Case No.CO/4708/2008

Neutral Citation Number: [2009] EWHC 3807 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 19 March 2009

B e f o r e:

MR JUSTICE STADLEN

- -

Between:
THE QUEEN ON THE APPLICATION OF CELAL KAPLAN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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Mr J Collins (instructed by Montague Solicitors) appeared on behalf of the **Claimant**
Mr P Coppel (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE STADLEN: This is an application for judicial review of a decision by the Secretary of State for the Home Department in a letter dated 6 May 2008 rejecting further representations submitted by the claimant on 20 August 2007 under Article 8 of the ECHR, and determining that the said representations did not constitute a fresh claim as defined by paragraph 353 of the Immigration Rules.

2. The grounds of the application are, in essence, that the analysis by the Secretary of State of the claimant's solicitor's representations was inadequate and erroneous, and second, that on any rational view those representations made good a claim that would satisfy the test of being a fresh claim under paragraph 353, and in particular the test that they had a realistic prospect of success on an appeal to the Immigration Appeal Tribunal.

3. The background can be summarised as follows. The claimant is a citizen of Turkey of Kurdish ethnicity, who was born on 20 February 1957. He left Turkey and arrived in the United Kingdom on 19 September 2003, and immediately claimed asylum on arrival. By a decision dated 30 October 2003, communicated by a letter dated 3 November 2003, the Secretary of State refused that application under paragraph 336 of the Immigration Rules.

4. The claimant appealed to the adjudicator and his appeal was heard on 9 January 2004 and 26 March 2004. By a determination promulgated on 2 April 2004, the adjudicator dismissed the appeal. That appeal was an appeal based in essence on asylum grounds and Article 3 ECHR grounds, and was based on representations that the claimant would be subjected to persecution and ill-treatment upon return by reason of his ethnicity and his political involvement.

5. In rejecting that appeal, the adjudicator, among other things, compared what had been said and the evidence adduced in support of the claim with what was said and the evidence adduced in a separate claim that had been made by the claimant's wife. She had come with their two children on 30 July 2001 to the United Kingdom without the claimant claiming asylum on arrival. That claim was refused on 29 August 2001 and the appeal dismissed on 6 September 2002. In her reasons for dismissing his appeal on 2 April 2004, the adjudicator said, among other things this:

> "The issue in this case is credibility and I do not find the core of the appellant's account credible. I accept he has given a detailed account. I also bear in mind that his wife has been through the appeal process and he may well have had access to documentary information. There are so many disparities between his account and that of his wife that I am left with little doubt that his account is untrue. I need to consider whether there is a real risk to the appellant returning to Turkey as a failed asylum seeker. I believe while there is a real risk to certain individuals returning to Turkey, the appellant is not one of them. That is because I do not believe he has been arrested as he claims."

6. There is no reference in the adjudicator's reasons to any claim having been advanced under Article 8 of the ECHR. I was told that the claimant's current solicitors had made

valiant efforts to try and track down, through the former solicitors who had been acting at that time, the representations advanced on behalf of the claimant to establish that they did not include Article 8 claims, but they have been unable to secure any information from those former solicitors. But I have no difficulty in inferring from the absence of any reference to an Article 8 claim in the adjudicator's reasons that no such claim was put forward, and indeed on this application it was accepted by Mr Coppel, on behalf of the Secretary of State, that I should proceed on the basis that no Article 8 claim had previously been considered on that appeal.

7. There then were further representations made by previous solicitors on behalf of the claimant under Articles 3 and 8 of the ECHR dated 3 August 2004, which were refused in a decision letter dated 14 January 2005. Unfortunately the representations were not capable of being identified and placed before the court, but there was read to the court an extract from the decision letter of 14 January 2005, which suggested that the reference to Article 8 was a bare reference in a single sentence by the Secretary of State rejecting the representation based on Article 8. It therefore follows that, in considering the merits of this application today, it is reasonable to do so, and I did not apprehend Mr Coppel to take issue with this, on the assumption that, for the purposes of considering paragraph 353 of the Immigration Rules, the court should proceed on the basis that there is only one issue and not two issues; that is to say, that the submissions have not already been considered. This application is not resisted by the Secretary of State on the basis that the submissions made in December 2007 and rejected in May 2008 have previously been considered; the claim is resisted on the second limb of rule 353, namely that, taken together with the previously considered material, they do not create a realistic prospect of success, notwithstanding their rejection by the Secretary of State.

8. On 18 May 2005, an ECAA business application was made on behalf of the claimant, but refused on 27 November 2006. Following receipt of further correspondence in support of his business interests in the United Kingdom, reconsideration was given to the application, but it was again refused on 10 August 2007. A second application was made on 19 December 2007 and refused on 6 May 2008.

9. The Article 8 claim advanced on behalf of the claimant, which was rejected by the Secretary of State, was based on two limbs. It was asserted in the letter of 19 December 2007 that the claimant has established two businesses in the United Kingdom known as Mr Box UK Limited and Peterborough Food and Wine Centre. It was said that they are both doing well and employ between them five people, and that documents appended to the submissions demonstrated how well established the businesses were, and that they were profitable and well run. It was asserted that, given his central role in running the businesses, if the claimant were to be removed from the United Kingdom, that would inevitably lead to the businesses closing and his employees losing their jobs.

10. It was said that there would also be a further loss to the local community and business community since both the claimant's businesses supplied local shops as there is a wholesale aspect to the businesses, and he had invested £40,000 and had continuing investment in the evolving businesses.

11. The second limb relied on by the claimant was that he had two children aged at the time of the representations 16 and 18. The 18 year-old daughter was said to be a student at Greenwich University in her second year on a media studies course, having previously passed a foundation course at De Montfort University, the course fees being paid privately by the claimant, as was her maintenance. The 16 year-old, his son, was said to be studying for his GCSEs at college, and was presently said to be doing well on his courses and was hoping to go to university. At no time, it was said, had either the claimant or any member of his family been reliant on state funds -- indeed, just the opposite as he had contributed financially to the United Kingdom since his time here.

12. The Secretary of State in her letter rejected those submissions, and also determined that they did not constitute a fresh claim within the meaning of paragraph 353 of the Immigration Rules. She said in paragraphs 8 and 9:

> "Some of the points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for refusal on 14 January 2005.
>
> The remaining points raised in your submissions, taken together with the material previously considered in the letter, would not have created a realistic prospect of success."

13. In relation to family life, the letter quoted from paragraph 20 of the judgment of the House of Lords in the well-known case of Huang v SSHD [2007] UKHL 11, which provided guidance in relation to applying the test of proportionality under Article 8:

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8."

14. Addressing the family life limb of the representations, the letter continued:

> "As neither your client nor his dependants have any valid status in the United Kingdom, they will be removed as a family unit. Consequently upon their return to Turkey there will be no breach of your client's human rights in relation to their family life."

15. The letter then turned to the private life limb of the Article 8 claim, and dealt first with the business aspect and then with the education of the children aspect. In relation to the former, it was said that while during their time in the United Kingdom the claimant and his family might have established a private life, it was considered that any interference could be justified in the circumstances of his case, the state having the right to control the entry of non-nationals into its territory, and Article 8 not meaning that an individual can choose where he or she wishes to enjoy his or her private life.

16. The point was then made that the first business, Mr Box UK Limited was formed on 18 August 2005, the second business being opened on 25 November 2006, by which stage he had no basis for staying in the United Kingdom, his appeal against the refusal of his asylum claim having been dismissed on 2 April 2004, and a later application for permission to appeal to the Tribunal having been dismissed on 29 June 2004. So it was said the claimant could have been in no doubt that his immigration status was precarious, and that consequently he might be required to leave the United Kingdom at any time.

17. Further, he had never been given permission to work in the United Kingdom, or leave to enter permitting him to work here, and it was viewed that he had worked and taken on responsibilities in the full knowledge that he did not have a right to remain in the United Kingdom having entered and remained unlawfully.

18. It was pointed out that it was now open to him to return to Turkey and make an application for the correct entry clearance to return as a businessman.

19. In relation to the assertion in the representations to which the letter responded, that if the claimant were to be removed from the United Kingdom it would "inevitably lead to the businesses closing and his employees losing their jobs", it had been taken into consideration that the claimant was not the sole partner in either of the businesses. There were two other co-directors of Mr Box UK Limited, and three partners of Peterborough Food and Wine Centre. Reference was made to a letter of 9 March 2007 in which the claimant's former solicitors had stated:

> "Currently all four of the partners are involved in running [the latter business]."

It was therefore said that it was not accepted that his business partners could not run the businesses in his absence from the United Kingdom while he sought to regularise his immigration status from abroad.

20. The letter then turned to the claimant's children's education. As to that, the letter said:

> "16. ... no evidence has been provided to confirm that they are undertaking the above stated courses. Nonetheless, even if evidence were provided to this effect, it would not create a realistic prospect of success as, upon return to Turkey, it would be open to them to apply for entry clearance as students, thus enabling them, if their applications were successful, to resume their studies in the United Kingdom. As had been indicated previously in respect of your client's business interests, your client's children have sought to study in the United Kingdom, although it should be pointed out that no evidence that they are currently studying has been provided, at a time when they and their parents were fully aware that their immigration status was such that it may not be possible for them to continue with their studies in the United Kingdom ...
>
> 17. It has also been taken into consideration that upon their return to

> Turkey your client and his family can maintain ties with any contacts they may have in the United Kingdom by way of telephone calls, letters, e-mails, etc.
>
> 18. For these reasons it is considered that any interference with your clients' family life is necessary and proportionate to the wider interest of the maintenance of an effective immigration policy.
>
> 19. Furthermore, your client and his family should not benefit from their breach of immigration control. To allow them to remain here, thus circumventing the need for any entry clearance, would benefit them over those who comply with the law.
>
> 20. We do not consider that your further representations would demonstrate a realistic prospect that a Tribunal would find that your clients' removal would give rise to a disproportionate interference with their Article 8 rights. In the circumstances it is not considered that the prejudice to your clients' rights to a private life in the UK is sufficiently serious as to amount to a breach of their Article 8 rights."

21. So far as the grounds of appeal are concerned in relation to the incorrect approach, the point made by Mr Collins on behalf of the claimant was that there was no evidence in the letter that the decision-maker was applying the correct test in the sense of considering, for the purposes of paragraph 353, not what his or her own views of the merits were, but rather whether there was a realistic prospect of success on an appeal to the IAT. In my view, that argument is not tenable. Paragraph 9 of the letter reads:

> "The remaining points raised in your submissions, taken together with the material previously considered in the letter, would not have created a realistic prospect of success."

22. As to that, Mr Coppel submitted that the use of the conditional tense indicated that what was being contemplated there by the decision-maker was the decision of someone other than the writer. In my view, that is plainly right.

23. Further, and in any event, in paragraph 20, which I have already set out, it is explicitly stated that the decision-maker did not consider that the further representations would demonstrate a realistic prospect that a Tribunal would find the claimant's removal would give rise to a disproportionate interference with his and his family's Article 8 rights. It is quite plain from that that the decision-maker was addressing not his or her own view of the merits of the claim, but rather the correct question of whether there was a realistic prospect that an IAT adjudicator might form a different view.

24. The second ground of the claim was based on irrationality. In essence, it was said that no reasonable decision-maker could have come to the conclusion that either the private life or the family life limbs of the Article 8 claim did not have a realistic prospect of success, and that was put on the basis that it could not rationally be concluded that an

IAT might not take the view that the proportionality test enshrined in Article 8(2) was satisfied.

25. So far as the reliance on the private life was based on the businesses, it seems to me that this argument is not tenable. It is, as I pointed out in argument, much to the credit of the claimant that he has set up two successful businesses and has, so far from living off the public revenues, contributed, and also employed five employees together with four other business partners. Even if one leaves to one side the fact that both businesses were entered into at a time when it was plain, or should have been plain to the claimant, that his immigration status was precarious, at the heart of the claim in relation to proportionality, as it was advanced both in the written submissions and before me today, lay the proposition that, if the claimant were removed to Turkey, it was inevitable that the businesses would fail with the resultant loss of five jobs, although Mr Collins, in answer to a question from me, accepted that the effect of that, were that to be the case, on those five employees is not itself a ground on its own for allowing an Article 8 claim. He said, if you take it in the round, it is all part of the background to the private life that is established.

26. The difficulty that it seems to me the claimant is faced with on that aspect of the claim is that the assertion that it was inevitable that the business would fail and have to close with a loss of five jobs if the claimant was removed to Turkey was just that -- an assertion. It was not supported by evidence which, taken on its own, or indeed taken together with anything else, would make it unreasonable not to conclude that there was a realistic prospect that an IAT might accept those arguments.

27. Mr Collins submitted to me that the whole point about an IAT hearing is that that is where evidence is heard and can be tested. It seems to me that while it is of course the case that if the case does go to the IAT there is an opportunity to adduce evidence, that begs the critical prior question, which is whether there is an entitlement to have an appeal to the IAT, and that depends upon whether the test of a realistic prospect of success is satisfied, and that in turn must, in my view, depend upon the existence of evidence before the Secretary of State which no reasonable Secretary of State could fail to conclude or determine had a realistic prospect of being accepted on appeal. The difficulty the claimant faced on this aspect, in my view, was that Mr Collins was unable to point to any evidence that falls into that category. It was purely an assertion: these are businesses with together a total of five business partners, and although it is undoubtedly the case that there are businesses which depend wholly or in large part on one individual whose departure could have adverse effects on the business, there was no evidence to support a conclusion that that was the only rational conclusion on the evidence in this case.

28. The next aspect was family life. So far as that is concerned, the Secretary of State's answer was, as I have indicated in the letter, that there was no evidence to support a submission that the family could not reasonably be expected to enjoy a family life in Turkey such that their family life would be prejudiced if his claim were to fail. The only respect in which such an argument, as it seemed to me on the arguments and evidence before the Secretary of State, could be advanced would be on the basis that, if one or other of the children applied to and were allowed to come back to the United

Kingdom to pursue their studies, that would involve them living on their own without their parents and, in particular, as I raised the question in argument, it might involve a possibility of the 16 year-old son coming back on his own to pursue his GCSE studies in the United Kingdom.

29. The difficulty with that argument is that it presupposed that there was any evidence that, if they were to return to Turkey, the children could not pursue equivalent studies in Turkey without any material prejudice or hardship. It was urged upon me by Mr Coppel that there are many cases -- indeed it might be thought to be most cases -- where an Article 8 claim is raised by an adult claimant where the effect of it being rejected is that children who are at school or university in this country would, as a consequence, have to leave their studies and go to another country. There is nothing to indicate that that fact in itself is sufficient to satisfy the very high threshold of disproportionality under Article 8(2).

30. It is different, Mr Coppel says, or may be different, in a case where there is evidence that, for some reason or another, it is not possible for children to be educated in the country to which the claimant would be returned, either at all or at any rate with a reasonable equivalence to their studies in the United Kingdom, or where for some other peculiar reason or particular reason there is a connection between the child and his or her studies or school or college that is out of the ordinary. None of those features were able to prayed in aid evidentially in this case.

31. Accordingly, in my judgment, Mr Collins was forced, on the family life aspect of the claim, to rely on nothing more than the mere fact that the children would be required to leave their education in the United Kingdom and pursue their studies in Turkey. In my judgment, it cannot be said, on the basis of that alone, that the Secretary of State was irrational in concluding that there was no realistic prospect of an IAT taking a view that those facts would satisfy the high test of disproportionality under Article 8.

32. That does not conclude the matter because Mr Collins put the education of the children in a different way in the alternative, which was that they too had a private life and the private life involved their education in this country, and that by being deprived of that education, there was a realistic prospect that an IAT might take the view that, if they were to have to be deprived of that, there would be a breach of Article 8. Alternatively, that if the only way in which that could be avoided would be for them to come back on their own, that would separate them from their parents and leads to a breach of family life rights under Article 8.

33. As it seemed to me that was the high point of the claimant's claim, and it was one to which I gave anxious consideration and explored closely in argument with both counsel. In paragraph 16 of the decision letter, what was said was even if evidence was provided that the children were undertaking the courses that were asserted, that would not create a realistic prospect of success because, upon return to Turkey, it would be open to them to apply for entry clearance as students, thus enabling them, if their applications were successful, to resume their studies in the United Kingdom. I asked Mr Coppel whether it was not implicit in that that the Secretary of State accepted that, unless they were able to come back and resume their studies here, there would be a

breach of Article 8, and if that were right, could it not also be said on behalf of the claimant that, if the only way that they could avoid that breach of Article 8 would be by being separated by their parents, was there not a realistic prospect that an IAT might consider that that was a breach of the right to family life?

34. Mr Coppel's answer to that was that, on a fair reading of that paragraph or that sentence, what the decision-maker was saying was that, even if there was evidence that the children were undergoing courses (and I should say that he accepted that I should make my decision on the basis that there was such evidence and subsequent evidence was put before the court), and even if, as to which there was no evidence, there was no equivalent opportunity for education in Turkey, then it would still be open for them to apply for entry clearance and come back as students here. In other words, there was implicit in that sentence a further assumption -- the Secretary of State in effect taking the argument at its most favourable to the claimant -- namely, an assumption that there would be no equivalent opportunity for reasonable education in Turkey. But the reality is that there was no evidence to that effect; nor indeed was that asserted in the submission letter of December 2007 or orally before me. That being so, it does not seem to me that it can be said that it was unreasonable for the Secretary of State to reject that aspect of the claim as well.

35. As it seems to me, there is nothing evidentially to take this case out of the normal run of cases in which the effect of an adult Article 8 claimant having his claim rejected is that his children will be unable to continue their full-time studies in this country, and will have to resume them in the country of return. As I have indicated, in this case the claimant was unable to point to any evidence that that factor would lead to some prejudice by reason of the unavailability of any or any adequate or any equivalent education in that country of return such as to give rise to a breach of Article 8, or even an argument that no reasonable Secretary of State could reasonably take the view that an IAT might not consider there was a breach of Article 8.

36. In those circumstances, it seems to me that the grounds of this application are not made out, and the application must fail.

37. MR COPPEL: My Lord, in the circumstances I would ask for an order for costs in favour of the Secretary of State. I do not understand my learned friend's client is a beneficiary of a Legal Services certificate.

38. MR COLLINS: Just the opposite; that was part of our claim, was it not?

39. MR JUSTICE STADLEN: You cannot resist that?

40. MR COLLINS: We do not resist that.

41. MR JUSTICE STADLEN: Then I will order that the claimant should pay the defendant's costs of this application.

42. MR COPPEL: I am grateful, my Lord.

43. MR JUSTICE STADLEN: Thank you both very much indeed.