EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 6
XA27/17

OPINION OF LORD DRUMMOND YOUNG

in an application under section 13 of the Tribunals, Courts and Enforcement Act 2007

by

MCB

Applicant

against

Refusal of permission to appeal by the Upper Tribunal

Applicant: Haddow; Drummond Miller LLP
Respondent (The Advocate General for Scotland as representing the Secretary of State for the Home Department): Pirie; Office of the Advocate General

16 January 2018

[1] The applicant is a citizen of Cameroon born on 16 August 1982. She applied for a residence card as the spouse of a Czech national on 18 January 2012, but that application was refused by the Home Secretary. Her marriage subsequently broke down, and she was served with notice as a person subject to removal on 20 October 2013. By that time she had a child born on 21 December 2012 as her dependent. On 26 November 2013 she claimed asylum, on the ground that she feared that, because of her membership of a particular social group, she

would be subject to forced marriage and female genital mutilation if she were returned to Cameroon. That claim was refused by the Home Secretary by letter dated 2 September 2015. The applicant appealed to the First-tier Tribunal against that decision and, following a hearing, her appeal was granted on 1 July 2016. Thereafter the Home Secretary appealed to the Upper Tribunal, which by decision dated 19 September 2016 allowed the appeal, set aside the decision of the judge of the First-tier Tribunal in its entirety, and remitted the case to the First-tier Tribunal, to be heard by a different judge. Thereafter the applicant applied to the Upper Tribunal for permission to appeal to the Court of Session, but that application was refused by a decision of 20 February 2017. The applicant has now applied to the Court for permission to appeal against the Upper Tribunal's determination, in terms of section 13 of the Tribunals, Courts and Enforcement Act 2007.

[2] At the hearing before the First-tier Tribunal, the applicant gave evidence about her upbringing at some length. She stated that when she was 15 an attempt was made by her mother and aunts to compel her to undergo female genital mutilation, but she resisted this physically, although she was admitted to hospital as a result of a cut on her stomach. She attended boarding school and university. Her father tried to protect her and her sister from female genital mutilation, and the two girls moved around the country with him. The applicant's father died in 2012. A tribal chief paid for her father's funeral, and the applicant gave evidence that in consequence her mother had agreed that in return the applicant would marry him. Any such marriage would be polygamous. The applicant had worked as a teacher in Cameroon in a primary school run by missionaries, but the salary for such work is very low and she would not be able to sit the necessary examination for government employment as a teacher as she was over the maximum age, 32. She could not depend on her family for support, nor could her son, whose father was the applicant's former husband.

She gave evidence that her son would not be accepted as a member of her tribe, the Ejagham.

[3] At the hearing before the First-tier Tribunal the applicant's account was supported by evidence from her sister, who had obtained special leave as a serving member of the United States Armed Forces, currently stationed in Kuwait. The judge of the First-tier Tribunal records that a large quantity of written evidence was available. Expert evidence was also available in the form of a report from a journalist who is accredited by the United Nations. The evidence was to the effect that, although female genital mutilation was low in Cameroon by comparison with other sub-Saharan African countries, it was highly prevalent in the applicant's ethnic group. The applicant's account of the attempt to subject her to female genital mutilation accorded with the expert's knowledge of the country, and it also accorded with her sister's evidence. The expert further gave evidence that forced marriage was common in Cameroon.

[4] The judge recorded that the applicant had been criticized by the Home Secretary's representative as she had not claimed asylum as soon as she arrived in the United Kingdom. He noted, however, that she had arrived on a student visa which appeared to have been valid, and once she was in the United Kingdom she met her husband, who was Czech, and made EEA applications for leave to remain. The judge stated that that did not alter the fact that the reason that she came to the United Kingdom was to avoid the issues that she still wished to escape, namely female genital mutilation and, now, forced marriage. It was only after the applicant had a child that she obtained advice to the effect that she could claim asylum on account of the difficulties that she confronted in Cameroon.

[5] The judge referred to the evidence of the applicant's sister. He recorded that she had made considerable effort to attend the court and give evidence, and that her evidence was

consistent in all material respects with the applicant's evidence. The sister was accordingly a corroborating witness, which frequently did not happen in asylum cases. The judge further held that the expert report assisted the applicant in providing additional confirmation from the standpoint of a journalist from Cameroon as to the customs of the country. The expert's evidence, which was to the effect that in the country as a whole the risk of female genital mutilation was 20%, was enough to disclose a significant risk to an unacceptable and barbaric procedure. The expert had further given evidence that for the applicant's tribe the risk was significantly greater, rising to possibly 80% or greater. That was clearly significant, and explained the applicant's father's concern for her safety. Consequently there was a significant risk that the applicant would be unable to enjoy protection from the authorities when she was in Cameroon as her tribe were spread throughout the country. She had in addition a child with a foreign father and autistic traits, which would set her apart. It would, moreover, be very difficult for the applicant to find work or to find suitable childcare without being discovered by someone of her tribe and forced to marry the chief to whom she had been promised. The expert report confirmed that that was a wholly possible scenario. The child would then be taken from her, which would be unacceptable.

[6] The judge of the First-tier Tribunal held that the applicant was at risk on return to Cameroon on account of her particular social group as a woman from the Ejagham tribe and hence liable to female genital mutilation. That engaged the Refugee Convention and Articles 2 and 3 of the European Convention on Human Rights. There was in addition a risk to the applicant's son which fell within Article 8, as he could be left without his mother to look after him. Internal relocation would be unduly harsh as the applicant's tribe was spread throughout the country and she would therefore be at risk in any part of the country.

Furthermore, her mother's family had links to persons who had been in power, including a former prime minister. In addition the applicant would have difficulty in finding employment. In those circumstances it was unlikely that the local authorities could successfully protect her from family members.

[7] The Upper Tribunal allowed the Home Secretary's appeal. The Upper Tribunal's reasoning is shortly stated. First, after a review of certain decided cases, notably *NK (FGM - Cameroon)*, [2004] UKIAT 00247, it was stated that, although the latter was not a country guidance case, it clearly had relevance to the present case, and had been relied on by the Home Secretary in submissions to the First-tier Tribunal. The judge had not, however, compared the findings of the Upper Tribunal in that case against the expert evidence in the present case. Secondly, the judge had placed reliance on the expert report without saying why, and had not attempted to distinguish the conclusions from the expert report from the ratio of *NK*. Both of those factors involved an inadequacy of reasoning. Thirdly, the judge had referred to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which provides that failure to make an asylum claim before an adverse decision must be treated as damaging a claimant's credibility, but had not "factored in" that obligation as part of the reasoning of the decision. Consequently it was not clear to an objective reader why the applicant's account of events was to be accepted. Fourthly, the judge had not dealt adequately with the expert's report. She had failed to set out the expert's qualifications, and did not discuss the content of the report or explain why she found the report to be persuasive and reliable. The expert report was not set against relevant background materials which were available to the judge. This related particularly to internal relocation.

[8] For these reasons the judge of the Upper Tribunal found that the decision of the First-tier Tribunal was tainted by material errors of law because of the inadequacy of the reasoning contained in the decision. The decision was therefore set aside in its entirety, in order that matters might be determined of new. The case was remitted to the First-tier Tribunal before a different judge for reconsideration.

Application for Leave to Appeal

[9] The applicant now seeks leave to appeal against the decision of the Upper Tribunal, on two grounds. The first of these relates to the Upper Tribunal's refusal to grant permission to appeal to the Court of Session, and is based on the terms of section 13 of the Tribunals, Courts and Enforcement Act 2007. It was submitted that the Upper Tribunal had accepted in its decision on permission to appeal that the applicant had a case that was "potentially arguable", but permission to appeal was refused on the ground that the second appeals test was not satisfied: the appeal did not raise an important point of principle or practice, and there was no other compelling reason to allow the appeal to proceed. In those circumstances, it was submitted, there was no justification for refusing permission to appeal, in view of the wording of section 13 of the 2007 Act. So far as material, that section is in the following terms:

> "(2) Any party to a case has a right of appeal….
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> …
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> (4) Permission…may be given by –
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> a) the Upper Tribunal or
>
> (b) the relevant appellate court,
>
> on an application by the party.
>
> …

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and from which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers –

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(6A) Rules of court may make provision for permission not to be granted on an application under subsection (4) to the Court of Session that falls within subsection (7) unless the court considers -

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11".

[10] Thus different provisions are made for England and Wales and Northern Ireland on one hand and Scotland on the other hand. In the former case, subsection (6) applies, and according to the terms of that subsection both the Upper Tribunal and the relevant appellate court are bound by the second appeals test. In Scotland, by contrast, subsection (6A) (which was inserted by section 23 of the Crime and Courts Act 2013 and subsequently amended by sections 83(2) and 95(1) of the Criminal Justice and Courts Act 2015; in each case further statutory instruments were involved in the enactment process) prescribes that the Rules of Court should incorporate the second appeals test but says nothing about the Upper Tribunal. The Rules of Court have been duly amended to incorporate that test, but no corresponding provision exists that is binding on the Upper Tribunal. Counsel for the applicant founded on those provisions, and in particular the difference between subsection (6) and subsection (6A),

to argue that in cases in Scotland the Upper Tribunal is not empowered to apply the second appeals test. Consequently, if it considers that there is an arguable point of law in the appeal, it must grant permission to appeal, and cannot refuse it on the ground that the appeal does not raise an important point of principle or practice or that there is some other compelling reason for granting permission.

[11] Counsel for the Home Secretary conceded that the Upper Tribunal was not entitled to apply the second appeals test. In my opinion that is an unfortunate conclusion, because the obvious intention of section 13 of the 2007 Act was that the second appeals test should be applied at all stages where permission to appeal to the Court of Session, or the Court of Appeal in England and Wales or Northern Ireland, is considered. In the light of the concession, however, it appears that the Home Secretary accepts that, if the Upper Tribunal considers that there is a sufficiently arguable ground of appeal, it should grant permission to appeal. I accordingly proceed on that basis.

[12] The second ground on which the applicant seeks permission to appeal is based on the standard second appeals test. It is submitted that the reasoning of the Upper Tribunal was defective, and that in particular the test applied in considering the adequacy of the reasoning of the First-tier Tribunal, as laid down in a substantial number of earlier cases, had been misapplied. While the reasoning of the First-tier Tribunal was shortly stated, the criticisms of it advanced by the Upper Tribunal had all been adequately dealt with. Thus there were arguable grounds of appeal. Moreover, an important point of principle arose relating to the correct approach to reasons challenges brought against decisions of the First-tier Tribunal, especially where the First-tier decision is favourable to an applicant for asylum. This, it was said, was a matter of general importance, and was not a matter of settled law.

[13] Counsel for the Home Secretary contended that the test for the adequacy of the grounds of appeal was not arguability but a test of "real prospects of success". That test, it was submitted, was not satisfied in the present case. Nothing in the criticisms made by counsel for the applicant of the Upper Tribunal's reasoning could be described as legally compelling, and any prospects of success were poor. Consequently permission should not be granted.

Decision

[14] In my opinion permission to appeal should be granted in this case. In the first place, in the light of the concession made by counsel for the Home Secretary as to the test that should be applied by the Upper Tribunal in deciding whether to grant or refuse permission to appeal, I consider that the applicant can argue that the reasoning of the Upper Tribunal was defective, in that it refused permission to appeal on the basis of the second appeals test; that is very clear from the shortly stated decision of the Upper Tribunal refusing permission to appeal further. This raises significant questions about the powers that the Upper Tribunal has in any such application, and I consider that it is a matter of general importance.

[15] The more important question relates to the merits of the proposed appeal. In my opinion the grounds put forward by the applicant have reasonable prospects of success, on the basis that the Upper Tribunal misapplied the criteria for determining whether the reasoning of the First-tier Tribunal was inadequate. The first criticism made by the Upper Tribunal of the reasoning of the judge of the First-tier Tribunal was a failure to have proper regard to the decision in *NK (FGM - Cameroon)*, which, although not a country guidance case, should have been taken into account. That decision was referred to by the judge. It is not a general country guidance case, and when the terms of the decision are

carefully examined it is clear that it is concerned with one particular situation where it was open to the claimant to relocate to another part of the country, where Christians were dominant and female genital mutilation was relatively uncommon. In the present case, however, the judge gave detailed consideration to the particular circumstances of the applicant, and concluded that, because of the way in which her tribe was distributed throughout the country and the influence and power that at least some of the members of that tribe had, internal relocation would not be practicable. The judge further took account of the fact that the applicant's son is distinctive, and would draw attention to her. In these circumstances it may be said that the decision in *NK* was of limited relevance, as it related to different factors. For the foregoing reasons I am of opinion that the argument for the applicant that the Upper Tribunal erred in its application of the test for adequacy of reasons has sufficiently substantial prospects of success to permit the appeal to proceed.

[16] The Upper Tribunal criticized the First-tier Tribunal for placing reliance on the applicant's expert report without saying why and distinguishing that report from the ratio of *NK*. It is true that the expert's report is referred to fairly briefly, but it is relied on principally to corroborate the evidence given by the applicant, which was further corroborated by the evidence of her sister. Once again, it is the particular facts of the case that are material, and these are discovered primarily from the evidence of the applicant and her sister. In these circumstances the argument that the brief treatment of the expert's report was not a material defect in the reasoning of the First-tier Tribunal has sufficiently substantial prospects of success to grant permission to appeal.

[17] The Upper Tribunal had criticized the First-tier Tribunal for failure to apply section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 properly. That Act was obviously known to the judge of the First-tier Tribunal, who refers to it in her opinion,

and deals with the substance of this criticism at paragraph 31 of her opinion. She there indicates that the applicant arrived in the United Kingdom on a visa that appeared to be valid (it was in fact a student visa), and she subsequently met her husband, a Czech, and applied for an EEA visa. Consequently her immigration status was quite clear for a considerable time after she arrived in the country. In my opinion it is arguable that these findings negate the obvious rationale of section 6 of the 2004 Act. Indeed, because the applicant took proper care of her immigration status, it is possible to conclude, as the judge of the First-tier Tribunal did, that she came here legally and completed the studies that her original visa contemplated, which tended to show that she was a credible witness. In these circumstances I consider that this part of the criticism of the reasoning of the Upper Tribunal has sufficiently substantial prospects of success to permit the appeal to proceed.

[18] The final criticism of the decision of the First-tier Tribunal was that the judge had not dealt adequately with the expert's report in that she failed to set out the expert's qualifications, and did not discuss the content of the report or explain why she found it to be persuasive and reliable. The factors that are referred to in paragraph 15 above are relevant here. The expert's report is not at the forefront of the judge's decision; she rather considered the evidence of the applicant and her principal corroborating witness, her sister. The judge found both of these to be credible witnesses. That in itself is significant, because the ability of an appellate court to interfere with the decision of a judge of first instance on issues of credibility and to a lesser extent reliability is inevitably very limited: *AW* v *Greater Glasgow Health Board*, [2017] CSIH 58. It can thus be said that the Upper Tribunal failed to have due regard to the findings on credibility of the First-tier Tribunal. Thus the expert evidence was of relatively limited significance. So far as it went, it was found to corroborate the evidence of the two persons who gave evidence before the Tribunal. In my opinion the criticisms

made by the applicant of the reasoning of the Upper Tribunal have sufficient prospects of success for permission to appeal to be granted.

[19] I am further of opinion that the second part of the second appeals test is satisfied in that the proposed appeal raises an important point of principle or practice. The fundamental issue of substance in the present case relates to the test for assessing the adequacy of reasoning of the First-tier Tribunal. It is true that reasons tests have been the subject of a considerable number of decided cases in many different areas of the law, including a number of decisions by the Upper Tribunal in immigration cases. Nevertheless, the present case raises an unusual form of tension, between a decision based on the assessment of the credibility and reliability of an applicant for asylum and her principal supporting witness on one hand and general information about the country on the other hand. Furthermore, there are two further specialties. First, the general information about Cameroon was largely contained in a case, *NK*, decided 10 years previously, in which the particular circumstances were clearly distinguishable from the present case. Secondly, the primary basis for the decision of the First-tier Tribunal was an assessment of the credibility of the applicant. For a number of reasons, which are set out in some detail in her opinion, the judge of the First-tier Tribunal decided that the applicant was a credible witness and that she was genuinely at risk of persecution if she were compelled to return to Cameroon, in the form of female genital mutilation and forced marriage. So far as I can discover, none of the cases dealing with adequacy of reasons addresses this situation, where it is credibility that is paramount and the other evidence is essentially corroborative.

[20] For the foregoing reasons I will grant permission to appeal to the Court of Session against the decision of the Upper Tribunal dated 19 September 2016, in which the previous decison of the First-tier Tribunal was set aside as being tainted by material errors of law.