of the Court of Session Act 1988, the Lord Ordinary's decision of 9 April 2021 (refusing permission for the appellant's judicial review to proceed) is challenged.

[2] The appellant is a 32 year-old Iraqi national from Kurdistan who claimed asylum in the United Kingdom on 28 March 2019. On 10 October 2019 the respondent refused that claim. The appellant's subsequent appeal to the First-tier Tribunal was refused by decision dated 24 April 2020. By decision dated 4 August 2020, the Upper Tribunal refused the appellant's application for permission to appeal to it. The present petition for judicial review seeks to challenge that decision.

[3] The circumstances underpinning the appellant's claim for asylum can be stated shortly. He claims that in December 2018 he worked as a police officer at an oil refinery near Sulaymaniyah, a city in the Kurdistan region of Iraq, when, on the evening of 22 December, he and some colleagues attempted to prevent the unauthorised removal of oil from the refinery by the drivers of five oil tankers who claimed to be operating under the instructions of the Patriotic Union of Kurdistan (PUK). After some time he received a telephone call from a superior officer who instructed that the tankers were to be permitted entry.

[4] The appellant claims that later, apparently on the evening of 1 January 2019, he was walking to a coffee shop with one of his colleagues when a motor car drew up beside them and one of the occupants shot the colleague dead. The appellant managed to escape by running away and fled from Iraq with the assistance of family members the next day.

[5] On the basis of these incidents the appellant claims to have a well-founded fear of persecution if returned to Iraq, the premise being that he uncovered corruption being carried out by the PUK and, having voiced his opposition to this, his life has been put in danger. In support of his claim he relied upon a document bearing to be a warrant for his arrest issued on 10 March 2019 and a country expert report prepared by Dr Rebwar Fatah. The fundamental difficulty which the appellant faces, and which he largely ignores in the current proceedings, is that his account of events at the oil refinery was disbelieved by the

First-tier Tribunal judge for reasons which are clearly articulated and which are not, and cannot be, challenged by way of appeal.

The basis of the judicial review

[6] The petition for judicial review proceeds upon the basis that the Upper Tribunal erred in law by failing to recognise that the grounds of appeal disclosed arguable errors of law. This proposition is advanced by an examination of the approach taken by the First-tier Tribunal judge. Three essential complaints are made:

> The First-tier Tribunal gave inadequate reasons for rejecting (as it is put) the evidence of the arrest warrant relied upon by the appellant.
>
> The First-tier Tribunal misapplied the law in failing to recognise that there was a duty on the respondent to verify the content of the arrest warrant relied upon by the appellant.
>
> The First-tier Tribunal erred in its approach to the assessment of the country expert report and its findings in relation to that report were inadequately reasoned.

The Lord Ordinary's decision

[7] The Lord Ordinary saw no valid criticism of the First-tier Tribunal judge's assessment of the arrest warrant. His view was that there was no nexus between this document and the appellant's claim of being at risk because he had attempted to prevent theft by the PUK of oil. Neither did he see any valid criticism of the approach taken to the country expert report. He observed that it had nothing to say about the vulnerability of the appellant to persecution. He noted that whilst the appellant was a police officer the report advised that activists and journalists were at risk. The report did not shed light on the

appellant's claim that his life would be at risk from the PUK. The Lord Ordinary noted that the First-tier Tribunal judge rejected the appellant's account on the basis of inconsistencies in his evidence and that this assessment was uninfluenced by the approach taken to the documents. The Lord Ordinary accepted that there would be a duty on the respondent to investigate documents to determine their provenance if they were central to the issue to be decided.

The First-tier Tribunal decision

[8] The First-tier Tribunal judge concluded that the appellant had failed to prove his account to the standard of proof applicable. He did not accept the appellant's account of attempting to prevent the unauthorised removal of oil for the reasons which he gave. He expressed a degree of concern as to the arrest warrant and concluded that it could be given little weight.

[9] In relation to the country expert report, the judge concluded that it contained no independent or underlying support for the general proposition that the PUK would be likely to organise theft from an oil refinery. He found the suggestion difficult to reconcile with the evidence that the oil industry was strictly controlled by the Kurdistan Democratic Party (KDP) and that the PUK was provided with a share of that revenue. He accepted the expert's opinion that journalists and activists who had raised voices about corruption had been the subject of attacks and killings by the PUK. However he concluded that those who had been subject to attack came from groups quite dissimilar to the appellant and did not share his background. The report did not address the appellant's individual claim in any detail and the judge was not persuaded that he could give it any more than minimal weight.

Submissions

Appellant

[10] Mr Winter submitted that the First-tier Tribunal judge had provided no good reason for giving the arrest warrant little weight. The appellant had explained that the warrant was issued because the PUK authorities had not been able to find him. It was to be assumed that the PUK was using it to pursue the appellant because of what he had seen.

[11] The warrant purported to be addressed to members of the department of judicial arrest, police forces and "Anyone receiving this arrest warrant". It was the broad scope of this last aspect of the warrant which was of concern to the First-tier Tribunal judge. That of itself provided no good reason for giving the document little weight. Reliance was placed on what had been said by Lord Malcolm in the case of *AR* v *SSHD* [2017] CSIH 52 in delivering the opinion of the court at paragraph 34. The Lord Ordinary had been wrong to state that there was no nexus between this document and the appellant's claim.

[12] Separately, the arrest warrant relied upon was central to the issue at the heart of the appellant's claim. There was accordingly a duty on the respondent to verify the arrest warrant, a step which could easily have been undertaken. This was all the more important since the warrant appeared to be for an offence which carried the death penalty.

[13] The First-tier Tribunal judge had given inadequate reasons for his assessment of the country expert report. The report had not stated that it was only activists and journalists who are at risk. Read properly, the report indicated that those who were at risk were persons who uncovered and exposed corruption. The report had not stated that the appellant's claim was unfounded and the Lord Ordinary had been wrong in his view that the report had nothing to say about the vulnerability of the appellant to persecution. The

Upper Tribunal had failed to engage with the grounds of appeal and to realise the errors made by the First-tier Tribunal.

[14] For these reasons the appeal should be allowed, the Lord Ordinary's interlocutor recalled, and permission to proceed granted. There was a real prospect of success and compelling reasons for allowing the application to proceed in the form of strongly arguable errors of law with truly drastic consequences for the appellant were he to be returned to Iraq.

Respondent

[15] Mr Middleton drew attention to the First-tier Tribunal judge's statement that he was not persuaded that the appellant had been truthful in his claim, or that it was founded in fact. The arrest warrant had no relevance to the claim for asylum advanced and the judge could not be criticised for attaching little weight to it. The warrant was not at the centre of the appellant's request for protection and there was therefore no duty upon the respondent to take steps to verify it (*PJ (Sri Lanka)* v *SSHD* [2015] 1 WLR 1322). The appellant's circumstances were distinguishable from those in the case of *AR*. In that case the documentation was truly at the heart of the claim being advanced. In any event, it was not accepted that a simple process of enquiry would have conclusively resolved the warrant's authenticity and reliability. There was no basis for the appellant's assertion to the contrary.

[16] The First-tier Tribunal had been entitled to conclude that the country expert report did not support the appellant's version of events. The appellant founded on paragraphs 73 to 75 of that report but those paragraphs required to be read in the context of the preceding paragraphs in which certain categories of people were identified as being subject to

persecution. The First-tier Tribunal judge was entitled to conclude that the appellant did not fall within any of those categories.

[17] The appellant's appeal did not have a real prospect of success within the meaning of section 27B(2)(b) of the Court of Session Act 1988 and leave could not therefore be granted. Being arguable or stateable was not enough (*Wightman and others* v *Scotland* 2018 SLT 356). Furthermore the submissions did not pass the compelling reasons test and the appeal ought to be refused.

Decision and Reasons

[18] The First-tier Tribunal judge disbelieved the appellant's account of the events at the oil refinery. He did so on the basis of discrepancies and inconsistencies in the account given by the appellant. He gave detailed and cogent reasons for his decision. His analysis is beyond criticism and is not the subject of complaint in the present judicial review. Accordingly, as noted above, the fundamental difficulty which the appellant faces is that the basis of his claim has been rejected.

[19] The First-tier Tribunal judge considered that the terms of the warrant were remarkably wide, being addressed to "anyone receiving this arrest warrant". He also noted that there was no evidence to suggest that this was a normal provision. He was entitled to make such an observation given that evidence had been led from a country expert who had not been asked to support or comment on the authenticity of the warrant. The judge's decision to give little weight to the arrest warrant is beyond criticism. The Lord Ordinary was correct to say that there is no connection between this document and the events which the appellant claims occurred at the oil refinery. The document simply bears to vouch that the appellant's arrest is sought in connection with an unspecified offence of theft. On its

own it adds no colour to his account. It is not suggested that he told anyone about what he claimed to have observed. The only basis upon which a connection could be drawn between the warrant and the appellant's account is by application of the sort of speculation suggested by Mr Winter in his note of argument.

[20] Since there is no obvious or logical connection between the arrest warrant and the account of events given by the appellant, the warrant cannot be said to be central to his request for protection. There was therefore no duty on the respondent to verify its authenticity. In any event, it adds nothing to the claim for protection. It simply demonstrates that the appellant is subject to an unspecified charge of theft. His account of events remains disbelieved for reasons which are unaffected. It cannot be said that the First-tier Tribunal erred in law in its assessment of the arrest warrant. The judge engaged in an appropriate exercise of fact-finding assessment.

[21] The First-tier Tribunal judge did not err in his assessment of the country expert report. He considered the import of the report in its entirety and was entitled to conclude that it ought only to be given little weight. It is to be noted that the report did not provide direct support for any aspect of the appellant's claim. It did not vouch the existence of a refinery at the location described by the appellant, it provided no support for the suggestion of theft of oil by the PUK and it provided no support for the authenticity of the arrest warrant, far less for the suggestion as to why it might be issued.

[22] For these reasons we do not agree that the First-tier Tribunal judge can be said to have erred in law in any respect and the Upper Tribunal was correct to refuse leave to appeal. It did not err in law in doing so.

[23] The arguments presented on behalf of the appellant have no merit. There was no error of law on the part of the Upper Tribunal. It follows that we are not satisfied that the application has a real prospect of success, or that the appellant has made out legally compelling reasons for allowing the application to proceed. The requirements of section 27B(3)(b) and (c) of the Court of Session Act 1988 have not been met and the appeal is refused.