EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Macfadyen
Lord Johnston
Lord Wheatley

[2008] CSIH 17
XA178/06

OPINION OF THE COURT

delivered by LORD MACFADYEN

in

APPLICATION FOR LEAVE TO APPEAL

under section 103B of the Nationality, Immigration and Asylum Act 2002

by

R. A-B.

Applicant;

against

a decision of the Asylum and Immigration Tribunal dated 7 September 2006 refusing leave to appeal against a decision of the Asylum and Immigration Tribunal dated 7 August 2006

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Act: Forrest; Drummond Miller LLP
Alt: Miss Carmichael; C. Mullin, Solicitor to the Advocate General for Scotland

14 February 2008

Introduction

[1] This is an application for leave to appeal to this court against a decision of the Asylum and Immigration Tribunal ("the Tribunal") dated 7 August 2006. Leave to appeal was refused by the Tribunal on 7 September 2006. Mr Forrest, who appeared for the applicant, R. A-B., invited us (1) to grant leave to appeal; (2) to treat the application for leave to appeal as the appeal; (3) to grant the appeal; and (4) to remit the proceedings to the Tribunal for reconsideration. Ms Carmichael, who appeared for the respondent, the Secretary of State for the Home Department, invited us to refuse leave to appeal or, if we granted it, to refuse the substantive appeal.

Procedural History

[2] The applicant, who is a Russian national born in 1957, and until 1999 lived with her husband, E.B., in Chechnya, arrived in the United Kingdom via Georgia on 7 April 2003. Her husband had arrived in the United Kingdom in January 2000. The applicant did not immediately apply for asylum. Her husband's application for asylum was refused on appeal on 17 November 2004. The applicant eventually claimed asylum on 17 August 2005. She was interviewed in connection with her claim on 1 September 2005. By letter dated 17 October 2005 the Immigration and Nationality Directorate of the Home Office refused her application. Her initial appeal against that decision was refused, but on reconsideration it was held that the Immigration Judge who had made that decision had made a material error in law, and the appeal therefore came before another Immigration Judge for a full rehearing. That resulted in the decision of 7 August 2006 which is the subject of this application. The appeal was again refused. Leave to appeal against that refusal was refused by the Tribunal on 7 September 2006. This application therefore now comes before us.

The applicant's claims

[3] The applicant claims that to return her to Russia would be contrary to the obligations of the United Kingdom (a) under the 1951 United Nations Convention relating to the status of refugees ("the Refugee Convention") and also (b) under Articles 2 and 3 of the European Convention on Human Rights ("ECHR").

[4] The applicant's position is summarised in the Immigration Judge's decision (at paragraph 7) in the following terms:

> "The basis of the Appellant's claim is that she fears persecution due to her religion and because her husband was in the Russian Military. She claimed to have had problems because of her Christian Orthodox faith and that she was verbally assaulted and abused because of her religion. She stated she faced problems in Chechnya because her husband was connected with the Russian Military, that he had flown planes for the Russian Military in the past and that in August 1999 he received call-up papers to take part in the war in Chechnya. He did not want to fight against the people where he lived so he refused to take part in further military service. The Chechens in her area did not believe her husband was not serving in the Russian Military. On 29 November 1999 she stated that two men in camouflage entered her home, tied her up and searched her house. Both men raped her because they believed her husband was in the Russian Military. As a consequence of this she left Chechnya and travelled with her son to Georgia on 30 November 1999. During the journey the bus was stopped and her son was kidnapped by Chechen militants. When she arrived back in Grozny [in or after the summer of 2002] she was beaten by a group of women and two police officers, was struck on the head and lost consciousness and [was] taken to hospital. After a day in hospital she returned to Georgia where she spent

almost a month in hospital recovering from her injuries, leaving Georgia in March 2003, travelling by car to Turkey before travelling to the United Kingdom in a lorry, arriving in the United Kingdom on 7 April 2003. She fears that she and her husband would be killed if returned to Russia."

The Immigration Judge's decision

[5] After that summary the Immigration Judge set out the evidence given by the applicant and her husband at the hearing of her appeal. She adopted what she had said at interview on 1 September 2005, and supplemented it with oral evidence recorded by the Immigration Judge at paragraphs 10 to 13 of his decision. Her husband's evidence is summarised by the Immigration Judge at paragraphs 14 to 17 of his decision. The Immigration Judge discussed the credibility of the applicant's evidence at length in paragraphs 20 to 26 of his decision. He concluded at paragraph 27 in the following terms:

"I find the Appellant's account in her claim to be highly incredible. I do not believe that she was raped on 29 November 1999 or that she was assaulted in August 2002. I do not believe that she was the subject of the ill treatment she claims. I do not believe she met her husband in the United Kingdom as claimed. I believe it likely that the Appellant travelled from Georgia to join her husband in the United Kingdom, I do not believe that the Appellant has a well-founded fear of persecution for a convention reason or that she has been the subject of persecution and there is no reasonable degree of likelihood that she would suffer persecution because of her religion, there being no evidence in the US State Department Report that this is a problem or because of her husband's involvement allegedly with the Russian Military. For similar reasons, I see no

real risk of any treatment contrary to Article 2 of the European Convention on Human Rights."

The Immigration Judge went on to consider, on an *esto* basis, the question of internal relocation. In the event, however, the appeal was refused both on asylum grounds and on human rights grounds.

The grounds of appeal

[6] The grounds of appeal which the applicant seeks leave to advance are set out in paragraph 5 of the application. They are:

"5.1 [The Tribunal] has erred in law because its assessment of credibility of the applicant in regard to whether she was raped was flawed. ...

5.2 It has erred in law because its reference to the decision in the applicant's husband's case is flawed. ...

5.3 It has erred in law by failing properly to assess the risk of return to the applicant if sent back to Chechnya and further the risk that the United Kingdom would be in breach of its obligations under Article 3 ECHR if this happened.

5.4 It has erred in law in holding that the applicant could internally relocate in Russia. ..."

The proper approach to leave to appeal and to the identification of error of law

[7] Mr Forrest for the applicant accepted that in order to obtain leave to appeal he required to satisfy the test set out in *Hosseini* v *Secretary of State for the Home Department* 2005 SLT 550, namely that there was a genuine point of law which was of some practical consequence and which would have a real prospect of success (per

Lord President Cullen at paragraph 5). He also accepted the observations made in *HA* v *Secretary of State for the Home Department* [2007] CSIH 65 (a) at paragraph 11 warning against characterising as points of law matters that are truly mere disagreement with the fact-finder on matters of fact, and (b) at paragraph 17 on the circumstances in which a decision on credibility may disclose error of law.

Ground of appeal 5.1

[8] The Immigration Judge dealt with the credibility of the applicant's evidence of having been raped on 29 November 1999 in paragraphs 20 and 21 of his decision. In paragraph 20 he said:

> "The Appellant's husband found out about the rape on the date of the alleged incident. Yet, despite this and despite the claims that the Appellant believed [at] least in part that this was due to her husband's involvement with the Russian Military, the Appellant's husband made no mention of this is his asylum application or when he gave evidence to the Adjudicator in his appeal on 4 November 2004. The Appellant also gave evidence in that appeal and did not mention the rape. The Appellant did not claim asylum until 17 August 2005 and did not make any mention of her alleged rape until her Asylum Interview on 1 September 2005. This was almost five years after the Appellant's husband arrived in the United Kingdom and two and a half years after she arrived in the United Kingdom. Whilst I note that the Appellant and her husband felt this rape was a matter of shame and one they did not wish to talk about, I am not satisfied that this can explain why this was not previously mentioned. It would have been an exceptionally important piece of evidence in the Appellant's husband's own appeal, adding very much to the credibility of his appeal and indeed it

established that the Appellant in this appeal had an asylum claim in her own right which she could and should have made upon entry to the United Kingdom. The Appellant could have asked for a female Immigration Officer to tell her about the rape at any time."

In paragraph 21 he continued:

"Accordingly, therefore, the Appellant's failure to mention this alleged rape until after she applied for asylum following the refusal of her husband's appeal, in my opinion, severely casts doubt on the claim that this ever occurred."

[9] In ground of appeal 5.1 it is submitted that the applicant's failure to mention the alleged rape in her evidence at her husband's appeal was "wholly irrelevant to her claim". While it is no doubt right that the applicant's husband's claim was differently focused from her own, we are quite unable to accept that the absence of reference to the rape from the evidence of the applicant before the Adjudicator can be explained in that way. The analysis set out by the Immigration Judge in paragraph 20 of his decision is in our view cogent and rational. The consideration he identified there was one which he was in our view plainly entitled to give considerable weight when considering the credibility of the applicant's evidence.

[10] In his submissions before us Mr Forrest placed stress on a passage in the US Department of State Annual Report on Russia (2005) at page 57, where it is stated that many victims never reported rape due to social stigma. He described that as a "critical item of evidence", and criticised the Immigration Judge for not relying on it. He was, however, unable to advise us whether the Immigration Judge had been specifically referred to that passage. We do not consider that the Immigration Judge can be said to have made an error of law by failing to pick out of a country report a short passage not specifically drawn to his attention. The Immigration Judge does

specifically deal with the question of whether shame might explain the failure to mention the alleged rape. We are of opinion that he was entitled to reach the conclusion which he expressed.

[11] Mr Forrest submitted that the consistency of the applicant's evidence, comparing her interview with her evidence before the Immigration Judge, and the support which her evidence obtained from that of her husband, ought to have satisfied the Immigration Judge that she was credible in her account of the rape. That argument disclosed no error of law on the Immigration Judge's part. It is no answer to the considerations which he regarded as damaging to her credibility. Moreover, her husband's evidence, as recorded in paragraph 16 of the decision, is much more bland than might be expected if he came home to find her, as she described in her interview (at Question 11), with her clothes torn and herself covered in bruises and scratches.

Ground of appeal 5.2

[12] As this ground of appeal was developed before us, the proposition came to be that the Immigration Judge should not have taken the applicant's husband's claim into account at all. That was because the issues raised in it were irrelevant to the applicant's claim. Mr Forrest cited *AA (Somalia)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1040, the decision of the Court of Appeal from the decision referred to by the Immigration Judge in paragraph 23 of his decision. He referred to paragraph 8 where the guidance given in *Devaseelan* [2004] UKIAT 00282 as to the proper approach to be adopted by a second tribunal dealing with a human rights appeal at the instance of an appellant whose asylum appeal has already been considered is set out. He referred to points (4) and (7) in that guidance. In point (4) it was said that "facts personal to the Appellant that were not brought to the

attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection". In point (7), however, it was noted that the "force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him" (original emphasis). Mr Forrest suggested that there was a "very good reason" for not mentioning the alleged rape in the applicant's husband's case, namely that it was irrelevant to it. Miss Carmichael pointed out that *AA (Somalia*) was concerned with how far the guidelines set out in *Devaseelan* applied in a case where the second tribunal was concerned with an appeal by a different party from the one involved in the first appeal. She referred to paragraph 61, in which reference was made to *Ocampo* v *Secretary of State for the Home Department* [2006] EWCA 1276, and to two qualifications to that case proposed at paragraphs 69 and 70. In paragraph 69 the point is made that the guidance given in *Ocampo* should be regarded as applying where the two cases have "arisen out of the same factual matrix". It seems to us that that is the situation here. In order to see what the Immigration Judge did, it is necessary to examine the structure of paragraph 23 of his decision. He starts with the simple point that doubt is cast of the applicant's credibility by her failure to claim asylum upon arrival. It is in that context that he considers the fact that she was waiting for the outcome of her husband's appeal, and notes that her husband's account was not accepted. He regarded that as not determinative, but a starting point. We are not persuaded that that discloses any error of law. In so far as Mr Forrest went on to criticise as irrelevant the Immigration Judge's discussion of the additional medical evidence about the applicant's husband, the point is in our view unstateable. It is evident that the medical evidence was tendered to the Immigration Judge on the applicant's behalf in the hope of persuading him that there was

more merit to the applicant's husband's case than had been perceived by the adjudicator. That material having been put before him at the applicant's behest, he very properly dealt with it. The applicant cannot in these circumstances criticise him for discussing irrelevant material.

Ground of appeal 5.3

[13] This ground of appeal came to depend on the proposition that the Immigration Judge had failed to give proper consideration to the human rights case under Article 3 of ECHR. As Mr Forrest pointed out, Article 3 is not expressly mentioned in paragraph 27 of the decision, whereas it is mentioned later in the context of internal relocation (paragraph 29). There is in our view no merit whatsoever in this submission. The applicant's claims were that she feared persecution (a) because of her religion, and (b) because of her husband's involvement with the Russian military. These claims are both rejected in paragraph 27. The rejection is based on the Immigration Judge's adverse view of the applicant's credibility, which view was based on more considerations than those attacked in the grounds of appeal. Mr Forrest accepted that the Article 3 claim related to the alleged fear of persecution due to the applicant's husband's connections with the Russian military. That is thus clearly dealt with, despite the absence from paragraph 27 of express mention of Article 3. There is no error of law of the sort asserted in this ground of appeal.

Ground of Appeal 5.4

[14] In view of the fact that we reject the grounds of appeal attacking the soundness of the Immigration Judge's decision that the applicant has failed to make out her case either under the Refugee Convention or under ECHR, the question of internal

relocation does not arise. We therefore need say nothing more about this ground of appeal.

Result

[15] We are satisfied that the applicant has not put forward any ground of appeal which has real prospects of success. Leave to appeal is therefore refused.