



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 35
P600/19

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal by

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Petitioner and Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioner and Appellant: Winter; Drummond Miller LLP (for Ethnic Minorities Law Centre,
Glasgow)**

Respondents: Maciver; Office of the Advocate General

19 June 2020

Introduction

[1] This is an appeal under section 27D of the Court of Session Act 1988. The petitioner challenges the interlocutor of the Lord Ordinary, dated 18 September 2019, which refused to grant the petitioner permission to proceed with a judicial review of a decision of the Upper Tribunal (Immigration and Asylum Chamber), dated 10 April 2019, which refused her leave

to appeal to the UT. The petitioner was attempting to appeal against a First-tier Tribunal's decision, dated 21 January 2019, which dismissed her appeal against the respondent's decision, dated 16 January 2018, to reject her claim for asylum. Her claim had been based on contentions that, a return to her country of origin, namely Nigeria, would: produce a well-founded fear of being persecuted as a single female who was vulnerable to a violent and abusive ex-husband; result in her ex-husband removing her children from her care; and cause her to be accused of witchcraft because of her mental health, notably her anxiety and depression.

[2] In so far as the appeal raises generic procedural issues about the function of the Lord Ordinary in permission cases and the scope of an appeal to this court, reference should be made to the court's opinion in *PA v Secretary of State for the Home Office* [2020] CSIH 34, which was heard in conjunction with the petitioner's appeal. The issue of substance is whether the Lord Ordinary was correct to determine that the petition did not have a real prospect of success and that there was no compelling reason to allow it to proceed (1988 Act, ss 27B(2)(b) and (3)(c)(i)).

Background

[3] The petitioner is a Nigerian national. She arrived in the United Kingdom in 2013 with her two children. Their father is the petitioner's ex-husband, who lives in Nigeria. It was the ex-husband who had arranged what was to be a holiday in the UK. While the family were in the UK, the ex-husband developed a relationship with a friend of the petitioner in Nigeria. In 2014, the petitioner had a child with a man who lives in the UK. On 8 August 2017, the petitioner claimed asylum on the basis that she was at real risk from her husband. On 16 January 2018, the petitioner's claim was refused. She appealed to the FTT.

Her appeal was refused, but on appeal the UT found a material error of law. The decision was set aside and the appeal remitted to the FTT for redetermination.

[4] The petitioner's claim was that she has a well-founded fear of persecution because of her membership of a particular social group; as a single female parent who is vulnerable to a violent and abusive ex-husband. The petitioner is a Christian and her ex-husband is a Muslim. She claimed that her husband had forced her to change religion and had become violent towards her. On one occasion, he poured boiling water over her legs. When her ex-husband discovered that she was pregnant to another man, he had divorced her. Were she to return to Nigeria, her ex-husband would harm her. His reach extended throughout Nigeria. As a single parent she would be denied access to accommodation, medical treatment and education for her children.

[5] The petitioner suffers from anxiety and depression, which would cause her to be isolated and accused of witchcraft in Nigeria. A medical report stated that, at interview, the petitioner was distressed and displaying symptoms of anxiety, stress and mild depression. She took medication for anxiety and depression. She did not require psychiatric care.

[6] The position of the respondent was that the petitioner's claim was not credible on the basis of inconsistency and implausibility. Adverse inferences as to credibility were to be drawn from her failure to claim asylum before 2017. Her claims were fabricated. She had no reason to fear her ex-husband, who had no interest in her. She could safely return to Nigeria with her three children. Internal flight within Nigeria was a viable alternative to seeking international protection in the UK.

[7] The FTT set out some background information regarding the current political stability of Nigeria and the ethnic and religious divisions. It set out the general

demographics of the country and its substantial gross domestic product. It was classified as an emerging global power.

[8] Professor Mario Aguilar, who is the Director of the Centre for the Study of Religion and Politics at the University of St Andrews, had been asked by the petitioner's solicitors to express a view on whether the petitioner would: (1) be able to return to Nigeria safely; (2) relocate safely elsewhere within Nigeria; (3) seek police protection in Nigeria; (4) provide financial support to her children; and (5) have access to support for mental health issues. He answered all five questions in the negative. It would not be safe for the petitioner to return to Nigeria because of the risk of violence from her husband; she having had a child with another man. Her ex-husband would attempt to recover his children who belonged, in traditional customary law, to him and his extended family. Internal relocation would not remove this risk because her husband would be able to bribe the police to find her. Nigerian police would regard domestic abuse as a private matter. The petitioner's ex-husband could bribe the police to ignore his violence towards her. There would be insufficient state protection in Nigeria. The petitioner would not be able to support her children financially. The state provided no social benefits to a single woman with three children. She would be destitute. It would be very difficult for the petitioner to seek employment as she would have to find somebody to care for her three children while she went to work.

[9] Prof Aguilar explained that mental health care in Nigeria was very limited. Social and public stigma about mental health arose from its cultural association with spirit possession in witchcraft. If the petitioner's condition were to be made public, she would be accused of witchcraft. This would have violent consequences and lead to social exclusion. Although Prof Aguilar had not been asked anything about witchcraft, and it had not formed part of the petitioner's initial claim, he set out at considerable length the dangers of being

labelled a witch, the origins and assumptions about witchcraft and the malicious activities of witches in Nigeria.

[10] On 21 January 2019, the FTT again refused the petitioner's appeal. The FTT was critical of Prof Aguilar's report. He had not been asked for comments on witchcraft but, like other reports that the Immigration Judge had read, it was a central section of the report and occupied about a third of its total content. Prof Aguilar's comments on witchcraft were not directly linked to the petitioner's mental health. The petitioner had made no mention of witchcraft until she had seen the report. It had not been part of her claim that her mental health issues would lead to accusations of witchcraft.

[11] The FTT was unable to accept Prof Aguilar's view that it was not safe for the petitioner to return to Nigeria because her ex-husband would remove the children. The petitioner had not said this. On the contrary, her evidence was that he did not want to see her or the children again. The FTT could not place reliance on Prof Aguilar's report because: it was contradicted by background materials; it was not supported by a reasoned analysis; and it was contradicted by the appellant's own evidence. Prof Aguilar offered little insight into why the petitioner should be labelled a witch. He did not refer specifically to the mental health issues which the petitioner suffered from or how their manifestation, or the awareness of others about them, would result in her being labelled a witch. He had not explained why the petitioner would be deprived of medical services or medication. There would be no permanent or disastrous deterioration in the petitioner's mental health. Her mental health was managed by medication. There was no reliable evidence that any exacerbation of her symptoms could not be dealt with by mental health services in Nigeria.

[12] In respect of the risk said to be posed to the appellant by her husband, there was a woeful lack of specification about the ex-husband's power, influence and ability to bribe the

police. The weight of the evidence was that there was sufficient state protection. Nigeria had a functioning police force. The petitioner could live safely outside of Lagos state. She would be beyond the reach of an ex-husband who had not been in contact with her for five years and had said that he did not want to see her or the children again. The fact that the petitioner had not claimed asylum until 2017 was a factor which damaged her overall credibility. Overall, the petitioner had not established that she was a refugee or that her removal to her country of origin would breach any international obligations. Such a return would not create a real risk of serious harm.

Application for permission to appeal to the Upper Tribunal

[13] On 23 January 2019, the FTT refused the petitioner's application for permission to appeal to the UT. The petitioner applied directly to the UT. The grounds were that, although the FTT found that Prof Aguilar's report was contradicted by background materials, the materials related only to sufficiency of state protection. The report also addressed witchcraft and internal relocation. The FTT's reasons were inadequate. If there was a contradiction, the FTT did not give adequate reasons for preferring the background materials (*KS (Burma) v Secretary of State for the Home Department* [2013] Imm AR 525). The FTT's conclusion in respect of sufficiency of protection was not adequately supported by the evidence. It had been wrong to say that Prof Aguilar's report was not supported by a fully reasoned analysis in relation to witchcraft and sufficiency of protection. The report, in relation to witchcraft and sufficiency of protection, was not contradicted by the petitioner's evidence. The FTT was wrong to consider that the ex-husband would not want to see her if she returned to Nigeria. The FTT misapplied the law (Qualification Directive, art 4(4); *Demirkaya* [1999] Imm AR 498) by failing to conclude that previous ill-treatment was

indicative of future ill-treatment. The fact that a person could access medication was irrelevant where the key issue was others' awareness of the petitioner's mental health issues, as a result of which she would be perceived as a witch (*RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152, paras 53 to 55). The petitioner could not be expected to lie about her mental health in order to escape serious harm (*ibid*; *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 308). The possibility of internal flight was irrelevant, where the risk of being accused of witchcraft was state-wide. Finally, the FTT failed to take account of, or adequately assess, the country information which demonstrated why international flight was not reasonable. It failed to assess that evidence in the round.

[14] On 10 April 2019, the UT refused permission to appeal. The FTT had been entitled to rely on background evidence which was in the public domain and not just the material presented by the parties. The FTT had not relied on background material which the petitioner would not have had the opportunity to consider. The petitioner claimed asylum as being a member of a particular social group; a single female parent fleeing a violent and domineering ex-husband. The FTT had taken into account the petitioner's written and oral evidence, which it had the advantage of reading and hearing. The FTT took into account Prof Aguilar's report. It was this report that had raised witchcraft for the first time. The FTT had considered the evidence with anxious scrutiny and given adequate reasons for its decision. The report could not be relied upon because it was not supported by an adequate reasoned analysis and it was contradicted by the petitioner's own evidence. The FTT's reasoning in respect of the absence of risk from her ex-husband was noted, *viz.* that the petitioner had not heard from her husband since 2014. No arguable legal error had been made out. The evidence had been considered in the round and the petitioner had failed to prove that she was a refugee or at risk of harm.

The Petition and the Lord Ordinary's reasons

[15] The Lord Ordinary appointed an oral hearing (cf 1988 Act, s 27B(5)). The petition avers that the UT failed to give any, or adequate, reasons for finding that there was evidence available in the public domain. The background information was irrelevant to domestic violence, sufficiency of state protection, mental health issues, their consequences and internal flight. If adequate reasons had been given by the UT, they were not supported by the FTT's decision. The conclusion that Prof Aguilar's report was contradicted by the background material was wrong. It was not supported by adequate reasons. The refusal letter related to sufficiency of state protection; there was no contradiction in respect of witchcraft or internal relocation. The FTT's failure to give the report any weight was not supported by a reasoned analysis. The FTT erred in relying on the fact that the ex-husband had not been in contact with the petitioner since 2014. That did not absolve the errors in respect of the risk from witchcraft accusations. Although the FTT took account of written and oral evidence and the expert report, the grounds were not exclusively predicated on a failure to take account of the evidence. They were not dependent on the FTT hearing and seeing the petitioner give evidence. Inadequate reasons were given for the finding that the FTT considered the evidence with the required degree of scrutiny.

[16] The Lord Ordinary refused permission to proceed. The gravamen of the petition was that the UT had failed to provide adequate reasons and its refusal to take issue with the FTT's decision not to place any reliance on Prof Aguilar's report. The respondent's answers that the UT had not left the informed reader in any doubt as to its reasons and any error of law was immaterial in view of the FTT's other findings, were well made. There was no ground of challenge, which had reasonable prospects of success, on the ground that the FTT

was wrong not to place reliance on Prof Aguilar's report and evidence in so far as he addressed the topics of witchcraft, internal relocation and the absence of future risk of mistreatment of the petitioner. Even if there was an error, it was immaterial. In any event, subsection 27B(3) was not satisfied. There was nothing legally compelling in the petition (cf 27B(3)(c)(ii)).

Submissions

Petitioner

[17] The petitioner contended that the UT erred because it failed to address the FTT's determination in respect of the danger to the petitioner which arose from her being accused of witchcraft. Its reasons in that respect left the informed reader in substantial uncertainty as to the reason it had refused permission. The witchcraft element of the claim was severable from the risk from her ex-husband. The sufficiency of state protection and international flight related only to the latter. Anxious scrutiny was not exercised relative to the witchcraft risk. Prof Aguilar's report was not said to be contradicted by background information or the appellant's own evidence in respect of that risk. The UT's errors were material. The respondent had not passed the high bar of inevitability in demonstrating immateriality. Witchcraft had not been adequately addressed; it was relevant to the determination of the FTT and the refusal of permission.

[18] Both of these were legally compelling reasons (1988 Act, s 27B(3)(c)(ii)). Such reasons could arise where the UT had not engaged with the grounds of appeal put to it (*TJM (Swaziland) v Secretary of State for the Home Department* [2015] CSOH 131), that there was a deficient assessment of an expert report (*OA (Nigeria) v Secretary of State for the Home Department* [2018] EWCA Civ 3042) or where there was a strongly arguable error of law,

with truly drastic consequences (*PR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 73). The focus should be on the decision of the UT to establish whether it was legally flawed (*SA v Secretary of State for the Home Department* 2014 SC 1, para [15]). Prof Aguilar, who had been provided with the petitioner's psychological reports, was entitled to come to a view on the implications of her mental illness in Nigeria, including that she would be accused of witchcraft. It was irrelevant that there could well be access to treatment; the risk arose from being labelled a witch as a result of her illness.

Respondent

[19] The Lord Ordinary was correct that the petition had no real prospects of success and that there was no compelling reason to allow it to proceed. The UT's reasons, to the effect that the FTT had addressed the risks from the petitioner's ex-husband and accusations of witchcraft, were clear. How the UT dealt with the witchcraft risk was the focus of the petitioner's submissions. The FTT had given proper reasons for not relying on the report of Prof Aguilar when considering that risk. It was not persuaded that, because the petitioner would be returning with mental health difficulties, she would be at risk of being perceived as being involved in witchcraft. The FTT was evidently frustrated with the digression to an academic discussion on witchcraft. It observed that it had not been a feature of the asylum claim until after the petitioner's solicitors received the report. It did not accept that mental health care was not available in Nigeria. The FTT had dealt with the risk from the petitioner's ex-husband. It considered he was not a risk where he had not been in contact with the petitioner for five years. The UT had accepted this. Nothing in the nature of a compelling reason, such as perversity or a wholesale collapse in fair procedure, had been advanced.

Decision

[20] The first question for the Lord Ordinary was whether there was “a real prospect of success” in challenging the Upper Tribunal’s refusal of leave to appeal on the basis of the grounds set out in the petition. For that to be the case, the petition had to contain a point of substance, which may stand less than a probable prospect, but which is greater than mere arguability or statability (*Wightman v Advocate General* 2018 SC 388 (LP (Carloway) at para [9]). In order to do this the petition has to disclose a material error of law on the part of the UT which goes to the root of the question for determination (*RSPB v Scottish Ministers* 2017 SC 552, LP (Carloway), delivering the opinion of the court, at para [203] and citing *Wordie Property Co v Secretary of State for Scotland* 1984 SLT 345, LP (Emslie) at 347-348).

[21] The petition first mounts a reasons challenge. There is no identifiable error in the expression of the UT’s reasons. The informed reader is left in no doubt as to the reasons for the decision to refuse leave and the material considerations which were, or were not, taken into account in reaching the decision. Decisions on permission to appeal, whether by the FTT, the UT or the court should be capable of succinct expression (see *SA v Secretary of State for the Home Department* 2014 SC 1, LJC (Carloway), delivering the opinion of the court, at para [44]). They should not be essays on the merits of the case.

[22] This was a relatively straightforward asylum claim in which the petitioner maintained that she was at risk of violence from her ex-husband primarily because she had given birth to another man’s child. That claim failed for the simple reason that her own evidence contradicted it. She said that not only had she not heard from her ex-husband since their divorce in 2014 but that he did not want to see her or the children again. In any event, there was no reason why the petitioner could not re-locate outwith Lagos state where,

the FTT held, the ex-husband would have no influence. The UT explained that the FTT had taken the petitioner's evidence into account. The FTT had been entitled to have regard to the fact that the claim about witchcraft had not been raised by the petitioner, but had emerged from Prof Aguilar's report. The FTT had been entitled to give that report little weight because it was not consistent with the background evidence that there was a functioning police force and an absence of evidence that mental health services were not available in Nigeria. It was not consistent with the petitioner's evidence on the threat posed by her ex-husband. There is no difficulty in understanding this reasoning. The UT give as the basic reason for refusing permission to appeal that no material error of law is identifiable from the grounds stated. Equally, none can be seen from the averments in the petition.

[23] The second task for the Lord Ordinary was to determine whether, in terms of section 27B(3)(c)(ii) of the 1988 Act, there was some compelling reason for allowing the appeal to proceed. It was not argued that it raised an important point of principle or practice. The test for allowing a judicial review to proceed where leave to appeal has been refused is a stringent one, which is designed (as with the second appeals test) to allow a review only in rare and exceptional cases in order to ensure that no compelling injustice occurs. The error should be one that cries out for consideration (*SA v Secretary of State for the Home Department (supra)*, LJC (Carloway), delivering the opinion of the court, at para [44] and citing *R (Cart) v Upper Tribunal* [2012] 1 AC 663, Lady Hale at paras 29 and 31 and *PR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 73, Carnwath LJ at paras 6 and 35). There is nothing of this nature in the petitioner's case.

[24] The appeal motion is accordingly refused.