EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 43
P868/20

Lady Paton
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Petition

by

HMH

Petitioner and Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner and Appellant: Winter, Drummond Miller LLP (for Jones Whyte, Solicitors, Glasgow)
Respondent: Pirie; Office of the Advocate General

10 August 2021

[1] This is an appeal under section 27D(2) of the Court of Session Act 1988 against the Lord Ordinary's refusal, after an oral hearing, to grant permission to proceed with a petition for judicial review. The appellant seeks reduction of a decision of the Upper Tribunal ("the UT") refusing permission to appeal against a decision of the First-tier Tribunal ("the FtT"). The Lord Ordinary refused permission to appeal on the basis that no error of law was disclosed in the UT's decision. He considered that the alleged errors of law founded upon

concerned aspects of the evidence adduced before the FtT and were all of a factual nature. He noted that the FtT judge did not find the petitioner to be credible in relation to the matters founded upon and, in the Lord Ordinary's view, he gave adequate reasons for arriving at the findings which he made.

Background

[2] The appellant is an Iraqi citizen of Kurdish ethnicity who arrived in the United Kingdom in May 2019. He claimed asylum on the basis that he had a well-founded fear of persecution, or faced the risk of serious harm if he returned to Iraq due to a blood feud. He claimed to have been falsely accused of killing his maternal cousin who disappeared during the course of a trip to Iran to purchase sheep for the farm which they operated together. Death threats were then issued against him by his cousin's family. The appellant's account was that he could not seek protection from the authorities and he left Iraq, travelling first to Turkey and then on via Bosnia, Italy and France to the United Kingdom. The appellant claimed that his passport was confiscated from him on his arrival in Bosnia. He had no CSID (Civil Status Identity Card) or other identity documents and therefore could not travel to the Iraqi Kurdistan Region. Without identification he would not be able to live and work there.

The dismissal of the appellant's claim

[3] The appellant's claim was rejected by the respondent on 7 November 2019 and an appeal to the FtT was refused on 1 May 2020. The FtT judge did not find the evidence given by the petitioner to be in any way credible. A number of matters led him to this conclusion. The Iranian authorities had not been informed of his cousin's disappearance and the threats

made to the appellant had not been notified to the Iraqi police. Although his cousin disappeared in January 2018, the appellant did not leave Iraq until March 2019. Aspects of the appellant's account were found to be inconsistent. The FtT judge noted that the appellant's first claim was that he had left Iraq due to social problems and a threat by a business associate. He later claimed that it was because of a family feud. In his screening interview the appellant said that he had left his passport in Iraq, only later stating that it had been confiscated from him on arrival in Bosnia. He noted that the appellant's family remained living in Iraq and that his account of a subsequent attempt to shoot his son, resulting in him having to flee to Turkey, did not feature in the statement provided by the appellant's wife. In assessing the appellant's overall credibility the FtT judge took account of section 8 of the Asylum and Immigration (Treatment of Claimants, et cetera.) Act 2004.

[4] In addition, the judge concluded that even if the appellant were to be at risk on returning to his home area of Sulaymaniyah he would be able to safely relocate to a place such as Erbil.

[5] In light of his decisions the FtT judge found that the petitioner was not a refugee, concluded that he was not eligible for humanitarian protection and found that he was not otherwise protected from removal under the ECHR.

[6] In refusing permission to appeal the UT noted that the appellant's account had been rejected for a number of reasons. Even if it could be said that the judge ought not to have taken into account the fact that the appellant had not reported the threats to the police, that was not arguably material to his overall adverse credibility assessment. The UT concluded that the ground of appeal identifying this point was not arguably material and that the remaining grounds amounted to no more than an attempt to re-argue the case. It held that

the judge had made findings of fact that were unarguably open to him on the evidence for the reasons which he gave. There was no arguable error of law.

Submissions for the appellant

[7] Counsel for the appellant submitted that the UT had failed to recognise that there was an arguable error of law on the part of the FtT. The complaints made against the FtT decision did not relate to errors of a factual nature, as the Lord Ordinary had said, but demonstrated errors of law which vitiated the factual findings and reasons of the FtT judge. There had been inadequate assessment and consideration of the country information relied upon before the FtT. The appellant's failure to notify the Iranian authorities could be explained in light of how they treat Kurds, as highlighted in *HB (Kurds) Iran CG* [2018] UKUT 00430 (IAC). The appellant's failure to notify the police in Iraq could be explained by the fact that the appellant was attempting mediation and that local police are reluctant to get involved, as explained in paragraph 2.5.6 of the Home Office Country Policy and Information Note Iraq: Blood feuds. His delay in leaving the country could be explained by the issue of tribal mediation with support being drawn from paragraph 2.5.3 of the Country Policy and Information Note. It was necessary for the FtT judge to consider the probative value of the appellant's evidence in light of what is known about the condition in his country of origin – *Horvath* v *Secretary of State for the Home Department* [1999] Imm AR 121. The FtT judge did not explain what account he took of, or what effect he gave to, any of this country information in deciding to reject the appellant's account.

[8] Separately, counsel for the appellant submitted that there was no true inconsistency in the appellant's account of why he had left Iraq. At the screening interview he had mentioned social issues. Blood feud is a social issue. He notified the Home Office after the

screening interview that his business associate was his maternal cousin. If there truly was a change there was an inadequate assessment of the information immediately given to the Home Office as well as an inadequate assessment of the reference to social issues in the screening interview. These were material errors.

[9] Counsel for the appellant also submitted that the FtT judge had erred in his conclusions about relocation. The country guidance case of *SMO & others Iraq CG* [2019] UKUT 00400 (IAC) made it clear that the CSID documentation had been replaced in Iraq by a new system of identification documents and that someone seeking to obtain the relevant new document would require to make an application at an office within their home area. The appellant would be at risk if he was to do this.

[10] On the basis of these submissions counsel contended that the appellant had set out a legally compelling reason for allowing the judicial review to proceed, namely that the reasons given by the UT did not adequately engage and did not give confidence that the UT had properly understood the grounds. The grounds were strongly arguable and there were truly drastic consequences for the appellant.

Respondent's submissions

[11] On behalf of the respondent, counsel drew attention to the terms of the Joint Presidential Guidance Note No.1 of 2019 on permission to appeal to the UTIAC. Paragraph 30 referred to the observations of Lord Justice McCombe at para [12] of the decision in the case of *VW (Sri Lanka)* [2013] EWCA Civ 522:

> "Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgement explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully.

> In my judgement, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact."

[12] Counsel submitted that this was an accurate statement of the law and applied directly to the criticisms advanced by the appellant of the FtT judge's decision in the present case.

[13] There were inconsistencies in the appellant's case, as the appellant himself had accepted in his submissions as noted at paragraph 16 of the Tribunal decision. The FtT judge was perfectly entitled to take account of these and to give them the weight which he thought appropriate. At paragraph 19 the judge had stated that he had considered all of the subjective and objective evidence. At paragraph 23 he explained that despite taking account of the appellant's explanations he remained of the view that his evidence about the disappearance of his cousin and subsequent threats to him lacked coherence and was not credible.

[14] In relation to the specific criticisms concerning country guidance counsel made two points. First, he noted that the first ground of appeal by way of application to the UT was that the FtT judge did not adequately explain why he had rejected the appellant's explanation to the effect that the Iranian authorities would not provide assistance because he was Kurdish. The ground of appeal did not complain about failure to follow country guidance. Second, he submitted that the Home Office Country Policy Information Note in relation to blood feuds in Iraq had no relevance to the appellant's circumstances. As set out in paragraph 1.2.1, the country information was concerned with intertribal disputes whereas the appellant's claim was that it was his own family and his own tribe from whom he was at risk.

[15] In relation to relocation, counsel pointed out the FtT judge had rejected the appellant's explanation that he did not have access to his passport and CSID identification. In paragraph 26, the judge had explained that even on the hypothesis that the appellant's account were to be accepted, his family would still be able to obtain new documents and send them to him. Even this hypothesis was not undermined by the country guidance case relied on.

[16] Counsel submitted that the FtT judge had made findings which were reasonable and open to him and the reasons which he had given for doing so were adequate. In any event the appellant's case did not meet the test of disclosing legally compelling reasons and fell far short of the requirement for very high prospects of success implicit in the test set out in section 27B(3) of the Court of Session Act 1988.

Discussion

[17] In this appeal the challenge is, correctly, brought against the UT's decision. However the focus was on the decision and reasoning of the FtT. If the FtT had made material errors the UT should have recognised these.

[18] At the appellant's screening interview on 15 May 2019 he was asked why he came to the United Kingdom. He replied that he had problems. When asked to explain the reasons why he could not return to his home country he stated that he had some social problems. He expanded this by saying that he was threatened that he would be killed by a business associate (Box 4.1). On 17 June 2019, the appellant's solicitors wrote to the respondent's asylum team noting that they had been provided with a copy of the appellant's screening interview and intimating certain amendments to the record of that interview in light of their

reading it over to him. In relation to Box 4.1 it was explained that the business associate was the appellant's business partner and his full cousin from his mother's side.

[19] There was no mention in either the screening interview, or the proposed amendments of 17 June, of the appellant's cousin going missing, nor of the appellant receiving threats from members of his cousin's family. It was only later that the appellant gave an account of his trip to Iran and the subsequent blame which he claimed was attached to him for his cousin's disappearance. The FtT judge accurately summarised these facts in paragraph 20 of his decision. The inconsistency which he noted was in the identity of the source of perceived harm to the appellant. The first account was that he had received threats from his maternal cousin, his business partner. On his subsequent account that could not possibly have been true, as it was his business partner who had gone missing. The FtT judge was perfectly entitled to take note of what was in fact an inconsistency and to treat this as bearing upon an important issue at the heart of the appellant's claim. He was also entitled to take account of that in his overall assessment of the credibility of the appellant's account.

[20] The appellant acknowledges that the Country Information relied upon was before the FtT and that the judge explained that he considered this. The facts which were before the Tribunal were that the Iranian authorities were not notified, that the appellant did not seek any assistance from the Iraqi police, or authorities, and that he did remain living with his family for a period of a year or so after his cousin's disappearance. The FtT judge was entitled to consider that these were relevant features which raised questions over the credibility of the appellant's account. He required to determine what to make of these matters in light of any explanation given by the appellant. The Country Information could only have a part to play if it chimed with the appellant's account.

[21] Counsel for the respondent was correct in drawing attention to the content of the ground of appeal relied upon in the application to the UT. The UT cannot have erred in law in relation to a ground not put before it. In any event, we do not consider that the case of *HB (Kurds) Iran CG* provided any relevant country guidance which the FtT judge should have applied in the circumstances of the appellant's claim. That case was principally concerned with the extent to which a failed asylum seeker of Kurdish ethnicity would be at risk of persecution on return to Iran. The appellant would fall to be returned to Iraq. Even the passages of the decision relied upon by counsel for the appellant, at paragraph 30, appear to have little, if any, application to the appellant's circumstances.

[22] In his statement the appellant explained that the real problems for him began when he returned to Iraq after his efforts to find his cousin had been unsuccessful. Beyond explaining that there were negotiations going on, that his uncle was trying to mediate and that he fled when he saw these were not going anywhere, the appellant provided little if any information as to what transpired in the year or so following his cousin's disappearance. Whilst the Country Information might be said to provide support for the suggestion that disputes might be mediated and resolved through tribal mechanisms, what was of concern to the FtT judge was the period of time which elapsed with no particular explanation. He cannot be criticised for taking account of this factor along with others.

[23] The appellant also claimed that he could not go to the Iraqi authorities for protection as the dispute he was involved with was considered to be a family matter and should be dealt with under tribal law. Again, counsel for the respondent was correct in questioning whether the Country Information relied upon was in fact of any relevance to the appellant's claim. As he pointed out, the Home Office Policy Note on blood feuds explicitly addresses feuds between rival tribes.

[24] Even if that information was thought to be of some application to the appellant's circumstances it does not support the proposition that he would be unable to seek support from the state authorities or that they would be unable to provide such support. Paragraph 2.5.6 of the Country Policy and Information Note states that:

> "There are also reports of law enforcement personnel being reluctant to get involved in tribal conflicts as they fear that they will exacerbate the situation. Law enforcement have also been known to take sides in line with their own tribal affiliations. At other times law-enforcement officials are reported to be powerless to intervene in tribal disputes and, without sufficient military back up, fear reprisals."

[25] That information might provide support for a claim that protection was sought and was not provided. It is less clear that it provides an obvious context in which to understand the fact that the appellant failed over a period of a year to seek any such support.

[26] In relation to relocation, the important point is that the FtT judge did not accept the appellant's evidence to the effect that he did not have access to his passport and CSID. There would be nothing to stop him relocating to an area where he would not be at risk and the Country Guidance case of *SMO & others* does not undermine the judges reasoning or decision.

[27] For these reasons we do not consider that the FtT judge can be said to have erred in law in taking account of the facts in the manner in which he did. The conclusion which he reached was that the appellant's account was in no way credible and lacked coherence. That conclusion was arrived at in light of the totality of the evidence, including the FtT judge's assessment of the appellant's changing account of what became of his passport and other identification document.

[28] It was in this context that the UT concluded that:

> "Even if it could be said that the Judge ought not to have taken into account the fact that the appellant had not reported the threats to the police, this is not arguably material to his overall adverse credibility assessment."

[29] This is a plainly correct statement and does not contain any error of law. The UT considered that the remaining grounds amounted to no more than an attempt to reargue the case. We agree with that assessment. In our opinion it is clear that the FtT judge approached the evaluation of the evidence in this case in an orderly and rational manner. He properly considered all of the evidence in the round and did not misdirect himself in any material sense. There is no merit in any suggestion that he failed to provide adequate reasons for his decisions.

[30] In these circumstances, the UT was correct to conclude that the FtT judge made findings of fact that were unarguably open to him on the evidence for the reasons which he gave. There is no error of law in the decision of the UT to refuse permission to appeal. In any event, there is no legally compelling reason for allowing the application for judicial review to proceed. The application does not raise an important point of principle or practice. The appeal is therefore refused and we shall adhere to the Lord Ordinary's interlocutor of 18 January 2021. We shall reserve the question of expenses.