OUTER HOUSE, COURT OF SESSION

[2019] CSOH 45

P938/18

OPINION OF LORD PENTLAND

In the petition

LB (AP)

Petitioner

for

JUDICIAL REVIEW

Petitioner: Caskie; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

13 June 2019

Introduction

[1] In these proceedings for judicial review brought against the Secretary of State for the Home Office, the petitioner is a citizen of the Gambia. The petitioner challenges a decision by the Upper Tribunal ("UT") to refuse him permission to appeal against a decision of the First-tier Tribunal ("FTT").

[2] The petitioner was born on 26 December 1979. It is not known when he first arrived in the United Kingdom. On 5 May 2016 the police detained him. It was discovered that the petitioner had been convicted of a drug-related offence in Sweden on 24 January 2012, for which he was sentenced to 4 months imprisonment. On 3 July 2013 the petitioner was again

convicted in Sweden, this time for two drug-related offences. In respect of these offences he was sentenced to 2 years imprisonment, deported from Sweden, and prohibited from re-entering that country until 3 July 2023.

[3] On 24 August 2017 the Home Office served a deportation order on the petitioner. Thereafter he made a human rights claim and an application to transfer to this country refugee status which he claimed to have been granted in Italy in 2008. On 26 October 2017 the human rights claim, and the transfer application were refused. The Home Office did not accept that the petitioner currently had refugee status in Italy. The decision letter noted that the petitioner had explained in his interview that on his return to the Gambia from Sweden he had travelled through Senegal and Spain to the Republic of Ireland. He provided no explanation as to why he did not apply for re-entry to Italy in view of his alleged refugee status there. The petitioner had applied for asylum in Ireland, but he could not explain why he had done so. In his statement the petitioner said that his asylum claim in Ireland had been refused. He had appealed against the refusal, but he had then left Ireland for the UK before his appeal was heard.

[4] Against this unpromising background, the petitioner appealed to the FTT. By a determination promulgated on 13 March 2018, his appeal was refused. Leave to appeal to the UT was refused by the FTT on 4 April 2018. Then on 13 June 2018 the UT refused leave to appeal.

[5] The petitioner challenges the refusal of leave by the UT. On his behalf Mr Caskie advanced two broad lines of argument. First, Mr Caskie submitted that there was an arguable appeal against the FTT's finding that the petitioner had not shown that he had been granted refugee status in Italy. The Home Office had failed to take steps to verify the petitioner's alleged refugee status; in the circumstances of the case, it was said to be

incumbent on the Home Office to have done so – in other words, the normal burden of proof was, according to Mr Caskie, reversed. Second, the FTT had wrongly treated the petitioner as a "foreign criminal"; this error was also said to give rise to an arguable ground of appeal to the UT.

[6] I shall address these lines of argument in turn.

Refugee status

[7] In refusing leave to appeal, the UT held that the FTT had been entitled to conclude that the petitioner did not have refugee status in Italy.

[8] Mr Caskie submitted that both the FTT and the UT had failed to appreciate the fundamental distinction between refugee status on the one hand and leave to remain on the other.

[9] In paragraph 46 of his determination the FTT Judge said this:

> "I was not inclined to place any real weight on the claimed Italian asylum documents in view of the concerns I had over other documentation in this case and the (petitioner's) credibility as a whole. No explanation was given as to why a document dated 18 March 2008 for the Local Administrative Division of Crotone referred to the existence of grounds in Article 1A of the Geneva Convention and that he had refugee status when the other documentation lodged indicated that he had limited leave to remain in Italy to March 2013."

[10] In paragraph 47 the FTT Judge continued as follows:

> "In any event even if he had secured asylum in Italy there was no real explanation as to why he had not renewed that status there if the validity of that status was only until 6 March 2013. On the face of it even if this documentation was valid any asylum status he had in Italy was, under Italian law, only valid until March 2013. I agreed with Mr Young (the presenting officer) that there was no basis upon which it could be said that there was refugee status to transfer to the UK."

[11] Mr Caskie's argument was that once refugee status had been granted, it could only be lost where one of the grounds for cessation set out in Article 11 of the Qualification

Directive (Council Directive 2004/83/EC of 29 April 2004) applied. None of these grounds was satisfied in the petitioner's case. The FTT Judge had misdirected himself by finding that the petitioner only had refugee status until 6 March 2013. The UT had fallen into the same error. Even if the petitioner's leave to remain in Italy had expired on 6 March 2013, this had no effect on his refugee status.

[12] The difficulty with Mr Caskie's argument is that it ignores the primary basis on which the FTT Judge rejected the petitioner's evidence that he had been granted refugee status in Italy in March 2008. The argument also misunderstands the basis of the FTT's reasoning. As the first sentence in paragraph 46 of the determination makes clear, the FTT Judge was not prepared to place "any weight" on the Italian asylum documents because of the concerns he had over other documentation in the case and the petitioner's credibility as a whole.

[13] In earlier parts of his determination the FTT Judge made clear that he was not willing to accept the petitioner as a credible witness. In paragraph 20 the Judge found the petitioner to be a most unsatisfactory witness. The answers the petitioner gave to the Judge's questions "simply reinforced the view that I was not being told the truth". In his findings in paragraph 38 the Judge stated that he had little doubt that he was not told the truth; he added that he considered the accounts of the witnesses an elaborate concoction designed to facilitate the petitioner remaining in the UK when quite properly he ought to be deported.

[14] In paragraph 43 the Judge described the petitioner's evidence as being poor in a number of respects: he was unable to explain how he had come into possession of what appeared to be internal court documents purporting to relate to certain proceedings allegedly taking place in the Gambia. In paragraph 48 the Judge drew attention to other unsatisfactory aspects of the petitioner's evidence: he was not able to explain why he had

not shown more interest in the Irish appeal proceedings. The Judge formed a highly unfavourable view of the petitioner's evidence in support of his Article 8 claim. He considered that a child had been used "as a convenient pawn in this whole affair".

[15] In paragraph 67 the Judge said this:

> "There was nothing to show what the basis of his claim for political asylum had been in Italy much less that it could be linked to what he says are current circumstances in the Gambia relating to court proceedings instigated by rivals. I found the documentation said to support his claim to be unpersuasive even to the low standard and when taken with the general credibility problems I had with the (petitioner)."

[16] In paragraph 68 the Judge concluded as follows:

> "I could not be satisfied that there was any continuation of risk of serious harm to the (petitioner) and when taken with the terms of his Italian grant of asylum and failure to renew it and lack of interest in pursuing the Irish proceedings, this all indicated to me that the (petitioner) was simply making up a claim of risk upon return."

[17] From all this it is clear that the FTT Judge did not believe the petitioner in regard to any aspect of his evidence; that finding plainly extended to the claim that the petitioner had been granted refugee status in Italy. Having regard to the Judge's highly adverse findings on the petitioner's credibility, there can be no doubt that he was well entitled to find as a fact that no weight should be placed on any of the Italian asylum documentation. The position is that the Judge simply did not believe anything that the petitioner said in support of his case. He did not accept that any of the documents on which the petitioner sought to rely were genuine. The Judge gave ample reasons why he formed such an unfavourable view of the petitioner's case. He was entitled, for example, to take into account that the petitioner offered no explanation as to why one document (bearing to be from 2008) said that he had refugee status, whereas others indicated that he had limited leave to remain in Italy until March 2013. He was also entitled to have regard to the petitioner's failure to explain the basis on which he had allegedly been granted asylum.

[18] Since the finding on the issue of the petitioner's alleged refugee status was a factual finding and since the finding was amply supported by the evidence before the FTT, it follows that the UT was correct to hold that there was no basis for an appeal against this finding.

[19] Turning to the second aspect of Mr Caskie's argument on this branch of the case, he submitted that the onus had, in any event, been incumbent on the Secretary of State to check the authenticity and validity of the Italian asylum documentation. According to Mr Caskie, the FTT Judge had erred in law in failing to appreciate where the burden of proof lay. Reference was made to *MJ Afghanistan* [2013] UKUT 253 at paragraphs 49 and 50. In that decision it was confirmed that there may be some cases in which it is incumbent on the Home Office to make its own inquiries to verify the authenticity of documentation. That would only be in circumstances where verification would be easy, the documentation came from an unimpeachable source, and the documents were at the heart of the request for protection. The onus of checking verification is transferred to the State only in circumstances where it would be simple and straightforward to expect the State to do that; the normal rule is, of course, that it lies upon the applicant to establish the authenticity of the evidence on which he or she relies. Thus in *Singh* v *Belgium (Application no 33110/2011)*, the European Court of Human Rights was willing to hold that it was not unreasonable to expect the agency of the State to check the authenticity of email attachments which were attestations from the UNHCR.

[20] In my opinion, the present case is not one in which it would have been at all easy or straightforward for the Home Office to have checked the authenticity of the Italian documents relied on by the petitioner. Mr Caskie pointed to the fact that there was a Home Office official posted to Italy with responsibility for investigation of asylum issues. He said

that this official could have checked the "Eurodac" database. In response to this assertion, Mr McIver explained, on the basis of specific instructions from the Home Office, that such investigations were in practice far from straightforward. The Italian Border Police received thousands of such requests a year; there were lengthy turn-around times for the verification of documents. The Eurodac database only showed the context in which a person had been apprehended, for example whether he or she had entered Italy illegally or had made an asylum application and had fingerprints taken in the course of that application process. It was therefore necessary for all requests to be directed to the Italian Border Police at local level; the Ministry of the Interior in Rome would not be able to assist. In his oral submissions Mr Caskie did not question the accuracy of this information, although he asserted that verification would have involved no more than a telephone call. I have already noted that the Italian documents referred to by the FTT Judge said nothing about the petitioner's immigration status in 2018. No explanation was given as to why one document referred to refugee status in 2008 and another referred to his having limited leave to remain until March 2013. In the circumstances, I do not accept that the process of verification would have been easy, straightforward or simple.

[21] I am not persuaded that the onus lay on the Home Office to verify the authenticity of the Italian documentation. It seems to me that this was not a case in which the normal rule that the burden of proof lay upon the claimant would be reversed.

[22] Since I have dismissed the argument on onus to verify as being unfounded in substance, there is no need for me to consider separately the respondent's submission that the point was not now open to the petitioner as it was not taken before the FTT.

The "foreign criminal" point

[23] That leaves the third point argued by Mr Caskie. He submitted that the petitioner was not a "foreign criminal" as defined by section 32(1) of the UK Borders Act 2007 ("the 2007 Act") because he had not been convicted of an offence in the United Kingdom. The FTT Judge had erred in applying paragraphs 398, 399 and 399A of the Immigration Rules because these applied only to "foreign criminals" as defined in the 2007 Act.

[24] In its decision refusing leave to appeal, the UT observed simply that the petitioner was a foreign criminal; it noted that he had been deported from Sweden following convictions on 3 July 2013 for serious drug offences for which he was sentenced to 2 years imprisonment.

[25] The guidance issued by the Home Office in February 2017 on *Criminality: Article 8 cases* ("the Guidance") makes clear that where deportation is pursued on the basis of an overseas conviction the claim will be considered outside the Immigration Rules. Importantly, however, the Guidance says that the rules must be used as a guide because they reflect Parliament's view of the balance to be struck between an individual's right to private and family life and the public interest.

[26] It is clear from his determination that the FTT Judge had regard to paragraphs 399 and 399A of the Immigration Rules. In paragraph 69 of his determination he found that the child might not even be in the UK. Even if he was, he had not lived here for 7 years. On no objective view was the child likely to be living in the Gambia with the petitioner. He was likely to be living in Sweden. The child's alleged presence in the UK was a contrivance. The petitioner appeared to have little interest in the child. The FTT Judge concluded that a case had not been made out under paragraph 399. It is important to note that he went on to say that this was also his conclusion on wider Article 8 grounds.

[27] The Judge also found that paragraph 399A was not met. There was no genuine and subsisting relationship between the petitioner and his alleged new partner. On this aspect as well, no case had been made out under paragraph 399A or on wider Article 8 grounds.

[28] Having regard to these clear findings, the point taken by Mr Caskie can be seen to be purely technical and theoretical. The FTT Judge had regard to the relevant provisions contained in the Immigration Rules and took account of them properly. He adopted the approach set out in the Rules. He considered whether the petitioner's deportation would be conducive to the public good. He then addressed the question of whether there were any very compelling reasons capable of overcoming that public interest. Overall, the Judge's approach was one that complied with the Guidance in substance and in spirit. In the circumstances, the UT was, I consider, entitled to refuse leave to appeal on the "foreign criminal" point. The UT did not err in law on this aspect of the case.

Disposal

[29] Since I have rejected all the petitioner's submissions, it follows that the petition must fail. I have granted decree of dismissal and reserved all questions as to expenses.