Case No: CO/4305/2009

Neutral Citation Number: [2011] EWHC 9 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Date: 10th January 2011

Before :

HIS HONOUR JUDGE S P GRENFELL

- -

Between :

The Queen on the application of MEHMET ARSLAN	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Ms Melanie Plimmer (instructed by **Cole & Yousaf**) for the claimant
Mr Rory Dunlop (instructed by **the Treasury Solicitor**) for the defendant

Hearing date: 22nd October 2010; further written submissions 8th and 15th December 2010

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JUDGMENT

His Honour Judge Grenfell:

1. This Immigration Asylum Fresh Claim has a complex procedural history. The application for permission to apply for judicial review of the Secretary of State's decision refusing the claim was lodged 6th May 2009. Permission was refused 27th May 2009 on papers by His Honour Judge Kaye QC and certified totally without merit. On the 16th July 2009 I ordered the claimant not to be removed from the United Kingdom pending further directions of the court and ordered the renewal hearing to be listed with expedition. At the renewed oral application 29th September 2009, His Honour Judge Kaye on amended grounds granted permission to challenge the decision of 30th April 2009. On the 5th February 2010, His Honour Judge Kaye approved a consent order to vacate the hearing scheduled for 10th February pending a fresh determination, permitted the claimant to file amended grounds and the defendant's grounds thereafter. Finally, on 31st August 2010 His Honour Judge Behrens, noting the complex history of the claim, granted permission to challenge the new decision of 12th April 2010 on the amended grounds. It is common ground that it is this decision that is now under review.

2. I heard oral argument on the 22nd October 2010 and reserved judgment. Following a request by Mr Dunlop, counsel for the Secretary of State, I permitted further written submissions restricted to the application of Sir Michael Harrison's decision given on the 22nd October 2010 in *R (on the application of M) v Secretary of State for the Home Department (2010)*[1] which I have now considered and which has some factual similarities to the instant case.

3. The claimant Arslan, a Turkish national of Kurdish origin and failed asylum-seeker, who has exhausted his rights of appeal, challenges the 12th April 2010 decision to refuse to treat his further representations under paragraph 353 Immigration Rules as a fresh claim (thereby excluding an 'in-country' right of appeal) on the amended grounds that the defendant:

> (i) failed to apply the necessary 'anxious scrutiny' when considering the further representations;
>
> (ii) failed to take into account properly the evidence relating to the claimant's medical condition when assessing his vulnerability in relation to a potential breach of Article 3 ECHR upon being interviewed at the airport on his return.

The Background

4. On the 26th April 2001 the claimant entered the United Kingdom illegally and claimed asylum. On the 7th June 2001 his asylum claim was refused. It was reconsidered, but again refused on the 23rd May 2007. His appeal was dismissed on the 17th July 2007, his appeal rights becoming exhausted by the 31st July 2007. On the 23rd August 2007

[1] The approved judgment is not yet available but I have read counsel's note of the judgment and the Lawtel summary of the decision.

further information was submitted as a fresh asylum claim and human rights claim; medical evidence was submitted as part of the fresh claim on the 4th October 2007 and 18th June 2008. On the 21st October 2008 the fresh claim was refused. Further information was submitted on the 26th November 2008. On the 27th April 2009 this fresh claim was refused: the claimant was detained and served with removal directions for 5th May 2009 (since cancelled). Yet further representations were made on the 30th April 2009, but the further fresh claim was refused by letter of the same day. At the oral renewal hearing on the 29th September 2009 the claimant filed further evidence (medical reports dating back to 9th June 2009). As I have already indicated permission was granted at this hearing. Following the consent order vacating the hearing on the 5th February 2010 the amended grounds were filed; on the 13th March 2010 Dr Gardner, psychiatrist, reported further; the decision now under challenge was issued on the 12th April 2010. On the 5th May 2010 the amended grounds were filed and defence detailed grounds filed on the 7th June. Finally Dr Gardner on the 17th June 2010 confirmed that his medical opinion remained unaltered having considered the immigration judge's determination, the decision of 12th April 2010 and the claimant's amended grounds.

5. In the Acknowledgement of Service the defendant contended that the claim had been considered in accordance with the Immigration Rules and the guidance in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495. In relation to mental health facilities in Turkey and the claimant's human rights submissions, the Secretary of State relied on the decision in *N v United Kingdom* [2008] ECHR 453 and also relied on the letters dated 21st October 2008 and 27th April 2009.

6. In the Detailed Grounds of defence the Secretary of State contends that:

> (i) the further information has been considered in accordance with *WM (DRC)* and *YH (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 116;
>
> (ii) Turkey is a signatory to the ECHR and there is nothing to rebut the presumption that a mentally ill person such as the claimant would not be interrogated in such a way as to breach his Article 3 ECHR;
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> (iii) the claimant's medical condition is not such an exceptional case that any questioning at all would amount to a breach of Article 3: *N v United Kingdom*
>
> (iv) the report of Dr Gardner of 13th March 2010 was based on the rejected claims of the claimant regarding his past mistreatment in Turkey.

7. The parties agree that the central issue for me to decide is whether or not the claimant's claim, that there is a real risk that he will suffer an interrogation that would constitute a breach of Article 3 ECHR, would have a realistic prospect of success before an immigration judge considering the fresh material.

8. The claimant's case, put clearly and succinctly by Ms Plimmer, his counsel, is that there is fresh material in the form of psychiatric medical evidence that relates specifically to the risk of a severe mental health breakdown in the form of re-traumatisation in the event that he were to be interrogated on arrival at the Turkish airport for some 6 to 9 hours. This was against a relatively recent diagnosis of Post Traumatic Stress Disorder. The difficulty which she accepts is that the factual basis of the diagnosis was the claimant's account of mistreatment at the hands of the Turkish authorities. This was the account which the immigration judge considering his asylum claim rejected on the basis that his evidence generally was unreliable. Ms Plimmer argues, however, that many of the immigration judge's criticisms of the claimant's evidence amounted to mere observations rather than findings of unreliability; that, nonetheless, the diagnosis is not dependent on the factual reliability of the account; that the diagnosis is now clear and forms the basis of the risk of harm. She submits that the fresh material which the Secretary of State had to consider in April 2010 did not call into question the availability of suitable treatment in Turkey, but related simply to the risk associated with prolonged interrogation on return to Turkey. The claimant relies on the country guidance cases of *A (Turkey) CG* [2003] UKIAT 00034 and *IK (Turkey) CG* [2004] UKIAT 00312, which have not since been modified, as indicators that people, who return to Turkey in circumstances such as will probably apply to the claimant, are likely to face interrogation of an average of 6 to 9 hours. It is not suggested that the interrogation would on its own necessarily lead to the risk of intentional ill treatment such as could amount to a breach of Article 3 ECHR. Rather, it is argued that the perception of ill treatment, which forms the basis of the Post Traumatic Stress Disorder, itself would be sufficient to trigger the breakdown, which in turn would amount to the kind of serious harm that would bring it within the ambit of Article 3. The serious harm which is envisaged by Dr Gardner is self harming, possibly to the extent of suicide.

9. Ms Plimmer acknowledges that this has to be one of those rare cases where the potential for sustaining serious harm at the hands of a state's authority can amount to a risk of a breach of Article 3 without there being an intention to cause serious harm. It will be necessary to consider the two country guidance cases in this regard.

10. Thus, the claimant's case is that the decision maker in April 2010 did not engage in anxious scrutiny of the specific risk to which the medical evidence was directed, but should have decided that there was a realistic prospect of an immigration judge concluding on the basis of this fresh material that there was a risk of a breach of Article 3 should the claimant be returned to Turkey. Ms Plimmer emphasised that the decision maker was only considering the relatively modest test whether there was a realistic prospect of success and not prejudging the outcome. That said, she acknowledged that the Secretary of State in these circumstances is a 'gate keeper' and to a certain extent can and should exclude cases which plainly do not have a realistic prospect of success (*YH (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 116).

11. The Secretary of State's case is that anxious scrutiny was applied to every aspect of the fresh material; that, because Dr Gardner's opinion is essentially based on facts already found by an immigration judge to be unreliable, there is not a realistic

prospect that a new immigration judge would in effect reverse those findings and find that there was after all a factual basis for the diagnosis of Post Traumatic Stress Disorder. Mr Dunlop points to the 20 separate reasons in paragraph 22 of the determination why the immigration judge found the claimant's evidence not credible. In fact properly analysed not all of the subparagraph do amount to such reasons, some of which are merely reasons for rejecting the asylum claim. However, the point is still valid that he gave a substantial number of clear reasons for his finding on credibility. It is clear that the majority of those reasons went beyond mere observations. Mr Dunlop submits that, unless there were very good reasons not to do so, the Secretary of State can properly anticipate that a new immigration judge would be reluctant to go behind such clear findings. Perhaps the most significant of the findings was to the effect that it was implausible that the claimant should have come to the attention of the authorities when on his own account he had been no more than a low level supporter of HADEP which was at the time still legal at the time he left Turkey.

12. Mr Dunlop points out that the immigration judge plainly had in mind the country guidance cases of *A (Turkey)* and *IK (Turkey).*

13. He submits that there is no prospect of a new immigration judge reaching a different conclusion on the credibility of his account of ill treatment before he left Turkey; that the new immigration judge would have in mind the basis of the core account before the first tribunal and the same inconsistencies of evidence. He submits, further, that it is remarkable considering that the appeal was heard some 6 years after the claimant arrived in the United Kingdom that there was no reference to any mental health issues, or at least some reaction to the questioning which he undoubtedly faced which could be considered to be consistent with the diagnosis of Post Traumatic Stress Disorder. It is clear that no mental health issues were in fact raised at the appeal and that the immigration judge's reference to a lack of medical evidence related to physical medical signs of ill treatment, such as scarring and the like, rather than any psychological effects. Significantly, he submits that the further representations made in August 2007 (the month after the appeal decision was promulgated) only made reference to medical care for a head injury.

14. In terms of whether a risk of breaching Article 3 could arise in this case, Mr Dunlop submits that the Secretary of State was entitled to decide that this was not one of those cases which could come within the exceptional cases where serious harm is envisaged without any direct intervention on the part of the receiving state.

The Legal Framework

15. The Secretary of State clearly had to consider whether the fresh material would give rise to a realistic prospect of the Article 3 claim succeeding before an immigration judge; that the threshold was not a high one, but the Secretary of State was entitled to assess the prospects of the immigration judge reaching a different factual conclusion as a 'gatekeeper' in respect of fresh claims (*WM (DRC) v Secretary of State for the Home Department* and *YH (Iraq) v Secretary of State for the Home Department* [2010] EWCA Civ 116). In the context of this case, the decision maker had to give

anxious scrutiny to the medical evidence and to determine whether there was a realistic prospect of a new immigration judge accepting the factual basis of Dr Gardner's diagnosis of Post Traumatic Stress Disorder against the background of the previous immigration judge's findings on credibility; secondly, the decision maker had to consider the extent to which the Secretary of State could rely on a presumption that Turkey would honour its obligations under ECHR to honour the human rights of persons being returned (see R (*Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1); thirdly, the decision maker had to consider the risk of the claimant's being interrogated for some 6 to 9 hours at the airport of entry; fourthly, the decision maker had to consider whether in such supposed circumstances there was a risk that serious harm could result and whether such harm would bring the case within the rare category of case on which serious harm can amount to a breach of Article 3 without direct inflicting of harm on the part of the Turkish Authorities.

16. The relevant findings of the country guidance case *A (Turkey)* can be summarised as follows. The Turkish Government views Kurdish nationalist aspirations as a threat to the state and as causing a rift between Turkish nationals. Torture continues to be endemic among some of the security forces as noted in the reports before the Immigration Appeal Tribunal (paragraphs 7 to 13). Similarly the tribunal accepted the report[2] that sympathisers of HADEP (the Peoples' Democratic Party) continued to be harassed even before it was banned in March 2003 (paragraphs 18 to 20).

17. The part of the judgment which considered specifically 'Risk on Return' is relevant to the instant case. Referring to the CIPU report concerning the treatment of returned asylum seekers, they noted that, if there was no definite suspicion of involvement in unacceptable activities whilst abroad, then as a rule a person would be released after an average of 6 to 9 hours detention during which he would be interrogated. Whilst it went on to note that, for persons who *were* suspected of such activities, the possibility of being handed over to the anti-terror branch of the police and consequential risk of torture could not be ruled out. I hasten to interpose, however, that it is not the claimant's case that in fact he is likely to be handed over to the anti-terror branch. The judgment concluded with an inexhaustive list of factors which could give rise to suspicion on the part of the authorities, of which only the claimant's Kurdish ethnicity and possibly his lack of an up-to-date Turkish passport might be considered relevant in the instant case. Nevertheless and reading the judgment as a whole, there would seem to be recognised a real risk that a returning Kurdish failed asylum seeker would be subjected to some 6 to 9 hours detention and interrogation. I shall consider the effect of this risk in terms of resulting in serious harm when I come to apply the facts to my understanding of the law.

18. *IK (Turkey)* reviewed *A (Turkey)* and found no reason to depart from its conclusions so far as are relevant to this case. The judgment in *IK*, however, does make the point that when a tribunal is considering risk to a returnee, he would not be expected to lie in response to direct questioning. This is relevant where the border control authorities might not have a record of a person's illegal entry into another country or failed asylum claim. The additional effect of this gloss on the earlier country guidance case

[2] US State Department report 2003

is that it enhances the risk of a failed asylum seeker being detained and interrogated on return.

19. I turn to the question whether a risk of suffering serious harm can in certain circumstances amount to a risk of a breach of Article 3 ECHR. The terms of Article 3 make it clear that ordinarily it is concerned with the prohibition of deliberate and intentional torture or inhuman or degrading treatment on the part of an authority[3]. It is common ground that the prohibition of inhuman treatment is absolute. The effect of the authorities starting with *D v United Kingdom* (1997) 24 EHHR 423 (European Court of Human Rights "ECtHR") is that a decision to return a person to his country of origin, when the result will be to cause him serious harm to his health which cannot be controlled or treated in that country, can lead to a breach of Article 3 ECHR; that the harm need not be the result of direct and deliberate inhuman treatment on the part of the receiving authority.

20. In *Bensaid v United Kingdom* (Application no. 44599/98) (judgment delivered 6 February 2001) the ECtHR accepted the serious risk that the applicant would suffer a deterioration in his long term schizophrenia, if he were returned to Algeria. The court examined whether his removal would be contrary to the standards of Article 3 having said at paragraph 33:

> "Whilst it is true that Article 3 has been more commonly applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities or non-state bodies in the receiving country …, the Court has, in the light of the fundamental importance of Article 3, reserved to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not, therefore, prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection."

21. In *N v United Kingdom* the Strasbourg Court set out the following principles which it drew from the case law:

> "42 …. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if

[3] "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the D. case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

"43. The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case-law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.

44. Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (*Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 26). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 89). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

45. Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in

> relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

22. In my view, it is clear that *N* considers the situation where the potential future harm would result from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. For such a case to show a potential breach of Article 3 it has to be of an exceptional nature. A mere deterioration of personal health would be insufficient to reach what has to be a high threshold. Otherwise, it would be relatively easy to show that without particular treatment a person's health could deteriorate. The cases plainly demonstrate that where medical treatment in the receiving state is in issue, humanitarian considerations tend to dictate the outcome, but have deliberately been confined to exceptional cases such as where the person is facing death on return.

23. The instant case is not a medical treatment case. The risk of serious harm relied on is derived from the diagnosis of Post Traumatic Stress Disorder and is specific to the alleged likelihood of prolonged interrogation on arrival in Turkey without more.

24. I derive from the authorities the principle that a breach of Article 3 can be anticipated without direct and deliberate treatment on the part of the receiving country's security forces, where a person has the kind of medical condition that can result in serious harm when triggered by anticipated actions on the part of the security forces, which otherwise would be harmless. However, it is clear that the risk of the serious harm envisaged must be of an exceptional nature and extent in order to fulfil the criteria of Article 3. Risk of resulting serious self harm and possible suicide is capable of fulfilling such criteria.

25. Thus the word 'treatment' is used in different contexts. For there to be a breach of Article 3 there has to be some form of treatment on the part of an agency of the state; the outcome of that treatment has to be inhuman. It is clear from the case law that the prohibition of such treatment is absolute in nature, therefore, does not have as a requirement that the treatment should be deliberately or intentionally inhuman. It is this absolute nature of the terms of Article 3 that enables it to be engaged where the anticipated treatment on the part of an agency of the state is expected to be neither deliberately or intentionally human, but in the result is expected to be inhuman. It will obviously be only in an exceptional case that such unintentional result will materialise. However, where a possible breach of Article 3 is concerned which is premised on a course of anticipated treatment in the sense of conduct, it is the nature of the expected result which dictates whether or not it would be sufficiently serious in extent to be regarded as inhuman.

26. In *Y v Russia* the European Court considered the burden of proof in such cases and concluded at paragraph 77 that whilst it is for an applicant to adduce evidence that he

would be exposed to a real risk of being subjected to treatment contrary to Article 3, once that is done then it is for the Government of the appropriate country to dispel any doubts about it.

Discussion

27. In my view, the starting point is Dr Gardner's diagnosis. He concludes after an examination lasting some 90 minutes that the claimant's presentation of past and present symptoms is consistent with a diagnosis of Post Traumatic Stress Disorder in relation to his reports of detention and interrogation by police authorities in Elazig, Turkey; that the claimant's past and present symptoms suggest a clinically dissociative component to this disorder; that symptoms of Post Traumatic Stress Disorder and dissociation have been exacerbated and perpetuated by regular signing on with the immigration authorities and detention by the Home Office in April and May 2009 due to reminders of his previous traumatic experience; that future detention and interrogation by the Turkish authorities is likely to result in an increase in these mental health symptoms leading to re-traumatisation; that within this context the claimant is at an increased risk of physical harm to himself. Under 'Personal Background' Dr Gardner reproduces the claimant's account of being detained, questioned, beaten and tortured by police, so that fearing for his safety he fled Turkey in a lorry. Under 'Mental State Examination' he noted particular difficulty in discussing his treatment in Turkey and how he became noticeably more physically agitated and tearful with difficulty recalling specific names, dates, time and places and sometimes staring blankly into space. The claimant had described intentions of ending his life to avoid the fear of future detention. His score on the scale of 1 to 100 for assessing a dissociative disorder was 38 – a score of 30 or above indicates the presence of a disorder with a clinically significant or pathological dissociative component. Inability to recall, either partially or completely, some important aspects of the period of exposure to the stress is a recognised part of this condition. Dr Gardner concludes that the claimant is profoundly unwell; examination indicates the perceived threat of harm from future detention or interrogation; this will invariably lead to an exacerbation of Post Traumatic Stress Disorder symptoms and dissociation leading to re-traumatisation trigged by a subsequent event such as interrogation by the Turkish authorities associated with his perceived fear of emotional distress and harm or physical injury; within this context he is at a significant risk of harm to himself, including suicide in order to prevent further detention and interrogation.

28. The decision letter deals in some considerable detail with the further representations. It would be difficult to say that the decision maker had not given them considerable scrutiny. The issue is whether the decision focused on the essential point of whether there was a risk that the anticipated interviewing process at the receiving airport could result in the kind of serious harm that would constitute a breach of Article 3. The letter makes it clear that the possibility of the claimant being interviewed for some 6 to 9 hours was considered. However, in my view, whilst it indicated that thought had been given to the possible effect of the interviewing, the decision maker appears to have concentrated more on the question whether the Turkish authorities would be in a position to provide adequate treatment for the claimant. There is, however, no issue

in this case that adequate treatment would not be available in Turkey. To this extent, therefore, some of the reasoning on which the decision is based falls away.

29. A significant part of the reasoning centres on what is considered to be the lack of objective foundation to the psychiatric evidence and, in particular, Dr Gardner's diagnosis and prognosis. There is understandable concern that the factual basis of the diagnosis of Post Traumatic Stress Disorder is based on the claimant's account to Dr Gardner of ill treatment at the hands of the Turkish Authorities some time prior to 2001, which for a number of valid reasons was considered to be lacking in credibility by the immigration judge. The facts, that there appears to have been no mention of any mental health symptoms until after the appeal hearing and that there appears to have been no particular reaction to the questioning at the appeal hearing in July 2007, naturally raise questions as to the basis for the diagnosis of Post Traumatic Stress Disorder. The Secretary of State's decision, however, goes the stage further and reasons that these factual difficulties reduce the realistic prospect of a new immigration judge's accepting the diagnosis and translating it into the risk of an Article 3 breach as nil.

30. The issue that I have to resolve, therefore, is whether the Secretary of State was entitled to anticipate the findings that a new immigration judge would make when faced with Dr Gardner's diagnosis and prognosis in respect of the claimant's suffering serious harm in the event that he is interrogated on receipt at the airport. In this regard, it is important to note two matters. First, the apparent weakness, that Dr Gardner had been unaware of the immigration judge's findings and reasoning, has been addressed with Dr Gardner, who has indicated that his opinion remains unchanged despite the findings. Second, it appears not have been so much the genuineness of the claimant that has impressed the medical professionals, but rather the genuineness of the symptoms.

31. Ms Plimmer argues, therefore, in response to the powerful points made by Mr Dunlop in support of the decision, that a new immigration judge would be concerned not so much as to the credibility of the claimant but as to the genuineness of the symptoms which Dr Gardner has found, and the question not so much whether the current Post Traumatic Stress Disorder is logically based on fact but rather on genuine perception felt by the claimant. In essence Ms Plimmer argues that the Secretary of State has prejudged the central issue whether Dr Gardner's diagnosis and prognosis are correct, for, if they are correct, there is made out a potential risk of an Article 3 breach based on the reasonable assumption that the trigger of interrogation is likely to occur on landing in Turkey. This would be a risk of serious harm of the kind covered in the cases of *D* and *Bensaid*.

32. Ms Plimmer recognises that the key issue as to whether the claimant would be at risk of serious harm is how his reception at the Turkish airport would be handled; that, if he were not subjected to detention and lengthy interrogation, then Dr Gardner's fears for him would not arise. In the event, she submits that there was a serious inconsistency in the decision letter as to what, if any, special arrangements would be in place to address Dr Gardner's diagnosis and assessment of risk. The difficulty

which comes through from the decision letter stems from the decision maker's rejection of there being any real risk to the claimant (paragraph 90 under 'Airport Conclusion'). Nevertheless, Mr Dunlop at the outset of the hearing sought to clarify the Secretary of State's position in this regard: a decision will be made whether there should be a medical escort, but the Turkish authorities will not be informed of any medical condition from which the claimant may be suffering unless he consents to that information being given to them. I recognise the problem. The Secretary of State cannot indicate that the claimant's mental health should be taken into account by the Turkish authorities for reasons of confidentiality. The Secretary of State, however, was not in a position to second guess the claimant's willingness or otherwise to disclose his diagnosis of Post Traumatic Stress Disorder, nor indeed could I do so.

33. I now consider the decision of Sir Michael Harrison in *M* and, in particular, whether that case is distinguishable on its facts and, if not, whether I should follow that decision.

34. Mr Dunlop submits that for all practical purposes it is not distinguishable. The facts and the basis of the decision are set out in the following Lawtel Summary:

> "The claimant (M) … was a Turkish national who had entered the United Kingdom illegally with her son. She had another son in the UK. More than three years after arriving she claimed asylum, which was refused. She then exhausted her rights of appeal to the Asylum and Immigration Tribunal. She made further representations to the secretary of state arguing that her removal to Turkey would breach her human rights. They were refused. She was then detained pending removal. M made further representations, which the secretary of state refused to treat as a fresh claim. She obtained an injunction against removal and commenced the instant proceedings. She was then released from detention. She submitted further material and again the secretary of state decided that it did not amount to a fresh claim. Her case was that she would be at high risk of committing suicide if she was sent back to Turkey, and she adduced evidence of her previous suicide attempts and poor mental health, as well as Turkey's poor provision of psychiatric treatment. She also argued that she faced violence from her husband, who had been deported back to Turkey, and that she would lose the support of her parents and extended family who lived in the UK. M submitted that removal would be a disproportionate interference with her rights under (1) the European Convention on Human Rights 1950 art.2 because her suicide risk made her case exceptional; (2) art.3 because of the risk of violence from her husband and the lack of psychiatric facilities in Turkey; (3) art.8 because she would lose her family support.

35. The essence of the decision insofar as it is relevant to the instant case is as follows:

> There was fresh evidence, including references to two previous suicide attempts and the latest doctor's report. It was an anxious decision, but the court could not be led by sympathy for a claimant, *N v Secretary of State for the Home Department* (2005) UKHL 31, (2005) 2 AC 296 followed. The evidence of M's attempted suicides was unsatisfactory because there was a lack of medical records. On balance they took place, but it was not clear when or how serious they were. … Further, the secretary of state would make the normal arrangements for M's safety during her journey back to Turkey. She would be more vulnerable in Turkey without her mother, but Turkey was a signatory to the Convention and could be assumed to be compliant, *R (on the application of Nasseri) v Secretary of State for the Home Department* (2009) UKHL 23, (2010) 1 AC 1 followed. There were fewer psychiatric beds in Turkey, but M had not needed one, so that factor would not cause a breach of art.3. In conclusion, it was not a realistic prospect that a new immigration judge would find that M's circumstances were exceptional for the purposes of art.3, *N* followed.

36. The Court went onto to consider M's evidence about the threat of violence from her husband and found there was no realistic chance that another immigration judge would find that the risk of domestic violence would mean that her removal would be a breach of Article 3 and concluded that M's representations did not amount to a fresh claim.

37. Mr Dunlop points to the following factual similarities:

i) Both Claimants were Turkish Kurds;
ii) Both Claimants made asylum claims which were refused;
iii) Both Claimants brought appeals which were dismissed on credibility grounds;
iv) Both Claimants subsequently made further submissions against removal, purportedly under paragraph 353 of the Immigration Rules, in which they submitted that it would breach Article 3 to return them to Turkey because of their mental ill health.
v) In both cases the Claimants had evidence that they suffered from Post Traumatic Stress Disorder.

38. Ms Plimmer submits that the similarities end there; that there is a fundamental difference between the two cases. *M* was concerned with the general possible effect of returning to Turkey and related more to the argument that she would not receive sufficient support; that therefore she was at risk. M's case was that her return to Turkey would cause her to commit suicide once in Turkey away from the family support she had in the United Kingdom and without an adequate level of psychiatric care within Turkey. Further, Sir Michael Harrison did not regard the evidence regarding the alleged seriousness of Ms Mustafa's mental health or risk of suicide to be satisfactory.

39. The claimant Arslan's risk, on the other hand is stated to be specific to the likelihood of a lengthy interrogation only; the evidence as to the likely effect of that interrogation is satisfactory relying as it does on the reliability of symptoms in his case not the reliability of the claimant himself. *M*'s case engaged *N*. Specifically, Ms Plimmer does not rely on *N* which is essentially a medical treatment case. It is not alleged in the claimant Arslan's case that Article 3 will be breached by an absence of suitable care. This case, she submits, is a case of a one-off risk of serious harm resulting from the kind of interrogation which ordinarily would cause no harm.

40. Ms Plimmer takes issue with Mr Dunlop's submission that for this claim to succeed the claimant Arslan has to show that his condition is of an exceptional nature. In my view, there is a danger in reading too much into the words 'exceptional'. Article 3 sets the criteria for the degree of harm necessary to engage it. The claimant must show that for someone who suffers from the symptoms described by Dr Gardner, prolonged interrogation would have the potential effect of amounting to inhuman treatment. It must be an exceptional case where a prolonged interrogation could result in a person self harming or committing suicide. However, it is the unintentional treatment of the interrogator as opposed to the lack of medical treatment on which this fresh claim is based.

41. For those reasons, in my judgment, the instant case can properly be distinguished on its facts from *M*.

Conclusion

42. It may be that with the appropriate handling the claimant could pass through the Turkish airport control without the serious effects that Dr Gardner predicts. In such event, it is clear that Dr Gardner does not envisage any further risk of re-traumatisation that cannot be addressed by treatment that would be available to the claimant in Turkey.

43. The decision letter, however, does not adequately address this issue, in my judgment, for the simple reason that the decision maker rejects the foundation of the risk of serious harm. Whilst a new immigration judge could not help but be influenced by the views of the immigration judge in July 2007, the medical evidence, in particular, that of Dr Gardner, brings to the case an entirely new slant which deserves investigation beyond that simply of the Secretary of State.

44. The Secretary of State has raised a number of detailed points, as Mr Dunlop has highlighted in argument before me, which do cast serious doubt as to the basis of the medical evidence and the apparent risk to the claimant in the event that he is returned to Turkey. However, in my judgment, insufficient weight was given to the professional psychiatric evidence as to the genuineness of symptoms and the risk to which they give rise. Whilst I understand the reasons for that scepticism, I am persuaded that the decision cannot stand for the reasons that I have given.

45. In my judgment, a new immigration judge needs to examine the expert medical evidence, in particular, that of Dr Gardner and to form a conclusion as to whether or not it presents a risk of re-traumatisation and of serious self harming in the event that the claimant is interrogated at the Turkish reception airport; as to what reception arrangements are likely to be in place; as to whether or not such reception arrangements are likely to address any risk of re-traumatisation.

46. I should be content to receive written submissions by e-mail as to any consequential orders that may be necessary.