EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 27
P585/21

Lady Paton
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY PATON

in the appeal

by

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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 April 2021 refusing permission to appeal to itself

Petitioner and Appellant: K. Forrest; Drummond Miller LLP (for Gray & Co., Solicitors, Glasgow)
Respondent: Massaro; Office of the Advocate General

9 June 2022

Introduction

[1] The appellant was born on 25 April 1973. He is a citizen of Pakistan. He arrived in the UK on 10 August 2007 on a visitor visa. On 15 December 2011 he applied for permission

to remain on article 8 grounds (right to respect for private and family life). On 17 December 2012, permission was refused. On 5 March 2019, the appellant was encountered by personnel from immigration enforcement. On 12 March 2019 he claimed asylum on the ground that, if returned to Pakistan, he would be the victim of an honour killing at the hands of his first wife's family. On 27 January 2020 his asylum application was refused. Thereafter he was unsuccessful in appeal procedures, including a hearing with evidence and submissions in the First-tier Tribunal ("FtT") on 13 March 2020, and culminating in the Upper Tribunal's (UT's) decision dated 27 April 2021 refusing the appellant permission to appeal to itself.

[2] The appellant then raised the present petition for judicial review of the UT's decision of 27 April 2021. After an oral hearing on 19 October 2021, the Lord Ordinary refused the appellant permission to proceed. The appellant now appeals against that ruling, contending that (a) the UT erred in law in not acknowledging that there had been procedural unfairness before the FtT on 13 March 2020 because the appellant was not cross-examined on crucial issues in his claim; (b) the procedural unfairness constituted a compelling reason why the appeal should be granted; and (c) in the circumstances there was a real prospect of success, such that the appeal against the Lord Ordinary's interlocutor of 19 October 2021 should be granted in terms of section 27B(3)(b), (c)(ii) and section 27D of the Court of Session Act 1988.

[3] The issue of lack of cross-examination was not raised when the appellant sought permission to appeal from the UT. *Prima facie* therefore it is not a submission open to the appellant at this stage. However in order to ascertain whether the appellant's contention is so strongly arguable that it qualifies in terms of paragraph [18] of *SA* v *Secretary of State for the Home Department* 2014 SC 1, we shall assess the merits of the argument, and then consider the question of the lateness in the light of the strength of the argument.

The "second appeals test"

[4] 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 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.

[5] 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]).

The procedure before the FtT

[6] As noted above, the appellant contends that the UT erred in law in not recognising that there had been procedural unfairness before the FtT as the appellant was not cross-examined on crucial issues in his claim. It is therefore necessary to look at the procedure before the FtT.

[7] At the FtT hearing on 13 March 2020, lawyers for the appellant and the respondent advised the tribunal at the outset that (i) the issue in the case was one of credibility; (ii) there was a 49-page Reason for Refusal Letter with witness statements; (iii) the appellant intended to adopt his witness statement; (iv) no other evidence would be called; and (v) the lawyers would then present submissions to the tribunal. The appellant duly adopted his witness statement by way of evidence in chief, speaking with the assistance of an Urdu interpreter. Detailed submissions were then presented on behalf of the appellant and the

respondent. The FtT ultimately issued its determination dated 30 April 2020 and promulgated on 6 May 2020, dismissing the appeal.

The FtT's determination

[8] The FtT narrated the evidence, noting certain contradictions, discrepancies, and questionable aspects of the case. For example, in one statement the appellant described receiving threats from his first wife's family and being told that he should divorce his first wife, whereas in evidence during interview he said that he was told to divorce his second (Christian) wife. In another statement he said that he had divorced his first wife and had then received threats from the first wife's family because of the dishonour which the divorce brought; yet elsewhere he stated that he had not divorced his first wife.

[9] A further inconsistency noted was the fact that the appellant's 2011 witness statement explained:

> "My brothers told me that my ex-wife [first wife] committed suicide and her brothers killed my wife [second wife] in open public blaming my wife for their sister's suicide."

The killing of his second wife was not thereafter mentioned by the appellant in interviews or written statements. As the FtT pointed out:

> "… the Appellant did not mention his second wife being killed by his first wife's brothers during his [Asylum Interview] … in his statement which accompanied his [Preliminary Information Questionnaire], or in [his Witness Statement]."

The FtT also noted a statement by the appellant that his second wife had been physically beaten by his ex-wife's brothers to such an extent that she had a miscarriage, but when asked directly during his Asylum Interview whether his second wife or children had come to any harm, he replied:

> "Many times they have went to their house and threatened them and went to her father and saying because of your daughter, our daughters home was destroyed."

(with no mention of a miscarriage as a result of a physical assault).

[10] It is not clear from various statements, both oral and written, what ultimately happened to the second wife, whether she is alive or dead, and if the latter, in what way she died.

[11] A further area of discrepancy concerned an attack on the appellant, said to have happened on 8 February 2006, at the hands of his first wife's brothers. The descriptions of the attack varied, sometimes involving being shot with a revolver, on other occasions being beaten with belts and wooden sticks, with no mention of a revolver. There were also different descriptions of the length and place of medical treatment following the attack.

[12] Other discrepancies are outlined in the determination but need not be repeated here.

[13] The FtT also noted two signatures said to be the appellant's but not resembling the appellant's; identically worded letters from two Pakistani lawyers, referring to events said to have occurred some 17 years previously; and identically worded documents from six witnesses concerning events said to have occurred some 13 years previously.

[14] Ultimately the FtT concluded:

> "47. As per *SB (Sri Lanka)* [2019] EWCA Civ 160, I have taken the following factors into consideration when assessing the credibility of the Appellant's claim for asylum. The lack of consistency throughout in relation to core elements, as set out above. The fact that the Appellant entered the UK on a visitor visa in 2007 and after lodging an application in 2011 followed by a judicial review [Pre Action Protocol] letter, he made no further attempt to regularise his status until he was encountered working illegally in March 2019.
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> 48. Taking into consideration all the evidence, I find that the Appellant, who has had [a] legal representative throughout, has without good reason not been consistent in the core elements of his claim. I find that the police documents are not reliable, that the Appellant has fabricated his claim for asylum and that he enlisted the assistance of friends and family who then produced identical letters in support of that fabrication. Assessing all the evidence in the round and for the reasons set out

> above, applying the lower standard of proof, I find that the Appellant's claim for refugee status must fail."

Submissions for the appellant

[15] Counsel for the appellant submitted that there had been no agreement that the appellant would not be cross-examined. The FtT should have adopted a procedure which was fair, and it was unreasonable not to adopt a procedure whereby the appellant would be cross-examined. If discrepancies were to be held against him, it was procedurally unfair to conduct the hearing in a way that deprived him of the opportunity of responding to these. The issue in the case was credibility, and there had been a number of opportunities to question him about his statements. Differences and discrepancies had simply not been put to him for his comment. There might have been an explanation for the apparent discrepancy between, for example, his statement in 2011 (when he said that his wife had been murdered) and his statement in the 2019 Preliminary Information Questionnaire (when he indicated that she was in Pakistan, but that they had lost touch). In relation to that matter, the appellant had first been asked questions by his then solicitors some eight years previously. Since then, his solicitors had changed. The appellant should have been given an opportunity to explain why his accounts in 2011 and 2019 appeared to differ. The case of *Craig Murray* v *H M Advocate* [2022] HCJAC 14 was distinguishable because Mr Murray had had an opportunity to provide explanations if he wanted to: the appellant in the present case had not. The appellant had been deprived of a fair hearing.

[16] Despite the fact that the appellant's submission about lack of cross-examination had not been advanced earlier in the appeal procedure, it was such a strong argument that it should be allowed to proceed. There was a compelling reason for allowing the argument and the case to proceed. The UT had erred in law in approving the procedure in the FtT.

The procedural unfairness which had occurred was sufficiently important for the case to be heard by the Court of Session. The case should be returned to the Outer House and a substantive hearing fixed.

Submissions for the respondent

[17] Counsel for the respondent invited the court to refuse the appellant's motion. There was no merit in the appellant's submissions. Reference was made to *SA* v *Secretary of State for the Home Department* (*supra*); *HA* v *Secretary of State for the Home Department (No 2)* 2010 SC 457, paragraphs [8], [13]-[15] and [23]; and *Craig Murray* v *H M Advocate (supra*), paragraphs [64] and [65]. The appeal should be refused.

Discussion and decision

[18] As Lord Reed explained at paragraph [13] of *HA* v *Secretary of State for the Home Department (No 2)* 2010 SC 457:

> "… The tribunal is not under a general obligation to air its concerns about the evidence presented to it, even if the evidence is unchallenged. The point is illustrated, in relation to an adverse finding on credibility based on discrepancies between an applicant's account, by such decisions as *R* v *Immigration Appeal Tribunal, ex p Williams* [[1995] Imm AR 518] and *R (Hyensi)* v *Special Adjudicator* [[2002] EWHC 1239]. It is also illustrated, in relation to a finding based on the vagueness of an applicant's evidence, by the decision in *Hassan* v *Immigration Appeal Tribunal,* in which Buxton LJ remarked (para 18):
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> > 'Particular complaint is made that the adjudicator should not have concluded that the applicant's evidence was vague, without in some way warning him that he was going to come to that conclusion and asking him to improve matters. I have to say I simply cannot understand that complaint. The finding that the adjudicator made, that the evidence was vague, was one that he came to having heard everything that the applicant and his representative wished him to hear. It was the sort of conclusion that anybody who has to adjudicate on evidence is entitled to come to. The idea that the applicant not having satisfied the adjudicator in the course of the hearing, the adjudicator

> was under some obligation to ask him to start again is, in my view, plainly unfounded.'

This general approach is consistent with that adopted by the courts in relation to other types of adversarial procedure …"

[19] In the context of other types of adversarial procedure, it may be helpful to note the guidance given by the five-judge bench in *Craig Murray* v *Her Majesty's Advocate* [2022] HCJAC 14. In an evidential hearing before three judges concerning possible contempt of court, the alleged contemnor (the petitioner) chose to rely upon affidavits as his evidence, but also indicated a willingness to answer any questions which the prosecution might want to put. The advocate depute declined to ask any questions, and thus there was no cross-examination. A finding of contempt was made, and a custodial sentence of 8 months imposed. In an appeal to a bench of five judges, the petitioner submitted that there had been procedural unfairness in that his evidence had not been tested in cross-examination. Lord Justice General (Carloway) observed in paragraphs [64] and [65]:

> "[64] … [The material before the court] was sufficient to enable the court to draw the inference that the petitioner had deliberately, that is to say wilfully, acted in a manner which was in breach of the court order and therefore in contempt of court. It was a matter for the petitioner to decide, in the context of the summary procedure on a petition and complaint, how to persuade the court otherwise. He elected to do this by lodging affidavits which set out, amongst many other things, an explanation for his conduct. Although it was said that the petitioner would have been prepared to answer any questions, he did not elect to testify in open court. That was a decision for him to take, no doubt upon legal advice. That would include his counsel's view on the potential effectiveness of any cross. The respondent did not consider it necessary to put any questions to him. In that situation, it was a matter for the court to compare and contrast the information before it and to reach any findings in fact which were necessary for its determination.
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> [65] The respondent's case was presented in open court, with the material which was to be relied upon agreed by joint minute. There was no unfairness. The petitioner was given, and took, the opportunity to respond to it. It would have been apparent to the petitioner that, on its face, the agreed material called for an explanation. His credibility was under challenge by the Crown (cf *Balajigari)* v *Secretary of State for the Home Department* [2019] 1 WLR 4647). If he was unable to provide a satisfactory explanation, the court might draw inferences adverse to his

> interest. As it transpired, the court was not at all impressed by the content of the petitioner's affidavits … there was no requirement for the Advocate depute to insist on questioning the petitioner and thus providing him with an additional vehicle for expressing himself … "

[20] We consider that, in the present case, the material before the tribunal disclosed clear contradictions, inconsistencies, and discrepancies in the appellant's accounts, both written and oral. The material also disclosed periods of delay, for example, the lapse of several years when the appellant continued living in the UK before making an application for asylum in 2019. It was for the appellant and his representative to decide how to persuade the tribunal to decide these matters in his favour. For example, the appellant and those advising him had ample opportunity to review past statements and records of interviews, to note any discrepancies, and to lead evidence explaining any discrepancies. They were assisted in that task by the respondent's detailed 49-page Reason for Refusal Letter. The appellant and his advisers decided that he should not give oral evidence before the tribunal, other than the few words by which he adopted his witness statement. As was explained in *Craig Murray cit sup,* this was a decision for him to take, with the benefit of legal advice. The FtT was entitled to reject evidence despite its not having been challenged in the proceedings before it (*HA* v *Secretary of State for the Home Department (supra)*, paragraphs [8] and [13]). We are not therefore persuaded that any procedural unfairness occurred before the FtT.

[21] That being so, this application has no real prospect of success. Nor does the application raise any important point of principle or practice, or give rise to some other compelling reason for allowing the application to proceed.

[22] As a result, it will be seen that the appellant's current argument (which was not presented to the UT) does not qualify as being strongly arguable within *SA* v *Secretary of State for the Home Department* 2014 SC 1 paragraph [18], nor as being *Robinson*-obvious (*R* v

Secretary of State for the Home Department, ex parte Robinson [1998] QB 929). For those reasons also, the appeal does not succeed.

Disposal

[23] For the reasons given above, we refuse the appeal. We reserve all question of expenses.