Case No: C5/2008/2000

Neutral Citation Number: [2009] EWCA Civ 393
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/05563/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 24th March 2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE ELIAS

- -

Between:

CY (TURKEY)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr James Collins (instructed by **Messrs Sheikh & Co**) appeared for the **Appellant.**
Mr John-Paul Waite (instructed by **the Treasury Solicitor**) appeared for the **Respondent.**

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Judgment

Lord Justice Elias:

1. The appellant is a citizen of Turkey. She is of Kurdish ethnicity and Alevi faith. She came to the United Kingdom with her husband. She is now separated from him, but has a one-year-old daughter. Her husband applied for asylum shortly after arriving in the United Kingdom in 2004. The appellant at that stage elected that her claim for asylum should depend upon the outcome of his application. That was considered and refused and there were two appeals, both of which were unsuccessful. The appellant gave evidence at his appeal. It is to be noted that she made no mention of any personal ill-treatment which she had suffered when giving that evidence with respect to his application.

2. Following the separation from her husband, the appellant made an application for asylum in her own right. She says that she has a well-founded fear of persecution if returned to Turkey as a result of her political opinion arising from her actual and imputed support for Kurdish separatism. In the alternative, she claims humanitarian protection.

3. The Secretary of State rejected her claim and she appealed to the immigration judge.

4. The basis of her claim was as follows. She said that she and her family had lived in the south east of Turkey in a large Kurdish community. Two of her paternal uncles had been accused of being involved with the Kurdish Separatist Party, the PKK. The two uncles were unmarried and lived in the family home. The family were harassed by the police because of the suspicions which the uncles had aroused. Her sister, two years older than herself, had obtained asylum in Canada, and an uncle and two cousins lived in Germany

5. In 1991 the authorities arrested the appellant's father and grandfather, and they were tortured. The family was also threatened that if it continued to support the PKK they would all be killed. The harassment by the police caused the family to move on several occasions from village to village.

6. In 1997 when the appellant was attending secondary school (she was then about 14) she started to support HADEP, the pro-Kurdish People's Democratic Party. This is regarded as the political wing of the PKK. She joined the youth committee in Elbistan where the family lived. She would distribute leaflets and the HADEP newspaper.

7. In 2000 a teacher saw her distributing a party newspaper, and she was taken before a disciplinary committee. She said that thereafter she became targeted as a person supporting the separatist movement. On one occasion police officers came to the school and she was taken for questioning. The reason was that her cousins, also at the school, had been detained because a gun had been found at their house. She said she was blindfolded, handcuffed, interrogated and savagely beaten about the body. The next day she was released but she was frightened and in real pain.

8. She said that she continued to support HADEP after leaving school. She helped organise a folk dance in 2003 in connection with the Newroz Kurdish Festival, but the police broke this up and arrested a number of people, including the appellant. She said that she was blindfolded and taken to a cold dark cell. She was interrogated and accused of being involved with the PKK. She alleged that she had been beaten, and on 22 March 2003, two days after the detention began, she was raped. The police told her that if she mentioned what had happened they would kill her. She was fingerprinted and photographed. She was taken to a doctor, and appeared before the public prosecutor on accusations that she had been making propaganda for the PKK. She was released and went home. She was in a state of shock. The stigma attached to the rape in Turkey would be profound and so she did not even tell her mother.

9. It was arranged that she should marry her cousin, the son of her paternal aunt. Her husband was the only person she told about the rape. He was an active supporter of DEHAP (the successor party to HADEP) and was arrested for distributing leaflets. She went to enquire at the station as to her husband's whereabouts and was pushed to the ground. He was released on the same day and ordered to report to the police on a weekly basis. He failed to report and so the police ransacked their house. She and her husband then fled, initially to Istanbul, and then on to the United Kingdom, where he made his asylum application.

10. His application was refused, as was a further appeal. The AIT, however, concluded that there had been an error of law and there was a further reconsideration of the case, but that was also unsuccessful. The appellant says that in the course of the evidence in connection with her husband's application, she was told by his solicitors that she did not need to concentrate on what had happened to her personally in Turkey. In addition, she could not mention the rape incident because of the embarrassment. For these reasons she had made no mention at all of the two incidents in January 2000 and March 2003.

11. She submitted that if now returned to Turkey she would be at real risk. She would have to register with the local Muktahar, and her previous arrests would become apparent. She had been told by her mother that the police were watching their house and were still seeking to find her.

12. The immigration judge accepted some of this evidence but by no means all of it. In particular, he accepted that she had uncles who were active in the PKK and that there had been harassment by the authorities of the family because of their pro-Kurdish sympathies. He also accepted that the appellant herself had pro-Kurdish sympathies, and had been involved in what he described as "a low level" of activity with HADEP, attending meetings and distributing newspapers and so forth. He also accepted that she had been disciplined at school for bringing political material there. He found it plausible that she would have been taken in for questioning in January 2000 as she had alleged. He said he did not doubt that she would have been treated roughly, but he did not think the authorities would have kept any record of the appellant as a result of this overnight detention. He noted that the cousins had been released and an aunt fined for keeping an unregistered gun.

13. As to the second alleged detention in March 2003, the immigration judge accepted that she may well have been questioned about her uncles' activities following the Newroz celebrations but he considered that the allegations that she had been raped, fingerprinted, photographed and taken before the public prosecutor were untrue. These details had been fabricated in order to strengthen her claim. She was just one of a large number of people who had been detained on that day and there was no reason to believe that she had been particularly picked out or targeted.

14. More specifically, the immigration judge considered that there was no good reason why she would not have revealed these matters to her husband's solicitors if they had been true. As I have said, there was no mention at that stage of these incidents at all. All the appellant had said at that time was that she sympathised with HADEP and "was never active myself apart from attending demonstrations such as May Day, Newroz, and World Women's Day".

15. The immigration judge summarised his conclusions with respect to the two incidents in this way:

> "45. I find that she had not mentioned the two occasions on which she claimed she had been detained, and which I accept to have been the case, because they were of little value and assistance to the claim of her husband and herself. She had merely been held for questioning about other members of the family, and then released.
>
> 46. If all the incidents that she claimed to have occurred had been true then I do not accept that she would have failed to have revealed this to her husband's solicitors. Even if she had not wished to mention the rape on account of the stigma attached to it, it would have been relevant for her to have

> referred to beatings and ill-treatment and of having been fingerprinted, photographed and taken before the public prosecutor. She had failed to do so and I find that that was due to the fact that these events never took place."

In short, she had not herself perceived these incidents as being of any real importance nor to be causally relevant to her reason for leaving Turkey.

16. He then added that he did not believe that the police were still looking for her, or had asked about her whereabouts. It might well be they were still watching the family home because they would have an interest in her two uncles and the family were known to be pro-Kurdish.

17. The judge accepted that the appellant would be questioned if she were returned to Turkey because she had left without a passport. The judge then referred to and considered the two decisions of the IAT, namely IK (Turkey) [2004] UKIAT 00312 and A (Turkey) [2003] UKIAT 00034, both country guidance cases, which set down certain principles to be taken into account when considering applications for asylum from Turkey.

18. Paragraph 46 of A sets out a number of factors which were described as potential risk factors for somebody returning to Turkey. It was emphasised that it was not intended to be a 'check list' and that all the factors should be considered in the round in the context of the existing political and human rights context. The relevant factors identified in that paragraph which might give rise to potential suspicion in the minds of the authorities are as follows:

> "46. The following are the factors which inexhaustively we consider to be material in giving rise to potential suspicion in the minds of the authorities concerning a particular claimant.
>
> a) The level if any of the appellant's known or suspected involvement with a separatist organisation. Together with this must be assessed the basis upon which it is contended that the authorities knew of or might suspect such involvement.
>
> b) Whether the appellant has ever been arrested or detained and if so in what circumstances. In this context it may be relevant to note how long ago such arrests or detentions took place, if it is the case that there appears to be no causal connection

between them and the claimant's departure from Turkey, but otherwise it may be a factor of no particular significance.

c) Whether the circumstances of the appellant's past arrest(s) and detention(s) (if any) indicate that the authorities did in fact view him or her as a suspected separatist.

d) Whether the appellant was charged or placed on reporting conditions or now faces charges.

e) The degree of ill-treatment to which the appellant was subjected in the past.

f) Whether the appellant has family connections with a separatist organisation such as KADEK or HADEP or DEHAP.

g) How long a period elapsed between the appellant's last arrest and detention and his or her departure from Turkey. In this regard it may of course be relevant to consider the evidence if any concerning what the appellant was in fact doing between the time of the last arrest and detention and departure from Turkey. It is a factor that is only likely to be of any particular relevance if there is a reasonably lengthy period between the two events without any ongoing problems being experienced on the part of the appellant from the authorities.

h) Whether in the period after the appellant's last arrest there is any evidence that he or she was kept under surveillance or monitored by the authorities.

i) Kurdish ethnicity.

j) Alevi faith.

k) Lack of a current up-to-date Turkish passport.

l) Whether there is any evidence that the authorities have been pursuing or otherwise expressing an interest in the appellant since he or she left Turkey.

m) Whether the appellant became an informer or was asked to become one.

n) Actual perceived political activities abroad in connection with a separatist organisation.

o) If the returnee is a military draft evader there will be some logical impact on his profile to those assessing him on his immediate return. Following

> Sepet of course this alone is not a basis for a refugee or human rights claim."

19. In IK the IAT considered what records would be available to the authorities of someone returning to Turkey. The tribunal heard extensive evidence about this. They were told of a GPTS computer system in Turkey. The tribunal concluded that there would not be evidence of detentions on that system unless they resulted in some form of court intervention. Information on the GPTS system would, however, be widely available.

20. The tribunal also identified other information systems. There would be border control information dealing with those who entered and left Turkey legally. There were also what were termed NUFUS records, which are of two main types. NUFUS Kufsdani is the national identity card, and there is a separate register called NUFUS Kyit, which would contain information about such matters as someone's age, residence, marriage, death, parents and children's details and religious status. The tribunal noted that if a person of material adverse interest to the authorities disappeared from sight and did not register his residence elsewhere then a marker would be put on the NUFUS file and that would alert the authorities if he were to apply for a new NUFUS card.

21. The tribunal also noted that there were certain records kept by some of the security organisations, which they referred to as TAB records. That information will be to some extent shared, but will be at its greatest in the area where someone lives, particularly so if they live in an area of conflict, as in the south and east of Turkey. Accordingly, the tribunal noted that:

> "We consider that the starting point in any inquiry into risk on return should normally begin not with the airport on return, but with whether the claimant will be at any real risk of persecution or a breach of Article 3 in his home area as a consequence of his material history there."

22. It was contended on behalf of the appellant that she fell into almost every risk category identified in the A case. The immigration judge rejected that. He said she would, if returned, be found to be of Kurdish ethnicity, Alevi faith and without a passport. She would also potentially be identified as a member of a family of pro-Kurdish activitists. He did not, however, believe that there would be any record of her on the GBTS system because, following IK, she had been detained but not arrested. The judge accepted, however, that if she returned as a failed asylum seeker then she would be subject to some scrutiny and it was quite plausible that the police would connect her name with her relations who were known to be pro-Kurdish.

23. The appellant had contended that she could not relocate internally. The immigration judge observed there was no reason why she would need to do that. She had a family to whom she could return, and so she could safely go back to her own home. She was in touch with her mother, and had a sister and brother still living in Elbistan.

24. Finally, the judge also considered it material that she had not made her claim until three years after her arrival in this country. This plainly affected her credibility.

25. The appellant appealed against that decision. The appeal was rejected by the Senior Immigration Judge, but Dobbs J ordered reconsideration. The matter was therefore reconsidered by Senior Immigration Judge Jordan, who by a decision dated 2 June 2008 concluded that there was no error of law in the immigration judge's analysis and accordingly the appeal failed.

26. The appeal to the Court of Appeal was initially turned down on paper by Richards LJ, but was allowed to go to a full hearing after oral consideration by Ward LJ.

The grounds of appeal

27. There are six principal issues that are now being advanced. They are all directed to the question of whether the immigration judge had properly carried out the necessary assessment of the risk of persecution if the appellant were now to be returned to Turkey. The essence of the appeal is that he did not carry out the important fact sensitive analysis, in the context of the IK case, which the case required. There was no careful and considered assessment of the risk factors identified in A.

28. The skeleton identified six separate strands to the argument, which for convenience I will consider separately, although they are closely interrelated.

29. First, it is said that given the overwhelming and positive findings with respect to the appellant's account of her treatment in Turkey, it was not possible for the immigration judge to conclude that she would not be at risk of persecution if returned. She had been subject to beating on the first incident, and, given the pro-Kurdish stance of the family, which the immigration judge accepted, together with her Kurdish background and Alevi faith, it was simply not possible to discount the very real possibility that something similar would happen again.

30. The fundamental difficulty, in my view, with this submission is that it assumes that the immigration judge accepted that the appellant's account of the

beatings she received during her first detention was accurate and reliable. I do not accept that the judge did so. It is true that he said that she may have been subject to some rough treatment but it is also quite plain from his decision that he did not think that this was a matter of any great significance, and indeed neither apparently did she since it was not something she mentioned herself when her husband's application for asylum was being pursued. On any fair reading of the judgment, in my view, the immigration judge was rejecting her account of the first incident. Like the second incident, it was exaggerated. Any rough treatment fell well below the standard for persecution or breach of Article 3 of the Convention.

31. A second and related ground is that it is said that the immigration judge ought to have determined whether or not there would be a record of the appellant's activities in her home area. Reference was made to the case of SD (Turkey) v SSHD [2007] EWCA Civ 1514 in which the Court of Appeal had held that the fact that information was not located on the GBTS system did not mean that relevant information was not available to the authorities.

32. I do not accept that the judge fell into that error here. He recognised that there was a risk that her activities in her home area would be known. They would be readily discoverable if enquiries were made of the authorities there and it was realistic to believe that such inquiries would be made. In my judgment that analysis is entirely consistent with the approach in IK. The judge did not assume that nothing would be known about this appellant because of the lack of information on the GBTS system. He thought that information would become available, but he did not accept even to the lower standard of proof that this would lead to the appellant's arrest, ill-treatment or persecution.

33. The third ground is this. It is said that the immigration judge focused on risk at the airport, but did not adequately address the question of risk in the home area, yet IK tells us that that is where the focus of attention has to be.

34. I do not accept that at all. The whole analysis of the immigration judge, in my view, was focused upon whether this appellant would be at risk if returned home, particularly in view of her connections with family members who were known to be strong supporters of Kurdish independence. The judge concluded that she would not. Her mother and siblings were there and there was insufficient in her background to create a well-founded fear that she would be at risk if returned there.

35. Then it is submitted that the judge did not analyse the risk factors as set out in A (Turkey) and IK. It is said that the immigration judge considered that the only factors relevant were that she was Kurdish, and Alevi, and without a passport, and connected with a pro-Kurdish family. Mr Collins, her counsel, submits that there were other highly material factors such as her known

sympathies for HADEP, that she had been detained and ill-treated and that she had been targeted.

36. In my judgment, the immigration judge concluded that she had not been targeted and had not been ill-treated in any way remotely amounting to persecution in the past. Nor did he think that there would be any record of her two detentions. He recognised that she was what he termed a low level sympathiser of HADEP but plainly did not consider that this should carry much weight.

37. The fifth ground is that there was a failure to give sufficient weight to the risk emanating from the fact that members of the extended family had a high political profile in the Kurdish separatist cause. The judge was plainly fully alive to that link but he did not think that this factor, even when combined with other factors, created a well-founded fear of persecution.

38. A final ground is that the immigration judge did not assess risk on the basis of objective evidence at the date of the hearing. He referred to the fact that he was provided with a 2007 country report on Turkey, but thereafter barely referred to it. Mr Collins submits that he should have done so. True it was that no emphasis was placed on this by the appellant's representative, but it was incumbent on the immigration judge to have regard to it. This was particularly so given that the situation in the South East of Turkey had deteriorated since the case of IK.

39. Mr Waite, counsel for the Secretary of State, contends that it is not in fact clear that matters have deteriorated in the way suggested. The situation has always been difficult in Turkey, and the judge recognised in terms that the background evidence showed that torture in Turkey was still widespread and that there were systematic and severe beatings, and rape and sexual assaults were used as weapons against individuals considered to be adverse to the state.

40. I agree that this is the essential background information which the immigration judge needed to identify. He did not reject the appellant's evidence because it was not plausible that incidents of the kind she had alleged could not occur, or that it was fanciful to believe that they could occur. He did so because on the evidence, and in the light of her own personal history, he did not find her account credible.

Conclusions

41. Like the previous judges who have considered this matter in any detail, I do not think there is any error of law demonstrated in the analysis by the immigration judge in this case. There was plainly a proper basis for the relevant findings of fact which he made. He concluded that there had been no

past persecution, notwithstanding the connection of the appellant with pro-Kurdish family members. He did accept that the appellant would have been detained and may on one occasion have been treated roughly. That is far from accepting that she had in the past been persecuted, and in my judgment his decision makes it plain that in his view she had not. He recognised that her connections with her pro-Kurdish family may well be discovered on her return to Turkey, particularly since she was returning without her passport. Notwithstanding that, he was satisfied that there was no well-founded fear of persecution on return. The issue of relocation did not arise because, in his view, she could live safely in her own home area. Her mother and some siblings were able to do just that. All these were perfectly cogent conclusions based on a careful analysis of the evidence.

42. In my judgment there is no error of law and the appeal is dismissed.

Lord Justice Maurice Kay:

43. I agree. One of Mr Collins' principal submissions is that the appellant's account of the first detention in 2000 was entirely accepted by the immigration judge. I am satisfied that that is not so. In the witness statement that was before the immigration judge dealing with that incident, the appellant described being "beaten severely all over my body". She made further references to beating and to "this treatment lasting for a very long time". She said that after her release she had bruises all over her body. The finding of the immigration judge in relation to that is limited to the words "treated roughly". In my judgment it is quite clear that the immigration judge was rejecting the more serious parts of that account. But when he addressed the matter in detail in paragraphs 44 and 45 of his determination, it is clear that he was rejecting not only the graphic detail of the second detention but also the more serious aspects of the description of the first detention. That is plain from his reference in paragraph 45 to the "two occasions" after which he went on to say that:

> "…they were of little value and assistance … She had merely been held for questioning about other members of the family, and then released."

44. It follows that the immigration judge found two separate detentions some three years apart. On the first there was a degree of "rough treatment" but it fell significantly short of persecution and Article 3 ill-treatment. On both occasions, having been detained overnight, the appellant was released the following day following questioning about activities of other members of the family. On the basis of those permissible findings of fact, the immigration

judge was entitled to conclude that along with the rest of the material before him he did not find that a well-founded fear of persecution. I do not consider that he fell into legal error in that regard for these reasons and for the other reasons given by Elias LJ.

45. I too would dismiss the appeal.

Lord Justice Mummery:

46. I agree with both judgments.

Order: Appeal dismissed