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CO/6988/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 1 July 2008

B e f o r e:

MR JUSTICE HODGE

Between:
THE QUEEN ON THE APPLICATION OF BOR

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr E Fripp (instructed by Wilson & Co) appeared on behalf of the Claimant
Miss L Busch (instructed by Treasury Solicitor) appeared on behalf of the Defendant

J U D G M E N T
(As approved)

1. MR JUSTICE HODGE: This is an application for judicial review by Huseyin Bor. The defendant is the Secretary of State for the Home Department. Mr Bor is from Turkey. He came to the United Kingdom and claimed asylum on his arrival.

2. I look first at the background of the case. The claimant was born on 20 April 1980. When he came to the United Kingdom he claimed to be a refugee whose removal would be in breach of the United Kingdom's obligations under the Geneva Convention 1951. His application was refused by the Secretary of State. It came on for hearing as an appeal before an adjudicator, Miss M B Headen, in Birmingham (the then Immigration Appellate Authority). The determination was promulgated on 1 December 2004. The appellant was unsuccessful in his appeal. He challenged that decision. An application was made to the then Immigration Appeal Tribunal which was dismissed on 24 January 2005. Thereafter he made an application for a statutory review. That was considered by Moses J and dismissed on 14 February 2005. Very shortly thereafter, on 24 March 2005, the claimant's solicitors mounted a challenge to the process of decision making both by the adjudicator and by Moses J.

3. There has been significant persistence by those advising the claimant, pressing their contention that this matter should be reconsidered as a fresh claim.

4. On 25 October 2005 the appellant's brother Veysel Bor was successful in his asylum appeal which came on before an immigration judge, also in Birmingham, in that month. This led to further submissions from the claimant's solicitors.

5. As has too often been the case in applications of this sort, the Home Office was very slow to respond to these submissions. They eventually did so on 18 July 2006. The letter sent on that date to the claimant's solicitors declined to treat various submissions that had been received as a fresh claim. The letter concluded in the usual form, suggesting that the claimant should make arrangements to leave the United Kingdom without delay.

6. On 12 August 2006 these judicial review proceedings were launched. They came before a single judge who refused the application. It was however renewed. Permission was granted by Calvert-Smith J on 29 March 2007.

7. On 31 July 2007 the Home Office sent another letter to the claimant's solicitors. This purported to deal with the impact of IK (Returnees - Records - IFA) Turkey CG [2004] UKIAT 00312. As will appear further in this judgment, the core of the claimant's case is that the fresh claim should be properly allowed to go ahead particularly because of the findings in IK. That is a country guidance case by the Asylum and Immigration Tribunal. The practice directions of that tribunal require country guidance cases to be had regard to and - unless there is some reason - have to be followed by those who have to make decisions in relation to matters which they cover. If the cases can be distinguished then they are to be.

8. It is therefore clear that the claimant's asylum and human rights claims have been refused on appeal. Challenge to that appeal against the adjudicator's decision has been rejected by the Immigration Appeal Tribunal and by statutory review.

9. This case continues to be based on further submissions and is said to be a fresh claim. Such fresh claims are, under the Immigration Rules, considered in accordance with Rule 353:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, a decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. These 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 -
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> (i) had not already been considered, and
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> (ii) taken together with previously considered material creates no realistic prospect of success notwithstanding its rejection."

10. The test as to how this should be applied is well known. The leading case is WM (DRC) v Secretary of State for the Home Department [2006] EWHC 1495. The leading judgment was given is by Buxton LJ. He considered that the test in the second limb of paragraph 353 to be "somewhat modest". What the court has to do is to consider whether there is a realistic prospect of success when new material is considered together with material previously considered. That test applies to the Secretary of State as well as to the court, and both the court and the Secretary of State must, when applying the test, use anxious scrutiny.

11. The detailed grounds of defence (helpfully summarised at paragraph 20) state:

> "The issue in this application, therefore, is whether the defendant's view that the claimant's further submission, taken together with the previously considered material, did not create a realistic prospect of the claimant succeeding before an immigration judge was irrational/Wednesbury unreasonable bearing in mind the needs of anxious scrutiny (is the need to give proper weight to the issues and to consider the evidence in the round)."

12. Mr Fripp, in a full and helpful submission backed by a lengthy skeleton argument, relies on a number of points. His main case really relates to the applicability of IK to this decision. I shall return to that later. Secondly, he relies, as to some fresh evidence at least, on the decision in the claimant's brother's claim, that is the appeal allowed in October 2005. Thirdly, he relies on this claimant being part of a Turkish oppositionist political family. There are various sub-headings to that view. He says that there is sufficient evidence on the NUFUS system which operates in Turkey which identifies

the wider family of this claimant and can be used to pinpoint him as part of a political family.

13. It is said that the claimant is related to a woman Yeter Guzul, who died on hunger strike in prison, a person called Ali Bulut who is known for political involvement and Yeter Guzul's brother Murat Guzul, who was a fighter for the opposition groups but was killed in combat in about October 2005. Mr Fripp relies on evidence subsequent to the adjudicator's decision relating to a raid by the security forces on the claimant's father's home, also in about October 2005.

14. It is necessary to quote the factual findings of the adjudicator to enable these submissions and assertions to be considered, both in the round and in relation to what was actually decided. At paragraph 26 she stated:

> "26 The appellant has given a consistent account throughout his claim and I do not agree with the respondent's argument that his claim was vague and lacking in substance. I accept that the appellant was detained on three occasions when he was living in Tunceli. The objective evidence would show that frequent round-ups of young men who were then detained for a period, tortured and released without charge were a fact of life in south-eastern Turkey during the 1990s. Clearly, from his own evidence the appellant was not a member or strong supporter of TIKKO or TKP (ML). He describes himself as a sympathiser but remains oblivious to the violent nature of these organisations. Although he demonstrated at interview reasonable knowledge of the organisation, he denied their violent background. It would appear that the authorities do not consider him to be a threat in view of the fact that he was always released without charge or conditions. Although the appellant said he was asked to become an informer no consequences appear to have followed from his refusal. In 1998 the appellant moved to Istanbul. He was again arrested because he took part in a demonstration. However after a period of detention and mistreatment he was released. Even though he appeared to have avoided military service at this point, he was only advised to report for his medical. He continued to demonstrate but was not detained again. He says that the authorities were looking for him and that his father was detained and questioned. He has indicated in his evidence that the authorities in Tunceli are still looking for him and do not believe that he is in the UK. On the basis that the authorities have shown no particular interest in him following detentions in the past, I find it highly unlikely that they would take this much interest in him over the past four years and I consider that the appellant is attempting to enhance his claim by stating that the authorities are still looking for him.
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> 27 The appellant's account is supported by two witnesses who appear to be his cousins. Both have been granted refugee status and appear to be closely related to a known member of the PKK. Both say that the appellant suffered the same problems as them but their evidence is mostly as a result of hearsay and is not founded on direct knowledge. Apart from

the fact that I am satisfied that the appellant has suffered past mistreatment because he is an Alevi Kurd who lived in an area of Turkey that supported the Kurdish armed struggle, the witnesses' evidence does not add much weight to the appellant's claim. An important question is how far this appellant is considered by the Turkish authorities to be suspected of separatist sympathies because of his family connections. From the evidence it would appear that this appellant has not shown any more than that he was a Kurd living in the wrong area of Turkey when he, along with other local young men, were subjected to regular round-ups and periods of detention and mistreatment because they were Kurds. I am not satisfied that this appellant would be seen as a member of a family where other members were PKK guerillas. There is no evidence from his past detentions that this has featured prominently in his arrest. He himself has never proclaimed PKK sympathies and there is nothing to link him to TIKKO in particular. He has said in evidence that he was not arrested distributing leaflets and that this part of his statement was incorrect. The appellant has a brother living in Istanbul who appears never to have suffered because of his family connections or his ethnicity whilst living in Istanbul.

28 Although the appellant has indicated in evidence that he fears further detention and mistreatment, in all his evidence his main reason for leaving Turkey appears to be his desire to avoid military service. Despite previous detentions it appears to be his call-up papers that really prompted his departure from Turkey. Although the appellant indicates discrimination in the armed services against Kurds, the background evidence would not appear to support any serious discrimination unless the person was perceived to be a suspected separatist or terrorist. There is no reason disclosed in the appellant's evidence to show that this would be the case as his detentions have never resulted in any case against him and, despite his claim to have been photographed and finger-printed, are not likely to have been recorded other than locally if at all. It is likely on return that the appellant will be found to be a draft evader and will be subject to prosecution and punishment as a draft evader. On the basis of my findings above, however, there would be no reason for the appellant to be suspected of any separatist or terrorist support or sympathies. He does not appear ever to have been connected with his PKK cousin, even though he said that his family were considered to be rebels. However, on the basis that this view was taken generally by the authorities, it is unlikely that the appellant would have been released from his detention without conditions if at all.

29 In summary, therefore, whilst I find that the appellant has suffered past persecution as a result of his detention and mistreatment, the authorities do not have any ongoing interest in the appellant either by virtue of his political views or his ethnicity, particularly if the appellant remains in Istanbul. Should he return to the Tunceli area, however, there is a real risk that he would suffer similar persecution as in the past due to the

> continuing presence of the security forces in the area and the heightened tensions following the war in Iraq. As far as risk on return to Istanbul is concerned whilst the appellant is an Alevi Kurd and may suffer discrimination and harassment, I do not consider that the authorities have any interest in him for his political views or because he is a supporter of TIKKO. It is unlikely that his past detentions have been recorded or would show up on the GBTS database. He would be picked up as a draft evader and may be detained and passed to the military authorities because of this or released and ordered to report but I do not find that anything else would be recorded on the GBTS. Any punishment he received would not bring the appellant within the 1951 Convention."

15. These findings were unsuccessfully challenged but they are a starting point to any fresh claim challenge in relation to the claimant's broad contentions.

16. I turn, first, to the brother's case. This matter came before a different judicial officer, by then an immigration judge. The case had been through many hoops before it reached him. It was, I think, the third time the matter had been under instruction (?).

17. Miss Busch reminded me of the proper approach to cases of similar facts which are decided differently. This is contained in Otshudi v Secretary of State for the Home Department [2004] EWCA Civ 893. Sedley LJ said about that appeal:

> "This appeal comes before the court by permission of Kay LJ. He was much influenced by the fact that, some ten months after an adjudicator had dismissed Mr Otshudi's appeal, another adjudicator, on almost identical evidence, had allowed his brother's appeal. For reasons to which I shall shortly come, this cannot furnish a ground of legal challenge ..... "

Neither counsel has disagreed with that position.

18. The principle is clear. Just because two judges come to different conclusions on, broadly speaking, similar cases that does not make either wrong in law or mistaken as to the law. Sedley LJ characteristically said:

> "It is an illustration, if an alarming one, of the fact that two conscientious decision-makers can come to opposite or divergent conclusions on the same evidence."

19. However having considered both these determinations and heard from counsel, I identified (?) there being two clear differences between the decisions. The claimant was found by the adjudicator who heard his case to be a draft evader who had come to the United Kingdom for that reason. That is provided for in paragraph 28 as quoted above. This is not the case with the brother. The immigration judge there found that he had left Turkey because of fears, because of his political sympathies:

> "16 Fearing further arrest by the authorities and ill-treatment under interrogation for his political sympathies and support, the appellant contacted an agent and with money provided by the appellant's father,

> secured a passport and made personal application, and interview, at the British Consulate to obtain a visitor's visa."

He then left Turkey and travelled to the United Kingdom.

20. The second significantly different finding is made by the immigration judge in relation to the brother's case. At paragraph 24 he said:

> "24 I further find that, since his arrival in the United Kingdom, he has taken an active part in political demonstrations against the Turkish state outside the Turkish Embassy and that he has been observed and photographed by Embassy staff and that this evidence was not challenged by the respondent's representative."

That is not the position for this claimant.

21. In my judgment, when considering whether the decision in the brother's case and findings made by the immigration judge in the brother's case could amount to the claimant's case being treated as a fresh claim, is something that goes no further than something that must be had regard to.

22. I turn to the issue of the political family. The immigration judge in the brother's case found that the brother's families (sic) were well known to the Turkish authorities as opposed to the Government. It was accepted that two cousins had been granted asylum here. The adjudicator in the claimant's case heard those two witnesses as well. She found they did not add much weight:

> "Apart from the fact that I am satisfied that the defendant has suffered past mistreatment because he is an Alevi Kurd who lived in an area of Turkey that supported the Kurdish armed struggle, the witnesses' evidence does not add much weight to the appellant's claim."

23. As to the NUFUS evidence, it is said that this was not before the adjudicator. The claimant said that it was before the immigration judge in the brother's case. The evidence is said to show a close inter-relationship between various members.

24. I, having considered the matter, am not satisfied that there is enough to show that it is reasonably likely that a different decision would be reached in relation to this issue. Paragraph 9 of the adjudicator's decision in the claimant's case makes reference to this fact:

> "All of his uncle's brothers had been accepted as refugees in the UK. If he now returned to Turkey he would be persecuted because of his political activities by the police, gendarmerie and special police. They labeled him and his family as separatists and terrorists. His mother's cousin, Ali Balut, was involved in the armed struggle and another cousin, Yeter Guzel, had been imprisoned as a member of TIKKO. Her brother, Murat, was a TIKKO guerilla. Another cousin, Gumut Balut, was a PKK guerilla. He is a son of the appellant's maternal uncle, Davut Balut. Ali

Balut was Yilmaz Balut's brother."

25. The wider family is referred to in the adjudicator's decision. Murat - referred to in the "past (?)" - is the person who died apparently in combat with the security forces in October 2005.

26. I am satisfied therefore that there was evidence available for the adjudicator. He took a different view as to effectiveness (?) than did the immigration judge. I cannot say that it is not within his discretion to reach that conclusion. I have quoted the relevant passage above. It is probably sensible or important to do so again:

> "27 An important question is how far this appellant is considered by the Turkish authorities to be suspected of separatist sympathies because of his family connections. From the evidence it would appear that this appellant has not shown any more than that he was a Kurd living in the wrong area of Turkey when he, along with other local young men, were subjected to regular round-ups and periods of detention and mistreatment because they were Kurds. I am not satisfied that this appellant would be seen as a member of a family where other members were PKK guerillas. There is no evidence from his past detentions that this has featured prominently in his arrests. He himself has never proclaimed PKK sympathies and there is nothing to link him to TIKKO ..... "

27. I refer to the matter of the raid on his father's house in October 2005. New evidence suggests that the father was then harassed by the security forces. He was apparently asked about the whereabouts of the claimant and his brothers and he told the forces that they were in the UK. It was apparently not believed. The Secretary of State approached that, in my view properly, by saying that there is no evidence of further harassment. When the effect on the claimant is seen in the context of the round-up of people which took place in the 1990s, I do not see that that in itself is sufficient to justify the suggestion that this is a fresh claim.

28. I turn to IK. I comment that this case did not come as startling new jurisprudence in relation to the position of asylum seekers from Turkey. There have been a number of country guidance cases from the tribunal previously. IK brought the information up to date and provided a helpful summary of the apparent current position. It remains persuasive. It continues to be a source of guidance now four years later. Neither counsel has said that the existence of a new country guidance case means it is right to re-open old decisions.

29. Mr Fripp relied on IK as showing a changed approach which should, he said, lead properly to a decision that there be a fresh claim. Miss Busch said IK supported her case. Mr Fripp paid particular reliance to paragraphs 78 and 118 of IK. Paragraph 78, in summary, stated that a decision maker should start by assessing the risk on return to the home area for a Turk, not the risk that he or she might face at the airport when they arrive. If there is no risk to a returning failed asylum seeker in their home area then the guidance is that the claim should not normally succeed. If however there is a real risk then it is right that internal relocation should be considered.

30. In my judgment that is a process that the adjudicator went through. I quote from paragraphs 28 and 29 of her decision:

> "28 ..... On the basis of my findings above, however, there would be no reason for the appellant to be suspected of any separatist or terrorist support or sympathies. He does not appear ever to have been connected with his PKK cousin, even though he said that his family were considered to be rebels .....
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> 29 ..... Should he return to the Tunceli area, however, there is a risk that he would suffer similar persecution as in the past due to the continuing presence of the security forces in the area and the heightened tensions following the war in Iraq. As far as risk on return to Istanbul is concerned whilst the appellant is an Alevi Kurd and may suffer discrimination and harassment, I do not consider that the authorities have any interest in him for his political views or because he is a supporter of TIKKO ..... "

31. Paragraph 118 considers the position when assessing internal relocation. The tribunal said:

> " ..... when assessing the viability of internal relocation, on the basis that an individual's material history will in broad terms become known to the authorities at the airport and in his new area when he settles, either through registration with the local Mukhtar or if he comes to the attention for any reason of the police there. The issue is whether that record would be reasonably likely to lead to persecution outside his home area."

It is right that the adjudicator did not ask herself that question. But in my judgment she did decide that this claimant would not be seen as from a family of PKK members. She concluded that he did not have links to other political organisations. He had not been arrested for distributing leaflets. She concluded that there was no reason to suspect him of terrorist sympathies.

32. In my judgment, the legitimate answer to the question raised in paragraph 118 - and it is an answer to the Secretary of State with which I agree - is no. The record would not reasonably be likely to lead to persecution outside this claimant's home area.

33. The claimant is a draft evader and he is at risk of being picked up because of that. Both counsel said that is not a real risk in the sense used in either the Refugee Convention or the Human Rights Convention.

34. The adjudicator was also aware of the GBTS system which is referred to in detail in IK. She said the appellant would be unlikely to show up on that. IK deals with some of those issues in paragraph 32 where it states no records are kept of people detained and released by security forces. Or rather they accept that piece of evidence which came from officially the Turkish Government which appears to have been supported by independent outsiders. The GBTS focuses importantly on criminality, which this claimant fortunately does not face issues concerning, and on arrest warrants, again not

something which affects this claimant. There is some evidence in IK that other information is collected about dissidents in the broadest sense but it is not of the type, in my judgment, which would lead to this claimant facing arrest or a real risk on return. I do not see that IK supports the claim on the key grounds put forward by Mr Fripp.

35. The Secretary of State's letter of 31 July 2007 gives further reasons why the issues raised in IK were, in effect, met by the adjudicator. In particular of course this claimant can internally relocate.

36. In my judgment, it is right to suggest that the claimant is unlikely to be noted at the airport on any report except as a draft evader. I accept, as Mr Fripp urged, that if people get into the hands of some elements in the security forces in Turkey torture can follow. The person has to be identified as a potential terrorist. The adjudicator's decision points clearly away from such an identification in regards to this claimant. Mr Fripp also properly relies on past persecution as evidence of potential future persecution and cites paragraph 339 (k) of the Immigration Rules in support of that proposition which I do not need to read. Again he relies on IK as reasons for saying the adjudicator was wrong in her approach to this issue. The adjudicator did decide the claimant was not involved in the PKK and that there was some risk in Tunceli, but he need not go there because he could go to Istanbul and relocate there where he has family.

37. In the light of all this I have considered the test in paragraph 353 of the Immigration Rules. I have applied anxious scrutiny to the issues and looked at it in the round. I do not consider the matters brought before the Secretary of State or before this court as fresh evidence or as a fresh claim are so significant and different as to justify regarding it as a fresh claim. Much of the information has already been considered in relation in particular to the political family issues, risk on return and the internal relocation. The successful claim by the brother and the harassment issues of the father do not in themselves give rise to a realistic prospect that any further consideration of this matter would be successful from the claimant's point of view. The decision in IK is helpful evidence, but no more than that. For the reasons given I consider the adjudicator had regard to the relevant points that were raised by that decision.

38. I do not consider that this is a fresh claim case under paragraph 354 or 353, so the claim for judicial review is dismissed.

39. MISS BUSCH: I would ask for the Secretary of State's costs. I understand that the claimant is legally aided. The order would be in the form not be enforced without leave.

40. MR JUSTICE HODGE: Not to be enforced.

41. MR FRIPP: If we could also have detailed assessment of publicly funded costs.

42. MR JUSTICE HODGE: Sure.

43. MR FRIPP: The substantive order in the application for judicial review dismissed, but if I could seek leave to consider on instructions as to whether an application should be made and if any application is made to make it on notice within seven days perhaps.

44. MR JUSTICE HODGE: You have to make it quickly because of the time limits. What is the time limit?

45. MR FRIPP: It has slipped my mind.

46. MR JUSTICE HODGE: Get it in within time. It might even be seven days. I will make an order that any further application be lodged for my attention within seven days.

47. Judicial review application dismissed, assessment of your publicly funded costs, and an order in favour of the Secretary of State not be enforced without leave of the court in relation to costs.

48. MR FRIPP: Yes. The claimant at liberty to make written application on notice within seven days.

49. MR JUSTICE HODGE: Yes.
