SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 5
P747/17

Lord Justice Clerk
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

YC

Petitioner and Reclaimer

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner and Reclaimer: Dewar QC, Caskie; Drummond Miller LLP
Respondent: Gill; Office of the Advocate General for Scotland

31 January 2019

Introduction

[1] The reclaimer is a Chinese national, who illegally entered the United Kingdom in 2011. In January 2013 she claimed asylum based upon fear of persecution on the ground of religious beliefs, being a Jehovah's witness. That claim and a subsequent appeal were refused. She subsequently married PW, a Chinese national, whose claim for asylum had also been refused. They have three children, born in the UK in March 2013, January 2015

and August 2018 respectively. The third child was born after the Lord Ordinary's decision to which this appeal relates.

[2] On 11 May 2017, the petitioner submitted a further asylum and human rights claim under rule 353 of the Immigration Rules, on the basis of her religion and on the basis of China's two child family planning policy, stating that she feared forced sterilisation on return to China, having at the time of the claim two children. She also feared facing extortionate fines for the registration of the children. By letter dated 22 June 2017, the respondent rejected the application as not amounting to a fresh claim. Removal directions for the petitioner, PW and their two children at that time were set for 9 August 2017.

[3] On 7 August 2017, the reclaimer's agent submitted further representations under rule 353, the principal basis for which was the decision of the Inner House in *YZ* v *Secretary of State for the Home Department* [2017] CSIH 41. It was submitted that the reclaimer's circumstances were on all fours with those of the appellant in *YZ* and the expert evidence given therein, and that she faced a real risk of persecution if she were to return to China in view of her breach of the family planning policy. The respondent refused the further application under rule 353.

[4] The appellant challenged that decision by means of petition for judicial review. Following the hearing of submissions the Lord Ordinary refused the petition.

Country Guidance decisions

[5] The practice of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal in relation to country guidance is set out in paragraph 12 of the Chambers' Practice Direction dated 10 February 2010, as follows:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue

identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence.

12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current 'CG' determinations relating to that country.

12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

[6] The country guidance (CG) for China at all relevant times was and remains *AX (Family Planning Scheme) China CG* [2012] UKUT 00097. In *YZ* v *Secretary of State for the Home Department* [2017] CSIH 41, the court addressed the circumstances in which country guidance cases may be departed from, noting (para 8):

> "The effect of CG decisions was discussed, under reference to an earlier version of the Practice Direction, by the Court of Appeal in *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] Imm AR 535 at paragraphs 21-27. Quoting extensively from the determination delivered by Ouseley J, sitting as President of the IAT, in *NM and Others (Lone women – Ashraf) Somalia CG* [2005] UK IAT 00076, the court explained that CG decisions were to be applied by tribunals unless there was good reason, explicitly stated by the tribunal, for not doing so. Failure to adopt that approach would be an error of law in that a material consideration would have been ignored or legally adequate reasons for the decision would not have been given. But, unlike starred cases, CG cases were not binding. If there was evidence that circumstances had changed in a material way, or there was new evidence which required the views expressed in the CG case to be revised or refined or tailored to the particular circumstances under consideration, then it was open to a tribunal to proceed on the basis of that evidence, provided that it gave reasons for not following the CG decision. Failure without good reason to follow country guidance would be an error of law."

[7] In *YZ* the FTT had heard evidence from an expert witness, Dr Gordon, which it accepted provided a sufficient basis in that case for making findings in fact which enabled it to depart from the country guidance issued in *AX*. The UT had reversed the FTT, but the Inner House concluded that it had been wrong to do so.

The Lord Ordinary's decision

[8] The reclaimer's argument centred on the decision in *YZ*. As a consequence of the publication of the court's opinion in *YZ*, the evidence given by Dr Gordon and accepted by the FTT was well known, and as narrated in paras 16-18 of the decision, would be known to the hypothetical immigration judge considering the reclaimer's case. The evidence was generic and not confined to the facts of *YZ*, and it would be open to an immigration judge to rely on the summary of evidence there given in preference to the country guidance in *AX*, now some years old. The Lord Ordinary rejected these arguments, on the basis that:

i The hypothetical judge would have no more than the excerpts from Dr Gordon's report as quoted. He would not have seen the report, and would have had no opportunity to form his own view as to the credibility or reliability of the evidence, about which the Inner House had made no comment. He would be unable to assess whether a reading of the report as a whole might identify differences between the circumstances of the reclaimer and that of the appellant in *YZ*, or set the passages quoted in context.

ii No fact finder could base his decision on brief excerpts in an appellate judgement from the evidence of a witness in a different case. The current CG guidance for China was in *AX*. If a hypothetical judge were to disregard that guidance only on the basis of *YZ* that would be likely to constitute an error of law.

iii. It would entirely subvert the CG system if a claimant were able to search through reported appeal decisions for passages of evidence which appeared to support an argument that a relevant CG case should not be followed. That would lead to considerable uncertainty- contrary to the purpose of CG cases. Procedures existed to enable CG to be amended in an appeal, should it be the case that a particular aspect of the guidance had become inaccurate.

Submissions for the reclaimer

[9] It is clear that there are circumstances in which CG given in a specific case may be departed from. Whilst only extracts from the report had been quoted, a hypothetical immigration judge would be entitled to assume that these reflected the tenor and content of the report in an accurate and representative way, and that the Inner House accepted that the FTT had been entitled to accept Dr Gordon's evidence, and that she was entitled to be regarded as an expert. Had there been any contrary evidence one can assume that the court would have recorded it. The respondent has not advanced any such material. The Inner House had recorded the relevant evidence given by Dr Gordon and the reclaimer was entitled to rely upon it. There is no objection in principle to a party relying in one case on evidence which had been given in another case, as recorded in the written decision in that other case. If that proposition (for which no authority was cited) were incorrect as a generality, it nevertheless had validity in cases before an immigration tribunal on the basis of Rule 14 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which provides:

> "(2) The Tribunal may admit evidence whether or not-
>
> (a) the evidence would be admissible in a civil trial in the United Kingdom;".

It had been an error for the Lord Ordinary to say that the Inner House had expressed no view as to the credibility of the witness: the Inner House concluded that the FTT was entitled to find that the witness had the necessary expertise and was credible and reliable. In the pleadings, no material distinction has been made between the reclaimer and *YZ*. In allowing the case of *YZ* to proceed on the second appeals test the court acknowledged that it raised an important point of principle, namely whether the new evidence meant that the existing country guidance in *AX* had been superseded. The desirability of consistency in decision making is not designed to bring about ossification of the analysis of matters relevant to any individual case. It is the UT itself which decides whether a case should be decided as a country guidance case; this is not a matter in the hands of an appellant. The respondent had failed to advert to evidence contradicting Dr Gordon. It was an error in law for the Lord Ordinary to fail to consider these matters. The Lord Ordinary had assumed, without foundation that the passages quoted were taken out of context. The respondent raised the issue of the *Slimani* principle *(Slimani (Content of Adjudicator Determination) (Algeria)*, [2001] UKIAT 00009) but that has no application where what is relied upon is not the report itself but the summary of it contained in the court's decision.

Submissions for the respondent

[10] The essence of the submission for the respondent was that all that was decided in *YZ* was that the UT had erred in law in setting aside the findings of the FTT. The reclaimer sought to invest that case with a weight it does not, and was not intended to, bear. The Inner House itself made no findings in fact. The court heard no evidence, did not adjudicate upon the merits of the evidence heard below, made no findings in law relating to the merits,

and did not form its own view of the facts. The expansive power of rule 14 does not remove from an appellant the onus of establishing their case, to whatever test must be met.

[11] In advancing her claim it is incumbent upon the reclaimer to establish the basis upon which it rests, the only issue which was relevant being whether she had advanced a fresh claim. The issues raised by the reclaimer are not relevant to that issue. The Lord Ordinary did not suggest that it was open to an appellant to require the UT to specify any case as a CG case. Rather he indicated that there were mechanisms by which CG may be revisited.

[12] In giving the opinion of the tribunal in *Slimani,* Collins J had stated:

> "We would add that all too often reports prepared for a specific case are relied on in other cases in which appellants from the same country are represented by the same advisers. This should not happen unless the report is stated to be general and to be valid for all cases or the author is asked to confirm that he is content for it to be relied on. Apart from anything else, conditions change and views which may have been valid when the report was written might not be 12 months later."

The principle had been applied in proceedings before the Outer House-*YH* v *Secretary of State for the Home Department* [2016] CSOH 72 and *XL* v *Secretary of State for the Home Department [*2017] CSOH 41.

Analysis and decision

[12] This case proceeds on a number of misconceptions. The first relates to an erroneous understanding of the case of *YZ.* That case was not in any way concerned with the merits or otherwise of the country guidance advice contained in *AX,* or the validity of the evidence of Dr Gordon. It did not decide any point of general application. The only issue in the case was whether, as a matter of procedural law, the UT had been entitled to open up and reverse findings of fact made by the FTT and based on evidence which the FTT had heard. The UT would only have been entitled to do so in the event of an error of law by the FTT in

reaching those findings. What is meant by an error in law in these circumstances is well understood, and was addressed in para 42 of *YZ*. The argument was that the FTT had failed to give adequate reasons for rejecting the country guidance decision *AX* and for accepting the evidence before it. These arguments were rejected by the court which considered that the FTT did give proper consideration to *AX* and gave adequate reasons for accepting the evidence of Dr Gordon. Any reference to the evidence of Dr Gordon, or her report, was not made for the purpose of addressing any issue relating to the merits of the case, or the merits of any issue raised in *AX* or in the evidence of Dr Gordon. Rather it was simply for the purpose of identifying whether a proper explanation had been given by the FTT for acting as it did. The reclaimer's argument completely miscomprehends the point of principle upon which the appellant in *YZ* was given permission to proceed*:* it was not, as submitted for the reclaimer, whether the new evidence meant that the existing country guidance in AX had been superseded. The issue was not in any way to do with the merits, or the validity of the country guidance in *AX*, but was designed to ascertain whether the proper procedures and formalities had been adhered to. That the court's consideration of these matters was so restricted is made abundantly clear in para 5 where it states:

> "We should, however, emphasise one important point. It is for the relevant tribunal – in the first instance the FTT and, on appeal, in certain circumstances, the UT – to determine the facts relevant to the resolution of the case before it. This court sits in an appellate capacity. It is concerned with the question whether either tribunal erred in law in reaching its decision. To answer that question in the present case, it is clearly necessary for this court to identify the evidence which was before the tribunals and to evaluate their treatment of it; however we do so not in order to enable us to form our own view of the facts but only for the purpose of considering whether either tribunal committed a legal error sufficient to require this court to intervene."

[13] As counsel for the respondent pointed out, in *YZ* the court heard no evidence, did not adjudicate upon the merits of the evidence heard below, made no findings in law relating to the merits, and did not form its own view of the facts.

[14] A further misconception is that the contents of the decision in *YZ* in some way constitute evidence which could be taken into account by the FTT decision maker under Rule 14 of the rules. Senior counsel for the reclaimer submitted that even if the decision in *YZ* would not be considered admissible as evidence in a conventional litigation, it was admissible in this context because of the terms of rule 14 of the Tribunal rules. That submission ignores that before material is admissible in terms of that rule it must first of all constitute "evidence". It is in our view axiomatic that evidence led in the context of case A, and recorded by the court in its decision, is not thereby admissible, in the form only of the report of the case, as evidence in case B, between different parties, even where the circumstances of the case appear to be on all fours (which is not the case here). Where a matter has been the subject of a judicial determination it becomes *res judicata*, but that doctrine applies generally only between exactly the same parties and on exactly the same issue which was the subject of the determination (save for certain limited exceptions which do not apply here). Evidence in relation to the issue so determined is not admissible, it being deemed to have been conclusively resolved by the determination. Only a decree in *foro contentioso* will support the plea. In other words, if the court did not consider the merits, as in a decree by default, the matter will not be treated as having been determined in the prior case. Even where the facts are exactly the same, the plea cannot succeed if the parties are not identical (see *Anderson v Wilson* 1972 SC 147). The effect of this is explored further in Walker & Walker, Evidence, 4th edition, paras 19.5.1 - 19.5.3. It is noted there that interlocutors, decrees, and the like, proved by relevant certified extracts, are conclusive

between the parties and their successors, of all the facts stated in them which properly fall within the record (Para 19.15.1). However "they are not conclusive as to extraneous matters. When the parties are not the same the findings in one cause would appear to have no evidential value in another" (para 19.15.2). Of course, the reclaimer is not suggesting that the issue is *res judicata* but an examination of that doctrine assists in seeking to ascertain whether there is any possible basis for the reclaimer's argument. The plea of *res judicata* is an exception to the common law position which is that "the decree or verdict in an earlier cause, whether civil or criminal … is not admissible in evidence in another case" (Walker & Walker Evidence, 4th edition para 9.4.1 citing, *inter alia*, *Devlin* v *Earl* 1895 3 SLT 166). It was this common law rule which led to the need for the enactment of section 10 of the Law Reform (Miscellaneous Proceedings) (Scotland) Act 1968.

[15] Accordingly, we cannot see any merit in the arguments for the reclaimer, even before considering the very restricted nature of the material which is available. That issue was correctly addressed by the Lord Ordinary at para 23 in terms which we endorse. Any decision maker relying on *YZ* in the way suggested would have only partial extracts from a report, which appears to have extended to at least 54 paragraphs, was prepared in a different context and against a different factual background, and in respect of which the decision maker would be in an impossible position in trying to determine relevance, reliability and credibility. The testimony of a skilled witness in any individual case may be expected to be directed to the specific issues which are relevant in that case, and the opinion offered will be grounded in the facts averred and proved in that case. There is no basis for asserting that because there may be certain similarities between one case and another a summary of the evidence offered in one may equally be applied to the other. It is impossible for us to understand how any decision maker could proceed on the basis that the brief

extracts contained in *YZ*, cited for a different and limited purpose, and in a different context, could be viewed as evidence admissible and applicable in an entirely different case. In that respect we are in complete agreement with the Lord Ordinary at para 23 of his opinion.

[16] It was repeatedly asserted that the case of the reclaimer was identical to that of the appellant in *YZ* but it is not obvious that this is so. One obvious distinction is that the appellant in *YZ* had her children out of wedlock, whereas the reclaimer was married to the father when the children were born. This is an issue of relevance, since in *AX* the tribunal noted that it is the expectation in China that childbirth occurs in a marital context (*AX*, headnote para 3). Furthermore, it appears that a different approach may to some extent be taken within different provinces (the appellant in *YZ* was from Hunan, the reclaimer from Hebei), and the individual circumstances of the parents (*AX*, headnote para 4).

[17] We endorse the view of the Lord Ordinary that the reclaimer's submissions, if accepted, would subvert the CG system. In *R (SG)* v *Home Secretary* [2013] 1 WLR 41 Stanley Burnton LJ observed:

> "46 The system of country guidance determinations enables appropriate resources, in terms of the representations of the parties to the country guidance appeal, expert and factual evidence and the personnel and time of the tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the country guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination.
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> 47 It is for these reasons, as well as the desirability of consistency, that decision-makers and tribunal judges are required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so."

[18] The reference in a purely procedural decision to a few paragraphs of an expert report used simply to show that there was some evidence of a particular nature available to the fact finder in that case does not constitute cogent evidence for treating a CG case as superseded.

Nor does the fact that in some other individual case a FTT has been persuaded not to follow that guidance.

[19] A theme running through the submissions was that a person in the position of the reclaimer was effectively unable to challenge the application of the country guidance in *AX*. We reject that submission. The way in which it was put in the Note of Argument was that:

> "It cannot be lawful for individuals who fear persecution and a breach of their article 3 rights simply to accept that country guidance determines the outcome of their appeal when there is powerful evidence that the country guidance case has been superseded or is wrong but the appellant had no mechanism to correct that."

This is simply misguided. As counsel for the respondent pointed out, there was a simple way in which the reclaimer might have challenged the applicability of *AX*. If, as she asserts, her position can indeed be equiperated with that of *YZ*, she could have obtained her own expert report, and placed it before the decision maker as evidence which might allow him to conclude that there was a realistic prospect that the FTT could be persuaded not to follow *AX*.

[20] We are also of the view that there is merit in the respondent's arguments that the *Slimani* principles would apply equally to the exercise which the reclaimer seeks to have carried out in the present case, as it would to an attempt to rely directly on the report in question. In fact, they might apply with even greater validity.

[21] For all these reasons the reclaiming motion will be refused.