
**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 5**

**P576/22**

OPINION OF LORD SANDISON

in the petition of

AC

Petitioner

for Judicial review of a decision by the Upper Tribunal (Immigration and Asylum Chamber) to refuse the grant the Petitioner Permission to Appeal

Respondent

**Petitioner: Caskie; Drummond Miller LLP (for McGlashan MacKay, Glasgow)**
**Respondent: Maciver; (Advocate General for Scotland)**

2 February 2023

**Introduction**

[1] AC is a national of the Kingdom of Morocco in his mid-thirties. He currently resides in Glasgow, pending the resolution of a claim he has made to be entitled to asylum in the United Kingdom because of what he maintains is a genuine fear of persecution were he to be returned to Morocco.

[2] AC arrived in the United Kingdom around January 2018 and made his claim for asylum at the end of March that year. The Secretary of State for the Home Department refused that claim in May 2020, and AC appealed that refusal to the First-Tier Tribunal (Immigration and Asylum Chamber) in terms of section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. In August 2021 the FTT dismissed his appeal, and

subsequently refused him leave to appeal that decision to the Upper Tribunal. In April 2022 the Upper Tribunal itself refused him leave to appeal to it.

[3] In this petition for judicial review, AC seeks reduction of the decision of the Upper Tribunal to refuse him leave to appeal to it. To be entitled to such an order, he would require to demonstrate that the Upper Tribunal erred in law by ruling that the FTT had made no arguable error of law in its decision.

**Background**

[4] So far as relevant for present purposes, the background to the present application includes the following features. The petitioner left Morocco by air for Türkiye in 2015. For a little over two years he travelled in Greece, Macedonia, Serbia, Croatia, Slovenia, Austria, Switzerland, Italy and France, before entering the United Kingdom in the back of a lorry coming from Belgium. He made an asylum claim in Switzerland and another such claim was made in his name in Italy. He did not remain in those countries to await the determination of those claims. He waited for two or three months after arriving in the United Kingdom before making an asylum claim here.

[5] The nature of the petitioner's asylum claim in the United Kingdom was unusual. According to him, he was a founding member of, and a leading light in, the "Green Boys" group of football "ultras" supporting the Raja Casablanca football team. That brought him into conflict with members of the ultra group supporting the other main Casablanca football team, Wydad, which group is known as the "Winners". Matters had come to a head in October 2013 when he had taken an opportunity to seize a banner belonging to a Winners group and had, along with other Green Boys, been photographed holding the banner upside down, an act which was perceived as grossly insulting to the Winners. The photograph had

gone viral on social media and in consequence he became the object of revenge attacks by members of the Winners. That had started in January 2014 when he was kidnapped, stabbed and burned in Casablanca before being released against an assurance that he would supply the Winners with a Green Boys banner, presumably for them in turn to insult. He had spent some time in hospital being treated for the consequences of this attack, and had been questioned by police as to how he had come by his injuries, but had not co-operated because he feared infiltration of the police by the Winners. Instead, he had upon release from hospital left Casablanca and lived for a while in other places in Morocco. However, he had subsequently been seriously attacked again, both in Fez and in Casablanca, being released on each occasion against a repetition of his promise to secure a Green Boys banner for the Winners. He had again refused to co-operate with the police in their enquiries and had decided instead to flee Morocco altogether.

[6] After hearing the petitioner's evidence and considering the other material placed before it, the FTT did not entirely accept that version of events. It accepted that ultra groups existed in Moroccan society and that they constituted gangs with a sense of their own honour and dignity which could result in revenge attacks on those perceived as having insulted the group. It accepted that the petitioner was a founder member of the Green Boys and that he had indeed stolen and insulted the banner of a local Winners group in Casablanca. However, it did not accept that that incident had become the subject of intense social media attention, nor that the Moroccan police had been infiltrated by the ultra gangs, and held instead that the police would intervene in any incident of public violence coming to their attention. While accepting that the petitioner had indeed been kidnapped and attacked at least once by members of the Winners in Casablanca, and might continue to face some risk from that particular band of Winners whose banner he had directly insulted, it did

not accept that that insult was likely to be known, remembered or acted upon by members of the group more widely, particularly outside Casablanca itself. It found the petitioner's account of having been kidnapped and assaulted repeatedly and then released by dint of having repeated the same promise to pass over a Green Boys banner to be incredible, the Winners not being at all likely to be mollified by such a promise once it had been first made and unfulfilled. It found, under reference to *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489, that sufficient police protection was available in Morocco for such degree of risk that the petitioner might face upon return there, and that the petitioner had the personal qualities to relocate safely within the country should he wish to do so.

[7] The FTT also, under reference to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, determined that the petitioner's credibility in general was seriously damaged by the facts that he had passed through ten countries, taking more than two and a half years, before arriving in the United Kingdom; that he had made an asylum claim in Switzerland; that he had been inconsistent about whether or not he had caused an asylum claim to be made in his name in Italy; and that he had waited for a period of months after arriving in the United Kingdom before making an asylum claim here, without acceptable explanation.

**Petitioner's submissions**

[8] In written and oral argument on behalf of the petitioner, Counsel acknowledged that the FTT judge had correctly recognised that, although the onus of proving a need for humanitarian protection was on the petitioner, the standard of proof required of him was lower than the normal civil standard of proof and was properly expressed as simply requiring him to demonstrate his claim on a "reasonable degree of likelihood" (*R* v *Secretary*

*of State for the Home Department, ex parte Sivakumaran* [1988] AC 958), or else that there were substantial grounds for believing the relevant evidence. However, against that background, the judge had arguably erred in law in approaching and evaluating the evidence in the following various regards.

**Medical evidence**

[9] Firstly, the judge had had the benefit of a medical report dated February 2021 which supported, from an examination of the scars on his body and an assessment of his mental condition, the petitioner's evidence that he had been attacked on more than one occasion, separate in time and location from each other. It was not at all clear why the judge had apparently rejected that evidence supportive of the petitioner's case. The judge had arguably erred in law by failing to give adequate reasons for that rejection, which went not only to the petitioner's credibility in general, but also to the validity of his specific claims about the inadequacy of police protection and the likely inefficacy of internal relocation.

**Expert report**

[10] The FTT had before it an expert report by Professor Abderrahim Bourkia, a professor and head of the Political Science and Governance Department at Mundiapolis University in Casablanca. He had researched the ultra football fan scene in Morocco since 2009 and had been asked to comment on the plausibility of the petitioner's case, the significance of the banner incident, the sufficiency of protection and the viability of internal relocation. The FTT judge had concerns about how the report was expressed, describing the language used as "at times impenetrable", and noting that the report was unclear as to how, and on the basis of what material, certain conclusions had been reached. Counsel submitted that the

judge's approach to the report had been coloured by her disapproval of the way in which the expert had expressed his views and her unmerited criticism of its empirical basis. She had arguably erred in law by failing in those circumstances to take proper advantage of the material before her. Under reference to *Hamden* v. *Secretary of State for the Home Department* [2006] CSIH 57, Counsel submitted that that error fell to be presumptively regarded as having tainted the judge's assessment of each the matters she had to determine by reference to the expert report.

**Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004**

[11] Counsel next submitted that the FTT had arguably not understood the proper approach to the potential application of section 8 of the 2004 Act, which, so far as material, is in the following terms.

> "8 Claimant's credibility
>
> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> …
>
> (4) This section … applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country."

[12] Under reference to *JT (Cameroon)* v *Secretary of State for the Home Department* [2008] EWCA Civ 878, [2009] 1 WLR 1411 counsel submitted that the existence of circumstances falling within the ambit of the section did not necessarily require to be regarded by a deciding authority (an expression which includes both the Secretary of State and the FTT itself) as damaging to an applicant's credibility. Rather, that matter should be viewed in all

the circumstances, including in particular the availability of other material supportive of the applicant's position, such as existed here in the medical and expert reports.

**Cumulative effect**

[13] Counsel finally submitted that, even if any of the matters raised and discussed above was not regarded by the Court as in itself of sufficient materiality to constitute an arguable error of law on the part of the FTT, they ought together or in any combination to be so regarded.

**Respondent's submissions**

[14] On behalf of the Advocate General for Scotland, responding to the petition as representing the Home Secretary, counsel submitted that the petition should be dismissed as irrelevant, or else simply refused as ill-founded.

**Medical evidence**

[15] On a proper construction of the medical report, it provided no confirmation of the petitioner's account of having been attacked on more than one occasion. The examining doctor had explicitly noted that her task was not to assess the petitioner's credibility. All that she had done was examine his physical scars and assess his mental condition, ultimately going no further than opining that the petitioner's account of what had happened to him was a plausible explanation of what she was able to observe. In these circumstances the limited support which the medical evidence gave to the petitioner's account had been taken into account by the FTT but was not evaluated as outweighing the features of the case which led the FTT to reject at least the crucial aspects of the petitioner's claim to have a well-

founded fear of persecution in the event of his return to Morocco. While one might agree or disagree with the view that the FTT had taken of the evidence, disagreement would not justify a conclusion that that view had been arrived at under the influence of any arguable error of law.

**Expert report**

[16] Essentially similar points could be made in relation to the expert report. The FTT had expressed general concerns about its comprehensibility and the paucity of its citation of source material, but had nonetheless given credence to certain aspects of the report and explained in which respects, and why, it felt unable to afford to other aspects the full import which the petitioner claimed should be taken from them. Again, while one might disagree with the conclusions of the FTT on these matters, such disagreement instructed no arguable error of law.

**Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004**

[17] Although there was no dispute that the proper interpretation of section 8 was indeed that set out in *JT (Cameroon)*, the FTT had not arguably fallen into the error which the petitioner ascribed to it; rather, it had explained why it regarded the behaviour of the petitioner falling within the ambit of the section as adverse to his credibility, that explanation being in essence that one would have expected a person truly in the position in which he claimed to be to have made an asylum claim significantly in advance of the point in time at which he had in fact made the claim under consideration.

**Relevancy of the petition**

[18] Finally, Counsel submitted that the petitioner sought to make no attack on the FTT's ultimate and critical finding that he would not be at relevant risk should he return to Morocco. That in itself was fatal to the success of the petition and rendered it irrelevant on its face, notwithstanding that, as an attack on a relevant decision of the Upper Tribunal, it had been granted permission to proceed under the particularly demanding provisions of section 27B(3) of the Court of Session Act 1988

**Decision**

*Medical Evidence*

[19] An examination of the medical report reveals that it will not bear the weight which the petitioner seeks to place on it. The author acknowledges that it is not for her to come to any conclusions about the petitioner's credibility, but rather to perform a critical and objective analysis of the injuries and symptoms displayed. The report narrates the petitioner's account of the kidnappings and assaults to which he had been subject, the salient parts of which have already been set out. Considering firstly the results of the physical examination of the petitioner, and using the taxonomy of the UN's Istanbul Protocol (2004), it concludes that, of 12 observable scars, one was consistent with his explanation of how it had occurred, eight highly so consistent and three typical of the kind of assaults he described. Nothing observed was deemed inconsistent with his account. On that basis, the report opines in general terms that it is clinically plausible that the petitioner's account explains the pattern of injuries observed. Considering the petitioner's psychological state, it concludes that his account, supported by clinical observations, of a persistent change in his mental state following a series of traumatic incidents would be consistent with a

diagnosis of Post-Traumatic Stress Disorder, and that there was no evidence that his symptoms were feigned or exaggerated.

[20] What the report does not do is suggest that there is any medical evidence which supports the petitioner's specific claims as to when, where or in what precise circumstances any injury was sustained by him. Moreover, the petitioner attributed only one relevant scar to an attack other than the initial claimed attack on him in Casablanca in January 2014. That was a scar on his head which he attributed to a blow with either a bottle or stone during the claimed assault in Fez in 2015. While the report accepted that the scar was typical of that which would be left by a scalp laceration due to blunt force trauma, and was highly consistent with being struck by a bottle or stone, it could not and did not support any suggestion that any such attack had occurred in Fez, in 2015, at the hands of Winners ultras, or why it might have taken place.

[21] It follows that there was nothing in the medical report which the FTT required to "reject" in order to come to the conclusion that the petitioner was not in fact at relevant risk of persecution should he return to Morocco. The medical report provided support for the petitioner's position that he had been attacked and seriously injured, but not specifically that he had been attacked on several occasions by different groups of Winners in different locations because of his treatment of a Winners banner. It was that claim of persistent and generalised risk from Winners members throughout Morocco that underlay his claim for asylum. While the medical evidence was consistent to the very limited extent already described with the petitioner's account of a generalised risk, other evidence before the FTT (such as the availability of police protection) was unsupportive of it, and the judge found it to be inherently unlikely on its own terms (for, amongst other reasons, the lack of evidence of widespread and persistent awareness on the part of Winners groups throughout Morocco

of the petitioner's behaviour towards the banner, and the apparent oddness of what might be called the "catch and release" policy which the petitioner claimed had been consistently applied to him). These matters were taken into account by the FTT along with the evidence in support of the petitioner's account, and a reasoned conclusion reached that, while the petitioner had indeed established to the satisfaction of the judge and to the legal standard correctly identified by her that he had been subject to one serious attack by the Winners, his wider claim of an unmanageable and generalised risk from them on his return to Morocco had not been so established. That conclusion was not arguably attended by any error of law on the part of the FTT towards the medical evidence.

**Expert report**

[22] The expert report is couched in terms with which a political scientist or sociologist would be more familiar than would be a lawyer. Some flavour of how it generally reads may be gained by the following example:

> "The universe of the Ultras presents itself in an ambivalent relationship of rupture and continuity with everyday social life. The arena has become a place of choice for self-staging where supporters take on a role and perform it … The settling of scores or 'vendetta' is common in the world of supporters, and is often described as the culmination of an antagonistic process of acculturation. Indeed, there is what can be called a chain of verbal incivilities, which are part of symbolic violence and which can end in fights between the antagonists."

[23] It may be that this somewhat indefinite language is simply reflective of the somewhat indefinite underlying concepts being described. However, despite the effort which sometimes has to be put in to follow the report, it is not ultimately impossible to understand what is being said and why, although it is fair to say that some passages do more than others to maintain the integrity of their mystery. It is also fair to say that the nature and provenance of some of the source material relied upon is obscure if not indeed

obscurantist, and that the learned author has a tendency – perhaps only natural in one pre-eminent in a particular field – to cite his own research as definitively authoritative, lending a distinctly self-referential air to the whole exercise.

[24] It is possible – though, one must hope, unlikely – that a judicial office holder may be so irked by the way in which expert evidential material is presented as to subjectively devalue its content in a way which has no proper justification, and thus fail to take proper advantage of whatever insights it may truly have to offer. One would, however, expect to see some clear sign of that approach having been taken, such as unmerited or excessive criticism of the material, or unexplained and inexplicable rejection of well-reasoned and supported conclusions contained in it. Nothing of the sort is apparent in the judgment of the FTT. At its highest – and it may be that this is putting it too highly – all that appears is a degree of mild irritation that quite so much effort has had to be put in to understand what might have been capable of much simpler explanation. Further, far from rejecting the content and conclusions of the report out of hand, the judge accepted some points which it made in the petitioner's favour concerning the nature of ultra groups and the potential consequences of the petitioner's treatment of the banner. She pointed out – correctly – that the report was in fact unsupportive of the suggestion that the police had been infiltrated by ultras or of the idea that a legally-adequate degree of police protection would not be made available to the petitioner, and finally drew attention to the lack of any reasoned basis in the report for a suggestion that the petitioner would not be able to relocate safely within Morocco. Whether or not one agrees with the judge's treatment of the content of the report, it is not possible to maintain effectively that she approached it with any degree of prejudice such as could arguably amount to an error in law. There being no arguable error in law in the judge's approach to and treatment of the expert report, the question of whether or not

the existence of such an error would have resulted in *Hamden*-type contagion of the other reasons given by the judge for reaching the ultimate conclusion which she did on the validity of the petitioner's asylum claim does not arise.

**Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004**

[25] Parties were not in dispute about the true import of section 8. In summary, it is not to be read as a prescriptive direction as to how relevant decision-makers should reach their conclusions beyond its mandatory minimum requirement that the factors mentioned in the section have to be taken into account in assessing the credibility of an applicant. A global assessment of credibility which should not unduly concentrate on minutiae to the detriment of considering the wider picture continues to be required. What weight should be accorded to any of the s 8 factors is entirely a matter for the decision-maker. There may be cases, albeit unusual ones, where a factor or factors falling within the ambit of section 8 may properly be regarded as having no weight in any assessment of the applicant's credibility – *JT (Cameroon)*, *supra*, per Pill LJ at paras 19 – 21.

[26] Viewed in the light of that summary, it is not possible to arrive at the conclusion that the FTT erred in its application of section 8. The judge was required to take into account the factor that the petitioner had failed to make a prompt claim for asylum after his arrival in the United Kingdom. There is no suggestion in the judgment of the FTT that the judge considered that she was bound to regard that factor as detrimental to the petitioner's credibility, but it was certainly open to her to do so, and she chose to do so for reasons which she set out. The judge was also entitled (but not bound) to take into account factors not falling within section 8 – such as the lengthy journey of the petitioner through numerous countries *en route* to the United Kingdom, his previous making of asylum claims in other

countries without prosecuting them to a conclusion, and his inconsistent accounts of the circumstances of his Italian claim – in her assessment of the petitioner's credibility. She chose to do so and to regard those matters as seriously affecting that credibility because, in essence, she again regarded them as indicative of behaviour other than that to be expected of an honest asylum seeker. Nor did the FTT give these factors an excessive weight, having previously expressed views adverse to the petitioner's credibility arising out of the substance of his claim to have a well-founded fear of persecution rather than as a result of his behaviour as a putative asylum seeker. Indeed, even had there been an identifiable arguable error of law in the FTT's treatment of that behaviour, it would have been very difficult to form the view that any such error would have affected its ultimate decision, given the various other and perhaps more weighty reasons, both relating to the petitioner's credibility and otherwise, stated by the judge as requiring the rejection of his claim.

**Other points**

[27] Since I have determined that there is no validity in any of the arguments advanced by the petitioner in respect of the medical evidence, expert report and section 8, the question of the materiality of the effect in combination of any or all of those arguments does not arise. As counsel for the respondent aptly put it, thrice nothing is still nothing. On the respondent's suggestion that the petition might be dismissed as irrelevant, rather than being refused on its substance, I consider firstly that, despite the absence of a direct attack on the FTT's assessment of the risk to the petitioner should he return to Morocco, it is incorrect to say that the petitioner's attacks on the judge's treatment of the medical and expert evidence, had either or both been made out, were nonetheless incapable of being regarded as having potentially a strong, albeit oblique, effect on the validity in law of her conclusions on that

assessment of risk. Further, the merits or otherwise of the petition could not be determined simply by an examination of its own terms, but required the underlying factual material to be considered in detail. In these circumstances the appropriate order is one refusing the prayer of the petition rather than simply dismissing it.

**Conclusion**

[28] The Upper Tribunal refused the petitioner permission to appeal to it for the following succinct reasons:

> "The grounds are not arguably more than disagreement with the weighing of selected aspects of the evidence. They ignore the principal reasons given by [the FTT]. They identify no error on a point of law by which the decision might arguably be set aside."

[29] It is not possible to improve on that statement as a summary of the position presented both to the Upper Tribunal and to this Court by way of the present application. For the reasons stated, I shall sustain the respondent's fourth plea in law, repel the remainder of the parties' pleas insofar as not already disposed of, and refuse the prayer of the petition.