OUTER HOUSE, COURT OF SESSION

[2019] CSOH 107

P623/19

OPINION OF LORD PENTLAND

in the petition of

CARLOS LUIS MORLET MENDOZA (AP)

Petitioner

for

judicial review of a decision of the Upper Tribunal (Immigration and Asylum Chamber) to refuse to grant the petitioner permission to appeal

Petitioner: Caskie; MBS Solicitors
Respondent : McKinlay; Office of the Advocate General

20 December 2019

Introduction

[1] In this petition for judicial review, the petitioner is a citizen of Venezuela. He seeks reduction of a decision of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") refusing him permission to appeal against a judgment of the First-tier Tribunal ("the FtT"). The respondent is the Advocate General for Scotland representing the Secretary of State for the Home Department. The case came before me for a substantive hearing at which the petitioner moved for decree of reduction to be granted. The respondent sought refusal of the petition on the basis that the UT had not erred in law.

The facts of the case

[2] At the hearing before the FtT both the petitioner and his wife gave evidence. The FtT judge found their accounts to be credible insofar as they described the events that had occurred in Venezuela leading to the family leaving that country and coming to the United Kingdom. These events may be summarised as follows.

[3] On 11 April 2017 the petitioner attended a demonstration in Venezuela against the government. He was with his friend, Gruseni Canelon (to whom I will refer, in common with the tribunal judges and the parties, as "Tony"). After a few hours, officers from the *Guardia Nacional Bolivariana de Venezuela* ("the GNB") came to the demonstration and took up strategic positions in order to disperse the protestors. The GNB charged into the crowd of protestors. They used tear gas. The petitioner and Tony ran for the nearest safe area. In the ensuing commotion the petitioner suddenly realised that a member of the GNB had grabbed Tony and had shot him at very close range. The petitioner fled for his life. Later that evening he went to the hospital where Tony had been taken. Tony underwent surgery but died two days later.

[4] Whilst the petitioner was leaving the hospital later that evening, two GNB officers approached him in a car park. They pinned him against a car and took away his mobile phone and his watch. They told him that they knew that he had seen them when they shot Tony. They warned the petitioner not to tell anyone about the shooting or that he knew who had carried it out. He was to keep his mouth shut. The petitioner and his family would be killed if the petitioner said anything about the incident.

[5] Thereafter, the petitioner's wife started to receive mysterious and unsolicited telephone calls. They came from a number that she did not recognise. Sometimes there would just be silence on the line before the call ended abruptly. On another occasion one

call was followed soon afterwards by another. In one of the calls a woman said that the petitioner's son had been kidnapped (this turned out not to be true); in the background a child's voice could be heard crying and screaming. A woman's voice said that the petitioner's wife should tell him to keep his mouth shut. After that the petitioner's wife contacted a friend of her brother; the friend worked for the National Security Service. He said that the petitioner should forget about the incident and stay away from protests. Otherwise his life would be in danger. The friend also said that the number from which the calls had been made to the petitioner's wife was one that was connected to the government.

[6] In view of these events the petitioner and his wife became concerned about their safety. They felt that they had no option but to leave Venezuela. They arrived in the United Kingdom, where the petitioner's sister had lived for about 12 years, on 9 June 2017. The petitioner claimed protection as a refugee and on humanitarian grounds. The Secretary of State for the Home Department refused these claims on 1 December 2017.

The decision of the First-tier Tribunal

[7] The petitioner appealed to the FtT on a number of grounds. He claimed that he had a genuine fear of persecution if he returned to Venezuela and that he qualified as a refugee under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525); these regulations transpose into the domestic laws of the United Kingdom the Convention relating to the Status of Refugees (1951) (Cmnd 9171) as applied by the 1967 Protocol (Cmnd 3906) ("the Convention"). Alternatively, the petitioner claimed humanitarian protection as defined in paragraph 339C of the Immigration Rules. He also relied on Articles 2, 3 and 8 of the European Convention on Human Rights.

[8] In a detailed and closely reasoned judgement the FtT judge held that there was no reasonable likelihood that the petitioner would face persecution on being returned to Venezuela. In summary, the judge held that since the petitioner had not made a complaint about the shooting of Tony, he was in no danger from the GNB officers who had carried out the killing. The petitioner said in evidence at the FtT hearing that he had no way of being able to identify the perpetrators of the shooting, although he claimed that he had their faces in his head. The judge was of the view that if the petitioner had been of any real interest to the GNB, they could have detained and charged him; instead they let him go. The nuisance calls and the threats from the GNB, including the threat to kidnap the petitioner's son, had caused a great deal of anxiety, but these steps had been successful in ensuring that the petitioner did not divulge the identities of any GNB officers. The GNB had succeeded in their objective of ensuring that the petitioner did not reveal their involvement. Following the telephone calls, no contact had been made with the petitioner or his wife between 26 April 2017 and 8 June 2017 when the family left the country. There was no evidence that anyone in Venezuela was looking for the petitioner. The judge also held that the petitioner would be free to protest against the government on his return to Venezuela. The GNB officers had not endeavoured to prevent him from demonstrating. The only reason that the petitioner had been of any interest was because it was possible that he could recognise them as Tony's killers.

[9] In paragraph 24 of her decision the FtT judge said this:

> "I cannot condone the actions of the GNB in the way in which they have endeavoured to cover up their crime by intimidation or the fact that justice is unlikely to be done for Tony but the point at issue before me is whether there is a reasonable likelihood that the (petitioner) would be targeted on return and from the evidence before me and for the reasons given I do not find that the (petitioner) will be targeted by the GNB or any other part of the government on return to Venezuela."

[10] In the circumstances, the FtT judge held that the petitioner did not have a reason to fear persecution in Venezuela based on his political opinion; his Convention claim accordingly failed. The FtT judge further found that on the evidence there was no real risk of serious harm to the petitioner on return to Venezuela in terms of the humanitarian protection provisions in the Immigration Rules. Accordingly, the FtT dismissed the appeal on asylum and humanitarian protection grounds. For reasons set out later in her judgement, the FtT judge also dismissed the petitioner's claim insofar as it was based on alleged violations of the petitioner's human rights.

[11] The petitioner sought permission to appeal against the decision of the FtT, but this was refused by another judge of the FtT on 27 February 2019 on the basis that the grounds of appeal disclosed no error of law.

The application to the Upper Tribunal

[12] The petitioner next applied to the UT for permission to appeal. The grounds of appeal referred to the case of *HJ (Iran)* v *Secretary of State for the Home Department* [2011] 1 AC 596. It was submitted on the petitioner's behalf that the decision of the FtT implied that the petitioner should avoid making a complaint to the GNB and in doing so live discreetly in order to avoid persecution. The suggestion that he should not pursue his complaint was said to be contrary to the ruling of the Supreme Court in *HJ (Iran)*. It was submitted that, having found the petitioner's evidence to be credible, the FtT should have held it to be reasonably likely that the petitioner and his family would be identified on returning to Venezuela and that they would be at risk there. The grounds of appeal also asserted that there were logical errors in the approach taken by the FtT and that it had failed accurately to

assess the danger to the petitioner should he be returned to Venezuela. There was no challenge to the decision of the FtT on the human rights points.

[13] On 4 April 2019 the UT refused permission to appeal. The UT judge held that *HJ (Iran)* did not apply in the circumstances of the petitioner's case. The issue was said to be entirely different. In any event, the petitioner had not expressed any wish to pursue a complaint. The UT held that the FtT judge had given detailed reasons for her finding that the GNB would have no interest in the petitioner and for her finding that there was nothing to show that he and his family would be identified on their return. In these circumstances, neither the grounds of appeal nor the decision of the FtT disclosed any error of law.

The petition for judicial review

[14] In the petition for judicial review the decision of the UT to refuse permission to appeal is challenged on the ground that the FtT erred in law in failing to consider why the petitioner had not taken steps to report the perpetrator of Tony's murder. The petitioner avers that if a material part of the reason why a person conceals information is because he fears persecution, then in considering his asylum claim a hypothetical assessment has to be carried out of the impact on the person of acting in a way which ignores the risk of persecution. This approach is said to be supported by *HJ (Iran)* and *RT (Zimbabwe)* v *Secretary of State for the Home Department* [2013] 1 AC 152.

[15] The petitioner also avers that whether he had a political opinion was irrelevant. If there was a real risk that he would be viewed as having an opinion that the GNB should not be above the law and should not be able to act with impunity that would be sufficient for there to be a real risk of him having a political opinion imputed to him "by his persecutors who wish to avoid action being taken against them for the murder of Tony". The petitioner

goes on to aver that if any part of the reason for not reporting the information he holds on the murder of Tony is a fear of retribution, that was material to whether he is a refugee.

The petitioner's submissions

[16] In the petitioner's note of argument, it is submitted that the applicable Convention reasons in the present case are imputed political opinion and "quite possibly" membership of a particular social group. In respect of the first reason, the argument is that bringing the security forces within the control of the law is a political act; that was sufficient for the necessary link to the Convention reason of political opinion. As to the second reason, the proposed particular social group is said to be "persons who hold *inter alia* eyewitness evidence material to very serious potentially criminal activity by the security forces of Venezuela during anti-regime political protests." The fundamental right of being entitled to seek the effective protection of the State from State security forces acting criminally, violently and with impunity is also said to be material.

[17] In the course of his oral submissions at the substantive hearing, Mr Caskie adopted his note of argument. He referred to the answer the petitioner had given in his personal interview at question 62 where he explained that he was not going to speak to the security forces about the murder for the sake of his family and for his own safety. Mr Caskie stressed that the focus of both grounds of challenge (asylum and humanitarian protection) was on whether the petitioner faced a well-founded risk of persecution on being returned to Venezuela. According to Mr Caskie, the effect of the Supreme Court's decision in *HJ (Iran)* was that what counsel described as the "why question" had to be asked. By this he meant that the decision maker in the present case had to consider why the petitioner would not report the murder or make a complaint about it. Both the FtT and the UT had, it was

argued, failed to engage with that question. When assessing the risk faced by the petitioner it was necessary, Mr Caskie contended, to leave out of account the modification of his behaviour insofar as it was due to a threat of persecution. Mr Caskie also submitted that the evidence given by the petitioner that he had the faces of the GNB officers in his head could be interpreted as meaning that he was in a position to provide material evidence to the authorities in Venezuela.

The respondent's submissions

[18] On behalf of the respondent, Mr McKinlay argued that the grounds of appeal presented to the UT had no realistic prospect of succeeding. The UT did not err in law in refusing permission to appeal.

[19] The petitioner's reliance on the case of *HJ (Iran)* was, Mr McKinlay submitted, misconceived. Essentially, there were said to be two reasons why this was so. In the first place, the petitioner did not have a well-founded fear of persecution based on Convention grounds. Secondly, a wish to avoid persecution on Convention grounds would not form any part of the petitioner's reasons for modifying his behaviour, in the sense of refraining from making a complaint to the authorities, in the event that he was returned to Venezuela.

[20] In relation to the first reason, Mr McKinlay contended that the threats which had been made against the petitioner and his family were not threats of persecution on Convention grounds. They were made because the petitioner had been a witness to a crime. The perpetrators of the crime wished to avoid a complaint being made against them. The risk to the petitioner if he were to make a complaint could not be said to be related in any meaningful sense to his freedom of political opinion or to his membership of a particular social group. The petitioner would be free to continue to protest against the government on

return to Venezuela. The petitioner's argument that the risk he faced could be attributed to his imputed political opinion was, as Mr McKinlay put it, contrived.

[21] As to the second reason, counsel submitted that it was clear from the FtT's decision that a desire to avoid persecution on Convention grounds would form no part of the petitioner's reasons for not making a complaint against the perpetrators of Tony's killing. There was no evidence that the petitioner in fact wished to make a complaint. He had made clear in his personal interview that his reason for not making a complaint was in order to protect his safety and that of his family. That reasoning did not relate to avoiding persecution on a Convention ground. Finally (and crucially) the petitioner had accepted in evidence before the FtT that he would have no way of identifying the perpetrators. That in itself was fatal to any claim based on the principle in *HJ (Iran)*. If he had no means of identifying the perpetrators it followed that he would not be in a position to make a complaint. So, it could not be said that a material reason for his not making a complaint would be in order to avoid persecution on a Convention ground.

Analysis and decision

[22] Since the petitioner placed considerable reliance on *HJ (Iran)* and on *RT (Zimbabwe)* I propose to look first at what the Supreme Court decided in those cases.

[23] Both cases concerned claims for asylum under Article 1A(2) of the Convention. This provides that the definition of a refugee includes the need for:

> "A well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."

[24] In *HJ (Iran)* the Supreme Court held that if a gay person concealed his sexuality because of a fear of persecution (as opposed to concealing it for other reasons, such as social

pressures or cultural or religious reasons) then his or her asylum claim should succeed. This was even though such a person would in fact avoid persecution by concealing his sexuality on being returned to his country of origin. The leading judgment was given by Lord Rodger of Earlsferry, who said the following at paragraph 82:

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living 'discreetly'. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

[25] So, where an applicant for asylum modifies his or her behaviour in order to avoid a well-founded risk of persecution for a Convention reason, the decision-maker must address why he or she has chosen to do so. Lord Hope of Craighead encapsulated the issue as follows at paragraph 35:

> "The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well-founded."

[26] *RT (Zimbabwe)* concerned the status of a person holding no political beliefs who was obliged to support a political regime so as to avoid the persecution that he would suffer if his political neutrality were to be disclosed. The Supreme Court held that the principles set out in *HJ (Iran)* applied just as much to applicants for asylum who held no political beliefs but who would be required to pretend to support a political regime in order to avoid persecution. The leading judgment was given by Lord Dyson, who said the following at paragraph 25:

> "Thus the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental right."

[27] An extra division of the Inner House considered similar issues in the case of *M, Applicant* [2013] CSIH 8. The applicant was a citizen of the Democratic Republic of the Congo ("the DRC") who sought asylum in the United Kingdom. She claimed to have been raped by rebel and government soldiers. The issue was whether the applicant would be at risk of persecution if she relocated internally. The immigration judge held that there was no reasonable likelihood that the applicant would lodge complaints about the rapes. That was a relevant factor in assessing what risk, if any, she would face on return to the DRC. The Inner House held that there was no evidence that the applicant wished to report the rapes or

that she would have done so but for the fear of violence which might thereafter ensue. Accordingly leave to appeal was refused.

[28] In my opinion, the reasoning and decisions of the Supreme Court in *HJ (Iran)* and *RT (Zimbabwe)* are of no application in the circumstances of the present case. The facts of the case, as conclusively established by the FtT, are that the petitioner has decided, for reasons which are entirely understandable in the circumstances, that he will not make any complaint about Tony's murder on his return to Venezuela. This decision by the petitioner has nothing to do with any political opinion he may hold or indeed with a stance of political neutrality on his part. It is a decision which he has made for pragmatic reasons because he is concerned to protect his own safety and that of his family. That being the choice which the petitioner has freely made, there is no merit in the proposition that he has been forced or induced to modify his behaviour because of a well-founded fear of persecution for a Convention reason. The petitioner's stance cannot realistically be equiparated to that of a homosexual person who chooses to live a discrete lifestyle for fear of persecution on the basis of his sexual orientation.

[29] In connection with the issue of freedom to hold a political opinion, it is important to recall that the FtT held, on the evidence before it, that the petitioner will in fact be free to continue to protest against the government if he returns to Venezuela.

[30] In these circumstances, I agree with the respondent that the attempt to characterise the petitioner's decision not to report the murder as being related to a political opinion held by him is artificial and contrived.

[31] Another critical point is that the FtT has found as a fact that the petitioner is not able to identify the perpetrators of Tony's murder. I am unable to accept Mr Caskie's submission that the petitioner's statement that he had the faces of the killers in his head implies in some

way that he might be able to give evidence identifying them. The reality of matters is that the petitioner accepted in evidence before the FtT that he did not have any way of identifying the perpetrators. It follows that the petitioner is not in a position to provide any material evidence to the authorities in Venezuela about the identities of Tony's killers. For this reason, there is nothing to suggest that he will be of any interest to (far less persecuted by) the authorities in Venezuela on returning to that country.

[32] So far as the petitioner's alleged membership of a protected social group is concerned, I am not persuaded that there is any force in this line of argument. As was pointed out by the Inner House in *M, Applicant*, the rationale of *HJ (Iran)* was that to expect a person to subjugate his own personality by, in effect, living a lie was unacceptable and contrary to the Convention. In *HJ (Iran)* the court was concerned with protection of an immutable, inherent human characteristic, something that related to fundamental aspects of the claimant's personality, namely his sexual orientation. The circumstances of the petitioner in the present case come nowhere close to that. If he returns to Venezuela, the petitioner will not be required to suppress some core aspect of his personality. He will be able to live his life openly and, in particular, to continue to protest against the government if he wishes to do so. I do not accept that the proposed protected social group identified by the petitioner is one that reflects a fundamental and immutable human characteristic such as to entitle persons who might qualify as members of it to protection under the Convention.

[33] For these reasons, I conclude that there is no substance in the contention that the petitioner will be persecuted if he returns to Venezuela. In my opinion, his claims under the Convention and for humanitarian protection fall to be rejected. The UT was right to refuse permission to appeal. I consider that the UT correctly recognised that the decision of the FtT was essentially one based on the facts of the case. The factual decisions made by the FtT

cannot be opened up on appeal; they were carefully reasoned and based on a meticulous analysis of the evidence.

[34] At the end of the day I am satisfied that there was no error of law in the UT's decision. I shall, therefore, sustain the respondent's fifth plea-in-law, repel the petitioner's plea, and refuse the petition. I will reserve all questions as to expenses.