EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 13
XA49/18

Lady Paton
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

MA (AP)

Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Caskie; Drummond Miller LLP
Respondent: Webster QC; Office of the Advocate General for Scotland

12 March 2019

[1] The appellant is a citizen of Ethiopia who has made a claim for asylum in the United Kingdom. The claim was refused. An appeal was taken under section 82(1) of the Nationality, Immigration & Asylum Act 2002. In July 2017 that appeal was refused by a judge of the First-tier Tribunal. A further appeal to the Upper Tribunal was refused in January 2018. Subsequently this court granted leave to appeal to the Court of Session.

[2] The background circumstances are as follows. The appellant travelled to Sudan, and from there by air to France. Having hidden in a lorry she then travelled to the United Kingdom. The core of her claim is that in Ethiopia both she and her husband were sympathisers with a banned political opposition party, then called Ginbot 7 (now AGUDM). She states that she was a supporter and that her husband was a full member. She also relies on political activity carried out by her after her arrival in the UK.

The decision of the First-tier Tribunal

[3] The judge of the First-tier Tribunal did not believe the appellant's claims as to her and her husband's political activities in Ethiopia. Her evidence as to being detained and tortured was rejected. At no stage has any challenge been made to these findings. The appeal to the Upper Tribunal, as now to this court, concentrated on the appellant's conduct since arriving in the UK. The First-tier Tribunal judge dealt with this aspect of the claim as follows:

> "37. ... The appellant claims to be an active participant in Ginbot 7 in the UK. She claims to hold a specific position of power and authority in the Glasgow association and maintains links with higher members of the party in the United Kingdom. It might reasonably be expected that enquiries could have been made and vouching produced in respect of her husband's claimed membership and circumstances. The appellant's failure to provide any such material undermines her claims.
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> 38. The appellant's claim to be the party secretary of the Glasgow Ginbot 7 organisation is not vouched. There are no letters or other statements of support to confirm this. Such affiliation could easily have been evidenced.
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> 39. The appellant relies upon activities supportive of Ginbot 7 within the United Kingdom. She accepts that she undertook no such activities prior to her substantive asylum interview in October 2016. She explained that initially she had been isolated in the United Kingdom and had been unable to advance her interests in Ginbot 7. She states that two days after her substantive asylum interview, she had made links with other supporters and has since that time attended both events and demonstrations in Glasgow and London. Given the appellant's claims to have fled from her home country specifically due to her husband's and her own involvement

with Ginbot 7, then it is most likely that she would have sought solace and support from the UK branch of the party shortly after entering the United Kingdom. I do not accept her suggestions that she was unable to do so earlier.

40. The appellant at item H of her supplementary bundle has produced a copy of a reservation for a return bus journey to London on 26/27 November 2017. This was for the purpose of her attending a Ginbot 7 demonstration in London. Her claims in this respect are otherwise evidenced by a range of photographs at item H which depict her in such demonstrations. There is no indication that these photographs are publicly posted or available. They are private photographs. Whilst this vouches the appellant's participation in Ginbot 7 activities in the United Kingdom the extent to which she has participated and which can be identified and evidenced does not support her asylum claim.

41. Item G of the appellant's supplementary material is a still screenshot of a YouTube video. It is said to be of a demonstration in London. The appellant was highlighted as being one of tens of people in a crowd attending the event. On the basis of the material produced, it would be reasonable to estimate that there were at least 100 participants. The appellant is most certainly not prominent. It would be extremely unlikely that the appellant would be identifiable from this online material.

42. I do not believe that the appellant has been motivated to undertake Ginbot 7 activities in the United Kingdom as a means by which to continue her earlier activities in Ethiopia. I do not accept that she did actively support Ginbot 7 in Ethiopia. In the alternative, I find that any activities undertaken by the appellant in the United Kingdom have been self-serving and only undertaken by her following her substantive asylum interview after identifying that her failure to have done so would be damaging to her claim. She has no publicly assessable profile connected to Ginbot 7. She would be of no interest to the Ethiopian authorities in these circumstances.

43. ... The appellant has failed to prove her asylum claim, even given the lower standard of proof."

The decision of the Upper Tribunal

[4] Permission to appeal to the Upper Tribunal was granted for the following reasons:

"It was accepted that the appellant had been undertaking activities in the UK in support of banned Ethiopian opposition group 'Ginbot 7'. The Tribunal did not consider that these activities would place her at risk because it found them to be 'self-serving' and it was not satisfied that they would have come to the attention of the Ethiopian authorities. It is arguable that in reaching those conclusions the Tribunal failed to have regard to the country background material, which indicated that the Ethiopian regime is employing sophisticated technology to actively monitor opposition activities in the Diaspora. It is further arguable that the Tribunal failed to

> consider whether the Ethiopian security forces would be willing to overlook the appellant's activities on the basis that they were 'self-serving'."

[5] Although not mentioned earlier, before the Upper Tribunal the appellant relied upon *YB (Eritrea)* v *SSHD* [2008] EWCA Civ 360, and in particular Sedley LJ's observations at paragraph 18:

> "... the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their Embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive."

[6] On behalf of the appellant it was submitted that the Human Rights Watch evidence demonstrated (a) that the regime was not only looking for those known to it abroad but searching further for their associates in order to silence the opposition; (b) the use of internet surveillance, including enhanced facial recognition; and (c) that applying *YB*, "little or no evidence" might yield a real risk, a possibility the judge failed to consider.

[7] The Upper Tribunal judge dealt with the matter as follows:

> "17. YB is a strong and clear statement of how to analyse risk arising from *sur place* activities, but it is not a universal template which tribunals are invariably bound to specify in such cases. It is not a legal error that the FtT did not cite it, when the appellant placed no reliance on it.

18. However, applying YB as literally as possible to this case, the following would emerge:

i. There was objective evidence of 'suppression of political opponents' by the Ethiopean regime.

ii. There was a strong possibility that the foreign legations of the regime not only film or photograph nationals who demonstrate in public, but have informers who can name those filmed or photographed.

iii. The intelligence services of the regime monitor the internet for information about oppositionist groups.

iv. The 'real question' would be 'what follows' for the appellant.

v. Other than one obscure appearance on YouTube (on which four billion videos are viewed daily) the appellant has no oppositionist history or profile, or presence on the internet.

vi. In the unlikely event that any information were to reach the authorities, it would be that the appellant is a hanger on with no real commitment to the oppositionist cause'.

19. This analysis is the same as the FtT reached at paras 40-42."

The judge concluded that the appellant had not shown any error on a point of law, therefore the appeal failed and the earlier decision stood.

The appeal to the Court of Session

[8] The grounds of appeal to this court can be summarised as follows.

1. In referring at paragraph 18(vi) to certain events as being "unlikely", the Upper Tribunal adopted a balance of probabilities standard of proof, rather than the correct and lower standard, namely "real risk".

2. The Upper Tribunal left out of account evidence of the persecutory response of the Ethiopean regime to those who have previously come to the adverse attention of the authorities through activities connected to the appellant's group. The

Secretary of State ought to have drawn that material to the judge's attention. The failure to do so denied the appellant a fair hearing.

3. The failure of the Upper Tribunal to have regard to evidence relating to the extreme sensitivity of the Ethiopian regime was an error in law in that a relevant matter was left out of account.

[9] In the appellant's note of argument it was observed that it is immaterial why the appellant potentially brought herself to the attention of the authorities – *Danian* v *SSHD* [2000] Imm AR 96. As to material said to have been withheld from the Upper Tribunal, reference was made to the Home Office report entitled "Country Policy and Information Note Ethiopia: Opposition to the government" of October 2017, and in particular to paragraphs 3.1.1 and 4, and paragraphs 8.1.11 and 13. The Upper Tribunal should have been well aware from the background material that the applicant's group was a persecuted group in Ethiopia. The note continued:

> "The risk arising from the more than tacit acceptance by FtT (that was not interfered with by the UT) that the petitioner, in the UK, had a degree of association with an opposition group ... means the assessment of what was likely to happen in respect of the appellant was an application of the wrong standard of proof and applying the correct standard of proof it is clear that the appellant will be viewed as, at least, a sympathiser of AGUDM (the current name of the aforesaid group) and is therefore at real risk of persecution."

[10] In his submissions to the court on behalf of the appellant Mr Caskie relied upon paragraph 3.1.1 of the said report:

> "If the authorities have already linked a person to a designated terrorist group, principally the OLF, ONLF or AGUDM (the current name for Ginbot 7), and they have previously been arrested in connection with being a member or sympathising with such a group, or have previously come to the adverse attention of the authorities through activities connected to a group, then they are likely to be at risk of persecution or serious harm on return."

Counsel relied upon the latter alternative in the context that the Ethiopian authorities are "very alive to *sur place* opposition." It follows that there is a real risk that the appellant would have been identified as an oppositionist. It would be difficult to obtain and present positive evidence to this effect. Attention was drawn to examples of the Ethiopian authorities' activities in the UK as outlined in section 10 of the report. It was submitted that the Upper Tribunal's decision is inconsistent with the observations of Sedley LJ in *YB* quoted earlier. Having regard to the findings made by the First-tier judge as to the appellant's political activities in the UK, the Upper Tribunal judge failed to carry out a satisfactory risk assessment. No proper account had been taken of the findings in paragraphs 39/40 of the earlier decision.

The submissions for the Secretary of State

[11] For the respondent Mr Webster QC submitted that, essentially, the appeal was challenging matters of fact, not of law. The First-tier judge held that the appellant was of no interest to the Ethiopean authorities. The key finding of the Upper Tribunal was at paragraph 18(vi). Even if, which was unlikely, any information about the appellant had reached the Ethiopian authorities, it would be that she was "a hanger-on with no real commitment to the oppositionist cause." This echoed paragraph 42 in the earlier decision: the appellant had not actively supported Ginbot 7 when in Ethiopia, and was not a genuine supporter in the UK.

[12] With regard to the appropriate standard of proof, paragraph 18(vi) should not be read in isolation. If the decision was read as a whole, there is no merit in the complaint that the judge was adopting too high a standard of proof.

[13] The appeal was no more than a disagreement with the decisions taken below. The Upper Tribunal judge had regard to the absence of the appellant on the internet, other than as part of a crowd in one YouTube video. The country guidance confirms that participation in the activities of an opposition group does not in itself demonstrate the necessary risk. Different considerations might apply if an individual had previously come to the attention of the authorities or had a significant history of oppositionist activity – see the guidance at paragraphs 3.1.1 and 3.1.4, reflecting *MB (OLF and MTA – risk) Ethiopia CG* [2007] UKAIT 00030 at paragraph 66. The appellant's activity in the UK was "not prominent." There was no proof of significant involvement either previously or currently.

Discussion and decision

[14] There is no merit in the ground of appeal based on the proposition that the Upper Tribunal judge's reference to an "unlikely event" in paragraph 18(vi) betrayed a wrong approach to the standard of proof. That passage simply stated that if the appellant had come to the attention of the authorities, which was unlikely, it would be as a "hanger-on". The essence of the decision was that the First-tier judge's view that the appellant had failed to prove her asylum claim, "even given the low standard of proof", was not undermined by the country background material, nor by Sedley LJ's observations in *YB*. Reference was made to the rejection of the appellant's claims regarding her conduct and treatment in Ethiopia. That left only her activities in the UK. There was no vouching for her position in the Glasgow association, nor for contact with senior members of the group. The timing of her alleged interest in the group suggested that it was a device, not the pursuit of genuinely held beliefs. There are no publicly available photographs other than a YouTube video in which the appellant is not prominent and is unlikely to be identifiable.

[15] The Upper Tribunal's attention was drawn to the material dealing with Ethiopia's repression of dissidents and its sophisticated surveillance techniques in Europe. The view was taken that the appellant did not have a public profile such as might attract adverse attention. The judge applied *YB* to the proven facts of the case. He assumed that the foreign legations filmed or photographed demonstrators; relied upon informers; and monitored the internet. He asked – so "what follows" for the appellant? In effect he adopted paragraphs 40 – 42 of the First-tier Tribunal's decision, which included the conclusion that it was "extremely unlikely" that the appellant would be identifiable from the online material. In any event, given that she was not a genuine oppositionist, either in Ethiopia or in the UK, if she did come to their attention, she would be of no interest to the authorities.

[16] These are findings in fact. This court can interfere only if they are undermined by an error of law. There is nothing in Sedley LJ's observations in *YB* which demonstrates such an error. The Court of Appeal corrected the view that there required to be positive evidence that a genuine oppositionist had come to the attention of the foreign government. In the appellant's case, neither tribunal judge made that mistake. The decision was that the appellant is not genuine. Sedley LJ states that this can be a relevant factor when deciding whether there is a real risk of persecution if the claimant is identified by the authorities.

[17] Mr Caskie relied heavily upon section 3.1.1 of the country guidance quoted above; however there is nothing in it which undermines the decision on the appellant's asylum claim. The appellant does not fall into the category of persons covered by section 3.1.1. Section 3.1.3 addresses a person who has close family links to someone connected to a terrorist group, or who has a political profile which has or is likely to raise suspicions. For the purposes of the present case the more relevant passage begins at section 3.1.4:

> "… a person who, although having sympathies with the OLF, ONLF or AGUDM, (the current name for the group, previously known as Ginbot 7) has had limited involvement with the organisation and has not come to the attention of the authorities is less likely to be at risk. The onus is on the person to demonstrate that they would be at risk."

[18] Both tribunal judges have, in effect, addressed the relevant policies in the country guidance and concluded that the claimant has failed to prove her case. The present appeal is no more than an invitation to this court to express its disagreement with those decisions. It is for good reason that this court has a limited jurisdiction to interfere. The tribunal system is better placed to resolve issues of fact and to ensure the consistent application of country guidance. Both judges avoided the mistake of treating opportunistic activity *sur place* as an automatic bar to asylum. However, a finding that a claimant is not genuine remains relevant to the scrutiny of a request for asylum – see article 4(3)(d) of the Qualification Directive. Article 5(2) stresses the importance of *sur place* activities which "constitute the expression and continuation of convictions or orientations held in the country of origin." The discussion in *YB* at paragraphs 8 – 15 illustrates that the assessment of an opportunistic asylum claim in the context of *sur place* surveillance techniques may not be straightforward.

> "… what will initially be for inquiry is whether the authorities in the country of origin are likely to observe and record the claimant's activity, and it (article 4(3)(d)) appears to countenance a possible finding that the authorities will realise, or be able to be persuaded, that the activity was opportunistic and insincere. In that event – which can only in practice affect opportunistic claimants – the fear of consequent ill-treatment may be ill-founded."

[19] In *YB* the court was dealing with a genuine claimant. In the present case the appellant's evidence as to her activities in Ethiopia was not accepted. The timing of her activities in the UK and the lack of independent vouching of her involvement in the group's organisation indicated that the claim had been manufactured. She is not a genuine oppositionist. This plus the unlikelihood of her coming to the attention of the authorities led

to refusal of her asylum claim. The First-tier judge concluded that "she would be of no interest to the Ethiopian authorities…" The Upper Tribunal judge expressly approved the analysis of the First-tier judge, even after full consideration and application of the decision in *YB*. These were all matters for the tribunal judges to address and assess. In the absence of an identifiable error of law, it is not open to this court to interfere. The appeal will be refused.