OUTER HOUSE, COURT OF SESSION

[2018] CSOH 114

P629/18

NOTE BY LORD BANNATYNE

In the petition of

WIS

Petitioner

for

Judicial Review of a Decision of the Secretary of State for the Home Department

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: C Smith; Office of the Advocate General

5 December 2018

Introduction

[1] This judicial review came before me at the request of the petitioner for review of the Lord Ordinary's decision pronounced on 12 October 2018 refusing permission for the petition to proceed for the following reasons:

> "In the decision letter complained of the Secretary of State identified the correct legal test and had regard to all relevant material. The Secretary of State was entitled to reach his decision."

Background

[2] The petitioner's full immigration history is set out in paragraph 6 of the petition.

[3] The petition arises from a decision of the respondent dated 28 March 2018 to refuse to accept that the representations made on behalf of the petitioner amounted to a fresh claim for asylum in terms of Immigration Rule 353.

Submissions

Submissions for the petitioner

[4] Mr Winter's position was a concise one. He began by directing my attention to *TF and MA* v *The Secretary of State for the Home Department* [2018] CSIH 58 paragraphs 48 to 50 of the opinion (which was delivered by Lord Glennie).

[5] It is perhaps appropriate at this stage to quote the above passage in its entirety:

> "[48] The first point is that already mentioned in paragraph [38] above. Any court or tribunal must be very careful not to dismiss an appeal just because an appellant has told lies. For reasons we have already set out, the judge should not jump too readily to the conclusion that because the appellant has told lies about some matters then his credibility on all matters is fatally undermined.
>
> [49] The second point is that even if the FTT judge concludes that the witness's evidence on the critical matters is undermined by a finding that he is generally incredible and not to be relied on, that has the limited effect that the appellant's (disbelieved) evidence is disregarded or put to one side: it does not somehow become evidence to the opposite effect, to be used against the appellant in contradiction of other independent evidence on which he relies. That again reflects the standard direction in criminal cases in Scotland and applies in civil cases too, including cases before tribunals. The judge should not allow his adverse finding about the credibility of the appellant to sway his assessment of the credibility and relevance of other independent evidence bearing upon the issue before him. So here, where the FTT judges have disbelieved the appellants' evidence that they are genuine converts to Christianity, their evidence to that effect will be put to one side, given no weight. But the rejection of their evidence on this point does not become evidence that their conversion is not genuine, to be set against other, independent, evidence from which the genuineness of their conversion can be inferred. That other evidence requires to be assessed on its merits, without any *a priori* assumption derived from the complainer's own false evidence that it is in some way suspect or of little value.
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> [50] The third point is very familiar in this type of case. It is wrong in principle to form a concluded view of the probable veracity of particular items of evidence and then, from that fixed point, to allow that view to govern the assessment of other

evidence in the case. The proper approach is to adopt what is sometimes called an 'holistic' approach, considering all the evidence "in the round" before arriving at any concluded view on the facts. The authority usually cited for this proposition is the judgment of Sedley LJ in *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449 at 477 (para 16 of his judgment):

> '… a civil judge will not make a discrete assessment of the probable veracity of each item of the evidence; he or she will reach a conclusion on the probable factuality of an alleged event by evaluating *all* the evidence about it *for what it is worth*. Some will be so unreliable as to be worthless; some will amount to no more than straws in the wind; some will be indicative but not, by itself, probative; some may be compelling but contra-indicated by other evidence. It is only at the end-point that, for want of a better yardstick, a probabilistic test is applied. …'

In paragraph 140 of his decision in the TF appeal, the FTT judge pays lip service to this approach. He says that he has "looked at all the evidence in the round and taken into account my other findings herein before reaching my conclusions in respect of the Appellant's claimed conversion to Christianity". But when one looks at his reasons, he does no such thing. He has taken into account all the material showing, to his mind, that the appellant was not a truthful witness; and he has then carried that finding through in his discussion of the other evidence adduced by the appellant, including the evidence from the Tron Church witnesses, so as to reach a conclusion that the appellant is not telling the truth about being a genuine convert. What he ought to have done was to look at all the evidence in the case, including the evidence from the Tron Church witnesses, on its own merits before forming a concluded view as to the veracity of the appellant. We cannot say what conclusion he would have reached had he done this, but it is not beyond the bounds of possibility that a consideration of the evidence from the church, carried out on its merits and without any *a priori* assumption about the appellant's lack of credibility, might have led him to form a different view of the appellant. Even if he had remained of the view that the appellant's own evidence was not to be believed, he might nonetheless have accepted that the independent evidence from the church witnesses pointed to the conversion being genuine. For what it is worth, it is not clear that the FTT judge in MA had regard to this principle at all."

[6] It was Mr Winter's position that the respondent had fallen into the error identified by Lord Glennie. He asserted, as I understood it, that the respondent had taken the adverse findings regarding the credibility of the petitioner made by the First-tier Tribunal and allowed these findings to sway the assessment regarding the credibility and reliability of the other evidence which had been submitted in support of the petitioner's application. In other words he had started his analysis from an assumption based on the previous findings

regarding the petitioner's credibility that the fresh evidence produced was suspect or of little or no value. This error in approach by the respondent it was submitted amounted to a clear error of law. It was implicit in Mr Winter's submissions that in light of the court's observations the well-established approach as set out in *Devaseelan* [2002] UKIAT 702 would have to be revisited.

The reply for the respondent

[7] Ms Smith relied on the averments in the answers to the petition and in addition she submitted as regards the petitioner's argument based on *TF and MA* that: the respondent's approach in the decision letter could not on a fair reading of it be regarded as running contrary to the principles enunciated by Lord Glennie.

[8] She submitted that the First-tier Tribunal had made very clear and detailed findings regarding the petitioner's credibility on the central issue of whether he was a Syrian. Beyond that it had made very clear findings that certain documents submitted on behalf of the petitioner had been made up and thereafter presented to the First-tier Tribunal to support his position that he was Syrian.

[9] The respondent had properly taken the foregoing findings as the starting point in considering the fresh evidence presented by the petitioner. (See: *Devaseelan*).

[10] However, critically thereafter the respondent had brought an independent mind to the new evidence produced on behalf of the petitioner and considered it on its merits fully and carefully. It was her position that no criticism could properly be advanced in respect to the approach of the respondent.

Discussion

[11] The core issue in relation to the petitioner's application for asylum was this: could he establish that he was a citizen of Syria? If he could, then as I understood it, it was at all hands accepted he would be recognised as a refugee.

[12] Given the argument before me it is appropriate to set out in a little detail the findings of the original appeal decision of Judge Murray. He found *inter alia* as follows:

> "
> - 'I have noted the discrepancies in his original evidence when he came to the United Kingdom and his statement and the evidence given to the Tribunal today. In any case there are not just one or two discrepancies, there are many. He states that the evidence he has given today is the true evidence but he has given no explanation of why he did not tell the truth at his interview. This goes against his credibility.' (paragraph 38);
> - 'I have considered the language analysis report. This indicates that the Appellant is an Egyptian and speaks in the way somebody from Cairo would speak. This is not sufficient in itself for me to dismiss the claim but it is an important point if I find there to be other credibility issues.' (paragraph 39);
> - 'The appellant came to the United Kingdom with no documentation. He states that not only is he Syrian but he left Syria illegally. There are credibility issues relating to this because of the different accounts he has given of his journey to the United Kingdom. I do not believe that this is an Appellant who left Syria having refused to complete his military service. The original documents which the appellant has produced are rubber stamped with Syrian stamps. The individual civil record with his photograph stapled thereon must be dubious if the photograph used was a photograph Whatsapped in the UK. It seems that his father had these documents made up especially for this hearing and when this is considered along with the other credibility issues, using the **Tanveer Ahmed** principle, I find I can give them little weight.' (paragraph 42)" (see: page 4 of the decision letter).

[13] Further at page 9 of the decision letter the following is said:

> "Furthermore, the Immigration Judge found that the previous ID documents you submitted at your appeal hearing were 'dubious' had been specifically 'made up' by your father for your hearing, with one of them being 'Whatsapped' for your photo."

[14] The respondent in the decision letter took the following from these findings:

> "Therefore, in accordance with the findings above the Immigration Judge found serious credibility issues regarding the answers you had given during your asylum interview and the evidence at your appeal hearing. A language analysis report had also been produced, which strongly suggested that you were not Syrian, but in fact

> spoke in a dialect more commonly found in Cairo, Egypt. While this was not considered to be a determinative factor, it further undermined your claim to be a Syrian national." (See: page 5 of the decision letter).

[15] The respondent's starting point in consideration of the fresh claim was based on the observations in *Devaseelan* which the respondent summarised as follows:

> "1. The first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principal *(sic)* issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
>
> 2. Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the Appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
>
> 3. Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them."

[16] In light of the above guidance the respondent had regard to the decision of the First-tier Tribunal and said in particular this:

> "Therefore, it is considered that the starting point of this decision is that you have not been found to be credible, that you have fabricated your claim, that you are not an (sic) Syrian national and that you would not be at risk on account of the ongoing civil war as you would not be removed to Syria." (See: page 6 of the decision letter).

[17] It was not a matter of dispute between parties that *Devaseelan* is not referred to in *TF and MA* and I consider nothing that is said in *TF and MA* can impliedly be said to suggest that the principles enunciated in *Devaseelan* are incorrect. I do not believe that the observations in *TF and MA* are inconsistent with the observations in *Devaseelan*. As I understand it *Devaseelan* says this: the determination of the first hearing forms the starting point of the second determination and facts since the first determination are to be taken into account. Thus the observations in *Devaseelan* properly allow for a holistic approach to be

followed at the second determination. Accordingly I am persuaded that in taking *Devaseelan* as the starting point the respondent has not fallen foul of the principles set out in *TF and MA*.

[18] The question then becomes this: having had regard to *Devaseelan* does the respondent then fail to follow the approach at paragraphs 48 to 50 of *TF and MA* which sets out certain long established and well understood principles in relation to the approach to evidence?

[19] From page 7 of the decision letter the respondent goes on to consider the fresh evidence submitted on behalf of the petitioner. The respondent considers the new evidence in terms of the approach set out in *Tanveer Ahmed* [2002] UKIAT 439. It was not a contentious matter that this was the correct approach when considering this matter.

[20] At page 8 of the decision letter there is then what I believe is a careful and thorough analysis of the fresh evidence produced on behalf of the petitioner.

[21] The respondent first makes two detailed comments regarding the authenticity of the documents produced:

> "
> - It is noted that the majority of the documents are photocopies or have been on a type of paper that could have been altered and which the authenticity of cannot be verified due to their nature as copies of originals.
>
> - Furthermore, whilst scanned, faxed or photocopied documents may be copies of the originals, there is also the possibility that, during the copying process, changes are made to details such as names and addresses. These alterations then become impossible to verify as they become an integral part of that reproduced document. It is therefore not possible to ascertain whether or not the submissions are accurate reproductions of the original document and consequently the integrity of the document is compromised. For these reasons, the documents have not been shown to support your claim and thus very little weight can be attached to the documents you have enclosed."

These are findings which I consider the respondent was entitled to make.

[22] Secondly, in reference to the six letters of support which were produced the respondent says this:

> "It is considered that the letters are no more than unsubstantiated statements with no independent evidence to corroborate the claims that you are a Syrian national. There is no evidence such as a birth certificate or nationality document to validate your claim to be a Syrian national, it was also noted that you were previously found at appeal to be a national of Egypt."

Again these are conclusions which I believe the respondent is entitled to reach.

[23] The respondent goes on to make certain further observations regarding this documentation at page 8 and these are in the following terms:

> "
> - It is acknowledged that you have also enclosed a greeting card and photographs of (RM) and claim that she sent the greeting card and helped send the documents. However, it is noted that the card is also on a type of paper that can easily be reproduced on an ink jet printer and of which cannot be verified due to being a copy of the original.
>
> - Furthermore, whilst you have submitted an envelope along with the translated newspapers above, there is still no evidence that the documents submitted were placed in the envelope. More importantly, the newspaper reports do not corroborate your nationality and you have not submitted any official documents in the form of a Birth certificate or nationality documents, specific to you, that would confirm your identity as a Syrian."

[24] It is I think absolutely clear that the respondent in considering the new evidence has reviewed this evidence independently of the previous findings of Judge Murray regarding the credibility of the petitioner. It cannot, I think, be argued on a fair reading of the decision letter that the respondent has allowed the "adverse finding about the credibility of the appellant to sway his assessment of the credibility and relevance of other independent evidence bearing upon the issue before him." (See: *TF and MA* at paragraph 49).

[25] The respondent has considered the fresh evidence on its own merits. The observations made by the respondent in respect to the weight to be attached to the fresh evidence all relate to the type, nature, character and form of the documents produced. The respondent at no point rejects the fresh evidence as a result of the previous findings of Judge Murray regarding the credibility of the petitioner.

[26] The respondent's approach to the fresh evidence does not contravene the observations at paragraphs 48 to 50 of *TF and MA*. Rather in my view the approach to the fresh evidence is consistent with the approach enunciated in *TF and MA*.

[27] As part of the consideration of the application in terms of Rule 353 the respondent also had regard to first the results of the language analysis (see: page 8 of the decision letter) and second the previous findings about the petitioner's credibility and particularly the previous findings about identification documents submitted by him. (See: page 9 of the decision letter). I am persuaded that as part of its consideration of the Rule 353 application the respondent was entitled to have regard to these matters. The respondent has I think taken a holistic approach to the evidence.

[28] The respondent holds that looking at all of the evidence in the round little weight can be given to the fresh evidence. That is clearly a conclusion open to the respondent. It cannot be said that the respondent has paid mere lip service to the principles regarding evidence enunciated in *TF and MA*.

[29] It appears to me that the correct principles have been followed by the respondent, I can identify no error of law and in particular no error of law which arises from the observations in *TF and MA*.

[30] Another FTT judge would have to approach the matter in line with the principles above referred to. In addition such a First-tier Tribunal judge would require to consider as part of a holistic approach the previous credibility findings regarding the petitioner and the language analysis results. Such a judge could not accord the fresh evidence much weight and would come to the same conclusion as the respondent.

[31] Taking all these matters together a First-tier Tribunal judge could not conclude that the petitioner was Syrian.

Decision

[32] For the foregoing reasons I do not grant permission to proceed.