Case No: C5/2007/2247

Neutral Citation Number: [2008] EWCA Civ 511
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. HX/41661/2002]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 3rd April 2008

Before:

LORD JUSTICE SEDLEY
LORD JUSTICE CARNWATH
and
LORD JUSTICE MOSES

- -

Between:

XY (TURKEY) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Mr J Collins (instructed by Sheik & Co) appeared on behalf of the **Appellant**.

Mr S Kovats (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Carnwath:

1. XY is a Turkish national of Kurdish ethnicity and Alevi Muslim. He arrived in this country in July 2002 and claimed asylum. The case has an unfortunate history, having been subject to a number of reconsiderations without achieving a legally effective determination. However, we are directly concerned only with the most recent decision, which is that of Senior Immigration Judge Goldstein, sitting with Immigration Judge Osborne, promulgated on 19 July 2007.

2. The claim is based principally on the treatment of the applicant and his wife by the Turkish police between 1996 and 2002 and the risks to him said to result from that treatment if they were to be returned to Turkey. It is common ground that his treatment in that period was linked with the activities of his father who was a "fervent supporter" of a proscribed Kurdish organisation called the PSK. The father eventually disappeared in December 2001 and a year later, in December 2002, he was found dead – perhaps murdered, as the applicant understandably believed, but the tribunal felt unable to make any finding as to the cause of his death.

3. The only live issue before us is whether the tribunal was entitled to dismiss the appeal, on the basis that the authority's interest in the applicant was solely linked to his father's political activities and would, in consequence, have ceased with his death. It is common ground that the correct framework for considering this case was to be found in the country guidance case of IK (Turkey) CG [2004] UKIAT 00312. In that decision the tribunal repeated a list of what were called "potential risk factors" taken from a previous decision in A (Turkey) CG [2003] UKIAT 00034. They are at paragraphs 46 and 47. Paragraph 46 sets out factors which:

> "…inexhaustibly we consider to be material in giving rise to potential suspicion in the minds of the authorities concerning a particular claimant."

I will come back to some of them. Paragraph 47 is important:

> "We cannot emphasise too strongly the importance of avoiding treating these factors as some kind of checklist. Assessment of the claim must be in the round bearing in mind the matters set out above as a consequence of a careful scrutiny and assessment of the evidence. The central issue as always is the question of the real risk on return of ill treatment amounting to persecution or breach of a person's Article 3 rights. The existing political and human rights context overall is also a matter of significance as will be seen from our assessment of the particular appeals in our determinations of those below. The

> particular circumstances that prevail today may not be in existence in 6 months time for all we know."

4. I note that, at paragraph 63, following IK (Turkey CG) [2004] UKAIT 00312, there is a valuable discussion of sources or information that may be available to the Turkish authorities, in relation to a person in this applicant's position if he were to return. They discuss there what is called the GBTS system which, as they say, does not include detentions by security forces that have not resulted in some form of court intervention. But they refer to other sources of information such as "Nufus" records, which are connected with the national Nufus registration system. At paragraph 70 they point out that it is possible that, if a person of material interest to the authorities has not been charged with any offence and disappears from sight without registering his residence elsewhere, then a marker can be placed on his Nufus file. Then there is a reference to "Tab" records. There follows this at paragraph 73:

> "There is no dispute that some information about individuals who have come to the adverse attention of the authorities is kept by a variety of organisations in Turkey, which include systems such as the GBTS, border control information, Nufus and judicial records to which we have already referred. There are also records on individuals kept in local police and Jandarma stations and by the local Mukhtar. This information would appear to be in part on computer and part in documentary form. We also accept that MIT and the anti-terrorist police would have and be able to access a further computerised system or systems that common sense suggests would include information about individuals of actual potential concern to them. It will comprise information generated by themselves and their own activities and possibly information collected from other available information systems."

Then paragraph 78 on which Mr Collins relies particularly says this:

> "On this basis, 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 would 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. If the answer to that is 'no', then the claim cannot normally succeed, unless of course the risk arises from or is aggravated by other factors, such as his material activities abroad in other parts of Turkey. Any real risk would arise only from a person's material history, to borrow Mr Grieves' expression,

> and this history will in most normal circumstances be at its most extensive in the individual's home area..."

The determination goes on to consider the question of internal relocation which is not an issue in this case.

5. It is instructive to note how the tribunal dealt with the particular case before them. At paragraph 4 they noted that the respondent was an Alevi Kurd from a village in the south-east of Turkey and a sympathiser of the PKK who would supply them with food. Two of his cousins had joined the PKK in 1992 and were subsequently captured and convicted of terrorist offences and sentenced to life in prison. This "triggered specific interest by the authorities in the respondent's family". Following that the respondent was arrested, questioned and beaten by the authorities on two occasions in 1997. At the end of their decision, they came back to consider the way the adjudicator had approached the matter. They listed the various risk factors which they thought to be relevant to the case at paragraph 129, including the history or the treatment of the applicants and their relationship with their cousins which "may have focussed the authorities adverse attention on their family and the village". In conclusion they held that, although this was a marginal case, they were not going to interfere with the adjudicator's decision that the asylum claim had been made out.

6. Turning to the present case, the tribunal's decision is clearly and succinctly set out and summarises all the material matters. They refer to the particular incidents which had been relied on. The first incident was in June 1996 when the applicant, his wife and members of their families were celebrating a wedding. The police arrived and demanded to see the identification documents of all those present, and subsequently the appellant, his father and his brother were arrested and detained for two days; they were harshly beaten and questioned continually about their activities on behalf of the PSK. Eventually the appellant began to learn more about the activities of the PSK from his father. Mr Collins has referred us to the applicant's statement, of which that is, I take it, a summary. He says that it shows that this was a clear example of the family as a whole being targeted by the authorities.

7. Then was a period when the applicant was away for periods working as a welder in another city. During that period, while he was away, his wife was detained and harassed. On one occasion she was burnt with a cigarette and on another she was threatened with sexual assault. In March and April 1998 the applicant underwent two further periods of detention; on each occasion he was treated badly but was eventually released without any formal charges.

8. Then, as I said, in December 2001 his father disappeared. The family had no knowledge of what had happened to him in spite of the appellant travelling all over Turkey to try and find him. Then in February 2002 the applicant was once again detained and the security forces were demanding information as to the whereabouts of his father. Paragraph 22 of the decision says this:

> "After this period of detention the Appellant was detained on numerous occasions but not held for lengthy periods of time -- each time he would be asked about his father's whereabouts but he could give no information. The last time he was detained was on 3rd July 2002 and on that occasion he believed that his treatment was worse than before -- he was threatened with death and following his release he and his wife decided the time had come for them to leave Turkey in order to preserve their safety."

There follows an account of his activities in this country with a Kurdish welfare association. At one point there was some reliance on that material but it is no longer part of the case as presented before us today.

9. The tribunal accepted his truthfulness generally, and to that extent they disagreed with the Secretary of State. In paragraph 43 they said that he had given a truthful account of what had happened to him and his wife in Turkey, and they found that the treatment he had suffered was persecutory behaviour at the hands of the authorities. At paragraph 44 they said this:

> "We agree (and the appellant does not deny) that he was only involved in the PSK at the very lowest level but we do not share the view that this would prevent the authorities in Turkey from detaining and questioning him if they were suspicious of the activities."

They continued:

> "The Secretary of State's representative did not accept that the authorities would have continuously harassed the Appellant for any reason arising out of his father's disappearance in December 2001. However, by the Appellant's own account after the events complained of between 1996 and 1998 there do not appear to have been any further incidents until February 2002 which lead us to the conclusion that at that time the Appellant was of no interest to the authorities."

10. The one matter on which the tribunal found that the applicant's account had been seriously exaggeratedwas in respect of the time when he was away working in another city. He had said that when he came home he had to live like a fugitive to avoid the attentions of the authorities; but this evidence did not chime with that of his wife who, in her oral evidence, indicated that when her husband came home he lived openly with her and their child in their

family home. The tribunal commented that the difference between these two accounts was irreconcilable and could not be regarded as a mere discrepancy.

11. So his history of maltreatment by the authorities was broadly accepted. However, the key to the decision of the tribunal, as I have already said, was their conclusion that the interest related to the applicant's father, not him. This they based, at least in part, on the evidence of the appellant himself which they referred to at paragraph 47:

> "[He] laid great emphasis throughout on the fact that whenever he had been detained he was asked about his father's whereabouts and what the Appellant knew about his activities on behalf of PSK."

12. They also relied on the fact that when he was detained he was always released without charge, on the basis that there was no evidence against him. They summarised the position, as they saw it, at paragraph 50:

> "Therefore to summarise our finding at this stage we find that the Appellant's essential account of events in Turkey are likely to be true to the low standard required. We find that he had suffered various episodes of detention and harassment at the hands of the authorities in his home area and that all of this was due to the relationship with his father as the authorities wished to have information about the father's activities on behalf of the PSK.
>
> We are therefore satisfied that based on the extent of the harassment extending over several years the Appellant did experience persecutory behaviour at the hands of the authorities in Turkey."

13. They then turned to consider what risk there would be to him if he were to be returned. They started by repeating the conclusion that his past treatment related specifically to the activities of his father. They accepted, at paragraph 55, that his father had died and made no specific finding about how he met his death. Then , at paragraph 56, their considered the risk assessment:

> "…it appears to us that as the father's death has been officially recorded and based upon the findings we have made in accordance with the evidence we have heard we have concluded that the authorities in Turkey can no longer have any interest in the Appellant. We accept that it is possible that he and his family may continue to experience less favourable treatment because of their ethnicity and religious persuasion but again we

> conclude that that in itself does not amount to persecution and does not add to the risk on return.
>
> These matters are risk factors which have to be borne in mind when assessing the totality of risk on return to Turkey."

14. They referred to the list of factors in IK and continued (paragraph 58):

> "We have noted the efforts made by the Turkish government to improve their previously very poor record on the human rights particularly with regard to torture and accept that in certain situations torture continues and that there may be a real risk of ill-treatment in the course of questioning on return to Turkey particularly of those suspected by the authorities of involvement in left-wing or separatist groups. We find that there are two aspects of the evidence which are important here -- the first being whether the Appellant would be likely to appear on the GBTS system but we are satisfied that in accordance with the findings of the Tribunal in IK that the system does not include details of detentions by the security forces which did not result in some form of court intervention. We are satisfied and the Appellant states that he and his wife have never been formally charged -- that on each and every occasion they have been detained they have been released without charge and it has been clear that there has been no substantive evidence against them."

15. Finally, at the end of their decision, they said:

> "70. We have given careful consideration to the question of how, if at all, the Appellant would claim to demonstrate that he is likely to be of any interest to the authorities in Turkey but based on the evidence we have concluded there is no evidence that the authorities will be looking for the Appellant if he is returned.
>
> 71. For the sake of completeness we have taken account of the submissions which were made on behalf of the Appellant about relocation -- we accept a person in the Appellant's position (with a dependant wife and children) could not behave as a young single man and it would be necessary for him to register with the local Mukhtar even if he chose not to return to his local area. But on

> the basis that we cannot be satisfied based upon our careful examination of the evidence that the Appellant has anything specifically to fear from the authorities arising out of past events we do not take that into account as a further risk factor."

16. The arguments on both sides have been admirably concise and without, I hope, disrespect my conclusion can be equally so. I say at once that I make no criticism of the relative brevity of the tribunal's reasoning. Indeed in many respects it is a model of how a decision can be expressed relatively shortly while covering the relevant material.
17. Mr Kovats says that the only question, in substance, is whether the crucial finding is perverse, that is the finding that the sole cause of the applicant's problems with the authorities was his connection with his father whilst still alive, and that with his death those problems and risk have gone. Mr Collins says that that approach is much too simplistic and does not comply with the more sophisticated risk assessment required by IK.
18. I agree with Mr Collins. Paragraph 47 of A (Turkey), quoted in IK, makes clear that there needs to be a rounded assessment based on the up-to-date circumstances taking account of the various risk factors. Like Mr Collins, I do not consider that the tribunal has undertaken that task. I do not see this as a question of perversity. The conclusion which the tribunal reached about the connection with the father's activities as a matter of history is understandable but that, as I read IK, is only the starting point for the assessment.

19. To my mind, the most important failure comes in paragraph 56, where the tribunal moved from the proposition that the past problems were associated with the father and the reference to his death, to the consequence that he "can no longer be of interest to the authorities". They then proceeded on the basis that the relevant risk factors were simply those related to ethnicity and religious persuasion. However, if one looks at the list in IK (being careful not to treat it as a "checklist") it is quite clear that two of the most important factors are background experiences and family connections. There is nothing in IK to suggest that, simply because the family connection has died, that is the end of the story; nor that because of that fact that one can wipe from the record, as it were, the whole of the material history, which we have been told in paragraph 78of IK is the starting point for the exercise.

20. There are two further matters which cause me concern.. The first is the treatment of the information system. The tribunal mention, and it is not in dispute, that the applicant would be unlikely to appear on the GBTS system. That is baseed on IK. Ifthey were seeking to infer that he would not come to the attention of the authorities, that seems to me to fly in the face of what is said in IK about the other forms of information that may be available.

21. The other point of which Mr Collins complains is the failure to consider the up-to-date objective material. Now at the time of IK, which was decided in 2004, there was understood to be an improvement in the experiences of

treatment of Turkish Kurds in the south-east. This is referred to by the tribunal at paragraph 110 of IK where they refer to the evidence of:

> "some significant reduction of reported incidents as the Government's policies begin to bite"

22. Before *this* tribunal there was more recent material, which is summarised in Mr Collins's skeleton. It included a June 2007 CMI Report and an Amnesty International report of May 2007. They show an unfortunate deterioration in the behaviour of the authorities in this area. Mr Collins says that there is no indication that the tribunal has taken any account of that. As I have already noted, the tribunal in IK commented on the fact that the assessment needs to be made in the light of the existing political and human rights context, which may very well change from time to time. That again seems to me an indication of a failure by the authority to carry out the comprehensive assessment required by IK. For those reasons, although I am very reluctant to say that this case must be considered yet again, I see no alternative but to allow this appeal.

Lord Justice Moses:

23. I agree.

Lord Justice Sedley:

24. I also agree that the appeal should be allowed. I would, for myself, respectfully add to Carnwath LJ's commendation of the structure and, with one crucial omission, the content of the AIT's determination my own commendation of what they say in paragraph 49:

> "We do not find that the fact that the Appellant and his wife ran away from the police when they arrived at Dover to be of great significance -- when assessing his credibility -- the Appellant explained that he was fearful that the police were about to return him immediately to Turkey and in all the circumstances of his arrival in a foreign country and not knowing what to expect we find that a reasonable explanation. We similarly do not hold it against the Appellant when assessing his credibility that he failed to claim asylum in another country on route from Turkey to the United Kingdom."

25. The assertion of the independence of judicial fact-finding and evaluation in the context of the well-known endeavour by Section 8 of the 2004 Act to control it seems to me deserves the endorsement of this court.

26. The appeal plainly cannot be allowed outright since there is more than one possible answer to the unaddressed question. It follows, as it seems to me,

that it must be remitted to the AIT for redetermination. Assuming then that the Home Secretary considers it right to continue to oppose this appeal on what will be its fifth appearance before the AIT, the next question is on what terms the redetermination is to take place. Provisionally it seems, I think, to all of us that the remission should be, in fairness to everybody, to a differently constituted tribunal; but we would like to hear counsel briefly both on this, if they have any submission about it, and on the perhaps more difficult question of what should be taken on the remitted hearing as given and what should be at large.

Order: Appeal allowed

LORD JUSTICE SEDLEY: Mr Kovats, do you want to go first on this?

MR KOVATS: (Inaudible) the first point is that the Secretary of State has no preference one way or the other as to whether it's to a different panel or not. Normally the order simply says "referral to the tribunal" and leaves it up to the tribunal to make the appropriate…

LORD JUSTICE SEDLEY: Yes. It seems to us, it seems to me anyway, that that is a buck which we may pass but it's better if it stops here so we would prefer, I think, to say whether it should be the same or a different tribunal. There are some cases in which it is plainly the right thing to send it back to the same tribunal to carry on where they left off. This seems to us, while arguably such a case, also to be a case in which it may be embarrassing for the tribunal itself to be asked to review its own work and that's why our provisional view is that it should be a different tribunal. You say you are neutral on that?

MR KOVATS: Yes my Lord (inaudible).

LORD JUSTICE SEDLEY: Well, shall we hear Mr Collins on that first? Mr Collins, different or same tribunal?

MR COLLINS: My Lord, I would respectfully suggest a different tribunal. Given the background to this particular appeal it should perhaps go to the Field House tribunal.

LORD JUSTICE SEDLEY: To?

MR COLLINS: Field House tribunal.

LORD JUSTICE SEDLEY: You mean a different building?

MR COLLINS: Where the Senior Immigration Judges sit.

LORD JUSTICE CARNWATH: Yes, the SIJ.

LORD JUSTICE SEDLEY: But where was this heard?

MR COLLINS: This was heard in Stoke-on-Trent.

LORD JUSTICE MOSES: Yes. Yes I mean there is a sort of hierarchy in these things and it is going to be dealt with in Field House under the immediate supervision of the President or the Vice President.

LORD JUSTICE SEDLEY: Headmaster's study.

MR COLLINS: They see cases which have been before this court on more than one occasion.

LORD JUSTICE SEDLEY: Well, we will discuss that. Anyway it should be a different tribunal, query whether we should direct it in what venue?

MR COLLINS: Yes.

LORD JUSTICE SEDLEY: All right.

MR COLLINS: It doesn't need to necessarily be staged in Field House. It will go before generally the resident Senior Immigration Judges who will decide what to do to get to grips with it.

LORD JUSTICE CARNWATH: Is there a form of order that's used? I mean I sometime sort of send them back to direct to the President to nominate somebody to hear it but what you want is for it to be given consideration at a pretty high level as to how we proceed on this one?

MR COLLINS: Yes, and generally what we want to happen and what would happen (inaudible) prehearing, a directions hearing would be set down so that the issues can be identified.

LORD JUSTICE SEDLEY: Yes. We are certainly not going to try to dictate everything. Now what do you say about the second matter, namely… Do you want to take more instructions for a moment? Just give him a moment, Mr Kovats.

MR COLLINS: My Lord, my instructions are that the matter should go back on the basis of the findings of fact made by this tribunal.

LORD JUSTICE SEDLEY: So in other words to take on where this tribunal left off?

MR COLLINS: Yes, our complaint was essentially that (inaudible)

LORD JUSTICE SEDLEY: But you, that means that so far as the findings are adverse to you, you live with those?

MR COLLINS: Yes.

LORD JUSTICE SEDLEY: So far as they help you, you build on them? Mr Kovats? Do you have any different view?

MR KOVATS:: My Lord, perhaps this requires some clarification. I can understand the advantage in saying that the findings of fact made by the last tribunal can't be disturbed but we would need to be clear as to what findings of fact we are talking about. Clearly there will have been findings about the mistreatment which the appellant and his wife had suffered. More controversial than that do they include 1) the finding of fact that he totally exaggerated …

LORD JUSTICE SEDLEY: I think Mr Collins accepts yes.

MR KOVATS: Similarly, and this is obviously of importance the finding of fact which perhaps...

LORD JUSTICE SEDLEY: …which you said was conclusive, namely that it was the father they were interested in, only the father?

MR KOVATS: Leave aside the conclusive bit**.** There undoubtedly was a finding of fact that all that adverse interest arose because of (inaudible).

LORD JUSTICE SEDLEY: Mr Collins, that too then. That is part of the findings. Your case has been that that's fine and dandy but it doesn't deal with the present and future issue.

MR COLLINS: Yes I see the problem there …

LORD JUSTICE CARNWATH: But you don't want to be … I mean one of your problems is you won't be able to say to the fact finder, well you can't be confident it was just about the father and when you are being beaten up and detained your torturers don't identify we are beating you up for the following reasons, but we are not beating you up because of you. I mean actually all he said was whenever he was there they were asking about my father, but I mean how one can …

LORD JUSTICE MOSES: I mean, I think you are conceding that you don't… you are not, I mean, you are not going to try and reopen that, and as I understand what you are saying is that really everything up to paragraph 51 of the decision would stand. That is where they deal with the past and they then go on to consider the risk assessment and really it's the risk assessment that you quarrel with. Is that right?

MR COLLINS: My Lord I would say that if the findings of fact are going to stand, if they stand up to (inaudible)… I quite accept that the finding at 56 (inaudible)… see that but (inaudible) … 55, I still (inaudible) the facts.

LORD JUSTICE CARNWATH: Yes

LORD JUSTICE MOSES: I'm simply trying… I mean if we're going to use this sort of order which I certainly have not come across before, I think we need to be absolutely clear what we are saying stands and what does not, but if you are both agreed that …

LORD JUSTICE CARNWATH: But I mean, that means he doesn't give evidence?

LORD JUSTICE SEDLEY: Or needn't give evidence.

LORD JUSTICE CARNWATH: But I mean he is going to say I don't know why they were beating me up, nobody knows why they were beating me up, I know and I accept, as I said before, that every time I was detained and beaten up they asked about my father, beyond that I can't go, and he will want to say, well, look at what happened when they came round… and his wife will want to say, as we saw in her statement. Now you may say, and we may say, well that's just tough luck, you've lost that point, but I would be very surprised if, as it were, you conceded that.

MR COLLINS: Yes. I think on reflection, my Lord, and (inaudible) if there are (inaudible) the general finding (inaudible) credibility that there are glitches, it may be that this matter should …

LORD JUSTICE SEDLEY: Can I make the suggestion, entirely for myself, I have not consulted my (inaudible) about it. It is clear that this is not a case in which you're… counsel are jockeying for advantage. We see plenty of that and sometimes opportunistic submissions. It is clear that both of you are concerned to respect what has happened so far insofar as it does not require to be looked at again in the light of this court's judgment, and I think that is the course that we would want and would commend. On the other hand it must not go so far as to handicap the tribunal, in particular Mr Collins, in now canvassing what we intend should be canvassed and decided, in our view for the first time. Would you two feel likely that if we gave you a little time you could put something in writing that would have the agreement of both sides? As to the terms of remission?

MR KOVATS: My Lord if I'm realistic, if I go back and ask for instructions I think it likely that they will say everything should be up for grabs.

LORD JUSTICE SEDLEY: Everything up for grabs?

MR KOVATS: Because the Secretary of State's case in the tribunal was a wholesale attack on the credibility of the appellant. I suspect -- I don't know, but I suspect that the Secretary of State will say either all the findings of fact stand or none of them (inaudible).

LORD JUSTICE SEDLEY: Well Mr Collins might welcome a bare knuckle fight, I don't know.

LORD JUSTICE CARNWATH: Well, I hope that the first thing the Secretary of State will do is, am I really going to make this man go through this for a fifth time before he ever got on to that, and that is what Lord Justice Sedley says. I hope that won't be overlooked.

LORD JUSTICE SEDLEY: Subject to that, I am not sure that this court would sanction the reopening of everything. I think that we have an obligation to make sure that what is now tried is only what remains to be tried, and that what has already, if it can be made discreet, already discreetly decided, remains decided.

MR KOVATS: My Lord I understand that. What I am trying to say is that I don't mind if the court makes a ruling but I wouldn't hold out any hope that …

LORD JUSTICE CARNWATH: For any agreement, yes …

LORD JUSTICE SEDLEY: Well, except for this, Mr Kovats, that, as you know, as counsel you have independent authority. You don't have to do everything only according to instructions. There comes a point at which you must have instructions. But that point is not generally reached when it comes to matters of this kind which is simply a matter of helping the court and the AIT to get their bearings on what is to happen next. That seems to me eminently a matter for counsel and not a matter of policy at all. So while we have you here and you have an instructing solicitor here I think we can take advantage of it so far as is realistic. In any event the present, the immediate consensus is that, so far as will not interfere with what has now to be done, the findings of fact should stand. And that seems, I think, to me anyway, to be … The difficulty …

LORD JUSTICE MOSES: I mean I just want to be a little careful here because I can see, on the facts of this case, how one could, if the parties agreed, it would be highly desirable to say, well, don't go back over everything up to paragraph 55. I don't (inaudible) points either way and one would then… and it seems to me the real point in this case is the risk assessment. But I think there are big issues and I have said so in other cases about how one applies DK, the sort of principle (inaudible) standing. And we have said recently that that is an issue which I believe should be looked at properly by this court. Certainly not at half past four, half past three in the afternoon so .. But I certainly would very much welcome it if you were able to agree that approach, but if you weren't, I for my part would need a certain amount of argument (inaudible) the appellate court.

LORD JUSTICE SEDLEY: There has got to be a sufficient reservation to enable the issue that is going back to be tried out and not pre-empted. I think that would be everybody's concern.

LORD JUSTICE CARNWATH: I mean if you draw a line at 55 I am very much concerned, speaking for myself, that that is going to be impossible.

LORD JUSTICE SEDLEY: Well we don't want to set an intellectually impossible task for the tribunal. They think we do that often enough anyway.

LORD JUSTICE MOSES: I mean what we are, you know, as I have done in other cases, and maybe it's to do exactly what my Lords said we shouldn't do, is to send it back with an indication that the President should consider it or his nominees should consider it in person and give directions as to how to proceed and that gives both sides

a chance to think about it, not on their feet but actually in a realistic way, assuming that the Secretary of State really wants to go on with it.

MR KOVATS: And that is what I had in mind … When one gets to the first (inaudible) …

LORD JUSTICE SEDLEY: Well you are both content as I understand it that with a remission of the kind that Carnwarth LJ suggests, that is to say the directions as to the terms upon which the remitted hearing is to be conducted, are to be given by the President?

MR KOVATS: Well my Lord can I (inaudible) suggest, if we say that (inaudible) the findings of primary facts will stand and if necessary that could be explained as saying the findings of primary fact include the incidents in which he was mistreated. They also include the finding he grossly exaggerated the interest of the authorities from …

LORD JUSTICE SEDLEY: Do they include the finding that they were only interested in the father?

MR KOVATS: No. Because that is a secondary…that is a finding of secondary fact.

LORD JUSTICE MOSES: I think that is such a difficult distinction to make.

LORD JUSTICE SEDLEY: I think…

LORD JUSTICE MOSES: I think we could say as a general principle that would be our intention but I think we would have to leave it to the President to determine what that meant.

LORD JUSTICE SEDLEY: You see the trouble is that if the President simply makes a determination of the terms, primary factor stands, secondary factor be at large, the tribunal is going to be stumped as well.

MR KOVATS: (inaudible)

LORD JUSTICE SEDLEY: I do think that this is awkward for whoever has to do it. The worst possible situation is that it lands back in the tribunal's lap with it still being unclear what they are to redetermine and what they can't redetermine. That would be …

LORD JUSTICE MOSES: I think that is what is happening, I mean I don't know what people's experience is, but I think that may be one of the consequences of DK that tribunals are having to decide quite difficult issues about where they can draw the line, and on the whole it's by agreement that people sort of get through. I mean I certainly would favour the course that I think that Mr Collins suggests which is sending it back to the President or his nominee to direct as to how it should proceed, but presumably taking account of this discussion that is taking place…

MR KOVATS: I am confident that that is what my instructions would favour because the general policy line is that this court should simply remit it and leave it to the tribunal to decide the scope for remittal.

LORD JUSTICE SEDLEY: Well, I mean, in nine cases out of ten we can be confident that our reasons for remission will make it clear enough what should be left alone and what has to be looked at again. I think this is probably the tenth case and therefore somebody, before the redetermination hearing takes place, if it ever does, has got to say what is at large and what is given, and if that is not going to be us then it has got to be the President or his nominee.

MR KOVATS: Well it may, I don't know whether the court feels it appropriate to make a ruling that the tribunal's finding that the only reason he was mistreated was in order to find out what his father was doing and did not say …I am not inviting the court to do it but …

LORD JUSTICE CARNWATH: I would be very happy for that. You see I would be very happy to draw my line at 52. It is 53 where I am a bit worried. So that you have got your finding that the harassment was due to his relationship with his father as the authorities wished to have information about the father's activities on behalf of the PSK, that's fine, but it's the motive that they find. The last part of 50 and at 53, that is what worries me, because actually, I mean you described it as a secondary finding of fact, and I am not even sure that is right, but I mean the real nub of whatever the lawyers say of what the client fears is, well, we don't … nobody can say what the motive behind torturers is.

MR KOVATS: I think in the light of Sedley LJ (inaudible) a bit robust I could probably then agree that if we stop at the end of paragraph 52 …

LORD JUSTICE SEDLEY: What about the last sentence of paragraph 50?

MR KOVATS: No, I'll keep that, I'll keep that.

LORD JUSTICE CARNWATH: You see as the authorities wish to have information about the father's activities on behalf of the PSK, it seems to be almost the same as the first sentence of 53.

LORD JUSTICE SEDLEY: Well it isn't quite so though. Whether all of this was due to his relationship with his father is different. That is cause and effect. Had it not been for his father, they wouldn't have picked him out. Leaving open the question, what were they now interested in? So that, unless Mr Collins objects, I can see a great deal of practical good sense in drawing a line under paragraph 51 or 52.

MR KOVATS: The reason I want 52 is because 53 in a sense shifts from the past to the future…

LORD JUSTICE SEDLEY: Yes, quite.

LORD JUSTICE CARNWATH: I am with you down to 52.

MR KOVATS: (inaudible) it makes the point, that what it was of past standards, what we assess will happen in the future is nothing …

LORD JUSTICE SEDLEY: Well shall we draw a line? If we draw a line under 52.

MR KOVATS: Yes I think I will go along with that

LORD JUSTICE SEDLEY: Mr Collins?

MR COLLINS: I don't think I have a problem with that, that together with the judgment of this court.

LORD JUSTICE SEDLEY: That makes very good sense and I think probably what we can ask counsel to do, because you have both been extremely realistic and helpful about this, is to draw up a form of order which will reflect this and let me have it through my clerk and we will hopefully just endorse it and make those the terms of remission to the AIT. As to whether it should be Field House or some little (inaudible) emporium…

LORD JUSTICE MOSES: No I mean I think the point as it goes to the President, where he is sitting I don't think anyone minds…

LORD JUSTICE SEDLEY: Alright, so the President will determine who is to hear it. I think that is as it should be. Good. Anything else?

MR COLLINS: Just (inaudible) ask for costs in this matter.

LORD JUSTICE SEDLEY: Yes the appellant will have his costs. Anonymity will be preserved. Indeed I am rather worried about using people's initials because it makes it a doddle to work out who they are, and if you want to apply for some strong form of anonymity, such as XY, then you can, Mr Collins.

LORD JUSTICE CARNWATH: It should be. Let's call it XY.

LORD JUSTICE SEDLEY: I think we will direct that it should be called XY.

LORD JUSTICE MOSES: As long as everyone knows which case it is …

LORD JUSTICE SEDLEY: We are getting to the stage now where there are half a dozen XY (Turkey) cases and another XY (Sudan). It is all rather wretched.

MR KOVATS: My Lord that (inaudible) formally grant my learned friend a… public funding taxation …

LORD JUSTICE SEDLEY: You need a public funding taxation. Yes, you would not have your bill here then, and will you need a detailed assessment order? That goes with the public funding. Well we are very grateful to both of you for your helpful and realistic submissions as always. It makes our task easier.

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