Neutral Citation Number: [2014] EWCA Civ 477

Case No: C5/2013/2954

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UTJ HANSON
IA/14674/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2014

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE LEWISON
and
SIR STANLEY BURNTON

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Between :

Secretary of State for the Home Department	**Appellant**
- and -	
The Queen on the Application of JR (Jamaica)	**Respondent**

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Catherine Rowlands (instructed by **Treasury Solicitor**) for the **Appellant**
Colin Yeo (instructed by **Lambeth Law Centre**) for the **Respondent**

Hearing dates : 1 April 2014

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Approved Judgment

Lord Justice Maurice Kay: :

1. JR is a citizen of Jamaica who was born on 3 October 1985. He arrived in the United Kingdom on 20 December 2000 when he was 15. He had leave to enter as a visitor. He had come with his grandmother and a half sibling to visit his mother. Once here, an application for further leave to remain as a visitor was refused. However, he stayed. On 7 December 2001 he was party to the murder of another teenage boy. He and a co-accused were convicted on 27 August 2002 and sentenced a month later. The sentence was one of detention at Her Majesty's pleasure, with a recommendation that he serve a minimum period of 8 years and 2 months and a recommendation for deportation. He successfully appealed his sentence with the result that the minimum period was reduced to 6 years and 2 months and the recommendation for deportation was set aside. On 31 December 2009 the Secretary of State decided to deport JR. He appealed against that decision on spurious asylum grounds which were rejected on 3 June 2010. On 10 April 2012, whilst still in custody, JR submitted a fresh claim for refugee and human rights protection asserting that he is a homosexual. This was the first occasion upon which he had made such an assertion. He was released on licence on 15 June 2012 having spent 11 and a half years in custody. On 15 June 2012 the Secretary of State refused to revoke the deportation decision. It was that refusal which prompted JR to appeal to the First Tier Tribunal (FTT).

2. The FTT accepted that JR is a homosexual and allowed his appeal on refugee and Article 3 ECHR grounds. The Secretary of State appealed to the Upper Tribunal (UT) but by a determination promulgated on 27 August 2013, the UT dismissed her appeal. The Secretary of State now appeals to this court, permission having been granted by Sir Stanley Burnton.

3. I should mention two features of this litigation. The first is that the Secretary of State accepts that, if JR is a homosexual, she cannot return him to Jamaica without breaching at least his Article 3 rights. Secondly, because of the gravity of the offence of which he was convicted, the Secretary of State issued a certificate pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 whereby, in relation to the asylum claim (but not the Article 3 claim), JR is to be presumed to constitute a danger to the community of the United Kingdom unless he rebuts that presumption. The Secretary of State failed in the UT because the finding that JR is a homosexual was upheld and he succeeded in rebutting the presumption of dangerousness.

<u>This appeal</u>

4. In this Court, the Secretary of State seeks to challenge the conclusions of the UT that (1) JR is a homosexual and (2) he has succeeded in rebutting the presumption of dangerousness pursuant to section 72. The conclusions are factual matters. An appeal to this Court from the UT lies only on a point of law: Tribunals, Courts and Enforcement Act 2007, section 13. Accordingly, the submissions on behalf of the Secretary of State seek to establish errors of law in the form of failure to have regard to material considerations or failure to provide adequate reasons to support the conclusions that JR is a homosexual and not dangerous.

5. It is the conclusion on homosexuality that is pivotal. If it is unassailable, it is common ground that JR succeeds on Article 3. Section 72 and dangerousness only arise in the context of refugee status. However, refugee status remains a relevant issue, even if JR

succeeds in relation to Article 3, because it would bring with it additional benefits as regards the form and duration of the leave to remain which would ensue. Because Article 3 is freestanding and unencumbered by section 72 I shall take the course that was agreed in the UT and deal with it first.

Article 3: homosexuality.

6. In the FTT the Secretary of State conceded that if JR is homosexual and wishes to live openly as such, he would be at risk of inhuman and degrading treatment upon return to Jamaica. She does not seek to resile from that concession. When she refused JR's application for protection, she rejected his assertion of homosexuality on credibility grounds, relying on the facts that he had made no mention of it in the course of his previous asylum application and appeal in 2010 and that there were inconsistencies in his later account. In the FTT, the presenting officer submitted that the claim of homosexuality was contrived and brought as a last resort to avoid deportation. Nevertheless, the FTT found the account to be credible. It accepted the evidence of JR and his mother. The determination included these passages:

> "20. We have made such a finding only after material consideration of all relevant and material circumstances. In making this finding, we have taken into account all the available evidence, in the round, and have attached such weight as we consider properly attributable thereto after anxious scrutiny. We approach the issue of credibility with a high degree of circumspection, mindful of the appellant's immigration history, the sequence of events and the appellant's late disclosure that he is gay.
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> …..
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> 22….We attach particular weight to the mother's evidence that she knew all along that the appellant was gay and that his late disclosure was prompted by societal attitudes, particularly that of Jamaicans towards gays. No cogent reason exists to doubt her testimony. "

Applying the lower standard of proof, the FTT found the appellant and his witnesses to be "both credible and persuasive", supporting the conclusion that he is "gay and wishes to live openly as such". The UT found no legal error in that reasoning or conclusion, nor did another UT judge who refused permission to appeal to this Court. However, the Secretary of State now has permission and I shall consider the two aspects of the reasoning about which complaint is made.

(1) Lateness

7. It is obvious that important assertions made in these proceedings which were not made in the previous proceedings raise credibility questions. However, it is abundantly clear that the FTT was alert to that. It referred to all the points made on behalf of the Secretary of State in relation to lateness and, indeed, in relation to alleged inconsistencies although, on close examination, the inconsistencies seem unremarkable. It also referred to the explanations for not having disclosed

homosexuality earlier, including the need to suppress it whilst in prison and fear of societal attitudes, specifically in relation to Jamaicans. However, by the time of the hearing, he had disclosed it to his mother, to significant members of her Church and to Dr Oliver White, an experienced consultant psychiatrist who had prepared the most recent report on JR and who found him to be "open and honest about his sexuality". In my judgment, it simply cannot be said that the FTT omitted to take into account any material consideration or evidence in relation to this issue which, at this stage, had been agreed between the parties to be "the sole question to be addressed": FTT, paragraph 11. I detect no inadequacy of reasoning. It is readily apparent why the FTT did not consider its lateness to be fatal to the assertion of homosexuality. The reasons why the Secretary of State lost on this issue are intelligible to any reader of the FTT's determination which also makes it clear that all material considerations were addressed.

(2) The mother's evidence

8. There is no doubt but that the FTT attached significance to the mother's evidence. It said so, with the rider "No cogent reason exists to doubt her testimony". The submissions on behalf of the Secretary of State focus on these words. Ms Rowlands submits that the FTT failed to take into account that here was a mother giving evidence to prevent her son's deportation. For this reason, there was every reason to doubt its truthfulness and the FTT was wrong to accept it without further reasoning to support such a conclusion. She does not go so far as to suggest that any reasonable tribunal would have rejected it. In her oral submissions she characterises her complaint as "a failure to take account of the mother's reason to lie" and a failure to provide further explanation for accepting her evidence.

9. In my judgment, these submissions are unsustainable. It is fanciful to suggest that this FTT − a two member panel, lawyer and lay person as is common in deportation cases – did not consider that a mother might have an incentive to lie in these circumstances. The determination of the FTT records the existence of a witness statement by the mother (although it has not been produced in this court). More importantly, it saw and heard mother and son being cross-examined. There is no reason to suppose that it did not bring to its task the "mature consideration" and the "high degree of circumspection" to which it expressly adverted. When it referred to there being "no cogent reason to doubt her testimony", it can only have meant that, having approached her evidence critically, it was satisfied that she was not lying. It is not for this Court to guess what our view of the witnesses might have been. In R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19, Lord Hope said (at paragraph 25):

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it"

This is a reflection of the jurisprudence from R v Immigration Appeal Tribunal, ex parte Khan [1983] QB 790 (per Lord Lane CJ at page 794) onwards.

10. Once again, the Secretary of State knows why the invitation to disbelieve the mother was rejected. The FTT plainly found her an impressive witness. Moreover, her evidence gained support from the other material relied upon by JF – including the letters from the Church and the report of the consultant psychiatrist. As Lewison LJ observed in the course of argument, what the Secretary of State is seeking in this appeal is not simply reasons but "reasons for reasons". In my judgment, this goes too far in the light of the authorities to which I have referred and, for that matter, the classic formulation outside the sphere of tribunals, English v Emery Reimbold & Strick [2002] 1 WLR 2409.

11. For all these reasons, I consider that the UT was correct to find no error of law in the FTT's treatment of the issue of homosexuality. It was therefore correct to dismiss the Secretary of State's appeal in relation to Article 3.

Section 72 and refugee status

12. The purpose of section 72 is to raise a rebuttable presumption of dangerousness such that, absent rebuttal, a person may be refouled when he would not be if he were not dangerous. The prohibition of refoulment in Article 33.1 of the Refugee Convention is followed by Article 33.2:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"

Section 72 (1) provides:

> "This section applies for the purpose of the construction and application of Article 33 (2) of the Refugee Convention."

By Section 72 (2):

> "A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –
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> (a) convicted in the United Kingdom of an offence, and
> (b) sentenced to a period of imprisonment of at least two years."

On an asylum appeal, the Secretary of State may issue a certificate pursuant to Section 72 (9) (b) that the presumption under subsection (2) applies. Thereafter:

> "(10) The…tribunal…hearing the appeal –
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> (a) must begin substantive deliberation on the appeal by considering the certificate, and

> (b) if in agreement that presumptions under subsection (2) …apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground [that to remove him would breach the United Kingdom's obligation under the Refugee Convention]."

13. Section 72 was not considered by the FTT, probably because in the course of closing submissions it became common ground that "the sole question to address was whether [JR] is gay". Having concluded that he is, the FTT allowed his appeal not only under Article 3 but also on asylum grounds. When the matter came before the UT section 72 was considered in detail. In essence, the UT concluded that JR had successfully rebutted the statutory presumption. This enabled him to rely on the Refugee Convention as well as on Article 3.

14. As with any similar case, the UT had to consider a large amount of material in relation to JR. It had to consider not only the extreme gravity of the offence of which JR had been convicted but also the assessments and reports on him compiled in the intervening years. The question for us is whether the UT fell into legal error in concluding that JR had rebutted the presumption. Ms Rowlands makes a number of submissions but, it seems to me, they really amount to a perversity or irrationality challenge. Essentially, she is submitting that, because of the gravity of the original offence and having regard to some of the risk assessments, the presumption in this case is especially strong and it could not be reasonably concluded that it had been rebutted.

15. In setting out the submissions made by the presenting officer, the UT referred to "the most serious offence". In my judgment, it can not realistically be suggested that the UT ever lost sight of this.

16. The risk assessments were made over a period of time and, unsurprisingly, were not identical in their conclusions. There was a NOMS assessment prepared in June 2010 following an OASys assessment on 20 March 2012. It assessed the level of risk of serious harm as medium and likely to increase in the event of conflict of someone. It also described the risk of re-conviction as low. The Secretary of State places considerable emphasis on the NOMS assessment. Ms Rowlands also submits, correctly, that a low risk in relation to future conduct has to be considered in the context of the seriousness of the consequences if the risk eventuates.

17. On the other hand, the remainder of the evidence was more favourable to JR, sometimes conspicuously so. The question of his ongoing dangerousness had been the Parole Board's concern in 2012. The Board found that the risk posed by JR had continued to decrease and was now at a manageable level. He had done well on offender behaviour courses, had no adjudications since 2008 and had not taken drugs for many years. This is what led the Board to conclude that the risk had reduced to such a level that it was no longer necessary for the protection of the public that JR should be confined in prison. There was other evidence of JR's development. Whilst he had been assessed as having a low IQ and a mild learning disability at the time when he was sentenced, the up-to -date assessments found him to be of normal intelligence. The UT placed a significant amount of importance on the report of Dr Oliver White which had been prepared in December 2012. I referred to it in the context of the homosexuality issue. Dr White assessed the current risk of current re-

offending to be medium to low and the risk of harm to others to be low. Viewed as a whole, Dr White's report was to the effect that JR no longer constitutes a significant danger to the community of the United Kingdom. He has continuing problems of depression but, in general, any difficulties in that or other respects can be expected to be resolved with appropriate management in the community of which JR is proving to be a successful recipient since his release. In addition to all this professional assessment, the UT also had the benefit of the evidence of JR's mother, aunt and senior Church members. In my judgment it cannot be said that the UT committed a legal error in its assessment of all this material. It reached a conclusion which was open to it. It was neither perverse nor irrational. It was more than adequately reasoned. It is the FTT and the UT, as specialist tribunals, that have been entrusted by Parliament with jurisdiction in this sphere. In the absence of legal error on their part it is not for this Court to intervene. I should add, however, that this case turns on its specific and quite unusual facts. It should not be seen as providing more general succour to others convicted of grave crimes.

Conclusion

18. It follows from what I have said that the Secretary of State's appeal must fail in relation to both issues. The consequence is that JR is entitled to both Article 3 protection and refugee status.

Lord Justice Lewison

19. I agree.

Sir Stanley Burnton.

20. I also agree.