EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

2021 CSIH 15
P623/19

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Appeal

by

CM

Petitioner and Reclaimer

for

Judicial Review of a decision of the Secretary of State for the Home Department

Petitioner and Appellant: Bovey QC and Caskie; MBS Solicitors
Respondent: McKinlay; Office of the Advocate General

24 February 2021

Introduction

[1] The petitioner arrived in the United Kingdom with his wife and young son in June 2017. He claimed asylum, telling immigration officials that he faced persecution if he returned home to Venezuela. The risk arose, he said, because of an incident that had occurred two months earlier. Members of the Bolivarian National Guard of Venezuela ("the GNB") had shot and killed one of his friends. He had been present when this event took place.

[2] The Home Office declined to grant asylum and the First-tier Tribunal subsequently refused the appeal. It concluded that the petitioner would not report the matter to the authorities in order to protect the safety of himself and his family. Further he could not identify the perpetrators. Accordingly, he was not at risk of persecution

[3] Subsequently both the F-tT and the Upper Tribunal ("the UT") refused to grant permission to appeal. They held that there had been no arguable error of law. In these proceedings for judicial review the petitioner seeks to reduce the UT decision. The Lord Ordinary refused the petition. The petitioner submits that in doing so, he erred in law.

[4] As the case has progressed, it has altered in two material respects. One relates to the law. The other relates to the facts. We shall say more about both matters below.

Background

[5] The petitioner was born and grew up in Venezuela, where his family and in-laws continue to reside. Latterly he owned an IT business. In recent times the country has experienced periods of civil unrest. The petitioner and his wife took part in peaceful protests against the Venezuelan government.

[6] The petitioner arranged to meet his friend T at one such demonstration which took place on 11 April 2017. Officers of the GNB were present. They fired tear gas and charged into the crowd of protestors. In the ensuing minutes, the petitioner and T ran for safety. A GNB officer grabbed T and shot him in the face at point blank range. Despite being taken to hospital and undergoing surgery, T died two days later.

[7] On the night of the shooting the petitioner visited T. Afterwards two GNB officers accosted him in the hospital car park. They pinned him against a car and took his mobile phone and watch. They told him that they knew he had witnessed them shoot T and that he

should not open his mouth about it. He would have serious problems with them and the national police if he did he and his family would be killed.

[8] About a fortnight later, the petitioner's wife received a series of unsettling telephone calls. They came from unknown numbers. Some were silent. Others were not. During one call, a child could be heard crying and screaming in the background. A woman said that the petitioner should keep his mouth shut and that their son had been kidnapped. In fact he was safe at nursery. The calls took place over a three day period.

[9] The petitioner's wife contacted an individual in the national security service. He linked one of the telephone numbers to the government. His advice was that the petitioner should forget about the incident and stay away from protests, otherwise his life would be in danger.

[10] Understandably, the petitioner and his wife were alarmed. They decided to flee to the United Kingdom with their son. On their arrival in Edinburgh the petitioner sought protection, either as a refugee or on the basis of humanitarian protection. Success on either branch of the application would also entitle his wife and son to remain here.

M's application

(1) Refugee Status

[11] The petitioner brought the first branch of his application under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006/2525 ('the 2006 Regulations'). Regulation 6 governs two key questions:

> *Who is entitled to refugee status?* Individuals who have a well-founded fear of being persecuted by reason of their race, religion, nationality or membership of a particular social group. These are sometimes referred to as 'the Convention reasons'.
>
> *What constitutes a particular social group?* The answer is where:

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society (such as a group based on a common characteristic of sexual orientation).

[12] There are two additional points. (I) Holding an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods is enough. It does not require such an opinion, thought or belief to have been acted upon. (II) In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the characteristic in question, provided the persecutor attributes it to him.

(2) Humanitarian protection

[13] The petitioner also founded on paragraph 339C of the Immigration Rules. It states that the Home Office will grant a person humanitarian protection if it is satisfied that they do not qualify as a refugee and substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country.

F-tT decision

[14] Following a two day hearing the F-tT judge found both the petitioner and his wife to be credible and reliable witnesses. She concluded, however, that there was no reasonable likelihood of him being persecuted on return to Venezuela. He had failed to discharge the onus of establishing his case, even at the lower standard of proof that applied.

[15] Two findings were crucial to the F-tT judge's decision. The first was that if the petitioner made no complaint he would be in no danger. The second concerned the petitioner's recollection of the killers.

[16] At paragraph 23 (a) of her decision the F-tT judge reasoned:

> "…[I]n my view as the Appellant has not made a complaint then he is in no danger from the GNB officers who were responsible for shooting T at close range..."

[17] Later in paragraph 23 (a) she observed:

> "… In oral evidence I asked the Appellant if such a long period of time has passed since the incident he would be able to recognise these GNB officers and he said that he had their faces in his head. I then asked if he had any way of being able to identify them and he said 'no'."

As will become apparent, we consider that this exchange has caused a confusion which has permeated the judgments of the F-tT, the UT, and the Lord Ordinary.

[18] We summarise the other findings of the F-tT judge as follows: (a) although the nuisance calls had caused great anxiety, they had served their deterrent purpose; (b) the GNB had allowed the petitioner to remain free and had not, for example, detained him or charged him with a groundless crime; (c) he and his family were able to leave the country using their own passports; (d) the GNB had not contacted members of his or his wife's family; (e) the petitioner and his wife had not taken part in any political activities in the UK which could bring them to the attention of the Venezuelan authorities; (f) the petitioner would continue to protest if he returns to Venezuela; and (g) the petitioner would not

report what he had seen out of safety concerns for himself and his family he had been consistent in his position since his asylum interview on 15 August 2017.

UT decision

[19] The proposed grounds of appeal to the UT raised several matters, but it is only necessary to mention two of them. First, the F-tT had failed accurately to assess the danger to the petitioner were he to be returned. The perception of the killers was that the petitioner could speak to the commission of the crime and could identify them as the perpetrators. That placed him in danger whether or not he complained to the authorities. Second, ("the *HJ (Iran)* ground") was a new argument. The F-tT ought to have held that a requirement for the petitioner to 'keep quiet' about the murder infringed his human rights. The petitioner's position was analogous to that of the applicants in *HJ (Iran) and HT (Cameroon)* v *Secretary of State for the Home Department* [2011] 1 AC 596. He could only avoid persecution in his home country if he 'lived a lie' by not reporting the matter to the Venezuelan authorities.

[20] The UT rejected both arguments. In relation to the first, it reasoned:

> "The Judge gave detailed reasons for her finding that the GNB would have no interest in the Appellant and for her finding that there was nothing to identify them on return."

In relation to the *HJ (Iran)* ground, it held that that case did not apply to the petitioner's circumstances, and that "[i]n any event the Appellant has not expressed any wish to pursue a complaint".

Lord Ordinary's decision

[21] The Lord Ordinary refused the petition for essentially similar reasons. First, the factual findings could not be revisited as they were based on a meticulous analysis of the

evidence. Second, *HJ (Iran)* did not apply as the petitioner was not a member of a protected social group. Third, his decision not to make any complaint was based on pragmatic considerations, and had been a choice which had been "freely made": Opinion, paragraph [28]. In particular, he had not been forced or induced to modify his behaviour because of a well-founded fear of persecution for a Convention reason. Fourth, if he returned to Venezuela he would not be required to suppress a core aspect of his personality. He could live his life openly and continue to protest against the government if he wished to do so. Fifth, it was artificial and contrived to characterise the decision not to report the murder as being related to a political opinion held by him.

[22] But it is important to note that the Lord Ordinary also regarded it as "critical" that the F-tT found as a fact that the petitioner was not able to identify the perpetrators of T's murder: Opinion, paragraph [31]. In consequence of this the view was taken that he would not be of any interest to them were he to be returned to Venezuela.

Decision

[23] We shall not rehearse the submissions of counsel in any detail. They essentially followed the contours of what had been said at the hearing before the Lord Ordinary. We remind ourselves that at this stage we are not concerned with the merits of the appeal, but with whether the UT erred in law in refusing to grant permission to appeal.

[24] Mr Bovey QC invited us to conclude that it was arguable that the FtT had erred in law in relation to the first ground, and that the UT had erred in law in not recognising that; and that it was also arguable that the UT had erred in law in relation to the *HJ (Iran)* ground.

[25] Mr McKinlay submitted that the Lord Ordinary's analysis was correct. The petitioner did not have a well-founded fear of persecution on Convention grounds - the

contrary view was not arguable. Any modification of his behaviour on being returned to Venezuela would stem from the petitioner's interest in personal safety, not on his political opinion. It was not arguable that *HJ (Iran)* applied. In the course of his clear and well-presented submissions, however, Mr McKinlay accepted two points. In our view, the concessions were rightly and properly made.

[26] First, if it is arguable that the principle in *HJ (Iran)* applies, then this court should allow the appeal and remit to the UT. Second, Mr McKinlay recognised that the F-tT, the UT and the Lord Ordinary all proceeded on the basis that the petitioner could not identify the individuals who shot T. If on a proper analysis of the facts that was not correct, their reasoning would be undermined. Mr McKinlay also acknowledged that even if the petitioner was unable to identify the perpetrators, he might nevertheless have important information to impart to the authorities, *viz* -when, how and by whom (*ie* GNB officers) T was shot. Matters may go further in any investigation. Witnesses are typically asked to view photographs, to create photo-fit images or drawings, and to attend identification parades. Sometimes this can jog an individual's memory. We are satisfied that the first ground does disclose an arguable error of law on the part of the F-tT, and that the UT and the Lord Ordinary erred in law in not recognising that. It is arguable that it was unreasonable in the circumstances for the F-tT to conclude that the petitioner is in no danger because he has not made a complaint. He is a witness to a murder by state actors. The murderers know that he witnessed the commission of the crime and they believe that he can identify them as the perpetrators. It may reasonably be inferred from the circumstance of the murder and from their subsequent threats to the petitioner that the perpetrators are ruthless men with scant regard for human life. They run the risk that at some point the petitioner might speak up, with potentially grave consequences for them. In those circumstance it may be reasonable to

conclude that they represent a danger to the petitioner. Since it is the killers' perception of the evidence which the petitioner may be able to give which is critical to his safety, whether that perception is accurate, appears to us to be of secondary importance. However, in our opinion it is arguable that the F-tT (and in their turn the UT and the Lord Ordinary) misunderstood the petitioner's evidence. He stated that he might well be able to recognise the perpetrators - he recollected their faces. We think that there is, at the very least, a substantial argument that it may reasonably be inferred that the petitioner understood the judge's follow-up question to be asking something different, *viz*. apart from recollecting what they looked like, had he any other way of being able to establish who they were? We think it arguable that, on a reasonable reading of the entirety of the relevant passage, the petitioner indicated that he thought he would be able to recognise the killers.

[27] We would add that in the circumstances summarised at paragraphs 5-10 above, it is unclear, at least to this court, how and why the petitioner's reluctance to make a report should have the significance attached to it by the F-tT.

[28] Since we are satisfied that the UT erred in law in failing to recognise that the first ground was arguably a material error of law on the part of the F-tT, it follows that the UT's decision cannot stand.

[29] It is not necessary for present purposes to decide whether the UT erred in law in relation to the *HJ (Iran)* ground. Since that ground raises a somewhat novel point, and there is going to have to be an appeal to the UT in any case, there may be advantages in the *HJ (Iran)* ground being fully canvassed before the UT during the course of that appeal (if, on advice, the petitioner wishes to pursue it).

[30] We conclude that the proper course is to allow the reclaiming motion; recall the Lord Ordinary's interlocutor; sustain the petitioner's first plea-in-law, repel the respondent's

fifth and sixth pleas-in-law, and reduce the decision of the UT; and remit to the UT to proceed as accords in the light of this court's findings. We anticipate that the UT will grant permission to appeal, and will then hear the substantive appeal.