OUTER HOUSE, COURT OF SESSION

2020 CSOH 85

P899/19

OPINION OF LORD FAIRLEY

In the Petition of

MDRIK VALABAIGI (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: Middleton; Office of the Advocate General

15 September 2020

Introduction

[1] In this petition for judicial review, the petitioner seeks reduction of a decision dated 2 July 2019 of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT"). By that decision, the UT refused permission to appeal to itself against a decision of the First Tier Tribunal ("the FTT") dated 10 April 2019. Permission to proceed with this petition was given under section 27B(3) of the Court of Session Act, 1988 on 31 December 2019. A full Hearing on the petition took place by Webex on 14 August 2020.

Overview and procedural history

[2] The petitioner is a citizen of Iran. He arrived in the United Kingdom on 27 March 2014 and immediately claimed asylum. He asserted that he was at real risk of persecution by the Iranian authorities because he was suspected of supporting a Kurdish political party, PJAK. In particular, he claimed that such suspicion arose as the result of an incident in February 2014 when he was compelled to give a lift in his taxi to members of PJAK. The Secretary of State refused his asylum claim on 24 February 2015. The petitioner appealed to the FTT which dismissed his appeal on 30 September 2015. In its decision of 30 September 2015, the FTT did not find the petitioner to be a credible witness and rejected the evidence he gave in support of his claim. He was refused permission to appeal to the UT and became "appeal rights exhausted" on 18 December 2015.

[3] Thereafter, on 12 December 2017, the petitioner made further submissions to the Secretary of State. Those further submissions relied upon substantially the same factual material as had previously been rejected by the FTT in its decision of 30 September 2015. The main addition to the further submissions involved production by the petitioner of what he claimed was an arrest warrant issued by the Iranian authorities, together with further witness evidence in connection with that document. In particular, he produced an authentication report from an expert in Iranian law dated 2 August 2017 (produced as 6/1 of process in this petition). On 4 December 2018 the Secretary of State again refused the petitioner's asylum claim as set out within his further submissions but granted the petitioner a right of appeal. The petitioner appealed to the FTT. Before the FTT he produced a further authentication report from the expert dated 23 January 2019 (produced as 6/2 of process in this petition). On 11 April 2019, the FTT dismissed his appeal. The petitioner sought permission from the FTT to appeal to the UT. Such permission was refused by the FTT on

14 May 2019. The petitioner then sought permission from the UT to appeal to the UT. The UT refused permission on 2 July 2019.

The proposed grounds of appeal and the UT's refusal of leave

[4] The proposed Grounds of Appeal to the UT (6/6 of process) contained two substantive challenges to the decision of the FTT. The first of these (Ground (i) / paragraph 3.1) was that the FTT had erred in finding material inconsistencies in the evidence given by the petitioner and by two of his supporting (non-expert) witnesses, and in concluding that the petitioner had given a vague and contradictory account of the circumstances in which the warrant was obtained. The petitioner does not now challenge the UT's refusal to give leave on that ground. The second proposed challenge (Ground (ii)) was that the FTT had not accorded sufficient weight to the expert's report and had failed to take account of relevant evidence of the expert. It is only the UT's decision in relation to Ground (ii) which is the subject of this petition.

[5] Paragraph 3.2 of the proposed Grounds of Appeal gave further specification of Ground (ii) as follows:-

> "**3.2 Expert Evidence:** Insufficient weight has been given to what he says. He is an expert who at page 2 of his report dated 23/1/19 explains why it may not be unusual for a warrant to have been issued so long after the event. No account is taken of this point and in so far as it materially influenced the judge's conclusions she has erred by failing to take it into account."

[6] In refusing leave to appeal on both Grounds, the UT gave the following reasons (6/7 of process):-

> "1. The grounds assert that the judge should have attached greater weight to some of the material before him and should have attached less weight to other material. However, the weight to be attached to the evidence is a matter for the judge and the grounds fail to identify a material error of law.
> 2. In an earlier appeal, the appellant had not been found to be credible.

3. The judge gave full and detailed consideration to the evidence of the appellant and his witnesses. He gave detailed consideration to the arrest warrant, its late production and provenance. Material discrepancies were found. Paragraphs 34 to 45 provide compelling reasons for rejecting the appellant's account."

Submissions

Petitioner

[7] Mr Winter, for the petitioner, submitted that in refusing to give leave to advance the argument set out in paragraph 3.2 of the Grounds, the UT had erred in law by failing to give adequate reasons for such refusal. He submitted that there were arguable errors of law by the FTT in its treatment of both authentication reports. Although paragraph 3.2 of the proposed Grounds made express reference only to the FTT's treatment of the second of the authentication reports (dated 23 January 2019), paragraph 3.2 was habile to cover the FTT's treatment of both that report and the earlier one of 2 August 2017. Even if that was too broad a reading of paragraph 3.2, the FTT's error in relation to the first authentication report was an obvious one which should be allowed to be argued pursuant to *R* v *Secretary of State for the Home Department ex parte Robinson* [1998] QB 929. Alternatively, even if the error of law was not "obvious" in the *Robinson* sense, this court should exercise an inherent discretion to allow the point to be taken now by analogy to the power of an appellate court under section 13 of the Tribunals, Courts and Enforcement Act 2007 to allow, on appeal, a point which was not argued before the lower court. In the context of appeals from the UT, that power was discussed in *RJG* v *Secretary of State for the Home Department* [2016] EWCA Civ 1042 at paragraph [51] under reference to the case of *Miskovic* v *Secretary of State for Work and Pensions* [2011] EWCA Civ 16.

[8] In relation to the authentication report of 2 August 2017 (6/1 of process), Mr Winter submitted that the FTT had plainly misunderstood the evidence of the expert at paragraph 21 on page 4. That paragraph was in the following terms:

> "**21) Arrest Warrant reason**
> That is normal practice to my knowledge; the court has the right to write down the reasons or to leave it blank.
> There are no specific reasons mentioned on this arrest warrant. A Revolutionary Court could issue a summons, warrant or arrest warrant for these reasons:
> 1- Political offences
> 2- Religion, dogma, (other opinions about Islam or other ideologies)
> 3- Any crime where Islam or the Quran is mentioned (alcoholic drinks, drugs, adultery etc.)
> 4- Crimes against internal and external security, enmity against God and corruption on earth, rebellion, conspiracy and community or armed action against the Islamic Republic of Iran or sabotage and destruction of property in order to deal with the system.
> 5- Insulting the founder of the Islamic Republic of Iran and the Supreme Leader.
> 6- all crimes related to narcotics, psychotropic substances and precursors and trafficking in firearms, ammunition and items and materials under control
> 7- others that are under special rules on jurisdiction."

Mr Winter submitted that the FTT had misinterpreted this passage of evidence in concluding that it was normal practice for an arrest warrant such as the one relied upon by the petitioner to state a reason for the warrant being granted. At paragraph 43 of its Reasons, the FTT had accordingly erred in concluding that the expert did not offer any explanation for that normal practice not being followed in this case. In referring to the normal practice for temporary detentions (6/3 of process at paragraph 43), the FTT had also misunderstood the evidence about the precise nature of this warrant. Specifically, it had failed to recognise that the expert's evidence (6/1 of process at paragraphs 3 and 7) had been that this was a post-conviction warrant rather than a warrant to facilitate questioning of a suspect.

[9] In relation to the authentication report of 23 January 2019 (6/2 of process), Mr Winter submitted that the FTT had erred in concluding that the expert offered no assistance on the issue of why there had been a significant delay between the alleged taxi incident in 2014 and the issuing of the warrant in 2016 (6/3 of process at paragraph 44). Paragraph 44 of the FTT's Reasons stated:

> "In respect of the timing of the document being issued, it was not clear to the Tribunal why, if the warrant was issued in January 2016, it was not delivered to the Appellant's home until July 2016…I find that [the expert's] report offers no assistance to the Tribunal in understanding why the document was issued after such a period of delay, either in terms of the period elapsed between his claimed political involvement and the warrant being issued, or between the date of issue and the document being taken to the family home."

Mr Winter submitted that such assistance could clearly be seen in a passage found within the first paragraph of page 2 of the report of 23 January 2019 which stated *inter alia*:

> "It is not my duty to explain why the arrest warrant reached UK within two years, but this arrest warrant is from enforcement office, this could be because Mr Validbeigi (*sic*) was free on bail, or the court procedure was so long, when the arrest warrant is from enforcement office it means that is end of court procedure."

[10] Since the concept of an error of law was wide enough to include circumstances where a decision had been made in the absence of evidence, or without sufficient evidence (*R* v *Secretary of State for Scotland* 1999 SC (HL) 17 at page 42, A-B), where the decision-maker had misconstrued the evidence or failed to take account of a relevant matter (*SS (Iran)* v *Secretary of State for the Home Department* [2010] CSIH 72 at paragraph [13]) or where there had been a failure to take into account and / or resolve conflicts of fact or opinion on material matters or to give reasons for findings on material matters (*R (Iran)* v *Secretary of State for the Home Department* [2005] Imm AR 535 at paragraph [9], these were plainly arguable errors by the FTT in respect of which leave ought to have been granted. The UT had not given adequate reasons for refusing to grant leave in relation to those errors.

[11] Mr Winter further submitted that it could be seen from paragraph 2 of its reasons that the UT had been inappropriately swayed by the previous adverse credibility finding against the petitioner when considering the significance of the separate evidence of the expert. The credibility of the petitioner had no bearing upon the assessment of that other independent evidence (*TF & MA* v *Secretary of State for the Home Department* 2019 SC 81 at paragraph 49).

[12] In all of these circumstances, Mr Winter submitted that the reasons given by the UT for refusing leave were inadequate in that they left the informed reader in real and substantial doubt as to why leave had not been granted to advance the ground of appeal set out at paragraph 3.2 of the proposed Grounds of Appeal.

Respondent

[13] Mr Middleton invited me to sustain either the respondent's second or third plea-in-law and to refuse the petition. Under reference to what was said by Lord Brodie about the constitutional function of this court in considering an application for judicial review in *HH* v *Secretary of State for the Home Department* 2015 SC 613 (at paragraph 15), he stressed that the correct starting point was to consider precisely what decision the UT had been asked to make. An application for leave to appeal to the UT is made under reference to specific grounds. Subject to what was held in *R* v *Secretary of State for the Home Department ex parte Robinson* [1997] QB 929, it is only the legality of a refusal of permission in respect of those specific grounds which is put in issue by the petitioner's application for judicial review. Embarking upon a consideration of new lines of argument which were not put forward in the Grounds of Appeal to the UT risks confusion about the function of this court in an application for judicial review.

[14] The petition challenges the adequacy of the reasons given by the UT in refusing leave to appeal on the basis of the argument set out in paragraph 3.2 of the Grounds of Appeal. The first sentence of paragraph 3.2 states only that the FTT gave insufficient weight to the evidence of the expert. That sentence does not describe any error of law, and the UT correctly held that the weight to be attached to the evidence was a matter for the FTT judge. The remainder of paragraph 3.2 was limited to an argument that the FTT judge had failed to take into account the passage at page 2 of the expert report of 23 January 2019. That argument was the subject of paragraph 3 of the UT's reasons. Taking paragraph 3.2 as the narrow context of the decision that the UT had been asked to make, paragraph 3 of the UT's reasons was perfectly clear and intelligible to an informed recipient when read with the reasons of the FTT judge.

Decision and reasons

[15] In considering an application for judicial review of a decision of the UT to refuse leave to appeal to itself, the role of this court is limited to considering whether or not the decision of the UT was erroneous in law. The starting point for consideration of that question is to consider what proposed Grounds of Appeal were presented to the UT in the leave application. In this case, two separate arguments were presented to the UT. These were set out in paragraphs 3.1 and 3.2 of the proposed Grounds of Appeal. It is not suggested that the UT erred in refusing permission to advance the argument set out in paragraph 3.1. This petition relates only to the refusal of leave to advance the argument set out in paragraph 3.2.

[16] I do not accept the submission made for the petitioner that paragraph 3.2 of the proposed Grounds of Appeal was habile to include an argument that the FTT judge had

misunderstood the terms of the first authentication report. That issue was not raised in paragraph 3.2, nor was it "obvious" in the *Robinson* sense such that the UT judge should have had regard to it notwithstanding its absence from the proposed Grounds of Appeal. On the question of whether or not I should exercise a discretion to grant the petition on the basis of an argument that was not advanced before the UT judge, I was not persuaded that the role of this court in the exercise of its supervisory jurisdiction is directly analogous to that of an appellate court. I do not, therefore, accept that the principles which were discussed in the cases of *RJG* v *Secretary of State for the Home Department* [2016] EWCA Civ 1042 and *Miskovic* v *Secretary of State for Work and Pensions* [2011] EWCA Civ 16) can simply be read across to the jurisdiction exercised by this court under Chapter 58. No authority was cited to me which suggested that it could. In any event, I saw no force in the submission that the FTT judge had arguably erred in her treatment and consideration of the first authentication report. Interpretation of any ambiguity in the evidence of the expert was a matter for the FTT judge.

[17] I also do not accept the submission made for the petitioner that paragraph 2 of the UT's reasons demonstrates that it fell into the type of error described in *TF & MA* v *Secretary of State for the Home Department* 2019 SC 81. On a fair reading, paragraph 2 of the UT's reasons relates only to its refusal of leave to advance the argument contained in paragraph 3.1 of the proposed grounds of appeal. Paragraph 2 of the UT's reasons does not relate to its refusal of leave in respect of paragraph 3.2. It is not, therefore, correct to say that the UT allowed the previous adverse credibility finding in relation to the petitioner's evidence to colour its conclusions about the separate evidence of the authentication expert.

[18] Turning to paragraph 3 of the UT's reasons, I accept the respondent's submission that those reasons were clear and intelligible to an informed reader. In particular, it is clear

that the UT refused leave to advance the argument set out in paragraph 3.2 of the proposed Grounds because, on a fair reading of the whole of the FTT judge's decision, it could be seen that full consideration had been given to the provenance of the warrant and that, in the context of the evidence as a whole, a number of material discrepancies were found. In particular, discrepancies were found in the petitioner's oral evidence and his witness statement to the FTT (described at paragraphs 37-39 of the FTT's Reasons) which undermined his claim that the warrant was genuine (paragraph 39). This led the FTT judge to conclude that the story as to how the warrant came to be in his hands had been concocted (paragraph 40). The expert evidence about the warrant was also then fully considered at paragraphs 41-44. The particular points about delay in delivering the warrant were considered in paragraph 44. The FTT judge took account of the evidence of the expert but found it to be of no assistance. That was understandable. The expert did not address at all the question of the delay of approximately 6 months between the date when the warrant was said to have been issued in January 2016 and its arrival at the petitioner's home in July of that year. In other respects, his comments at page 2 of the report of 23 January 2019 were speculative. The FTT judge was entitled to conclude that the expert offered no assistance on the issue of delay, and in determining that the FTT judge "gave full and detailed consideration to the evidence of the appellant and his witnesses", the UT judge was correct to conclude that it was not arguable that material evidence had been misunderstood or overlooked.

[19] In these circumstances, I will sustain the respondent's second plea-in-law and refuse the petition. I shall reserve meantime all questions of expenses.