OUTER HOUSE, COURT OF SESSION

[2020] CSOH 84

P797/19

OPINION OF LORD BRAID

In the petition of

MF

Petitioner

for

JUDICIAL REVIEW of a decision of the Upper Tribunal (Immigration and Asylum Chamber) to refuse to grant the petitioner Permission to Appeal

Petitioner: Caskie; Drummond Miller LLP
Respondent: McKinlay; Office of the Advocate General

11 September 2020

Introduction

[1] The petitioner is a national of El Salvador. He arrived in the UK on 15 February 2017, with his wife and three children, and claimed asylum on that day.

[2] The basis of the petitioner's claim was that he feared persecution from a gang in El Salvador known as the Mara Salvatrucha (referred to as "MS13") and that the state would be unable to protect him if he were to be returned. His account was that his family had been subjected to threats of violence as a result of extortion by the criminal gang which operated in his locality.

[3] The Secretary of State for the Home Department ("SSHD") refused his claim by decision letter dated 26 July 2017.

[4] The petitioner appealed against the SSHD's decision to the First-tier Tribunal (Immigration and Asylum Chamber) ("FtT"). The FtT refused his appeal by decision dated 21 November 2018 (the "FtT Decision"). The reasons for refusal are set out more fully below.

[5] The petitioner applied to the FTT, on 10 December 2018, then to the Upper Tribunal ("UT"), on 3 January 2019, for permission to appeal against the FTT Decision. The grounds of appeal are set out more fully below. Both the FtT and UT refused that application. The UT's decision is dated 13 May 2019. It, too, is set out more fully below but, in short, the UT judge reached the view that there were no arguable grounds of appeal.

[6] The petitioner seeks review of the UT decision. Accordingly, the sharp issue for determination is whether the UT erred in law in deciding that there were no arguable grounds of appeal against the decision of the FtT.

[7] Permission having been granted, a substantive hearing (initially delayed by COVID-19) took place before me by Webex on 19 August 2020.

The FtT Decision

[8] The issue for the FtT, as it had been for the SSHD, was whether the petitioner had fled El Salvador because of a fear of MS13. The decision reached in refusing the appeal was that the petitioner did not have a well-founded fear of persecution.

[9] In reaching that decision, the FtT had regard to two inventories of productions lodged on behalf of the petitioner; a bundle lodged for the SSHD; statements from, and evidence given at the appeal by, the petitioner, his wife and his son. Ultimately, the

petitioner's claim foundered because the FtT did not find his account credible, and it is therefore necessary to consider the decision and the reasoning therein, in a little detail.

[10] The FtT began by reminding itself of the burden and standard of proof, particularly at paragraph 5 of its decision. While the burden rested on the petitioner, the standard which he required to attain was that of showing a "reasonable likelihood" or "a serious possibility" of persecution were he to be returned to El Salvador. Having noted that the standard was not an exacting one, the FtT stated in terms, at the end of paragraph 5, that it was that standard which must be applied to the issues upon which the burden fell on the petitioner.

[11] There then followed a description of the petitioner's claim, at paragraph 7. In brief, it was that he and his family had run a cheese and dairy shop business in El Salvador. Since August 2016 they had been subjected to threats by MS13, who had extorted monthly protection money, under pain of threats of violence against the petitioner and his family. The FtT referred to the UNHCR report of 2010, which confirmed that such gang-related extortion was common in El Salvador.

[12] A chronology of the events relied upon by the petitioner then followed at paragraph 8 of the decision. The petitioner had begun his business in about January 2016, having previously had to move within El Salvador several times because of gangs. In August 2016, the gang demanded rent of $30 per month. In October it was increased to $60. In November, the gang increased the rent for December. The petitioner told them that it would be impossible for him to pay the increased amount at the beginning of December. When the gang came into the shop at the beginning of December to tell the petitioner to pay the rent by the end of December, his wife had been threatened. The petitioner carried out internet research on the possibility of seeking asylum in the UK. He first reported the matter to the police on 1 December 2016, and was granted protection under the Protection Programme.

An incident involving the petitioner's son then took place on 9 December 2016, when he was threatened by gang members while travelling between two branches of the sports shop where he worked, in relation to money due by the petitioner. He was wearing red trainers, being part of the corporate uniform recently adopted by his employers. That incident was reported to police. On 12 December the petitioner requested a copy of his police file (which he required for his asylum claim) and the consequence of his being handed it was that he was withdrawn from the protection programme. Notwithstanding the threats which had been made regarding the December rent, the gang never came back to collect that rent. The petitioner and his family could not explain why that was. In late December 2016, or early January 2017, the petitioner's wife began receiving threatening text messages. The petitioner's son was threatened on a second occasion, when a knife was held to his ribs. In January 2017 the petitioner decided to sell his business, which was closed down on 10 or 11 January 2017.

[13] Before going on to consider the FtT's analysis of the petitioner's claim, it should be observed that there were both internal and external inconsistencies in the petitioner's case: his evidence at times conflicted with his statement, and the witnesses gave conflicting evidence on various issues. On the other hand, much of the account was supported by documentary evidence which there was no suggestion was false or had been fabricated.

[14] The FtT began its discussion of the evidence at paragraph 9 by stating its conclusion that the petitioner's account had not been proved to the lower standard of proof applicable. Extensive reasons for that conclusion were then given.

[15] The FtT judge then embarked upon a detailed, and undeniably forensic, consideration of the evidence, at paragraphs 9.1 to 9.29 of the FtT decision. While counsel for the petitioner considered each individually, I do not propose to do so. It is sufficient to

summarise the themes which emerge, as follows.

[16] The FtT drew attention to various matters all of which could be said to bear upon credibility and reliability. It referred to matters on which the evidence had been either vague, or difficult to follow: paragraphs 9.1, 9.3 and 9.4. It drew attention to internal inconsistencies in the petitioner's evidence: paragraphs 9.5, 9.6, 9.8, 9.10, 9.12, 9.20 and 9.26. At 9.12 the FtT judge said that he had:

"doubts about the truth of the evidence relating to demands made by the gang".

[17] The FtT also drew attention to inconsistencies in the evidence of the petitioner's son: paragraph 9.24. In that last paragraph the contradictions caused the FtT to:

"doubt that the witness was trustworthy in his evidence."

[18] The FtT also drew attention to inconsistencies between the evidence of the petitioner, his wife and son: paragraphs 9.9 and 9.17.

[19] One central theme in the reasoning of the FtT judge was, as he put, the failure of the petitioners to explain why a gang which had issued threats, and had collected protection money from August to November 2016, would then fail to collect, at all, the increased rent which it had said it wanted in December 2016. This matter is first mentioned at paragraph 9.2 and is returned to in paragraphs 9.7, 9.14, 9.23 and 9.25. The FtT's reasoning is best summed up at paragraph 9.23 as follows:

> "It is difficult to reconcile the notion of a threatening gang from whom international protection is sought; with a gang which did not follow up on a series of threats. It is difficult to reconcile the notion of a gang extorting money from business in El Salvador which does not then call to collect the money by way of extortion."

[20] Another issue which the FtT judge considered to be important was that of the red trainers which the petitioner's son was wearing when threatened in December 2019. This was considered at paragraph 9.15 in which the FtT described as a "remarkable sequence of

coincidences" the claimed facts that the son's employers had only recently changed corporate uniforms so as to cause the son to be spotted by gang members; that gang members were in the vicinity of the son's place of work; that the son was told that day to travel between branches; and that the gang were owed money by the parents. The FtT noted from third party country information that gang members were more discrete (*sic*) in the way that they dress in order to avoid being detected. The FtT therefore concluded that the son's evidence was not supported by third party country information.

[21] Understandably, a matter which took up much of the decision was the petitioner's motives for leaving El Salvador, why he had withdrawn or been withdrawn from the protection programme, the complaints to the police, and whether the petitioner was truly in fear of the gang. These issues were considered by the FtT at paragraphs 9.11, 9.13 9.16, 9.19, 9.20 and 9.21. Some of those paragraphs do bear closer scrutiny. At 9.11, the FtT found it difficult to understand why the petitioner was noted to have made a complaint to the Department of Investigation on 1 December 2016 when he had said in his oral evidence that it was at the moment when the gang member arrived in December and said that the gang would wait for the money that he made the decision to report the matter to the police. The FtT observed that whereas it was "not beyond the bounds of possibility" that the petitioner was faced with a demand in late November, and was also faced with a demand on 1 December 2016 for a further payment and decided to go to the police on the same day, there was no mention of the gang turning up on 1 December in the evidence of the petitioner or his witnesses and no mention by the petitioner that it was on the same date as the December demand that he went to the police office. The concluding part of 9.11 reads as follows:

> "Had the [petitioner] truthfully only been reminded about a payment expected at the end of the month, rather than a demand for payment, then I consider it likely that that would have been noted in the formal report produced in evidence. The fact that the police report makes no mention of a reminder to make payment gives rise to doubt about the veracity of the evidence relating to events in December."

[22] Paragraph 9.13, dealing with the same issue, said that the known consequences of putting the business up for sale in January 2017 were not :

> "likely to have been so readily accepted at that moment in time by someone who had a genuine fear of gang retribution".

That paragraph concluded as follows:

> "…I am far from being persuaded that someone would so readily remove police protection afforded to them by the authorities in El Salvador. The only reason given for requesting the file is the need to claim asylum in the UK; but according to the evidence that was still only a future prospect and not an immediate one".

[23] At 9.19, the FtT again expressed "doubts" about whether the documents produced by the petitioner reflected the true position surrounding his withdrawal from the protection programme.

[24] At 9.22 reference was made to the petitioner being asked to collaborate to catch the gang members, the FtT then recording that it was "not persuaded" that it was the issue of helping to catch the gang which caused the petitioner to take steps to leave.

[25] At 9.28, the FtT referred to the fact that text messages (which were produced) from the gang had never been acted upon.

[26] At 9.29, the FtT returned to the timing of, and reasons for, the petitioner's decision to leave El Salvador. This paragraph concludes:

> "In my judgment, the claimed conduct of the [petitioner] and his family in continuing to operate the business after 7 December 2016, in the eldest son continuing to work for the same company until the end of January, of the reports made to the police and/or Fiscal Office in December 2016 and January 2017; of conducting himself so as to be withdrawn from police protection in December 2016 is cogent evidence from which I conclude that none of the [petitioner], his wife and his son truly perceived there to be a genuine threat from gang-members. Had there been

the perception of genuine risk of conduct liable to be deemed persecutory in nature, then I have little doubt that the business would not have been openly marketed for sale; that threats including the text messages would have formed the subject matter of complaints to the authorities; and that all steps would have been taken to remain in the protection programme till the last possible chance."

[27] In conclusion, the FtT stated at paragraph 9.30

"When I reflect on the whole evidence presented in support of the [petitioner's] appeal, for the foregoing reasons, I am not persuaded to the lower standard that the [petitioner], his wife or his son has given evidence founded in fact. In my judgment, when I have regard to the inconsistent detail given in the accounts given by the [petitioner] and his witnesses along with all other observations made in the foregoing paragraphs, I am not persuaded to the appropriate standard that the [petitioner's] account or that of his witnesses is founded in fact. I am not persuaded to the lower standard that any of the [petitioner's] account about feared risk of persecution in El Salvador is true".

Grounds of appeal

[28] The petitioner's ground of appeal against the foregoing decision of the FtT, is set out at paragraph 5 of his reasons for appealing, in the Form of Appeal, as follows:

"…There is no question but that there has been anxious scrutiny. However, it is arguable that the correct standard of proof has not been applied. The Judge finds that he is not persuaded that the extortion threats were made. Against the backdrop of objective evidence to the effect that it would be surprising if the owner of a successful and growing commercial enterprise in El Salvador were NOT the subject of extortion threats, something cogent is required to arrive at an adverse finding on the matter."

The UT decision

[29] In refusing permission to appeal the UT gave the following reasons:

"1. The grounds accept that the First-tier Tribunal Judge gave anxious scrutiny to the case and a great deal of time and effort was put into the fact-finding process. The claim that the judge failed to apply the correct standard of proof is not arguable on any reading of the decision. The argument seems to be that because the country background information indicates that business owners are particularly vulnerable to extortion then cogent evidence was required to refute that proposition. That makes a nonsense of the burden and standard of proof which lies on the [petitioner]. It is clear that the judge applied the lower standard of proof of reasonable likelihood

> and gave cogent reasons as to why the evidence on behalf of the [petitioner] was rejected. Those findings were entirely open to the tribunal.
> 2. No material arguable error of law is identified in the poorly drafted and weak grounds of application."

Submissions

Petitioner

[30] Counsel for the petitioner treated the various subparagraphs of paragraph 9 to extensive analysis. He accepted that some of the reasons given by the FtT for rejecting the evidence relied upon by the petitioner were entirely valid. However, he submitted that it was arguable that the FtT had erred in law by applying the wrong standard of proof on a number of occasions to the "building blocks" which made up the totality of the petitioner's claim. Although the FtT judge had professed to be applying the correct standard of proof, close examination of the detailed findings showed that he had not in fact done so. Although counsel considered each of paragraphs 9.1 to 9.30 individually, there were several distinct strands to his submission. First, in relation to a number of his observations (such as in 9.1) where the judge criticised the petitioner either for not having provided detail or for having given evidence the tenor of which was not clear (as referred to in 9.10), it would have been open to the judge to ask questions at the appeal about any matter which he considered required clarification. On a similar theme, the judge had failed to make any allowances whatsoever for the fact that the petitioner gave his oral evidence through an interpreter. Second, the judge repeatedly referred to the petitioner's inability to explain why the gang had not collected the December rent, when it was not for the petitioner to explain the thought processes or internal workings of the gang which was extorting money from him. Third, the judge had paid no regard whatsoever to the passage of time, which might have explained some of the inconsistencies in the evidence. Insofar as inconsistencies between

witnesses was concerned, that was natural where witnesses had not collaborated to ensure that their stories were consistent. Fourth, the judge had drawn inferences which he was not entitled to draw, such as in relation to the withdrawal from the protection programme. The petitioner's only means of securing asylum in the UK was to obtain a copy of the police file, which he could only do by withdrawing, or being withdrawn, from the programme. Fifth, the judge had misdirected himself in relation to the trainers worn by the petitioner's son. There was no suggestion that the son himself was a gang member. The judge had confused the gang uniform with the uniform worn by the son for his employment. Sixth, the judge had attached too much weight to evidence that the petitioner's business was profitable. It was nonetheless plausible that however much money the business was making, the petitioner might not have been able to afford the December rent. Seventh, much of the language used in paragraphs 9.1 to 9.29 was redolent of either a standard of proof of balance of probabilities or even beyond reasonable doubt. Finally, no balancing exercise had been carried out by the FtT at any stage, taking into account factors which were favourable to the petitioner's case. Reference was made to *Karanakaran* v *Secretary of State for the Home Department* [2004] 3 All ER 449.

[31] Counsel reminded me that the decision which was under challenge was that of the UT. All the petitioner had to show at this stage was that he had an arguable ground of appeal. If he did, the UT decision that he did not was itself wrong in law and must be reduced. As to the test for arguability, counsel was unable to refer to any authority. He accepted that it required something more than the mere ability to present an argument, as he had done, lasting some two hours but submitted that, like an elephant, one knew it when one saw it. His submission ultimately was that the question came to be whether there was anything in what he had submitted that had a prospect of success.

Respondent

[32] Counsel for the respondent agreed that the sole question to be answered at this stage was whether the UT had erred in law, which in turn hinged upon whether or not there was an arguable ground of appeal. He, too, was unaware of any authority on what was meant by "arguable". However, the appeal was not arguable. The UT could not be criticised for not having subjected the FtT decision to a paragraph by paragraph analysis, when the grounds of appeal did not do so and were so vague. Nonetheless, counsel accepted that ground of appeal 5 did raise the question of whether the correct standard of proof had been applied, which opened the door to the argument which had been presented by the petitioner. The application of the correct standard of proof arose only at the end, after the individual findings had been made, and the FtT judge had made it clear at several passages in his decision, both before and after considering the evidence, that he not only knew what the standard of proof was, but that he was applying it. The correct approach to an appeal from the findings of a specialist tribunal was laid down by the Supreme Court in *MA (Somalia)* v *SSHD* [2011] 2 All ER 65 at paragraphs [44] to [46]. After making the general observation at [44] that the role of the appellate court is to correct errors of law, rather than (at [45]) to substitute its own assessment of the facts, the court stated at [46] that where a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. That was precisely the situation in the present case.

[33] Counsel for the respondent then turned his attention to the various criticisms made by the petitioner of the FtT's individual findings. The FtT judge had not penalised the petitioner for not being able to explain the workings of the gang, rather, the passages complained of were simply another means of the FtT stating that it found the petitioner's

claims to be incredible. No weight should be attached to the use of phrases such as "beyond the bounds of possibility", when the standard of proof was simply applied at the end, as the FtT judge had done. The evidence about ability to pay was significant, the more so in the light of evidence that the petitioner was considering opening a second shop. In all the circumstances there was no arguable error of law and the petition should be refused.

Decision

[34] Whereas counsel assured me, in answer to a question which I posed, that the test for granting permission to appeal to the UT was whether there was an arguable ground of appeal, in terms of section 11 of the Tribunals, Courts and Enforcement Act 2007, in fact section 11 contains no such provision. It simply provides, in subsection (3), that the right to appeal may be exercised only with permission. As was pointed out by Lord Brodie in *MUB (Pakistan)* v *Secretary of State for the Home Department* 2015 SC 441, para [4], no more specific statutory criterion applies and perusal of the Guidance Note 2011 no 1 (*Permission to appeal to UTIAC)* (amended September 2013 and July 2014) issued by the President of the Immigration and Asylum Chamber in terms of his powers under paragraph 7 of schedule 4 to the 2007 Act (which counsel did produce during the course of the hearing, but did not refer to in detail) indicates that the exercise of the section 11 jurisdiction is a more nuanced matter than concentration on arguability and arguability alone might suggest. Nonetheless, that is the test which the UT judge expressly applied; and the argument before me was exclusively directed towards whether or not the appeal was arguable. The petitioner submitted, and the respondent accepted, that if the UT judge had erred in concluding that the appeal was not arguable, that would amount to an error in law which would vitiate his decision. I therefore approach the case on that basis. However, both counsel also accepted

that if there was an error in law in the UT decision, that decision would simply fall to be reduced, and the question of permission would be a live one. Notwithstanding that counsel for the petitioner told me that, in such situations, permission is routinely granted when a decision to refuse permission has been reduced, I observe that it would remain open to any future judge of the UT to take a wider approach to the question of permission than simply considering whether or not there was an arguable ground of appeal. In particular, consideration might be given to whether or not there were reasonable prospects of success, which would appear to me to be a legitimate consideration in deciding whether or not to grant permission.

[35] However, as things stand, the only question for me to resolve is whether or not the petitioner's grounds of appeal disclose an arguable ground of appeal. It is impossible to quarrel with the UT's criticism of the grounds of appeal as poorly drafted. Ground of appeal 5 bears little relation to the detailed argument presented to me by counsel for the petitioner. Nonetheless, counsel for the respondent accepted that that ground of appeal, poorly drafted as it was, provided the hook for the argument which had been presented. While counsel for the petitioner departed from his perhaps tongue-in-cheek observation that he had demonstrated the arguability of the appeal by the length of his submission, there is perhaps a kernel of truth in that comment, in that "arguability" focusses on whether an argument is able to be presented rather than on whether or not it is likely to succeed. A slightly more refined test might be whether an argument is able to be presented which is not immediately demonstrably wrong, or which is doomed to fail. However it is expressed, the arguability threshold is a low bar to clear, and on any view is lower than a test which is related to prospects of success.

[36] It follows that the guidance given by the Supreme Court in *MA (Somalia)* v *SSHD*

[2011], *supra,* perhaps carries less weight at this stage than at the appeal itself, should permission be granted (or even at the stage of considering permission). Simply because the UT should be slow to intervene, does not mean that it is prevented from doing so; and does not mean that the appeal is not arguable, particularly as the argument is that the FtT did make an error of law. Some of the arguments made by the petitioner are stronger than others but it seems to me that it is arguable that notwithstanding that the FtT judge said on more than one occasion that he was applying the correct standard of proof, in neither his analysis of the individual facts nor his overall discussion when summing up, did he use the language of "reasonable likelihood" or "serious possibility" of persecution. Although at paragraph 30 he referred to the lower standard of proof, he also referred back to his previous findings, in many of which he used language more redolent of a higher standard of proof. Nowhere in paragraphs 9.1 to 9.29 do we see any consideration of whether there was a reasonable likelihood or a serious possibility of the petitioner having a fear of persecution, or of the facts founded on being true. Further, and crucially, it is not obvious that the FtT judge followed the approach said to be required in *Karanakaran*, *supra* at 469-470, in that either he has not carried out a balancing process at all, or, if he has, he has arguably excluded matters totally from consideration in the balancing process simply because he believed that they probably did not occur, rather than discarding matters only because he had no real doubt that they were not true. On the contrary, expressions such as "I am far from being persuaded" (above, para 20) and "doubt about the veracity of the evidence" (above, para 19) may suggest that matters were left out of account which ought not to have been, and I am not persuaded that any error in approach to that extent would necessarily be cured by simply repeating that the lower standard of proof was being applied. As regards materiality, since any such error would undermine the entire approach of the FtT, it is

clearly material.

[37] That is sufficient to dispose of the petition. The only other arguable error I intend to mention is the FtT's treatment of the colour of trainers worn by the petitioner's son. The FtT's reasoning here is hard to follow and it is arguable that in that regard a plain error of fact was made. Apart from apparently conflating the employer's uniform with that of the gang, it is not obvious to me that what the FtT judge describes as a remarkable set of coincidences justifiably bears that description. On that approach, no chance meeting could ever be deemed plausible, and yet chance meetings occur day and daily. Again, since this was clearly a key factor taken into account in assessing the credibility of the petitioner's son, who gave evidence in support of the threats which were allegedly made, I consider that any error in this regard would be a material one.

[38] Of course, I do not say that the FtT judge did err in either of these, or other, respects but standing the low threshold of the arguability test, which was the sole test applied by the UT judge, I have concluded that it is arguable that he did.

[39] Since the UT was wrong to hold that there was no arguable error of law, the UT decision dated 13 May 2019 therefore falls to be reduced. I will sustain the petitioner's plea in law, repel the respondent's pleas in law, and grant the petition.

[40] In reaching this decision, I make no criticism whatsoever of the UT judge, who did not have the advantage I had, of hearing (or even reading), the details of the petitioner's argument. I also repeat the caveat expressed at the end of paragraph [34] above.

[41] I was not addressed on expenses, but will reserve all questions of expenses.