Upper Tribunal
(Immigration and Asylum Chamber) PA/02452/2019 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*
at George House, Edinburgh
on 30 September 2020

Decision & Reasons Promulgated
On 16 October 2020

Before

Upper Tribunal JUDGE MACLEMAN

Between

T C N

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Jain, Neil & Ruddy, Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Vietnam, aged 51. The respondent refused his asylum claim for reasons stated in her decision dated 28 February 2019.

2. A panel of the FtT comprising Judges Buchanan and Cowx dismissed the appellant's appeal for reasons stated in their decision promulgated on 9 May 2019.

3. The appellant applied to the FtT for permission to appeal to the UT on grounds stated in his application filed on 24 May 2019.

4. The FtT refused permission on 11 June 2019, on the view that the grounds were only disagreement.

5. The appellant applied to the UT for permission on 27 June 2019, submitting the same grounds, with a further set of grounds insisting on their arguability.

6. The UT refused permission on 5 July 2019, giving similar reasons.

7. The appellant petitioned the Court of Session for reduction of the UT's refusal of permission. He has adopted the terms of the petition as part of his case to the UT.

8. Parties submitted a joint minute to the Court:

> i. At 9.37 of its decision the FtT found the [appellant's] account of having paid $25,000 to agents on reaching the UK not to be credible, the lack of detail … leading to the inference that [he] was carrying the money on his person during his journey to the UK, which was implausible … the FtT appears to have left out of account [his] answers in the asylum interview record, at Q/A260 onwards, where he described payment having been made in Vietnam;
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> ii. At 9.40 of its decision the FtT found the appellant to have given inconsistent accounts of having been fingerprinted [in France and / or in Holland] [apparently] leaving out of account a later answer at Q/A 243;
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> iii. At 9.56 it is evident that the FtT's rejection of the [appellant's] account depended in part on its lack of detail and inconsistency;
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> …
>
> vi. The arguable errors of law on the FtT's part might have been material to its decision … the UT … ought to have granted permission.

9. On 2 September 2020, the Vice President of the UT granted permission, in light of the Court's interlocutor and the joint minute.

10. I conducted the hearing on 30 September 2020 from George House. Representatives attended remotely. The technology functioned without difficulty.

11. The main points which I noted from the submissions for the appellant were these:

    (i) The errors identified at 9.37 and 9.40 of the decision were not only arguable, but actual.

    (ii) Although the case had been developed and analysed at length and in detail, it turned on the narrow issue of whether the appellant was at risk for having reported his suspicions of corruption to higher levels of his company.

    (iii) The thrust of the petition was failure of anxious scrutiny, through absence of a holistic evaluation.

(iv) Certain grounds of appeal, and criticisms repeated and elaborated upon in the petition, were drawn to my attention; but all points were adopted, whether specifically submitted upon orally or not.

(v) The decision used many phrases which indicated application of too high a standard of proof, such as "reason to question whether the account is founded in fact", 9.15; "remarkable"; "reason to doubt", 9.20 and 9.21; "far from persuaded", 9.23, 9.36, 9.48, 9.50; "cause to doubt", 9.35; and "not persuaded", throughout.

(vi) This was not just unfortunate phrasing, but an error of legal approach. Arguable error along such lines was identified by Lord Braid in *MF* [2020] CSOH 84. The language and style of decision suggested that this case involved the same FtT judge.

12. The main points which I noted from the submissions for the appellant were these:

(i) The decision, read fairly and as a whole, applied both anxious scrutiny and the lower standard of proof, when resolving the case as a whole.

(ii) The appellant had shown arguable errors, but not actual errors.

(iii) The points on which permission was granted were minor. Even if made out, they were not shown to be material.

(iv) The other grounds were only a lengthy series of disagreements. They did not need to be answered in detail and point by point. An overall view should be taken of the case. The refusal letter at [69] made a strong general point. It was inexplicable that the police would charge two high profile company employees after the appellant's complaint, yet take no action on his complaints about attacks upon him.

(v) At 9.14 – 9.19, the FtT thoroughly explained why the appellant's claimed part in the investigation and prosecution of corruption was not established. There was no error in that crucial finding. In so addressing the concerns raised by the respondent, the FtT had the case as a whole in mind, and did not deal with it only as a series of minor points.

(vi) The case for the appellant amounted to seeking a rehearing of the case put to the FtT by way of submissions to the UT.

(vii) The grounds as a whole were disagreement, not identification of error on points of law.

(viii) Although the FtT did not deal with the point, the claim failed in any event on internal protection.

(ix) The submission by reference to *MF* amounted to an allegation of bias, based only on similarity of wording.

13. I observed that it did not appear to me that Mr Winter had gone so far as to allege bias.

14. Mr Winter replied as follows:

(i) The criticism by reference to *MF* was not of bias, but of applying too high a standard of proof, shown by the language used.

(ii) The focus was not on the SSHD's reasons for refusing the claim, but on the reasons given by the FtT.

(iii) The starting point should have been positive for the appellant, as the respondent accepted that he and his wife were trafficked.

(iv) The FtT failed to deal with internal flight. The appellant's expert report explained why that would not be a reasonable option, so if there was error, there would have to be a further hearing.

15. I reserved my decision.

16. The grounds show that the FtT (i) overlooked that the appellant said that agents were paid in Vietnam, not in the UK, and (ii) incorrectly perceived an inconsistency over where he had been fingerprinted.

17. Those slips need to be placed in context.

18. It is often necessary for the respondent and for the FtT to engage not only with an overall claim, but to examine it in considerable detail. The SSHD's analysis runs to 106 paragraphs, at pages 3 to 21 of her decision. The FtT's decision is even more detailed, at 34 pages.

19. The process of appeal on grounds of error on points of law, on the other hand, should not be one of picking over decisions by way of microscopic dispute on the facts. In this case, the first set of grounds runs to 24 paragraphs over 12 pages; the second set adds another 4 pages; and the petition contains 71 paragraphs over 18 pages. The identification of legal errors by which a decision might be set aside should be much more succinct.

20. The appellant has not ultimately sought to make much of the two errors specified in the joint minute. They do not play a large part in the ultimate decision, which contains a multitude of other reasons. Nor has the appellant shown that any of the other alleged errors amount to more than disagreement on the facts.

21. Of course, a decision based on a series of factual howlers would be wrong in law; but the grounds do not come close to that.

22. Mr Winter put the matter in submissions in this way: the FtT "over-engaged" in anxious scrutiny, and failed to take a holistic view. That might also be put as "not seeing the wood for the trees". I am not persuaded that it did so. It went into many minute aspects of the case. Some points were much more significant than others. Some at least verge on the trivial. However, the FtT did engage with the case overall – see 9.56, a summary of conclusions under the headings (1) absence of third party support, (2) lack of detail, (3) unexplained speculation, (4) internal inconsistency, (5) developing tale in the telling, (6) limitations of

documentary evidence, (7) contradictions between appellant and wife, (8-9) limitations of expert report; 9.57, "appropriate standard of proof applied to the whole evidence".

23. It would be tiresome to apply the same terms of "reasonable likelihood" to every factual finding; and there is no need to do so. It is common to all cases that some propositions of facts are established as certainties, others to varying degrees of possibility, and some given no credit at all. Provided that a tribunal does not leave even faint possibilities entirely out of the overall balance, and applies the lower standard at the point of overall decision, there is no error in using terms such as were criticised.

24. *MF* is a case where the Outer House reduced a refusal of permission by the UT. It is not an authority which shows that in the decision now under appeal the FtT left out of account any matter which ought to have weighed in the appellant's favour, or did not decide the case by applying the approach which it expressly stated, more than once.

25. Mr Winter was right to observe that the appeal turns on the strength of the FtT's reasoning not the SSHD's; but there was force in the point made by Ms Cunha on the case as a whole. It turned on whether the appellant was at risk from criminals as a "whistle blower", or whether the prosecution and conviction of his former senior colleagues was a convenient peg on which to hang a claim. The FtT's decision is a thorough explanation to the appellant of why it has found the first alternative not to be even reasonably likely.

26. The grounds set off on a dogged pursuit of the appellant's case, but in substance they are a lengthy disagreement on the facts, rather than a demonstration of error on a point of law.

27. The decision of the FtT shall stand.

28. The FtT made an anonymity direction. The matter was not addressed in the UT. Anonymity is preserved.

9 October 2020
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.