EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 14
P882/20

Lady Paton
Lord Turnbull
Lord Tyre

OPINION OF THE COURT

delivered by LADY PATON

in the Appeal

by

WALEED IL SHITANI (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 11 August 2020 refusing permission to appeal to itself

Petitioner and Appellant: Caskie; Drummond Miller LLP
Respondent: D Blair; Office of the Solicitor for the Advocate General

9 March 2022

Introduction

[1] In this appeal under section 27D(2) of the Court of Session Act 1988, the appellant challenges the Lord Ordinary's decision of 23 April 2021 refusing permission for the appellant's judicial review petition to proceed. The appellant claims to be Syrian, and it is

agreed that if the appellant's nationality were to be accepted, he would almost certainly be granted leave to remain in the United Kingdom. However the Home Office (the respondent) does not accept that the appellant is Syrian; he is believed to be Egyptian.

[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 68.

[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 SLT 889, paragraph [33]).

[4] While two of the grounds in the petition for judicial review are based on an alleged error of law by the Upper Tribunal ("UT"), the other grounds focus upon the alleged failure of the UT to recognise an arguable error of law on the part of the First-tier Tribunal ("the FtT"). It is therefore necessary to examine not only the decision of the UT, but also the decision of the FtT (*Waqar Ahmed and Others* v *Secretary of State for the Home Department* [2020] CSIH 59, paragraph [9]).

Background

[5] The appellant was born on 6 August 1985. He claims to have been born in Daraa in Syria, and to have left Syria when he was enrolled to join the military service. He arrived in the United Kingdom on 10 December 2013 and claimed asylum as a citizen of Syria.

[6] On 27 February 2015 the respondent refused the appellant's claim. The appellant appealed to the FtT. A hearing took place on 3 September 2015. The appellant had legal representation. On 21 October 2015 the FtT found that the appellant was Egyptian, and dismissed the appeal. That decision was based on *inter alia* a Linguistics Analysis Report.

[7] Subsequently, in September 2016, the appellant lodged further submissions with the respondent. A dispute arose as to whether this constituted a fresh claim. Further representations were lodged in 2017, but were not accepted by the respondent. In 2019 the appellant raised a petition for judicial review in the Court of Session. The appellant's legal advisers were then made aware of the existence of three witnesses in Glasgow (Hussein, Aljarad and Mansour) who could give evidence about the appellant's past, his personal circumstances, and his nationality. Statements given by those witnesses were intimated to the respondent. Ultimately the respondent conceded that there was a fresh claim, and the appellant's case was scheduled to be heard by a second FtT.

Proceedings before the second FtT

[8] Proceedings before the second FtT involved the following events:

- On the first day of the hearing (16 December 2019) the FtT adjourned the hearing to enable the respondent to trace the originals of some documents which had been lodged by the appellant in his fresh claim.
- On 16 January 2020, counsel for the respondent moved the FtT to adjourn the hearing, as the originals of the documents had not yet been located. A short adjournment until the afternoon was granted. That afternoon, the respondent's motion for a longer adjournment of two weeks (based on information that the originals were thought to be in the Office of the

Advocate General) was refused. The hearing then proceeded, involving *inter alia* the oral evidence of the appellant, the oral evidence of two witnesses (Hussein and Aljarad), a witness statement from a third witness (Mansour), documentary evidence, and submissions.

[9] The witness evidence *inter alia* disclosed the circumstances in which Hussein, Aljarad, and Mansour had known the appellant in the past, and how they had met him again in Glasgow. The dates of their reacquaintance with him were as follows: Mansour, in March 2015; Aljarad in early 2015; and Hussein in 2017.

[10] By decision dated 29 January 2020, the FtT refused the appeal. In paragraphs 33 to 36 of the decision, the FtT raised questions about the provenance and effect of certain documents, and the lack of other documents such as a birth certificate. Ultimately, little weight was given to the documents.

[11] In relation to the witness evidence, the FtT observed:

> "As to the witness evidence; again, there was no good reason put forward as to why these witnesses had not provided witness statements at an earlier stage. From the evidence Mr Aljarad had known the Appellant in Glasgow since 2015 and Mr Hussein had known him in Glasgow since 2017. The Appellant has always known his nationality was disputed yet it was not until 2019 that he submitted witness statements from them …"

[12] The FtT then considered the witnesses' evidence and, for the reasons given in the decision, found that their evidence did not assist the appellant.

[13] Ultimately, having considered all the evidence in the round, the FtT concluded that the appellant was Egyptian and that his fresh claim for asylum failed.

Applications for permission to appeal, and the UT's refusal dated 11 August 2020

[14] Subsequent procedure concerned the appellant's applications for permission to appeal against the FtT's decision. Both applications (to the FtT and to the UT) were out of time. The FtT refused permission on 7 April 2020, and the UT refused permission on 11 August 2020. The UT's refusal was primarily on the basis that the appeal was out of time, but other grounds of appeal were also addressed. They were summarised as follows:

> "The grounds of appeal are that the First-tier Tribunal materially erred in law in (i) refusing the Respondent's application for an adjournment to locate original documents sent in by the Appellant with his further submissions in circumstances where the decision under appeal found those documents not to be genuine; (ii) discounting the evidence of Mr H because it was not made available to a previous Tribunal in 2015 in circumstances where he and the Appellant became reacquainted only in 2017; (iii) rejecting evidence relied upon solely because it was not produced previously rather than considering in accordance with the principles in *Devaseelan* to treat it with circumspection and give reasons if it was to be rejected; (iv) failing to take into account the Appellant's evidence that the passport office was closed, not that all government offices were closed as recorded in the decision; (v) relying on earlier documents being 'dubious' and there being an equivocal linguistic analysis report to reject other documents; and (vi) rejecting evidence from the witnesses because it was not made available earlier without good reason and failing to take into account that each of the witnesses corroborated each other and the Appellant's claim."

[15] In relation to the proposed arguments on the merits, the UT concluded that the FtT had not erred in refusing the respondent's request for an adjournment. There was nothing to suggest that the appellant had supported the motion for the adjournment, or that having the original documents available would have led the FtT to a different conclusion. The other grounds were considered to amount to no more than a disagreement with the FtT's decision. On the evidence, the findings were open to the FtT.

Petition for judicial review

[16] In October 2020, the appellant raised the current petition seeking judicial review of the decision of the UT dated 11 August 2020. Lord Braid ordered an oral hearing. On 23 April 2021, counsel presented their submissions. It was contended that the UT had erred in three respects: (i) by failing to recognise that the FtT had erred in its approach to the request for an extension, resulting in undue weight being placed on the cumulative effect of two late applications; (ii) by failing to recognise that the FtT arguably erred in its refusal to grant an adjournment, since justice had to be seen to be done; and (iii) by wrongly categorising the grounds of appeal as mere disagreement with the decision, when arguable errors were:

- Treating the Linguistics Analysis Report as unequivocal, when it was not;
- Misrecording the appellant's evidence as to which government offices were closed, resulting in a decision on credibility which was flawed;
- Relying upon a "failure" to produce documents in 2015 which did not exist at that time;
- Adopting the *Devaseelan* approach, where a different package of evidence was relied upon before the second FtT.

[17] The Lord Ordinary gave a written decision, refusing to allow the petition to proceed. He held that there was no real prospect of success (section 27B(3)(b) of the Court of Session Act 1988). He further held that the petition did not raise "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

[18] The appellant appealed against the Lord Ordinary's refusal. The written grounds of appeal (headed "grounds for reclaiming") and the note of argument can be summarised as follows.

Evidence not used in the 2015 appeal

[19] The appellant's first ground of appeal is that part of the reasoning given by the FtT for not accepting the veracity of certain documents and the evidence of the petitioner's supporting witnesses was that the material had not been used in the 2015 appeal. However as most of the documentation had come into existence in June/July 2017, and contact with one of the witnesses (Hussein) had not been made until after the hearing in 2015, it was erroneous to adopt such an approach. The UT failed to recognise this arguable error of law.

Treatment of the Linguistics Analysis Report

[20] The Linguistics Analysis Report was treated by the FtT as unequivocal, but the report was in fact equivocal. In particular the report stated that the appellant "somewhat" sounded like he was from an area other than that claimed. The UT failed to recognise this arguable error of law.

Inaccurate recording of the appellant's evidence

[21] The appellant's evidence in relation to the closure of government offices in his home area was inaccurately recorded by the FtT. The inaccurately recorded evidence formed the basis of a credibility finding made against the appellant. The appellant was therefore disbelieved on an unfounded basis, which was an error of law.

Failure to take into account relevant matters in deciding on adjournment request

[22] The respondent had identified a likely location for the original documents which they had lost. The refusal to adjourn to enable the respondent to obtain the originals would lead an impartial observer to consider that the appellant did not have a fair hearing. The FtT ought to have considered the fairness of proceeding without the originals, as well as how proceeding without them would appear to the appellant and an impartial observer. The respondent's change in position regarding the possibility of locating the originals was a material factor. The UT erred in law in not accepting that as an arguable error of law.

Submissions at the oral hearing

Submissions for the appellant

[23] Counsel for the appellant submitted that there were strongly arguable errors of law and a real prospect of success. Those errors of law, when combined with the dire consequences of an enforced return to Syria, constituted a compelling reason in terms of *JD (Congo)* v *Secretary of State for the Home Department* [2012] 1 WLR 3273. Counsel outlined the errors of law as follows.

[24] When the appellant's fresh claim came before the second FtT on 16 January 2020, two new witnesses (Hussein and Aljarad) gave oral evidence. A third new witness (Mansour) had provided a witness statement. Certain other documents were referred to. The FtT had ruled that the principles set out in *Devaseelan* [2003] Imm AR 1 were applicable. However Hussein's presence in Scotland was not known to the appellant until 2017. All three witnesses had provided personal knowledge confirming that the appellant was Syrian. The FtT's reasons for not accepting the evidence of Hussein and Mansour were questionable,

while no reasons had been given for not accepting Aljarad's evidence. The treatment of the witnesses' evidence constituted an error of law (*S (AAS)* v *Secretary of State for the Home Department* 2011 SLT 1058).

[25] In relation to the lateness of the applications to the FtT and the UT, counsel pointed to the strongly arguable errors of law which, if assessed correctly, should result in permission to proceed. In respect of the Linguistics Analysis Report, the FtT had erred in treating that report as unequivocal: on the contrary, the report stated that the appellant "somewhat" sounded as if he was Egyptian. As for the question of the closure of government offices, the appellant's evidence had not been accurately noted, resulting in the appellant being disbelieved on an unfounded basis. Finally, the proceedings should have been adjourned on the respondent's motion, to enable the respondent to attempt to locate the originals of the documents lodged on behalf of the appellant.

Submissions for the respondent

[26] Counsel for the respondent submitted that the appeal should be refused. Section 27B(3) had not been satisfied. Decisions concerning late applications had properly been taken in the context of the strength or weakness of the arguments concerning errors in law, and the appellant's arguments were weak. The present case was not one "crying out" for the matter to be looked at again by the court: paragraphs {17] to [19] of *Alshammari (Kuwait)* v *Secretary of State for the Home Department* [2021] CSIH 26. The FtT had been entitled to reach views on credibility, and in particular to consider that it seemed incredible that the petitioner had not realised that, when trying to prove his nationality, it would be helpful to produce witnesses and productions at an earlier point. The FtT had fully engaged

with the evidence, and had then reached a decision which was rational and coherent. The high hurdle of the second appeals test had not been met.

Discussion and decision

Refusal to adjourn the hearing to enable the Home Office to search for the originals of documents

[27] The respondent moved the FtT to grant an adjournment so that an attempt could be made to locate certain documents relating to personal facts concerning the appellant. A short adjournment was granted, and thereafter a further motion for a longer adjournment was refused. The hearing continued.

[28] The respondent's motion was not supported by the appellant, who adopted a neutral stance. As the authenticity of the documents was not in issue, there appeared to be no need for originals rather than copies. In the circumstances, particularly as the matter was one for the discretion of the tribunal, we are not persuaded that the short adjournment granted, followed by the refusal of any longer adjournment, amounted to an error of law.

Late applications to the FtT and the UT

[29] We accept that the question of lateness of applications to the FtT and/or the UT may be affected by the strength of the proposed arguments on the merits. In the present case, the FtT and the UT considered the proposed arguments on the merits to be weak and to offer no real prospect of success. For the reasons given below, we agree, and are not persuaded that any error occurred in the decisions taken concerning failure to meet time-limits.

Supporting material not used in the 2015 appeal

[30] As we understand the argument, it is submitted that the FtT erred in discounting the evidence of the witnesses Hussein, Aljarad and Mansour because their evidence had not been led in the hearing in September 2015. As explained in the appellant's note of argument:

> "6. The FtT decided to dismiss his appeal, and the Upper Tribunal upheld that decision, in large part based upon the failure of the [appellant] to rely upon evidence that he first obtained in 2017 because he did not produce that evidence at a previous appeal in 2015.
>
> 9. The Judge's approach to the new evidence was strongly influenced, or was determined by, the Judge's view of the credibility of the appellant for not producing all evidence now relied upon previously. In so proceeding, the FtT judge erred in law and … the Upper Tribunal … erred in law when it regarded that ground of challenge as a disagreement and no more. It was the identification of a more than arguable error in law on the part of the FtT."

[31] In our view, the FtT did not take the approach described in the note of argument, quoted above. The FtT did not reach a view about credibility "because [the appellant] did not produce that evidence at a previous appeal in 2015", nor did the FtT take a view about the credibility of the appellant "for not producing all evidence now relied upon previously". What the FtT did was to observe that those witnesses' statements could have been made available "at an earlier stage" (see paragraph 36 of the FtT decision: "there was no good reason put forward as to why these witnesses had not provided witness statements at an earlier stage."). The FtT was entitled to make that observation. We agree with counsel for the respondent that the FtT was entitled to take the view that it seemed incredible that the appellant did not realise that, when trying to prove his nationality, it would be helpful to produce witnesses and productions at an earlier stage. In the event, the FtT fully engaged with the evidence of the three supporting witnesses and took their evidence into account, weighed it up, considered discrepancies, formed a view about each witness's credibility, and

ultimately concluded that their evidence did not assist the appellant, for the reasons given in the decision. Specific reasons for doubting the credibility of two of the witnesses were noted in paragraph 36 of the decision, and in relation to all three witnesses, it was pointed out that no reason could be identified to explain why their statements had not been provided "at an earlier stage". In our view, the FtT was entitled to adopt the approach taken. We are not persuaded that an error of law occurred, and in particular we are not persuaded that there was any misapplication of the guidance in *Devaseelan* [2003] Imm AR 1.

The Linguistics Analysis Report

[32] The weight to be given to a Linguistics Analysis Report was a matter for the FtT, assessing that report along with all the other evidence in the round. The context and wording of the report, taken with all relevant surrounding circumstances, may assist in the assessment of weight. In the present case, the FtT was entitled to assess the report as it did. We have found no error of law.

The recording of the appellant's evidence

[33] The appellant's contention is that his evidence about the closure of government offices in his home area was inaccurately recorded and/or misinterpreted by the FtT. Reference is made to paragraphs 20 and 34 of the decision. In his grounds of appeal to the UT, the appellant explains that his evidence was that the passport office was closed, but other offices were not. Thus he had been able to obtain official stamps on the documents produced. He had been disbelieved by the FtT on a wrong basis.

[34] The appellant may have intended to give the information outlined above and noted in his grounds of appeal, but in our view, the exchange between the presenting officer and

the appellant, as noted in paragraph 20 of the FtT decision, was confusing and was not ultimately clarified by further questioning. In the absence of a word-for-word transcript, or a tape-recording, we are not in a position to accept an assertion that the FtT erred when making the observation about closed offices in paragraph 34. In any event, the issue of the availability of certain offices was only one of several factors being considered by the FtT, other factors being, for example, discrepancies and gaps in the documentary and oral evidence; the fact that the appellant could give no explanation for not lodging a Linguistics Analysis Report which he had instructed; the absence of a birth certificate or other identification document; and other matters. In the result we are not persuaded that any error of law occurred.

Disposal

[35] For the reasons given above, we have been unable to identify any arguable error of law and we consider that the application has no real prospect of success. Section 27B(3)(b) of the Court of Session Act 1988 is therefore not satisfied. In the absence of a strongly arguable error of law, the appellant is unable to persuade this court that there is "some other compelling reason for allowing the application to proceed" as explained in *JD (Congo)* v *Secretary of State for the Home Department* [2012] 1 WLR 3273. Thus section 27B(3)(c) of the 1988 Act is not satisfied. In the result, we refuse the appeal, and adhere to the Lord Ordinary's interlocutor of 23 April 2021.