C5/2013/1809

Neutral Citation Number: [2014] EWCA Civ 1506

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 24 October 2014

B e f o r e:

LORD JUSTICE JACKSON

LORD JUSTICE LEWISON

LADY JUSTICE GLOSTER

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Between:
AM (BELARUS)

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr M Karnik (instructed by Paragon Law) appeared on behalf of the **Appellant**

Miss K Bretherton (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**

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J U D G M E N T

LORD JUSTICE LEWISON: . The Appellant is a national of Belarus who arrived in the United Kingdom in January 1998 and has been fighting to stay here ever since.

2. His principal claim to remain in the UK is based on his allegation that he has a well-founded fear of persecution if he were to be returned to Belarus on account of his political opinions and his political activities in Belarus some 15 years ago. In addition, he says that a return to Belarus would be a disproportionate interference with his private life.

3. This second appeal is an appeal from the Upper Tribunal, Upper Tribunal Judge Sullivan, dismissing his appeal from the First Tier Tribunal, First Tier Tribunal Judge Pooler.

4. The Appellant's claim that he has a well-founded fear of persecution for political reasons has been the subject of three hearings by fact finding tribunals. The first was a hearing by the adjudicator in January 2001, some three years after his arrival in the UK.

5. On that occasion the adjudicator recorded what the Appellant told him about his political activities. His problems began in 1997 when he became acquainted with persons who were members of the Belarusian Popular Front, the BPF. He did not himself become a member of the BPF, but he sympathised with them. Indeed, not only did he not become a member, he told the adjudicator that he could not become a member because the leadership had fragmented and the person responsible for issuing membership cards had left the country. His involvement, as he told the adjudicator at the time, was "limited to attending peaceful meetings" critical of the President. On one occasion, he distributed leaflets.

6. He told the adjudicator that at one such meeting, he was beaten by a police officer and arrested. On another occasion, the one when he was distributing leaflets, he was told by the police that if he did not give information about the leadership, he would end up in prison. He was told to return with the information within five days. When he failed to do so, he was abducted and taken to a forest where he was beaten unconscious. He woke up

in Minsk and he stayed there for six days, but later went to stay with a friend in Brest for three or four months.

7. The adjudicator concluded that the Appellant had failed to satisfy him that he could have been of any interest to authorities. His claim to being persecuted was neither credible nor reasonable. His claim to asylum, therefore, failed and an application for permission to appeal to the immigration Appeal Tribunal had also failed.

8. The second hearing took place some 18 months later in June 2002 before a different adjudicator. This time, in addition to his own evidence, the Appellant put before the adjudicator an unsigned statement from Mr Rostilav Berk, who was then in immigration detention at Oakington. The Appellant was legally represented. His representative told the adjudicator that she was expecting Mr Berk to be produced from Oakington to give evidence, but no application for an adjournment was then made. So Mr Berk did not, in the end, give oral evidence.

9. The adjudicator recorded that almost all the evidence in the Appellant's statement related to events in Belarus before his departure. The Appellant did, however, say that there were matters he had not mentioned in the first hearing for fear of what might happen to him if he returned to Belarus and that information leaked out.

10. The adjudicator also considered Mr Berk's unsigned statement. He recorded that it merely served to confirm the Appellant's membership of BPF. This was not in dispute.

11. I note at this point that at the first hearing, the Appellant told the first adjudicator that he was not a member of BPF and also explained why he could not have joined it, but his case at the second hearing was that he was a member of the BPF, something confirmed by Mr Berk. The Appellant also told the second adjudicator that not merely had he been distributing leaflets for the BPF, as he had said before, but he had been secretly printing

them as well. His case at the second hearing had, therefore, been improved. I note at this point that all that Mr Berk had said was that the Appellant was a member of BPF. He had not given any more information about the Appellant's political activities in Belarus.

12. The second adjudicator noted that the first adjudicator had made an adverse credibility finding against the Appellant. He went on to make his own independent adverse credibility finding on the basis that the Appellant had admitted having lied to immigration officials, both in Belarus in the course of an unsuccessful attempt to return him and on his return to the UK. The second adjudicator concluded that there was no evidence before him to show that the Appellant had any fear of persecution at all in Belarus. His claim, therefore, failed for the second time.

13. The Appellant's third claim, with which we are concerned, was heard by the First Tier Tribunal on 16 March 2012. The Appellant again gave evidence and this time, so also did Mr Berk. Mr Berk's own asylum claim had, in the meantime, been successful and his evidence had been accepted in that claim.

14. This time, the Appellant again said that not merely had he been distributing leaflets for the BPF, he had also been secretly printing them at his place of work. He also told the FTT that he had been beaten and interrogated and that his hands had been jammed in a door, breaking two of his fingers. This too was a new detail.

15. Mr Berk made a witness statement and gave oral evidence on the Appellant's behalf. He told the FTT that he had met the Appellant in 1997 and that the Appellant had secretly printed leaflets for the BPF at his workplace. He said that he had seen the Appellant immediately after he had been caught with the BPF leaflets and interrogated by the KGB in Minsk. The Appellant's face was bruised and he was badly shaken. None of this was in his unsigned statement placed before the adjudicator in the June 2002 hearing.

16. It can be seen quite clearly that the Appellant's case had improved with each successive hearing. In 2001, he claimed to be no more than a sympathiser with the BPF who had attended peaceful demonstrations and handed out leaflets. In 2002, he claimed in addition to have been a member of the BPF, contrary to his evidence in 2001. He also claimed not only to have distributed leaflets, but also to have secretly printed them at his workplace.

17. In essence, the reason why the Appellant's asylum claim failed first time round was that the adjudicator took the view that the Appellant's political activities were at so low a level that the authorities would not be interested in him. Since then, his claimed political activities have increased on each successive occasion.

18. The FTT was well aware that the Appellant's claim had been considered twice before. Before hearing evidence, Judge Pooler invited Mr Karnik, appearing then as now for the Appellant, to address him on why, in the light of the guidance given in Devaseelan v the Secretary of State for the Home Department [2002] UKIAT 00702, [2003] Imm AR 1, he should allow the Appellant to rerun an earlier appeal. Mr Karnik drew his attention to evidence that he said was not available at the previous hearing. That evidence consisted of the evidence of Mr Berk and two expert reports from Mr Chenciner on conditions in Belarus.

19. Mr Karnik submits that the way that the FTT posed the question why it should allow the Appellant to rerun an earlier appeal was too rigid an approach, having regard to the Devaseelan guidelines. But the fact is that, having posed the question, the judge did allow Mr Karnik to call the evidence. He considered that evidence together with the previous findings made by the previous two adjudicators.

20. It is common ground that the FTT was right to take into account the Devaseelan guidelines and to take the previous decisions as its starting point. The main question before the FTT

was what to make of Mr Berk's evidence. Judge Pooler considered that this fell within the fourth of the Devaseelan guidelines, which is as follows:

> "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. An Appellant who seeks in a later appeal to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute. It must also be borne in mind that the first adjudicator's determination was made at a time closer to the events alleged and in terms of both fact finding and general credibility, an assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first adjudicator."

21. These guidelines have been approved by this court on many occasions, while stressing that they are no more than guidelines. It is in two particular respects in which this guideline emphasises the advantage held by the earlier tribunal both in relation to general fact finding and also in relation to a general credibility assessment.

22. Moreover, in our case, unlike those considered in Devaseelan, the Appellant's claim has been heard not just once before, but twice. Thus, in our case, the judge in the FTT said expressly that both the previous adjudicators had made adverse credibility findings against him. That is an unexceptional observation and certainly reveals no error of law.

23. The judge then turned to consider Mr Berk's evidence. He regarded that evidence as falling within the fourth guideline which I have quoted. Mr Berk's evidence was, in my judgment, undoubtedly evidence about facts personal to the Appellant. That evidence was not brought to the attention of either the first or the second adjudicator. On the face of it, therefore, he fell within the fourth guideline in Devaseelan.

24. It was argued in the FTT that there were two reasons why Mr Berk's evidence should be

accepted: first because he had been believed in his own successful asylum appeal and, secondly, because his evidence had not been directly challenged in cross-examination.

25. As to the first of these reasons, the judge said Mr Berk's credibility in his own appeal was something that he should take into account, but it did not lead to an inevitable conclusion that the evidence before him should be regarded as credible. As to the second of these reasons, the judge noted that no direct challenge to Mr Berk had been put in cross-examination.

26. He continued at paragraph 41:

> "This cannot, however, be an end of the matter in relation to credibility. Clear adverse findings were made in two earlier determinations in respect of the Appellant's claim. Mr Berk was not called to give oral evidence in 2002, though he could have been. The guidance in Devaseelan is clear. This tribunal should properly regard with suspicion from the point of view of credibility an attempt to add to the available facts in an effort to obtain a more favourable outcome. Accordingly, I intend to view the evidence as a whole, and while the lack of challenge is a relevant factor, the Respondent has throughout these proceedings made clear the fact that the Appellant's credibility in respect of his claims has been directly challenged."

He expressed his conclusions at paragraph 46 as follows:

> "I have been careful to assess the evidence as a whole. While the Appellant's account of his activities and ill treatment in Belarus appears, according to Mr Chenciner, to be consistent with the background evidence, I conclude, placing weight on the findings of the two adjudicators and the fact that Mr Berk could have been but was not called to give evidence in the 2002 appeal, that the Appellant has not given a credible account and I make findings in line with those of the adjudicators who have previously heard his appeals. I reject his claim to have been active politically in opposition to the government or to have been detained and ill treated in consequence. He did not suffer ill treatment and I am not persuaded that he would be at real risk of ill treatment by reason of BPF membership or activity if he were returned now to Belarus."

27. The judge also considered the question why the Appellant was refused entry to Belarus when the government unsuccessfully tried to return him in 2001. His finding at 46 was:

> "I also find as a fact that the Appellant was not refused entry to Belarus because he was regarded as a political opponent. The fact that he lied, as he admitted previously, to the Belarus authorities is, in my judgment, a significant factor which will have been taken into account by the authorities in 2001 when the Appellant was refused entry. I am furthermore not persuaded that the refusal of the Belarus authorities to recognise the Appellant as a citizen of Belarus or to issue him with a travel document is based on his political opposition, given his past acknowledgement that he lied to the authorities in Belarus on his return there and that he lied to immigration officials in the UK in the context of the claim which he made on his return in 2001. It is likely that the Appellant has failed to provide accurate information to enable the Belarus authorities to trace him or to find any record of him."

28. The Appellant's claim to have a well-founded fear of persecution depends on the extent of his political activities 15 years earlier in Belarus. So, therefore, it is claimed that he would be refused entry to Belarus. He knew better than anyone what those activities have been. His credibility was, therefore, critical.

29. The FTT heard his evidence and rejected it. The judge did not say that earlier adverse findings were determinative, merely that weight should be attached to them. Whether to believe a witness is a question of fact. Questions of facts are for the FTT. Neither the Upper Tribunal nor this court can intervene unless there has been an error of law.

30. What then is the error of law said to be? Mr Karnik takes three points. First, he says that the FTT were wrong to infer that Mr Berk could have been called as a witness to give oral evidence in June 2002. The mere fact that no adjournment was asked for should not have led to that conclusion.

31. But that, to my mind, is not the real question. Mr Berk provided an unsigned statement for the June 2002 hearing which the second adjudicator took into account, but all that that statement said was that the Appellant was a member of the BPF. It said nothing about

printing leaflets or even ill treatment by the police. No reason has been given why Mr Berk's earlier statement could not have contained the evidence that he gave before the FTT. Thus, in my view, Mr Berk's evidence before the FTT did contain facts personal to the Appellant that were not brought to the attention of, in our case, the second adjudicator and thus fell squarely within the fourth guideline, whether or not Mr Berk could have been called to give oral evidence at the June 2002 hearing.

32. Second, Mr Karnik says that the FTT ought to have attached more weight to the expert evidence which was not available to the adjudicators in the previous hearings.

33. However, as the FTT correctly pointed out, the expert evidence was given on the assumption that the Appellant's case on the extent of his political activities was correct. If, as the FTT found, it was not credible, then the background evidence in the expert reports was of very little materiality. Whether the FTT accepted the evidence of the expert or not, once again, was a question of fact, not of law.

34. Third, Mr Karnik says that the FTT failed to comply with its fundamental obligation to decide the case on its own individual merits and wrongly treated the Devaseelan guidelines as a straitjacket.

35. That is not what the FTT did. In paragraph 46, the judge stated in terms that he had carefully considered the evidence as a whole. Moreover, he did no more than give weight to the findings in the earlier hearings. As the Devaseelan guidelines themselves make clear, a tribunal that hears a claim closer in time to the events on which it was based is in a better position to make general findings of fact and to assess credibility than a tribunal which, as here, is going over much the same ground 15 years later.

36. As I have noted, each time the Appellant has given evidence about his political activities in Belarus, the scope of those activities has grown. It is hardly surprising that the FTT found

his latest version not to be credible. In my judgment, there is no error of law in the way in which the FTT approached its task or in its reasoning or its conclusions on that part of the case.

37. The Appellant also relied on Article 8 of the European Convention on Human Rights and Fundamental Freedoms in order to resist removal. The judge set out a lengthy quotation from an earlier case, itself quoting from Razgar v the Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368 and Huang v the Secretary of State for the Home Department [2007] UKHL 11, [2007] 2 AC 167, together with other authorities. It is not suggested that that passage contains any misdirection of law.

38. The judge found at paragraph 51 that the Appellant had provided no evidence of family life in the United Kingdom. He, therefore, concentrated on the Appellant's private life. However, the judge noted at paragraph 52 that the evidence of the nature and extent of private life is extremely limited.

39. One other aspect of his private life on which the Appellant relied was his medical condition. He had been receiving treatment for psoriasis, although the latest medical evidence dated from 2009, some three years before the hearing, but the judge was willing to accept that he might be resuming treatment in the future. The Appellant also suffered from hepatitis C, although he had not been receiving any treatment for that.

40. He accepted evidence that basic medical care would be available in Belarus. Having weighed all that material, he came to the conclusion that removal would be proportionate. He summarised his conclusions at paragraph 28:

> "In summary, the Appellant has no family life in the UK. He has limited private life by way of a small number of friendships. Mr Karnik submitted that the Appellant had worked in the UK, although it appears that, for at least part of the time, he was working illegally. The Appellant has been in the UK

> since January 1998, but he has never had lawful status beyond temporary admission. Indeed, the likelihood is that he would have been removed successfully in June 2001 had he not lied to the authorities in Belarus. Basic medical care would be available. The Appellant's criminal record noted above is a significant factor to be taken into account, as is the fact that the Appellant remains subject to a deportation order. Removal would be reasonable in all the circumstances."

41. Mr Karnik does not quarrel with the self direction that the judge expressly gave himself and does not really submit that, as regards the Appellant's actual private life and medical problems, the judge went wrong in law. His basic submission is that the Appellant has more ties to the United Kingdom than to Belarus and that the UK is the only place in which, for the future, he can develop a private life.

42. In support of the proposition that respect to private life encompasses the right to develop a private or family life, Mr Karnik relies on the decision of the Europe Court of Human Rights in AA v the United Kingdom [2001] ECHR 1345 at paragraph 49. In support of the proposition that a denial of entry by the authorities in Belarus for political reasons amounts to persecution, he relies on the decision of this court in MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289.

43. At the heart of his submission is the factual proposition that the Appellant would still be refused entry to Belarus if he told the truth to the authorities there. But the judge decided that question against him, as did the judge in the Upper Tribunal. Mr Karnik says that that in itself was a misapplication of Devaseelan. But at paragraph 45 of the decision of the FTT, the judge considered evidence which the Appellant gave to him in the course of that hearing. He said in terms that he did not believe it. That is clearly an independent and third adverse credibility finding made against this Defendant.

44. Whether something is or is not proportionate, which was the question which the FTT had to

decide, is essentially a value judgment on which different people can reasonably disagree. We can only interfere if the value judgment which the FTT made is one that no reasonable tribunal properly instructed could have reached. In my judgment, the FTT was perfectly entitled to reach the conclusion that it did on the question of proportionality.

45. I would, therefore, dismiss the appeal.

LADY JUSTICE GLOSTER: I agree.

LORD JUSTICE JACKSON: I agree.

I add my thanks to Mr Karnik for arguing a difficult appeal clearly, forcefully and fairly.