EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Clarke
Lord Hardie
Lord Bonomy

[2010] CSIH 90
XA26/09

OPINION OF THE COURT

delivered by LORD BONOMY

in Application for Leave to Appeal

under Nationality, Immigration and Asylum Act 2002, section 103B

by

(FIRST) MR A A S and
(SECOND) MISS S A A S

Applicants;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

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Act: Caskie; Drummond Miller LLP
Alt: Lindsay; Solicitor to the Advocate General

16 November 2010

[1] The applicants seek leave to appeal against a decision of the Asylum and Immigration Tribunal of 26 November 2008 dismissing their appeals against the decisions of the respondent by letters of 4 January 2007 to refuse their claims for

asylum and to remove them to Somalia. These decisions were made following a second stage reconsideration of their appeals.

[2] The first applicant is father of the second who was born on 1 February 2006. The first applicant arrived in the United Kingdom with the second applicant, his wife and their male son on 16 November 2006. The first applicant claimed asylum on behalf of his family on the basis that he was a member of a persecuted minority clan in Somalia. An additional claim for asylum was made on behalf of the second applicant on the basis that she was at risk of requiring to undergo female genital mutilation if returned to Somalia. Throughout the various proceedings the outcome of the additional claim for asylum has been the same as that of the first applicant on behalf of his family. By the time the case came before us the first applicant and his wife had separated and the second applicant was residing with her mother. No indication was given of the present position of the son of the first applicant and his wife.

[3] In his written submissions and also in his oral submissions before us Mr Caskie, counsel for both applicants, identified six grounds on which he proposed to contend that the Designated Immigration Judge ("Tribunal") had erred in law in the Determination and Reasons dated 26 November 2008. The first was confined to the additional claim for the second applicant and was that the Tribunal had failed to provide an adequate explanation for deciding that female genital mutilation could be avoided in this case. The others related to the claim of the first applicant on behalf of himself and his family. The second and third concerned the treatment of the evidence of witnesses FA S and L S H led on behalf of the first applicant, which the first applicant contended the Tribunal had failed to consider along with the other evidence, particularly that of the first applicant and his wife, before deciding on their credibility. The fourth ground also related to the treatment of evidence, on this occasion the

Tribunal's assessment of the plausibility of the first applicant's account of his escape from enslavement without having regard to the significance of cultural context as a source of explanation for his actions. The fifth ground concerned the first applicant's mental health; it was asserted that in considering whether the high threshold required to establish failure to comply with Article 3 of the European Convention on Human Rights had been met the Tribunal left significant material out of account. The final ground, which was not argued at any earlier stage, depended upon the decision by the United Kingdom government on 22 September 2008 to revoke its derogation to the ratification of the United Nations Convention on the Rights of the Child in respect of immigration matters; as a result the Tribunal was bound to have regard to the best interests of the second applicant as a primary consideration in determining both claims and had failed to do so.

[4] While grounds 1, 5 and 6 relate to specific matters quite separate from the credibility of the first applicant and his wife, they only arise for consideration in the event that it is established that the first applicant is a Somali from Somalia. The Tribunal said at various points in the Determination and Reasons ("Determination") that it had not been established that the family were Somalis from Somalia. Paragraph 60 is in the following terms:

> "Due to lack of credibility I find that the Appellants are not refugees. They may be from Somalia but I do not find that they are members of a minority clan. They may not even be from Somalia. The Libyan issue casts doubt on their nationality but based on the evidence given I do not believe that the United Kingdom would be in breach of its obligations to return the Appellants to Somalia today under the Geneva Convention".

In paragraph 67 the Tribunal added:

> "I do not know whether the Appellants are from Somalia or not, but if they are, I do not believe that they are of the Ashraf clan and I find that they have no Convention reason for claiming asylum. Credibility in this case is severely damaged".

In light of that, we decided that the grounds relating to credibility and the question of the applicants' nationality and clan membership should be addressed first, in particular ground 2 relating to the second witness F A S.

[5] Mr Caskie drew particular attention to parts of the sworn statement of the witness and parts of the Tribunal's Determination which, he submitted, reflected personal knowledge on the part of the witness of significant material supportive of the evidence of the applicant, and indeed that of his wife, about the applicant's origins and ordeals. The witness recalled meeting the first applicant on the farm of the witness's uncle which had been taken over by the Haweye. The applicant was brought with other captives and forced to work on the farm. The witness worked together with him for three weeks. He had told the witness that he was Ashraf, the same sub-clan as the witness. The witness confirmed that they spoke the same dialect. The witness met the first applicant again in Glasgow and there for the first time also met his wife who, he claimed, spoke the same dialect. The Tribunal's Determination records that in oral evidence the witness confirmed the significant parts of the statement and explained that the farm had been taken from his family.

[6] When he turned to consider the statement and oral testimony of L S H, Mr Caskie recognised that his evidence was of marginal significance since, although he also is Ashraf, he first met the first applicant and his wife in Glasgow and acknowledged in his oral evidence that all he could say was that he believed that the applicants belong to the Ashraf clan.

[7] Mr Caskie submitted that, since the evidence of both witnesses related to core elements of the accounts of their origins and experiences given by the first applicant and his wife, the Tribunal was bound to take the evidence of the witnesses into account in assessing the credibility of the accounts of the first applicant and his wife. That had not been done. The failure to consider in the round all evidence bearing on the credibility of the first applicant and his wife had been compounded by failure to have regard to cultural context in assessing the plausibility of the accounts of their escape from the farm given by the first applicant and his wife. The Tribunal had concluded that it would not have taken them so long - the first applicant had been on the farm for six years - if it had been that easy. Only after reaching conclusions on the credibility of the evidence of the first applicant and his wife did the Tribunal proceed to consider the evidence of the other witnesses. The Tribunal had compared the evidence of the applicant with that of his wife without reference to other evidence and determined that all of it lacked credibility and was inconsistent and untrue. That was an error in law because it amounted to a basic structural failing in the assessment of the overall impact of the evidence on the credibility of particularly the first applicant. It was not simply an error in appreciation of the evidence. Mr Caskie founded on *Mibanga* v *Secretary of State for the Home Department* [2005] EWCA Civ 367 and in particular the words of Buckstone LJ at paragraph 30:

> "The Adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation...".

The point was an important one since the Tribunal was in the end unable to say whether the first applicant and his family were Somalis or not - the Tribunal simply did not know.

[8] In reply Mr Lindsay, counsel for the respondent, founded upon the terms of his written submissions in which he argued that the Tribunal had in fact assessed all of the evidence in the round. He founded in particular on paragraph 55 of the Determination in which the Tribunal stated that it had considered all the evidence, both on file and given orally, as well as the submissions, the grounds of appeal and the error of law findings and instructions form from the earlier procedure. In relation to the witness L S H he further submitted that his evidence was quite properly characterised by the Tribunal as "an expression of belief" to be given no weight. There was no reason to doubt that the Tribunal had assessed the credibility of the first applicant and his wife in the light of all material bearing upon it. Having done that, the Tribunal had been bound to set out adequate and comprehensible reasons for the conclusion reached. In doing so the Tribunal had indicated its views in relation to each of the witnesses. That was necessary to make the reasoning clear. In any event the discrepancies in the evidence of the first applicant and his wife were so major as to make it impossible for the account of either to be accepted.

[9] We are of the view that the Tribunal did err in law in assessing the credibility of the first applicant and his wife. We consider that the Determination discloses a structural failing in the approach of the Tribunal in that it indicates that the Tribunal reached conclusions as to the incredibility of the accounts of the first applicant and his wife before considering the significance of the evidence of other witnesses. The evidence of F A S in particular was of direct personal experience and contained details which were plainly material in relation to the credibility of core elements of

the account of the first applicant and his wife about their origins, nationality and clan membership as well as their experience of mistreatment. It was thus corroborative evidence on material aspects of the evidence of the first applicant and his wife that ought to have been considered along with their evidence and any other relevant evidence in the round before final conclusions in relation to the credibility of the first applicant and his wife were reached. To leave such significant material out of account in assessing credibility in this case was an error of law of such significance as to vitiate the decision of the Tribunal.

[10] While the Tribunal did say at paragraph 55, as pointed out by Mr Lindsay, that consideration had been given to all the evidence, and while the Tribunal went on at paragraph 57 to say that it found the account of the applicant, "based on his statement and based on his wife's evidence and all the evidence previously referred to, to lack credibility", the Tribunal then proceeded to reach apparently final decisions in relation to that credibility on the basis of an analysis and comparison of the evidence of the first applicant and his wife alone. At paragraph 60 it concluded:

> "Due to lack of credibility I find that the Appellants are not refugees. They may be from Somalia but I do not find that they are members of a minority clan. They may not even be from Somalia".

[11] Having reached that conclusion, the Tribunal then made reference to the evidence in a medical report and the evidence given by F A S and L S H. It pointed out with some justification that the medical report provided no support for the wife's statement. However in relation to the evidence of F A S and L S H the Tribunal stated that it did not find their evidence to be persuasive. In relation to L S H that was because he had no personal knowledge of events in Somalia and his evidence as to their clan

membership was a matter of belief rather than personal knowledge. However with regard to the witness F A S the Tribunal said simply this:

> "With regard to the second witness, who states that he knew the Appellant in Somalia, again because of the inconsistencies and discrepancies in the evidence given by the first Appellant and his wife, I find I can give this witness's evidence little weight".

That betrays a failure to consider the evidence bearing on the credibility of the first applicant and his wife in the round, in particular by considering the evidence of a witness with personal knowledge of their history when an apparent final conclusion on their credibility had already been reached. No doubt the Tribunal did take account of all evidence in the case as stated at paragraphs 55 and 57, but in addressing the issue of credibility the Tribunal failed to take account of material evidence in context and thus erred in law.

[12] It is not possible for us to say what conclusion the Tribunal would have reached on credibility had the correct approach to consideration of the evidence been followed. Since a different decision on the credibility of the applicant and his wife could have an impact on the determination of the issues focussed in some, if not all, of the other grounds of appeal, we do not consider that any useful purpose would be served by our now addressing them. We shall accordingly on the basis of the failure of the Tribunal to give proper consideration to all the evidence bearing on credibility, allow the application for leave to appeal, allow the appeal, and remit the case to the Upper Tribunal to proceed as accords.