EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 45
P340/19

Lord Glennie
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD GLENNIE

in the appeal by

MEHRAN KHODARAHMI

Petitioner and Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Winter; Drummond Miller LLP (for Katani & Co, Solicitors, Glasgow)
Respondent: McKinlay; Office of the Advocate General

28 July 2020

[1] This is an appeal by the petitioner pursuant to section 27D(2) of the Court of Session Act 1988 against the refusal by the Lord Ordinary, after an oral hearing, of permission to proceed with his application to the supervisory jurisdiction of the court, i.e. to proceed with his petition for judicial review. Permission to proceed is required in terms of section 27B of the 1988 Act.

[2] The petitioner, who is an Iranian national, arrived in the United Kingdom in January 2017. He immediately claimed asylum on the ground that, at some time before leaving Iran, he had converted to Christianity, and that on that account he was at risk in Iran and would be at real risk if required to return there. His claim was rejected by the Home Secretary. His appeal to the First-tier Tribunal ("FtT") was refused. He attempted to appeal to the Upper Tribunal ("UT") but leave was refused both by the FtT and the UT. The decision by the UT to refuse leave to appeal is not itself appealable. However, it is potentially subject to judicial review. The petitioner now seeks by petition for judicial review to have that refusal of leave to appeal reduced (set aside).

[3] A party disappointed by a decision of the FtT has a right of appeal to the UT on a point of law arising out of that decision: section 11 of the Tribunals, Courts and Enforcement Act 2007. But that right of appeal may be exercised only with the leave of the FtT or the UT. Leave was refused by both levels of tribunal essentially on the ground that the application for permission to appeal did not raise any arguable point of law; it was simply an attempt to re-argue issues of fact. In this petition for judicial review the petitioner challenges this analysis. He argues that the FtT, in the assessment of the evidence before it, failed to follow guidance given by the Inner House in *TF & MA* v *Secretary of State for the Home Department* 2019 SC 81, and that in so doing it erred in law. We shall consider this argument presently, but it is necessary first to identify the test which the petitioner must satisfy if the refusal of permission to appeal to the UT is to be set aside.

[4] Section 27B(1) of the 1988 Act provides that no proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court of Session unless the court has granted permission for the application to proceed. Sub-section (2) provides that the court may grant permission for the application to proceed only if it is satisfied (a) that the

applicant can demonstrate a sufficient interest in the subject matter of the application and (b) that the application has "a real prospect of success". That expression "a real prospect of success" has been the subject of authoritative analysis in *Wightman* v *Advocate General* 2018 SC 388 (LP (Carloway) at para [9]):

> "The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test. It is not enough that the petition is not 'manifestly devoid of merit', since that, in essence, reflects the 'manifestly without substance' test adopted in *EY* [v *Secretary of State for the Home Department* 2011 SC 388]. The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough …"

That passage was recently cited with approval in *PA* v *Secretary of State for the Home Department* [2020] CSIH 34 at para 29, a case rather nearer to the territory we are in here. But in a case such as the present, which involves a challenge to the decision of the Upper Tribunal to refuse permission to appeal to itself in terms of section 11 of the 2007 Act, there is an additional hurdle set out in section 27B(3)(c) of the 1988 Act. The court may grant permission to proceed with the application for judicial review only if it is satisfied (i) that the application would raise an important point of principle or practice or (ii) that there is some other compelling reason for allowing the application to proceed. That is sometimes known, colloquially, as the "second appeals test", under reference to the decision of the Supreme Court in *Eba* v *Advocate General* 2012 SC (UKSC) 1.

[5] Two further points should be mentioned. The first is this. The petition seeks reduction of the refusal by the UT to grant leave to appeal to itself from the decision of the FtT. That focuses attention on the reasoning in the UT's decision. However, the decision of the UT on an application for leave to appeal is invariably very short and concise in its

reasoning. Inevitably, therefore, in considering whether the test mentioned above is satisfied in any particular case, the focus of any discussion will be on the reasoning in the FtT and the failure, as the petitioner would have it, of the UT to identify that the FtT had made an error of law. It is that failure, if demonstrated, which would amount to an error of law on the part of the UT. The second point is that, as explained in *PA* v *Secretary of State for the Home Department* (supra) at paras [32]-[33], although the appeal to this court is an appeal from the decision of the Lord Ordinary, the task of this court is to decide for itself whether the statutory test for the grant of permission to proceed is met. Although the decision of the Lord Ordinary is entitled to respect, it is not necessary for the petitioner to identify any particular error of fact or law in his or her approach.

[6] We turn then to consider the petitioner's case that the FtT failed in this case to follow the guidance provided by the Inner House in the case of *TF & MA*. In the present case the petitioner claimed to have converted to Christianity while still in Iran, to have undergone a ceremony of baptism in Greece and, after his arrival in the United Kingdom, to have been a regular attender at a church in Glasgow on a twice-weekly basis. In support of this he adduced evidence before the FtT from a number of witnesses who spoke to the petitioner's twice-weekly attendance at the church and of their genuine belief that he was sincere in his adherence to his new found faith. The FtT accepted that the evidence from these witnesses was honest and given in good faith, but in light of its findings that the petitioner was not to be believed about other matters it came to the conclusion that this evidence from church witnesses was not sufficient to show that the petitioner's conversion to Christianity was genuine. It was submitted by Mr Winter, who appeared for the petitioner before this court, that this was very similar to the evidence given in *TF & MA*, a case in which in similar circumstances the failure of the FtT to give adequate weight to this type of evidence was

criticised by the Inner House. It is unnecessary for our decision to go into the minutiae of the argument presented on behalf of the petitioner or to compare and contrast the evidence in this case with that presented in the case of *TF & MA*. In *TF & MA* the evidence from the church witnesses was distinctly more compelling than in the present case, and the findings of dishonesty on behalf of the appellants in that case were insufficient to undermine, without proper analysis and explanation, reliance on the evidence from those witnesses. In the present case, however, as Mr McKinlay pointed out in his submissions, the petitioner claimed to have converted while still in Iran and to have been baptised in Greece. This was not a *sur place* conversion, and the evidence of church attendance in the United Kingdom was in the way of collateral evidence of his activities after the critical moment of his conversion elsewhere. The FtT had considered with great care the various conflicting accounts given by the petitioner of his alleged conversion in Iran, and his baptism in Greece, and had come to a considered view that his evidence on these matters was wholly unreliable. In those circumstances there was material upon which it could properly come to the conclusion that his participation in church events on arrival in the United Kingdom was insincere and designed only to bolster his claim to asylum.

[7] The petitioner obviously does not accept that reasoning on the part of the FtT. However that is a finding of fact which the FtT was entitled to make. The facts were very different from those in *TF & MA*. It is not possible, in our opinion, to say that in reaching his conclusions on the facts the FtT judge failed to follow guidance given by that case. Any error on the part of the FtT, if there was any error, was one of fact, not of law. We do not consider that the contrary is arguable. The petitioner has, in our view, failed to show that he has a real prospect of success on the petition.

[8] In those circumstances it is unnecessary for us to address the "second appeals test" set out in section 27B(3)(c) of the 1988 Act.

[9] The appeal is refused. All questions of expenses are reserved.