EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lady Paton
Lord Clarke
Lord Emslie

[2011] CSIH 28
XA60/10

OPINION OF THE COURT

delivered by LORD CLARKE

in THE APPLICATION FOR LEAVE TO APPEAL

by

I.A. (A.P.)

Applicant and Appellant;

under section 103B of the Nationality, Immigration and Asylum Act 2002 against a decision of the Asylum and Immigration Tribunal

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Act: J.J. Mitchell Q.C.; Komorowski; Drummond Miller LLP
Alt: Lindsay; C Mullin; Office of the Solicitor to the Advocate General
For Intervener: Carmichael Q.C.; Brodies LLP

1 April 2011

[1] The applicant seeks leave to appeal against a decision of the Asylum and Immigration Tribunal ("the tribunal") dated 8 December 2009, described in the application as the "the reconsidered decision", whereby the tribunal held that its decision of 19 January 2009, described in the application as the "initial decision", should stand. The latter decision dismissed the applicant's appeal against a decision of the respondent, the Home Secretary, of 5 November 2008 which refused to grant the

applicant asylum or humanitarian protection and determined that he should be removed from the United Kingdom as an illegal immigrant.

[2] The applicant claimed before the tribunal that requiring him to leave the United Kingdom in consequence of the respondent's decision would be a breach of the United Kingdom's obligations under the Geneva Convention of 1951 relating to the Status of Refugees, as amended by the protocol to the Convention 1967 (collectively the Refugee Convention) and would be unlawful under section 6 of the Human Rights Act 1998, as being incompatible with the appellant's rights under the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[3] In making his application for asylum the applicant in his statement gave the following history. He is a native of Iran, born on 20 September 1976. He had, in his youth, an association with the KDPI and arranged to be smuggled into Kurdistan in Iraq when he was 16 years of age. He thereafter joined the KDPI but gave up his association with them some six or seven years thereafter. In 1998 he successfully applied for asylum to the Office of the United Nations High Commission for Refugees ("the UNHCR") in Kurdistan. He was advised by the UNHCR that he would be sent to a safe country in due course. There was some delay in carrying out this undertaking and, since the applicant continued to feel at risk, he travelled to Turkey where he claimed asylum with the UNHCR there. After a delay of two years the UNHCR again recognised him as a refugee and, once again, he was told that he would be sent to a safe country. Three years later, however, he still remained in Turkey, the undertaking to send him to a safe country having apparently not been fulfilled. He made a protest outside the UNHCR building and was arrested. He did not respond to the summons to appear in court and left Turkey in August 2007, having paid $8,000 to an agent to

assist him in coming to the United Kingdom. He arrived in the United Kingdom on 23 or 24 August 2007 and claimed asylum thereafter.

[4] On 27 September 2007 his asylum claim was refused. That refusal was subsequently withdrawn to allow the respondent's representatives to make enquiries of the UNHCR. His claim for asylum was then, of new, refused by letter dated 10 November 2008. He appealed to the Asylum and Immigration Tribunal and that appeal was dismissed on 26 January 2009. As has been noted, the applicant applied for an order for reconsideration. Reconsideration was ordered and a reconsideration hearing took place on 28 August 2009. By decision promulgated on 14 December 2009 the tribunal held there was no material error of law and that the decision of the tribunal dated 26 January 2009 should stand. The applicant's application to the Upper Tribunal (Immigration and Asylum Chamber) for leave to appeal to this court was refused on 6 April 2010. (Contrary to what is stated in the application to this court for leave to appeal, the application does not proceed under section 13 of the Tribunals Courts and Enforcement Act 2007 but, as noted above, proceeds under section 103B of the Nationality, Immigration and Asylum Act 2002. This was agreed by the representatives of both parties before this court to be the correct statutory basis for bringing the present application.)

[5] The application raises for consideration by this court, apparently for the first time, questions as to the status and effect of the recognition by the UNHCR, under its mandate, that a person has "mandate refugee status" when that person is seeking asylum protection in this country. The UNHCR lodged a minute of intervention in the present proceedings. By interlocutor of 15 October 2010 the court granted the application for leave to intervene and appointed the UNHCR to lodge a written submission. It was noted in the minute of proceedings that counsel for the intervener

would not, at that stage, be given authority to make oral submissions in any hearing that may follow. It was further noted, however, that counsel for UNHCR appearing at any hearing would be in the position to provide the court with further assistance if called upon to do so. UNHCR provided full written submissions which have been of considerable assistance to the court in setting out its status, functions and responsibilities.

[6] In the primary written submission lodged by UNHCR, dated 22 October 2010 (15 of process) its position as regards the issue which is focused in the present application is noted as follows:

> "For the foregoing reasons, UNHCR submits that in determining whether a person is refugee for the purposes of the 1951 Convention and/or 1967 protocol, the UK decision maker must give considerable weight to, and seriously take into account, the fact that that person has been recognised previously by the UNHCR under its mandate as a refugee when determining risk and assessing the credibility of his or her claim for asylum protection". (para 41).

[7] The focus of the hearing before this court was on the reasoning of the "initial" decision of the tribunal which was upheld in the reconsidered decision. The applicant's complaint was that the tribunal which had reached the initial decision erred in law by relying, it was said, "entirely" on its adverse credibility findings as clear and substantial grounds differing from the UNHCR conclusion as to the status of the applicant. It should be noted that the Tribunal had before it, and considered, a previous case *KK (Recognition elsewhere as refugee) Democratic Republic of Congo* [2005] UKAIT00054. The Tribunal, at para 20 of its decision, concisely and correctly,

in our judgment, identified the competing positions of the applicant, on the one hand, and the respondent, on the other, when it said:

> "The thrust of the appellant's argument is that he has already been granted refugee status twice by the UNHCR and therefore he should have been granted it in the United Kingdom. At the very least, the respondent has not established the most clear and substantial grounds to depart from the conclusions of the UNHCR in Iraq and Turkey that the appellant is a refugee. The respondent, on the other hand, states that there is no available information on the reasons refugee status was granted, what information was provided, or the circumstances surrounding the appellant's application. Having considered the appellant's claim, the respondent considers he is not a credible witness and has not told the truth about his past experiences. She holds the position that the Iranian authorities have no interest in the appellant."

[8] As previously noted, the tribunal had had regard to the decision in the case of *KK*. At the outset of its findings and reasons (at para 24) the tribunal referred to passages from the *KK* decision which were to the following effect:

> "The earlier grant of asylum is not binding, but it is the appropriate starting point for the consideration of the claim; the grant is a very significant matter. There should be some certainty and stability in the position of refugees. The adjudicator must consider whether there are the most clear and substantial grounds for a different conclusion - paragraph 18.
>
> But the important point is that it does not prevent the United Kingdom from challenging the basis of the grant in the first place. It does not require only that there be a significant change of circumstances since the grant was made. Clear and substantial grounds may show that the grant should never have been made

by the authorities; it may be relevant to show that the authorities in the country in question lacked relevant information or did not apply the Geneva Convention in the same way....The procedures adopted for examination of the claim may also be relevant - paragraph 19"

The Tribunal, at para 25, under reference to the UNHCR decisions regarding the applicant's statement said:

"...I, however, do bear in mind that it is a starting point, that it is significant and that whilst considering the substantive merits of the case the most clear and substantial grounds, if they exist, must be provided for coming to a different conclusion."

At para 26 of its decision the tribunal then continued:

"I turn now to consider the other evidence before me" (emphasis added)

Thereafter from paragraph 26 to paragraph 52 of its decision, the tribunal considered the evidence which had been placed before it. There was a great deal of documentary evidence and the tribunal heard from the applicant and his supporting witness Mr Kamaran Armandzadeh. The Tribunal carried out an exercise of assessing the credibility and reliability of the applicant, having regard to the evidence placed before it. Senior counsel for the applicant accepted that the tribunal was entitled to do so. We, indeed, go further and say that the Tribunal was bound to do so in the circumstances, standing the position adopted by the respondent. As had been said in *KK* at para 17:

"...the grant (of refugee status) would not be determinative of the position so far as the United Kingdom is concerned. It would still be necessary to consider the substantive merits of the case".

That is the position because, as senior counsel for the applicant accepted, the granting of UNHCR refugee status is not binding upon the UK authorities and courts.

[9] At para 54 of its decision the tribunal reached its conclusions. In so doing it said:

> "I have noted all the background evidence before me to which I was referred, as well as the case law and have looked at all the evidence in the round, whilst bearing in mind the low standard of proof. I have been led to conclude, however, for the reasons given above that the evidence of the appellant is not plausible and I do not find him or Mr Armandzadeh to be credible witnesses. The appellant has not established that he was involved with KDPI in any capacity or that the Iranian authorities have any interest or would have any interest in him for that reason. He has not established he has a well-founded fear of persecution for the reasons he claims. In conclusion, the appellant has not discharged the burden of proof based on the low standard which rests with him to show that he has a well-founded fear of persecution for a Refugee Convention reason."

It is apparent from the reasoning of the tribunal that it had a basis for reaching the view that the applicant's story, insofar as material, was not true and there is no "reasons" attack, in these proceedings, on the Tribunal's own findings and conclusions in that regard. The Tribunal considered that having regard to its total disbelief of the applicant's story, insofar as material, there were "clear and substantial grounds for departing from the conclusions of the UNHCR" (para 55).

[10] Against all of that background, the position adopted by senior counsel for the applicant was that the tribunal was obliged to give cogent reasons for departing from the conclusions reached by the UNHCR. The granting of UNHCR Refugee Status should be taken as part of the evidence to be looked at in the round. The tribunal had

not, it was submitted, approached matters on that footing in this case, but had compartmentalised the evidence of the UNHCR status, as separate and detached from, the other evidence produced to it at the hearing. On the tribunal's approach to matters it appeared that no weight was given to the UNHCR decision. At the very worst for the applicant it could be contended that the court could not be confident that the tribunal had applied the appropriate approach. Moreover the tribunal had proceeded on the basis that it had no knowledge or information about the basis upon which the UNHCR status had been conferred on the applicant. This, it seemed, by implication, had devalued its force in the eyes of the tribunal. That was an inappropriate approach to adopt, particularly as there was now material available that established that the UNHCR decisions were taken on the basis of interviews with the applicant himself. The tribunal, in the present case, had simply failed to give the UNHCR decisions the respect that they merited. The high respect that such decisions merited had been endorsed, recently, by the Court of Appeal in the case of *MM (Iran)* [2010] EWCA Civ 1457.

[11] In responding, counsel for the respondent contended that the application for leave to appeal should be refused as not meeting the test set out in the case of *Hoseini* v *Secretary of State for the Home Department* 2005 SLT 550. The tribunal had clearly applied the correct approach to UNHCR decisions and, in doing so, was following the approach adopted in other cases such as *KK*, as now authoritatively approved of by the Court of Appeal in *MM (Iran)*. No error in law had been identified by the applicant.

[12] If, however, the court considered that, in the circumstances of this case, the threshold for leave being granted had been crossed, then the court should, nevertheless, dismiss the appeal as being without merit. The tribunal had addressed

the issues raised in the correct fashion and that was now authoritatively settled by the judgment of Sullivan LJ in *MM (Iran).* At para 27 of the judgment Sullivan LJ, with whom the Master of the Rolls and Gross L.J. agreed, said:

> "In reality, a decision by the UNHCR as to refugee status will, given the UNHCR's particular expertise and responsibilities under the Refugee Convention, be given considerable weight by the Secretary of State and the Tribunal unless in any particular case the decision taker concludes that there are cogent reasons not to do so on the facts of that individual case. It would be just as unrealistic to contend that a decision by the UNHCR as to refugee status must always be given considerable weight regardless of any indications to the contrary as it would be to contend that it could be given less than considerable weight for no good reason."

What the tribunal in the case of *MM (Iran)* had done was exactly what the tribunal in the present case had done, namely in taking into account the important status of the UNHCR decision in that case but, nevertheless, itself coming to a different conclusion on the basis of the material placed before it - (see the passages from the decision of the tribunal in *MM (Iran)* as set out in paras 6-7 of Sullivan LJ's judgment in the same case.) The approach of the tribunal in the present case reflected the approach adopted by the tribunal in *MM (Iran)* which did not attract any criticism from the Court of Appeal. For these reasons the appeal should be refused.

Decision.

[13] As we noted above, this is apparently the first time that the point raised in this appeal has been before this court. What is more, the decision in *MM (Iran)* was not available until after the application in this case was brought. Nevertheless it has to be said that there was guidance in previous cases which, in our view, was followed by

the tribunal in the present case, which demonstrated that no error in law was committed by the tribunal in addressing the issues before it. We saw some force, therefore, in the respondent's submission that the *Hoseini* test had not been met but, given the novelty of the point as far as this court is concerned, we have decided, with some hesitation, that leave to appeal should be granted.

[14] Having regard, however, to the submissions we have heard on the merits of the matter we have reached the clear conclusion that the appeal falls to be refused.

[15] There is no room for arguing that the UNHCR decisions on refugee status are binding on the authorities and courts of this country. As the Tribunal in *MM (Iran)* at para 15 of its decision said, after reference to the decision of the European Court of Human Rights in *Y* v *Russia (application No 20113/07)*, "Art 37 of the Convention imposes an obligation of co-operation with UNHCR, not of subjection to the UNHCR. Individual States Party to the Convention are entitled to reach their own assessments of refugee status, and are not bound by an assessment by the UNHCR". While UNHCR decisions as to status, therefore, have no binding legal effect they are to be treated with great respect in the interests of legal diplomacy and comity having regard to their source. The mind of the decision maker, in this jurisdiction, where an applicant can lay claim to UNHCR status, as a given datism, must in its decision making process not lose sight of that fact in reaching its disposal of the case before it. A decision of the UNHCR on refugee status will be a very important piece of evidence throughout the decision maker's journey. But it has ultimately no greater claim than that and, if the other material before the decision maker leads him/her to considerations that point cogently against the conclusion arrived at by the UNHCR, then the decision maker is fully justified in departing from the latter conclusion. The submissions of senior counsel for the applicant, in the present case, ultimately, at

times, amounted to a complaint of form rather than substance, namely that the tribunal had failed to use the appropriate language in dealing with the UNHCR decisions or had not referred to their significance frequently enough in the decision making process. It has to be noted, however, in that respect, that Sullivan LJ in *MM (Iran)* at para 28 said this:

> "I should emphasise that these observations of mine are not to be treated as enactment binding either the Secretary of State or the Tribunal to approach decision-making in any particular order; they are merely intended to be a reflection of the practicalities of decision-making in this difficult and sensitive area."

That dictum, in our judgment, falls to be read as eschewing a formalistic approach to such questions and we agree with that view of matters. In the present case, as noted, the Tribunal had regard to what was set out in the case of *KK* and, on this footing, properly defined the status of UNHCR decisions at the outset of its consideration of the applicant's position. It then specifically referred to "other evidence". After considering that other evidence it reminded itself that there were UNHCR decisions in the applicant's favour but came to the conclusion, on a reasoned basis, that having considered all the evidence that it had heard there were clear and substantial grounds for departing from those decisions. In all the circumstances the tribunal, in our judgment, approached the UNHCR decisions in a perfectly appropriate way, namely by assuming that they were properly reached by a competent decision maker with a particular expertise. Notwithstanding that, however, the tribunal found itself unable, having regard to the material before it, to reach the same conclusion. There was no obligation on it to abandon its own conclusions.

[16] For the foregoing reasons the appeal is refused.