Neutral Citation No. [2018] EWCA 3035 (Civ)

Case No: C5/2016/2147

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 6 June 2018

Before:

LORD JUSTICE HAMBLEN

Between:

WA (AFGHANISTAN)	**Applicant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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The Applicant was not represented and was not present

The Respondent was not represented and was not present

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Judgment

(Draft Approved)

LORD JUSTICE HAMBLEN:

Introduction

1. This is an oral renewal of the applicant's application for permission to bring a second appeal against the respondent's decision to refuse to extend his leave to remain and to grant him refugee status.

2. The applicant is not represented today. Until recently he had solicitors on the record, Cassadys. There have been extensive communications between the Appeals office and Cassadys. Since July 2017 Cassadys had been saying they no longer have instructions. It was repeatedly made clear to Cassadys that either they must come off the record or they must instruct counsel to attend the hearing. They have now finally come off the record. There has been some discussion of Duncan Lewis being instructed instead of Cassadys, but they have not come on the record.

3. It follows that the applicant now acts in person and it is clear that he has been so informed. No doubt it has long been made clear to him that this would be the consequence of having no solicitors on the record. The applicant is apparently in France. He has not indicated to the court that he wishes to attend in person, nor has any adjournment been sought.

4. It is difficult to see how an adjournment would serve any useful purpose. There is no indication that if an adjournment was granted instructions would be given for solicitors to go on the record or that the applicant would wish to or would attend in person and, if he

did so attend, there is nothing to indicate that he would have anything to add to the extensive written documents and grounds/arguments already provided.

5. Against that background I am satisfied that the hearing fixed for today should go ahead. The applicant and his prior solicitors on the record have had ample time to prepare and make representations for today's hearing. This application relates to a refusal of permission order made as long ago as 10 January 2017. It is unacceptable there should be further delay in dealing with the application and no good reason has been advanced for any such further delay. Although the applicant is not orally represented or present, I have had full regard for the written grounds and arguments advanced on his behalf. In any event, for reasons set out below, there is no merit in any of the grounds of appeal, nor is the second appeals test met and it is difficult to conceive how oral submissions, however persuasive, could ever overcome the fundamental obstacles facing the present application.

Background Facts

6. The applicant is a citizen of Afghanistan.

7. His age has been the subject of a dispute which is relevant to this application for permission to appeal. He states that his date of birth is 15 May 1994. An age assessment conducted by Croydon Council Social Services on 12 January 2010 assessed his date of birth to be 1 January 1992. However, after the applicant obtained official documents from Afghanistan, which confirmed his claimed date of birth, Croydon Council reassessed the applicant's age and on 17 January 2011, concluded that his date of birth is 15 May 1994.

8. The applicant's case is that when he was 13-years-old his father was killed by the Taliban, following which the applicant inherited his late father's farmland in Afghanistan. The occupants were farmers who had paid a portion of their income to his father for the use of the land, but after his death refused to continue to make these payments to the applicant. When the applicant complained and threatened to sell the land, the farmers detained and mistreated him. The applicant's initial account of this mistreatment was that he had been beaten with sticks. However, he subsequently added that he had had hot stones placed on his body and was sexually abused.

9. The circumstances of his escape from this detention is also the subject of conflicting testimony. In his initial witness statement, it was said that he was released after agreeing that he no longer wanted the land. In a subsequent witness statement dated 24 April 2015, he said that he had been released after agreeing to carry out a suicide bombing on a US convoy. In oral evidence before the first tier tribunal, he suggested that he had escaped when government forces attacked the compound in which he was held.

10. It is said that the police refused to help the applicant as the farmers were relatives of a powerful Taliban commander, Gulam Yahya. For the next year the applicant says that he lived with his cousin where he recovered from the emotional and physical abuse he had suffered at the hands of the farmers. The cousin then arranged for the applicant to be taken to a place of safety. He claims to have arrived in the UK on 20 September 2009 and claimed asylum on 22 September 2009. His case is that it would be unsafe for him to return to Afghanistan because, in particular, Gulam Yahya's men, who work for the Taliban, have issued letters and newspaper announcements

stating that the applicant is wanted. He also says that it is not possible for him to relocate to a different area within Afghanistan as he will be identified as an outsider and as being from another ethnic group and will be a target for this reason.

11. His application was refused by the respondent on 3 February 2010, but he was granted discretionary leave to remain until 15 November 2011. The applicant's appeal against this refusal was dismissed by Immigration Judge Miller on 6 May 2010, who found that the applicant's account was not credible.

12. In November 2011 he made a further application for leave to remain, which was again refused by the Secretary of State on 5 January 2015. It is clear from both decisions that the respondent does not consider the applicant's account credible.

13. The applicant's appeal against this refusal was determined by First Tier Tribunal Judge Andrews on 18 May 2015, who also found that the applicant's account was not credible. In doing so, she placed some reliance on the earlier finding of Judge Miller to that effect in accordance with the guidance provided in the case of Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702.

14. By order dated 10 August 2015, permission to appeal the decision of the first tier tribunal decision was granted by Upper Tribunal Judge Coker on the basis that it was:

> "Arguable that the judge in reasoning her findings on the appellant's credibility, failed to adequately factor in the appellant's accepted age of 16 at the date of his first hearing rather than aged 18 as considered to be at the time."

The Judgment Appealed

15. The appeal was heard by Deputy Upper Tribunal Judge Lewis on 27 November 2015. By a decision of 15 January 2016, he dismissed the appeal on the basis that:

1. Judge Andrews was clearly alive to the issues in respect of the dispute as to the applicant's age which arose in the hearing before Judge Miller and to the change of circumstances following the reassessment of the applicant's age following that hearing. There was no error of law in her approach to the application of the guidelines in Devaseelan.

2. In light of all the evidence before her, Judge Andrews was entitled to reach the conclusion on credibility which she did.

The Grounds of Appeal

16. The applicant seeks permission to appeal on the grounds that:

1. Judge Andrews erred in her assessment of the applicant's medico-legal report from Dr Goldwyn and the Upper Tribunal erred in failing to identify this error.

2. Judge Andrews erred in her application of the guidelines given in Devaseelan and the Upper Tribunal erred in failing to identify this error.

3. Judge Andrews failed to properly take into account the applicant's accepted minority at the time of the first appeal and the Upper Tribunal erred in failing to identify this error.

17. Permission to appeal was refused on the papers by Sir Kenneth Parker sitting as a judge of the Court of Appeal and the application is renewed at the present oral hearing.

Ground 1

18. The short answer to this Ground 1 is that no challenge was made to Judge Andrews' treatment of Dr Goldwyn's report in the appeal before Deputy Upper Tribunal Judge Lewis against which permission to appeal is now sought.

19. In any event, Judge Andrews set out the contents of Dr Goldwyn's report and the circumstances in which it was produced at paragraphs 22 to 23 of her judgement. From this it is clear that she understood fully the substance and implications of Dr Goldwyn's findings as to the degree of consistency between the applicant's injuries and his account of how they were inflicted. Her approach to this report is set out and justified at paragraph 28 of the judgement. In particular, her reasons for referring to Guideline (4) of Devaseelan are there set out, specifically that the applicant was legally represented at the 2010 hearing and that there was no reason why a medical report could not have been obtained at this time.

20. As the single judge stated in refusing permission to appeal:

> "The first tier tribunal in its decision of 18 May 2015 took into account Dr Goldwyn's report. That report had not been made available to the First-tier Tribunal in the earlier proceedings in 2010 when such report should have been produced (paragraph 28 of the decision of 18 May 2015). Dr Goldwyn assessed the scars consistent with or typical of the alleged torture. Dr Goldwyn was not shown the earlier First-tier Tribunal determination that had rejected the appellant's credibility. In the circumstances, the First-tier Tribunal in its decision treated Dr Goldwyn's report with circumspection."

21. In all the circumstances, Judge Andrews was clearly entitled to apply Guideline (4) of Devaseelan and to treat Dr Goldwyn's report with circumspection. There is accordingly no substance in this ground of appeal.

Ground 2

22. By Ground 2 the applicant complains that Judge Andrews erred in failing to apply Guideline (7) of Devaseelan, which provides that the force of the reasoning underlying Guideline (4) is, "greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be held against him." It is submitted that the fact the applicant was a child at the time of the first hearing is a "very good reason" such as to engage Guideline (7). Similarly, it is submitted that in respect of his failure to disclose the sexual abuse suffered during his detention, the fact that this is common among survivors of rape is a "very good reason why it should not be held against him." On this basis, the applicant submits that the judge should have applied Guideline (7) and accordingly she was not required or entitled to treat Dr Goldwyn's report with circumspection, as she did.

23. In relation to the applicant's age, although it now transpires that he was technically a minor at the time of the first appeal, Judge Miller had found that he had no difficulty in following the proceedings and, whether he was 17 or 18 he was clearly capable of giving a full account of his case and of understanding the potential consequences of failing to do so. Although Judge Andrews did not refer expressly to Guideline (7), it is clear that in substance she considered this question in paragraph 30 of her judgment. In all the circumstances, she was entitled to consider that the applicant's age is not a "very

good reason" why his failure to adduce relevant evidence at the time of the first hearing should not be held against him.

24. In relation to the failure to disclose the sexual abuse, even if it be correct that there is good reason for this, it is wrong to suggest that Judge Andrews materially held this specific failure against him. Rather it was inconsistencies and some revisions in relation to all the new features of the applicant's story to which the judge refers at paragraph 30, which were considered in the context of Guideline (4). The new reference to sexual abuse is noted as only one of the four major "discrepancies" identified by the judge. Of these four discrepancies the judge refers "in particular" to the applicant's failure to tell Judge Miller that he had been instructed to carry out a suicide bombing. Moreover, the judge expressly recognised that "victims of sexual abuse can be reluctant to disclose what has happened to them." She weighed this against other relevant factors, in particular the fact that the applicant had legal representation. This was an assessment which was open to her to make having reviewed all the evidence available to her. In any event, it does not appear to have been critical to her conclusion as to the applicant's credibility. There is, accordingly, no substance in this ground of appeal.

Ground 3

25. Finally, by Ground 3 the applicant submits that Judge Andrews failed to properly take into account the applicant's accepted minority at the time of the first appeal and the Upper Tribunal erred in failing to identify this error. However, as Deputy Upper Tribunal Judge Lewis identified at paragraph 19 of his judgment, Judge Andrews

clearly had regard to this, as reflected in paragraph 29 of her judgment. In particular, Judge Miller had considered the claim on the basis that, "whatever his true age" the applicant was "still comparatively young." As Judge Andrews found: "Judge Miller was therefore alive to the disagreement about the appellant's age and clearly took account of the applicant's young age in making his determination." In these circumstances Judge Andrews was clearly entitled to place weight on the findings made by Judge Miller in accordance with the Devaseelan guidelines. As Deputy Upper Tribunal Judge Lewis stated in paragraph 22 of his judgment:

> "In my judgment that was an approach entirely open to Judge Andrews. Judge Andrews was clearly alive to the issues in respect of the dispute over the appellant's age before Judge Miller and the change of circumstance in that a post appeal age assessment had reassessed the appellant's age to be closer to that which he all along claimed. Judge Andrews was clearly alive to the approach required under the guidelines in Devaseelan and essayed an application to those guidelines to the particular facts and circumstances of this appeal. In my judgment, Judge Andrews reached an evaluation as to how those guidelines should be applied to this appeal that was entirely within the remit of her judgment."

I agree. There is accordingly no substance in this ground of appeal either.

Conclusion

26. For the reasons outlined above, and those given by the single judge in refusing permission to appeal on the papers, there is no substance in any of the grounds of appeal advanced and the appeal has no prospect of success. In any event, the application does not raise any important point of principle or practice and the seconds appeal test in not met.

27. For all these reasons, the renewed application for permission to appeal must be refused.

Order: Application refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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