CO/6864/2008

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 27th January 2009

B e f o r e:

RABINDER SINGH QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- - - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF ALI AKSAMAZ

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- - - - - - - - - - - - -

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Mr Basharat Ali and (for judgment only) Ms K Ali (instructed by Messrs Aman & Co) appeared on behalf of the **Claimant**
Ms Samantha Broadfoot (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY: This is a claim for judicial review brought with the permission of Blake J, granted on 1st August 2008. The decision under challenge is one made by the Secretary of State on 23rd June 2008 to refuse the further submissions on behalf of the claimant, dated as long ago as 8th May 2003.

Factual background

2. The claimant is a Turkish national and was born on 20th May 1981. He arrived in the UK clandestinely on 2nd October 1999 in a lorry. He claimed asylum on 8th November 1999. The basis of his claim for asylum at that time was that he was afraid to do his military service because a friend of his had been killed during compulsory training.

3. His application for asylum and human rights protection was rejected by the Secretary of State on 11th June 2001. He appealed to the Adjudicator, as that office was still then known. By the time of the hearing in 2002 the basis of his claim had developed in that he claimed, first, that he had a conscientious objection to military service and, secondly, that he feared persecution on the ground of political opinion, namely his involvement in left wing politics, in particular the Social Democratic Party.

4. The determination of the Adjudicator was promulgated on 21st March 2002. Both the claim under the Refugee Convention and the claim under the Human Rights Convention were dismissed by the Adjudicator. It is important to note that, although they were not at the forefront of the claimant's asylum claim, as it was then formulated, there are some references in the course of that determination which indicate that members of the claimant's family were well-known for supporting "the socialist parties" (see paragraph 17) and that there is at least one reference to the fact that the claimant's brother had been granted asylum, although the date for that is said to be 1993 (see paragraph 9 of the determination).

5. In the section of the determination where the Adjudicator set out his findings and decisions (from paragraph 43), it is plain that the Adjudicator disbelieved the claimant; see in particular paragraphs 48 and 49, where the Adjudicator found him to be lacking in credibility. He also stated that the claimant had shown "a palpable lack of political knowledge or understanding". In his conclusion, the Adjudicator formed the view that the claimant had "the hallmarks of an economic migrant"; see paragraph 54 of the determination.

6. The claimant sought leave to appeal from what was then the Immigration Appeal Tribunal. Leave to appeal was refused by the Tribunal on 20th May 2002. The further representations which are the subject of the present claim were made on 8th May 2003 and enclosed some documents, the original text of which is in the bundle before me, as are translations. I will refer to the translations of each of the two documents.

7. The first is headed Republic of Turkey, Ministry of Justice, Legal Record and Statistics Department and it is to be found at page 78 of the bundle. It bears the heading Ankara and the date 1st April 2003 and a title "Legal Record Search Results". It sets out the

name of the present claimant and his date of birth, his father and mother's details and says:

> "The above mentioned person has a legal record. Since the warrant for his arrest has been issued on 08-01-2003 he is being searched."

The document has a signature of somebody who in translation is described as "Manager in charge" and bears a stamp in the bottom right hand corner.

8. The second document relied upon is to be found at page 80 of the bundle in its translated form, has similar headings to the earlier document I have described and in its text states:

> "The above person has acted in a criminal fashion by being a member of illegal T.D.K.P. party. He has helped, served and participated in events of the party. He has also posted and distributed political statements. He is accused of causing disruption on the April 23 Children's Day Holiday and Nevruz Holiday. Consequently he was sentenced to serve 9 years and 6 months. He is a fugitive since 08-01-2003 and his warrant for arrest has been issued.
>
> This person is also wanted for not serving in the military service."

At the bottom, the document is said to have the date of 1st April 2003, the manager's signature and a stamp as well.

9. The Secretary of State refused the submission for this to be treated as a fresh claim by a letter dated 23rd June 2008. At that time one might have been forgiven for inferring from the way in which the two documents I have referred to were addressed in this letter that the Secretary of State was not necessarily questioning their authenticity but was giving them no weight because of their content; see in particular paragraphs 16 to 18 of that letter. This may in part have been what lay behind the reasoning of Blake J on 1st August 2008, when he granted permission in this case. In any event, the Secretary of State has clarified her position in a subsequent letter dated 5th September 2008. Very fairly on behalf of the claimant, it was not contended that this letter was anything other than a clarification in good faith of the earlier letter. What was submitted on behalf of the claimant was that the letter of 5th September did not cure any error that there may have been in the earlier letter and, if anything, compounded such error.

10. It is clear from the letter of 5th September that the Secretary of State does not consider the two documents relied upon to be authentic and sets out her reasons for doubting their authenticity; see in particular paragraphs 9 to 14 of that letter. It is also important to note paragraphs 16 to 17 of that letter, where the Secretary of State addresses what is said to be "an assertion, for the first time, that the Claimant is at risk from the Turkish authorities because his brother, Hakki Aksamaz, was of interest to the authorities because of his (Hakki's) involvement with Dev Sol" (paragraph 16).

11. Paragraph 17 will be important to my judgment and I will set it out more fully. It reads:

> "Given the timing of this assertion, it is not accepted that your client and Hakki are related as claimed. However, even if they were, there is nothing to suggest that this would place your client at risk of persecution or Article 3 ill-treatment if returned. There is nothing in the documents submitted to demonstrate how long Hakki has been in the UK but from the date of grant, it is at least over 11 years. Any involvement with Dev Sol must therefore have been a very long time ago. Furthermore on the account submitted, Hakki's involvement with Dev Sol was at a very low level and there is no indication that he had any actual involvement with the authorities (he was chased once by the police but they could not catch him). Accordingly there is nothing in his history which might be of a nature to be recorded on the GBTS system as is now understood, following *IK (Returnees - Records - IFA) Turkey*, CG [2004] UKIAT 00312. In any event, there is no reason why anything on Hakki's record would be linked to your client. Finally, it is noted that this was raised for the first time the day before your client was due to be removed. Given all these circumstances, and taking into account *IK* there is nothing in this allegation that would enable an immigration judge to conclude that your client is at risk of persecution or ill-treatment on return. Insofar as the unparticularised assertion relating to the alleged cousins are concerned, this adds nothing to your client's case and it is noted that the Adjudicator in 2002 considered the relevance of one of the cousins' evidence in the context of a request for an adjournment and concluded that an adjournment was not necessary in this case."

I should note that, so far as that last sentence at paragraph 17 is concerned, no particular emphasis was placed at the hearing before me on the assertion relating to the alleged cousins. The focus of the argument on behalf of the claimant in this respect was in relation to his suggested relationship with Hakki.

12. Very recently, on 22nd January 2009, the claimant filed a witness statement which addresses the question of the authenticity of the documents and I will quote material passages which are at paragraphs 2 and 3 of that statement:

> "As far as I am aware, the documents are genuine. I obtained these documents from Turkey. I was in the UK at the time. These documents, which were issued in my absence were passed to the Mukhtar in my village in Turkey. It is normal in Turkey for the authorities to pass these documents to the Mukhtar when they cannot hand them in person. The Mukhtar in my village is a relative of mine and he passed these documents to my father. My father told me about these documents and he sent them to me in the UK.
>
> Since I became aware of the Secretary of State's decision regarding the authenticity of these documents, I have tried to obtain confirmation that they are genuine. I have tried to get a report from an expert here in the UK, but the expert's report was inconclusive. Then, with the help of a friend, I also tried to get verification of these documents from Turkey. I

managed to find a public prosecutor in Turkey who said he could verify my documents. However, since then, I have not been able to obtain verification from him."

Material provisions

13. The provision which governs the making of fresh claims is paragraph 353 of the Immigration Rules as amended. That reads:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submission and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> a. had not already been considered, and
>
> b. taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

The approach to be taken to fresh claims

14. It was common ground that the relevant legal principles as to the consideration of fresh claims were set out by the Court of Appeal in the authority of WM(DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495. I did not understand there to be any dispute between counsel as to the relevant principles and they can be summarised briefly. The leading judgment was given by Buxton LJ, with whom the other members of the court agreed. At paragraphs 6 and 7, Buxton LJ addressed the task of the Secretary of State and said that he or she:

> "... has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed ... If the material is not 'significantly different' the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material ... the Secretary of State in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator [or now immigration judge] to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator."

But, as Buxton LJ emphasised at the end of paragraph 6:

> "... he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before [the Court of Appeal in that case], the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source."

15. At paragraph 7 of his judgment, Buxton LJ emphasised that the rule only imposes "a somewhat modest test" that the application has to meet before it becomes a fresh claim. He emphasised three things in this context:

> "First, the question is whether there is a realistic prospect of success in an application before an adjudicator [or now immigration judge], but not more than that. Second, ... the [immigration judge] himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the [immigration judge] and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution."

16. At paragraphs 8 to 11 in particular, Buxton LJ then addressed the task of the court. He emphasised that there was no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim. Accordingly, the decision remains that of the Secretary of State subject only to judicial review. It is also now well established, and the Court of Appeal reaffirmed, that the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds. But, as Buxton LJ said at paragraph 10, that is by no means the end of the matter. While the decision remains that of the Secretary of State and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court, when reviewing a decision of the Secretary of State, must address two questions. They are set out at paragraph 11 of the judgment:

> First, has the Secretary of State asked [herself] the correct question? The question is not whether the Secretary of State [herself] thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an [immigration judge], applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return ... The Secretary of State of course can, and no doubt logically should, treat [her] own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up [her] own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny?"

I quote the last sentence of paragraph 11 in full:

> "If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

Issues

17. Two issues have been raised before me and the burden of the hearing was directed to these two issues: first, in relation to the two new documents that were annexed to the application for the matter to be considered as a fresh claim and, secondly, the reliance which has been placed upon the claimant's association with his brother and the assertion which is made that this will become known if he is returned to Istanbul airport.

The first issue

18. The Secretary of State, through her counsel, relied upon the judgment of Collins J in R (on the application of Nasser) v Secretary of State for the Home Department [2006] EWHC 1671 (Admin), a judgment given on 21st June 2006. It is plain from that judgment, in particular paragraph 22, that the Secretary of State is not bound to regard allegedly new documents as being genuine and probative. As Collins J said in that paragraph:

> "It is obviously right that the Secretary of State, in considering the evidence that is produced, should be able to form a view as to its reliability and the starting point in a case such as this, where there has been a rejection by the appellate authorities of a claimant's account that he has been disbelieved, is the decision of the AIT. That by itself will not mean that anything that he thereafter states or puts forward must equally be disbelieved, but it is proper for the Secretary of State to take that into account in assessing whether the fresh material is indeed such as will provide a realistic prospect of success."

19. In relation to the authenticity of the documents, the Secretary of State drew my attention particularly to the following matters, which I take largely from her skeleton argument at paragraph 29. First, that no year is stated in the second of the documents I have referred to for the alleged offence of "causing disruption on the 23 April..." It is said that it is highly unlikely that a genuine legal document would omit the year of the alleged offence. Secondly, it is said that the dates in any event make no sense: the claimant left Turkey in at least September 1999 since he arrived in the UK by lorry on 2nd October of that year, then aged 18, yet it would appear that a warrant for his arrest has been issued in January 2003 over three years later. Thirdly, it is said that it appears that the arrest warrant was issued after he was sentenced to nine years and six months' imprisonment following a trial. A trial must have been in his absence but it is said there was no indication as to the existence of an arrest warrant for him to be brought to trial, nor any documentation or detail relating to the charges or convictions. Fourthly, it is said that the impression given by the document and the words "He is a fugitive since

08-01-03" gives the impression that he fled after his trial. That would make no sense since it is known that the claimant has been in the UK since 1999 and it has not been a part of his case that he was convicted whilst still in Turkey.

20. It is also stated on behalf of the Secretary of State that there is general evidence to indicate that it is relatively easy for these apparently official documents to be forged and circulated in cases of this kind; see in particular the reliance which is placed upon information provided by the Norwegian Directorate of Immigration. It is also pointed out on behalf of the Secretary of State that, despite the claimant's solicitors going to the efforts and instruction of at least two experts, one in the UK and the other being lawyers in Turkey, no-one has been willing to state that these documents even could be genuine, let alone that they are. I note that in the witness statement by the claimant himself, dated 22nd January, he acknowledges that the report at least of an expert instructed in the UK was inconclusive.

21. In all the circumstances which I have described, I am quite satisfied that the Secretary of State was rationally entitled to form the view that she has in relation to the authenticity of the two documents upon which reliance has been placed. In this respect, therefore, I reject the claimant's submissions. I turn to the second issue.

The second issue

22. There was quite extensive citation of authority before me. In particular, lengthy citations were shown to me from two decisions, the decision of the Immigration Appeal Tribunal in IK (Turkey) v Secretary of State for the Home Department [2004] UKIAT 00312 and the decision of the Court of Appeal in SD (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ 1514. In the latter case, the tribunal's decision in IK was approved by the Court of Appeal, the main judgment being given Moses LJ. My attention was particularly drawn in IK to paragraphs 79 to 87 and in the SD case to paragraphs 2 to 3 and paragraphs 10 to 14.

23. As the Secretary of State pointed out in seeking to distinguish the decision in SD, although these cases set out important principles as to the approach to be taken to return to Turkey of failed asylum claimants in this country, ultimately each case turns on its own facts and I must examine the reasoning in this particular case with some close attention.

24. I therefore return to paragraph 17 of the second decision letter by the Secretary of State, dated 5th September 2008. I have set it out in full earlier and will not repeat it now. It is that paragraph which causes me particular anxiety. It is suggested there that it is not accepted that the claimant and Hakki are related as claimed. That may well be correct but what does not appear to be any longer in dispute is that the claimant does have a brother who at some time has been granted asylum in the UK. There is at least passing reference to that fact in the determination of the Adjudicator in 2002, to which I have referred earlier. It is fair to note that, at paragraph 17 of the determination of 5th September 2008, the Secretary of State goes on to consider what the position would be even if the claimant and Hakki are related as claimed. A number of value judgments are then made which may well turn out to be the correct judgments to make, but I

remind myself that the issue ultimately is what the immigration judge would say on what are essentially questions of fact and assessment of future risk, not what the Secretary of State says nor even what this court thinks.

25. I should mention that, in the skeleton argument on behalf of the Secretary of State at paragraph 31, it is said that there was no mention of the claimant's brother to the Adjudicator in 2002. I have to assume that that was written on instructions but in any event, it would now appear to be accepted, that was wrong because there is reference, although not by name, to the claimant's brother in the adjudicator's determination in 2002. I will also read what is said on behalf of the Secretary of State at paragraph 34 of the skeleton argument:

> "There is no reason to suspect that the Claimant would be subject to 'further interrogation' as a consequence of which he may have to reveal (or it would otherwise come to light) that his brother had, many years ago, been involved in Dev Sol. In any event such involvement appears on the face of his brother's SEF statement to have been at a very low level and not to have resulted in any arrest or charges by the authorities."

I would emphasise the next sentence:

> "Accordingly an Immigration Judge properly directed could only conclude that the Claimant does not have a well founded fear of persecution as a result of his alleged links to Hakki..."

It is fairly accepted on behalf of the Secretary of State before me that, when returned to Turkey, a failed asylum claimant cannot be expected to lie. So much is borne out by the authorities to which both counsel referred me and to which I have briefly referred to earlier, in particular SD.

26. Bearing in mind that the thresholds are relatively low, in accordance with the Court of Appeal's judgment in WM(DRC), I have come to the conclusion that there is enough material that needs to be considered by an immigration judge in this case in relation to what I have called the second issue. In my judgment, the Secretary of State's views on this (that an immigration judge, properly directed, could only reject the claimant's case) were unreasonable in the Wednesbury sense when the approach of anxious scrutiny is applied.

Conclusion

27. For the reasons I have given, this claim for judicial review is granted and I will hear counsel as to remedies and consequential matters.

28. Yes?

29. MS ALI: My Lord, in relation to the claim for judicial review being granted, we ask that the matters be put before the immigration judge for reconsideration.

30. THE DEPUTY: Yes.

31. MS ALI: And there is also an order for costs because the claimant had been privately funded during the last ten days or so.

32. THE DEPUTY: I see. Well, even if on legal aid, I think the principle would normally be that the successful claimant would get costs, but obviously I will hear counsel for the Secretary of State. Is there anything else for now?

33. MS ALI: No.

34. MS BROADFOOT: My Lord, obviously I cannot oppose the costs application. Insofar as costs are concerned, it is probably relevant to note that I think the claimant needs an order for detailed assessment of his costs pursuant to the regulations and then -- as well as an order for costs. In relation to the first part, the reason I jumped up was I think my learned friend has it slightly wrong. Of course, simply the order will be that the decision of the Secretary of State be quashed, not that the matter be directed to go before an immigration judge for reconsideration, because, of course, it has not gone that far.

35. THE DEPUTY: Yes. In the skeleton argument for the claimant the relief sought was said to be, first, a quashing order and specifying the letter of 5th September as well as 23rd June letter. Do you have any objection to doing it in that way for the sake of clarity?

36. MS BROADFOOT: No. That is fine. We all agreed yesterday that we would include the second letter as part of the challenge. That is fine.

37. THE DEPUTY: Secondly, the remedy sought was a declaration that on the facts of this case there is a fresh claim and that may not be necessary.

38. MS BROADFOOT: Well, my Lord. I would certainly oppose the declaration in those terms, simply because, as you will have seen from the quotations that your Lordship stated in the judgment, it is primarily a matter for the Secretary of State and it is then a matter for the Secretary of State to decide whether, in light of the judgment, he decides that actually it is a fresh claim and could only be a fresh claim or whether indeed she wishes to revisit that issue. So obviously she will need to take a view on that.

39. THE DEPUTY: Well, I am grateful to you.

40. MS BROADFOOT: Can I also say that I am instructed to make a formal application to seek leave to appeal? It is difficult for me to formulate without having time to properly think about your Lordship's judgment, which is very full, save to say that the effect of it may well be to create quite a demanding standard in relation to the approach to be taken by the Secretary of State and that is a matter that my client may wish to take further, so I formally make that application.

41. THE DEPUTY: I understand. Is there anything you would like to say on any of that?

42. MS ALI: My Lord, I apologise, I was not in attendance yesterday, so I was not aware that the remedies had been discussed and addressed. I would ask then that we follow what was put in the skeleton argument on behalf of the claimant.

43. In relation to costs, I have been asked for 28 days actually for a costs draftsman to put together the costs so far and that, I understand, will be provided to the Secretary of State.

44. THE DEPUTY: Yes, I see. Well, I do not think that is normally a matter for this court, so what I propose to do on costs, as I understand it without objection, is to order first of all that you have your costs assessed in the normal way under the Community Legal Services Rules and secondly the defendant shall pay the claimant's costs of this claim for judicial review, to be assessed if not agreed. I think that is all I need to say about costs. Secondly, in relation to -- sorry, did you want to come back to that?

45. MS BROADFOOT: Yes. I am not sure that we can agree costs insofar as they are subject to detailed assessment but I expect it does not really matter.

46. THE DEPUTY: Well, unless anyone tells me before the order is perfected that it does not matter, I am not intending to do anything other than make the usual orders on costs and, as I understand it, the principle has not been resisted that the defendant shall pay the claimant's costs.

47. On remedies, I do not propose to make a declaration. It seems on me it is unnecessary and I am persuaded by the Secretary of State that ultimately it is a matter for her to reconsider in the light of the court's judgment, subject to an any appeal. I will, again without objection from the defendant, quash the two decision letters of 23rd June 2008 and 5th September 2008.

48. In relation to permission to appeal, I am not so vain as to think that I could not be wrong but what I understand myself to have done is to apply well established legal principles to the particular facts of this case and I certainly did not understand myself to be laying down any higher threshold, or lower threshold for that matter, than has previously been stated by the appellate courts. Accordingly, I take the view that, if the Secretary of State wishes to pursue an appeal, that she should ask the Court of Appeal for that permission. No doubt, if they think that they should hear the case they will grant permission, but I myself am going to refuse permission to appeal.

49. Can I thank you all, including through you, the counsel in their absence, for their assistance in this case. Unless there is anything else, I just have to give the papers back to the associate.