EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 31
P467/20

Lady Paton
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal

by

FI (AP)

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Winter; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

11 June 2021

[1] In these proceedings for judicial review the court has before it an appeal under section 27D(2) of the Court of Session Act 1988 against the Lord Ordinary's refusal to grant permission to proceed. 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 proceed on the basis that the petition had no real prospect of success: he held that no error of law was disclosed in the UT's decision and, in any event, there was no legally compelling reason why it should be allowed to proceed.

[2] The background may be briefly stated. The appellant, who was born in August 1997, is a citizen of Pakistan. He first came to the United Kingdom on a student visa; this was valid from August 2017 to April 2021. In December 2018 the appellant returned to Pakistan. He gave the following account. He was discovered having sex with another man. A meeting of elders in the village (known as a *Jirga*) decided that the two men should be killed. After one member intervened, the *Jirga* ultimately ruled that the appellant and the other man should be allowed to repent by going on a pilgrimage to Mecca. After the pilgrimage the appellant's father ordered him to marry his cousin and not to return to the United Kingdom. In January 2019 the appellant was captured by a gang of armed religious extremists when he was visiting his mother's grave. He managed to escape and, with the assistance of a friend and a cousin, made his way again to the United Kingdom. He arrived on 3 February 2019.

[3] In July 2019 the appellant claimed asylum on the ground that he would be at real risk of persecution in Pakistan due to being gay. He said that he was fearful of returning to Pakistan because of what his family would do to him.

[4] The respondent refused the appellant's asylum claim. It was not accepted that he was gay or that the events described by him had occurred.

[5] The appellant appealed unsuccessfully to the FtT. Having heard his evidence, the tribunal did not accept that he was gay or that his claims about the events during his return visit to Pakistan were true. The appellant had produced a letter from LGBT Youth Scotland stating that he had first come to their office in Glasgow in July 2019 to join their weekly group, Standout. The FtT noted that the timing of the contact with LGBT Youth Scotland suggested this had been done to enhance his asylum claim.

[6] The UT refused permission to appeal against the FtT's ruling. It held that the judge had properly directed himself in his approach to assessing the evidence and, in particular, to

the appellant's claim to be gay. The FtT had provided cogent reasons for concluding that the appellant's claim was not a credible and genuine one. There was no arguable merit in the assertion that the FtT's decision left the informed reader in doubt as to why the appeal had been refused. The FtT had given full and proper reasons for its decision. The judge had not erred in giving no weight to the letter from LGBT Youth Scotland.

[7] Before us, Mr Winter submitted that the petition for judicial review had a real prospect of success. The UT had erred by failing to recognise that the FtT had arguably misdirected itself in its assessment of the evidence. The UT had also erred in holding that the FtT had given adequate reasons for its decision. The FtT had looked at the evidence in a one-dimensional way. It had failed to allow a positive role for uncertainty in applying the low standard of proof for an asylum claim. In particular, the FtT had failed adequately to explain why it had regarded certain aspects of the appellant's claim to be plausible, but had nonetheless concluded that he had failed to establish his claim to be gay. Reference was made to *KS (benefit of the doubt)* [2014] UKUT 00552 (IAC). Further, the UT had failed to recognise that the FtT had wrongly rejected the evidence tendered on behalf of the appellant in the form of the letter from LGBT Youth Scotland.

[8] On behalf of the respondent, Mr Maciver submitted that there was no error of law in the UT's approach. It had correctly recognised that the FtT had examined the whole of the evidence in the case thoroughly and carefully.

[9] We are satisfied that there is no merit in this appeal. Whilst the challenge is correctly brought against the UT's decision, the real focus must, as both counsel acknowledged, be on the decision and reasoning of the FtT. If the FtT had made material errors, the UT should have recognised these.

[10] Turning then to examine the decision of the FtT, we consider that it contains an unimpeachable assessment of the evidence viewed as a whole. It betrays no error of approach. We note that the judge bore in mind the guidance given in *KB* and *AH (credibility – structured approach) Pakistan* [2017] UKUT 00491 (IAC). He acknowledged that apparent improbability had to be treated with care in view of cultural differences. He recognised that credibility assessment was only part of the task of assessing the whole of the evidence. Some of an account might seem to be inherently unlikely, but that did not necessarily mean that the substance of the account was untrue. The judge explained that for convenience he had commented on individual aspects of the appellant's claim, but this did not mean that he had reached any conclusion before looking at the totality of the evidence.

[11] The FtT judge rightly observed that the issues raised by the appellant's claim to be gay were sensitive and that it was important to avoid stereotyping. He explained that he accordingly approached his task of evaluating the evidence with anxious scrutiny and sought to make a balanced evaluation of the appellant's claim. The judge commented that he had to look at all the evidence in the round, to try to grasp it as a whole, and to see how it fitted together and whether it was sufficient to discharge the burden of proof. All this was undoubtedly correct.

[12] The decision shows that the judge carefully considered each element of the appellant's evidence on its merits, taking into account both the inherent plausibility of the fact contended for, and any questions or doubts raised by it. For example, in paragraph 37 the judge's analysis shows that he found that the appellant's account of being apprehended during sexual activity with a friend during the visit to Pakistan was plausible, but questionable – they could have avoided detection by the simple expedient of locking the door. Similarly, in paragraph 38 the judge held that the appellant's evidence that one

member of the *Jirga* persuaded the others that he should not be killed was a possibility, although it could also be inferred that the appellant had changed his account to address a point made against him in the respondents' refusal letter to the effect that the meeting makes its decisions by a majority. The pilgrimage to Mecca described by the appellant in his evidence was consistent with his overall account of what happened during the visit, but was also consistent with his return to Pakistan at that time regardless of his being apprehended for being gay; it might always have been his intention to make the pilgrimage. As for managing to escape from the armed extremists, this aspect of the appellant's account was open to doubt. He claimed to have injured his foot in jumping from a window, but he produced no evidence. If the extremists intended to kill him, they could have been expected to have kept a close watch on him. The appellant's evidence that a friend paid for his airline ticket to the United Kingdom was also questionable. So too was the claim that he persuaded a cousin to put himself in danger by obtaining the appellant's passport and student card.

[13] Having considered these aspects of the appellant's evidence, the FtT judge went on to evaluate the appellant's conduct after he had reached safety in the United Kingdom. He found that the appellant's failure to claim asylum upon returning to this country in early February 2019 was inconsistent with his claim to be in fear of persecution on account of his sexuality. Having been threatened with serious harm by his family, having disobeyed his father by returning to the United Kingdom, and having escaped death at the hands of armed extremists by the narrowest of margins, why would the appellant not claim asylum immediately? The appellant was educated to degree level. It was difficult to accept that he was unaware of the concept of asylum. The judge held that the appellant's claim to have lost his passport was not plausible; he had not reported the loss. The appellant's evidence that he contacted his father about his tuition fees was not consistent with his claim that his

father intended to kill him and had tried to stop him returning to the United Kingdom. The judge found that the evidence in support of the appellant's claim to be gay was weak. He had provided minimal evidence to show this. He had produced no witnesses or other evidence to support his alleged attendance at gay clubs.

[14] In paragraph 48 the judge concluded by stating that looking at all these factors he did not find the appellant to have established his claim to be gay. Related to this he did not accept his claim about the surrounding events; this was a reference to the evidence given by the appellant concerning the events that allegedly occurred during his visit to Pakistan in December 2018 and January 2019. Mr Winter submitted that the reasoning expressed in this paragraph was deficient because it failed to explain sufficiently why the claim to be gay had been rejected and why the account of the other events had also been rejected. We cannot accept this submission. It focusses too narrowly on just one part of the decision. When the decision is read fairly and as a whole it is abundantly clear that the FtT judge has considered and weighed up all the evidence before reaching sustainable and well-reasoned conclusions. As the Lord Ordinary aptly observed, to say that a piece of evidence is plausible and then to point to a qualification or doubt is an unobjectionable process of assessment. The point was well put by the Upper Tribunal at paragraph 73 of *KS (benefit of the doubt)*: what is involved is a holistic approach to the assessment of evidence in cases like this. Every asserted fact should be kept in mind (and not rejected) as a possibility until the end when the question of risk is posed in relation to the evidence considered in the round. That is exactly the approach which the FtT judge can be seen to have followed in the present case. At the end of the day he took the view that the reality of matters was that the appellant's claims were open to serious doubt and were, when viewed in the round, unconvincing.

[15] In our opinion, it is clear that the FtT judge approached the evaluation of the evidence in the case in an orderly and rational manner. No error is disclosed in the approach he adopted. He properly considered all the evidence in the round and did not misdirect himself in any sense. There is no merit in the submission that he failed to provide adequate reasons for his decision.

[16] As to the letter from LGBT Youth Scotland, the judge was entitled to treat this as being of little weight. The letter merely stated that the appellant had approached the group in July 2019. This was shortly before he submitted his claim for asylum. The letter contained no further details concerning active involvement with the group.

[17] In these circumstances, the UT was correct to conclude that the FtT judge had provided cogent reasons for not accepting the appellant's claim to be gay. There is no error of law in the decision of the UT to refuse permission to appeal. Essentially, the present appeal amounts to an attempt to reargue the factual aspects of the case. That is not the function of judicial review.

[18] 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.

[19] The appeal is refused. We shall reserve all questions of expenses.