ST (s92(4)(a): meaning of "has made") Turkey [2007] UKAIT 00085

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 15 May 2007

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Jordan
Senior Immigration Judge Grubb

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Miss G Brown, instructed by Irving & Co.
For the Respondent: Mr P Deller, Home Office Presenting Officer

There is no proper ground for giving s 92(4)(a) a narrower meaning that would be suggested by the wording used. A person who has, at any time in the past, made an asylum claim or a human rights claim (within the meaning given to those phrases by s 113) has an in-country right of appeal against any appealable immigration decision.

RULING

1. The appellant, as we shall call him, is a citizen of Turkey. He issued a notice of appeal against the decision of the respondent on 31 March 2006 refusing him leave to enter the United Kingdom. The Immigration Judge decided that he had no right of appeal against that decision from within the United Kingdom. The appellant, who has at all material times been in the United Kingdom, sought and obtained an order for reconsideration. Thus the matter comes before us.

2. These proceedings do, however, present some difficulties of jurisdiction. Because the Immigration Judge's view was that there was no exercisable right of appeal, he was bound by rule 9, read with rule 2 of the Asylum and Immigration Tribunal

(Procedure) Rules 2005 (SI 2005/230) not to accept the notice of appeal and to do nothing other than notify the purported appellant and the respondent of the fact that the Tribunal was not accepting the notice of appeal. If the Immigration Judge had acted as in law he was bound to do, there could have been no reconsideration, because the provisions in ss103A-E of the Nationality, Immigration and Asylum Act 2002 relating to reconsiderations only apply to the reconsideration of the Tribunal's decision *on an appeal*. Further, for the avoidance of doubt, s103A(7)(a) specifically excludes "a procedural ancillary or preliminary decision" from the possibility of reconsideration. The Immigration Judge did not act as he should have done under rule 9. He prepared and signed a document headed "Determination and Reasons" which concludes as follows:

> "(a) I find that the appellant does not have an in-country appeal in respect of his fresh asylum and human rights claim
>
> (b) The appellant's appeal in this respect is dismissed."

3. We do not quite understand what the Immigration Judge thought he was dismissing, but the form of the document is that of a determination dismissing an appeal. It was presumably for that reason that the Senior Immigration Judge who dealt with it was prepared to entertain the application for reconsideration. In the circumstances we do so too. At the very least, if the position is that there is no exercisable right of appeal, the Immigration Judge's determination should be set aside and the appropriate notice should be issued. If, on the other hand, the Immigration Judge was wrong, the appellant has an appeal pending before the Asylum and Immigration Tribunal, which needs to be determined, and in that case his dismissal of it without any consideration of the merits would amount to a material error of law.

4. The principal relevant facts are not in dispute. The appellant entered the United Kingdom on 8 June 1998. He applied for asylum. The Secretary of State allowed that claim to mature in his usual way. The appellant was therefore interviewed some five years after his claim, and on 29 August 2003 his application was refused. The appellant appealed. His appeal was dismissed by an Adjudicator in November 2003 and an application for permission to appeal to the Immigration Appeal Tribunal was refused. On 25 May 2004 the appellant made further representations, which appear not to have been fully considered until March 2006. On 4 March 2005 the appellant made an application for leave to remain as a businessman under the Ankara Agreement. That application is said by the Secretary of State to have been refused on 4 October 2005, but it is difficult to see that any notice of that outcome was given to the appellant then. On 31 March 2006 three documents were served on the appellant. One was a letter giving the reasons for the refusal of his application under the Ankara Agreement. One was a letter dealing with his representations of May 2004. The third was a refusal of leave to enter the United Kingdom. The issue of such a notice to a person who had been in the United Kingdom since 1998 might cause some surprise, and little explanation is provided by the notice itself, of which the opening part reads:

"To: [the appellant]

I therefore refuse you leave to enter the United Kingdom."

5. The position is, however, that the appellant had applied for leave to enter as a refugee on his arrival in 1998 and has never had any leave to be here. Because the appellant's case has not been considered substantively in these proceedings, we do not need to set out the letters in detail, but we do need to indicate their structure. That relating to the Ankara Agreement refers in particular to the fact that the appellant had no entry clearance as a businessman as required by paragraph 205 of the Statement of Changes in Immigration Rules, HC 395, and further asserts that the appellant does not meet the requirements of paragraphs 30, 31 and 32 of the Statement of Changes in Immigration Rules, HC 509, which, for reasons set out in the Tribunal's leading case on the Ankara Agreement SS & Others [2006] UKAIT 00074, is the appropriate set of Immigration Rules preserved for Ankara cases by the standstill clause of the Agreement. The letter runs to some four pages, some of which consist of evidently standard paragraphs.

6. The letter dealing with the representations of May 2004 first of all records the fact that the representations were made, and then summarises the appellant's immigration history and the representations themselves as incorporating a wish to make a fresh claim on the appellant's Alevi faith, his Kurdish ethnicity, his alleged involvement with the PKK and his fear of returning to Turkey as a failed asylum seeker, together with claims under Articles 3 and 8 of the European Convention on Human Rights. The letter continues as follows (some of the omissions are long ones, but we wish to indicate the way in which the letter deals with the circumstances):

> "Paragraph 353 of the Immigration Rules (HC 395, as amended by HC 1112) states that when a human rights or asylum claim has been refused and any appeal relating to that appeal is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content had not already been considered; and taken together with the previously considered material, created a realistically prospect of success, notwithstanding its rejection.
>
> It is noted that the issue of your Kurdish ethnicity was considered in the reasons for refusal letter dated 29/08/03. …
>
> Despite this, further consideration has been given to the [representations]. …
>
> Having carefully considered your case, it is not accepted that you would be subjected to any persecution in Turkey due to your Kurdish ethnicity or your Alevi faith, and no further consideration will therefore be paid to either matter.

…

It is noted that the issue of your alleged involvement with the PKK was previously considered in your reasons for refusal letter, as well as by the adjudicator. … Your account of your alleged involvement with the PKK has not been found credible … . Your case has been carefully considered by two officials acting on behalf of the Secretary of State, as well as an independent special adjudicator and it has been concluded that you do not have a well-founded fear of persecution, either in your home area, or any where else in Turkey.

The statements signed by your paternal cousins have been carefully considered. However, it has been concluded that neither can be treated as credible supporting evidence of your account … accordingly, no further consideration can be paid to either statement.

Your concerns regarding your treatment upon return have also been taken into consideration, particularly with relevance to the GBTS computer system. … There will be no records of your previous alleged detentions, and as your account of escaping from your house during a gunfight between the security forces and the PKK has been found to be not credible, it is not accepted that the Turkish authorities have any interest in you at all.

…

Having carefully considered all of the above points, in conjunction with your claim under Article 3 of the ECHR, it has been concluded that the UK would not be in breach of its obligations under Article 3 of the ECHR and your rights would not be breached upon your return to Turkey. This is confirmed by the adjudicator, … .

The Immigration Service is satisfied that the United Kingdom would not be in breach of its obligations under Article 8 of the ECHR upon your return to Turkey, nor would your rights under Article 8 be breached.

Some points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for refusal, dated 29/08/03, and the appeal determination of 26/11/03.

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

As we have decided not to reverse the decision on the earlier claim and have determined that your submissions do not amount to a fresh claim, you have no further right of appeal."

7. The notice of decision, however, indicates that the appellant has a right of appeal against the refusal of leave to enter but that it cannot be exercised while the appellant is in the United Kingdom "because s92 of the 2002 Act does not apply".

8. We do not need to set that section out in full, because it is common ground that the

appellant's in-country right of appeal depends on subs4(a):

> "92. …
> (1) A person may not appeal under s82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
> …
> (4) This section also applies to an appeal against an immigration decision if the appellant -
> (a) has made an asylum claim, or a human rights claim, while in the United Kingdom … ."

There are definitions in s113 as follows:

> "**113. Interpretation**
> (1) In this Part, unless a contrary intention appears -
> 'asylum claim' means a claim made by a person to the Secretary of State at a place designed by the Secretary of State that to remove the person from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention,
> …
> 'human rights claim' means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights,
> … ."

9. (Both s92 and s113 are subject to amendment by provisions of the Immigration, Asylum and Nationality Act 2006 that have not yet come into force. The prospective amendments to s113 are of some interest in the context of this appeal. The new definitions will be as follows:

> "**113. Interpretation**
> (1) In this Part, unless a contrary intention appears -
> 'asylum claim' –
> (a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, but
> (b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with the immigration rules.
> …
> 'human rights claim' –
> (a) means a claim made by a person that to remove him from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights, but
> (b) does not include a claim which, having regard to a former claim, falls to be disregarded for the purposes of this Part in accordance with

immigration rules."

In this appeal, however, we are concerned with the unamended provisions of those two sections.)

10. Put broadly, the burden of the appellant's case is that he has an in-country right of appeal because he had an undetermined human rights claim, based on the May 2004 representations, at the time of the present decision: or, precisely, that the present decision is a response to representations in May 2004 that had not previously been dealt with. The respondent's position, as set out in the documents to which we have made reference, is that the appellant has no in-country right of appeal because the representations of May 2004 do not amount to a human rights claim for these purposes. In our judgment, neither of those positions is correct.

11. We must start with the words of the Act itself. Looking first at s113, we note that the definition is surprisingly rich. As the Tribunal pointed out in SS & Others Turkey [2006] UKAIT 00074, the requirement that the claim be made to the Secretary of State means that if the only claim is in grounds of appeal, the requirements of s113 are met if the appeal was to an Adjudicator before 4 May 2005 because the appeals process was then that an in-country appeal had to be lodged with the Secretary of State. A claim made only in grounds of appeal to this Tribunal, however, is not lodged with the Secretary of State and cannot therefore meet the requirements of s113. Further, as has been observed on a number of occasions, there do not appear to be any places formally designated for the purposes of s113: it seems clear, however, that the various addresses that the Secretary of State makes available for those intending to lodge asylum or human rights claims must be considered as designated for these purposes. (The requirement that the claim be to the Secretary of State or at any particular place is removed by the prospective amendments to s113.) In the present appeal there is no doubt that any asylum or human rights claims made by the appellant fall within the definitions of such claims in s113.

12. We turn then to s92(4)(a). Is the appellant to be treated as a person who "has made an asylum claim, or a human rights claim while in the United Kingdom"? The literal meaning of those words would appear to be absolutely clear. The literal meaning would, however, encompass not only a person whose asylum or human rights claim is the subject of the appeal, but also (1) a person who, having made such a claim, chooses now not to pursue it but to appeal on other grounds; (2) a person who has made such a claim in the past, had it dealt with, and makes it again; (3) a person who, having made such a claim in the past, does not make it again, but raises completely different reasons for being allowed to stay in the United Kingdom, and appeals against a refusal without raising asylum or human rights issues at all; and even (4) a person who makes such a claim, leaves the United Kingdom, returns and repeats this or makes any other claim. It may well be said that a restriction on in-country rights of appeal must have been intended to have an effect narrower than the literal meaning of the words in s92(4)(a) would

suggest. Circumstance (4) is a particularly glaring example of the type of case that might be regarded as not justifying a right to appeal from within the United Kingdom.

13. In SS & Others, the Tribunal, having concluded that, on their true construction, s113(1) and s92(4)(a) attributed an in-country right of appeal to a person making a human rights claim only in a notice of appeal to an Adjudicator, after a refusal of claims made on a completely different basis, said [at 91]: "We are bound to say that we have reservations … . Whilst that seems to us a wholly unintended consequence of the 2002 Act, we have applied the law as it seems to us to be."

14. We must do the same. There is no doubt that s92(4)(a) could have taken a different form. It could have provided that s92 applies to an appeal made on asylum or human rights grounds by a person in the United Kingdom. It could have provided that the section applied to an appeal against an immigration decision if the appeal related, in whole or in part, to an asylum claim (for the meaning of these words see HH [2007] UKAIT 00036). It could have provided that s92 did not apply to a person who had made no asylum or human rights claims since he last entered the United Kingdom. It does none of these things. In the circumstances, despite the breadth that the literal meaning of the words has, we see little reason to import into them a meaning which would require substantial re-writing, and which would have the effect of restricting an appellant's rights of appeal in a manner not clearly authorised by the Statute.

15. The particular interpretation of s92(4)(a) necessarily implicit in the notice of decision and accompanying letters in this appeal (although, it is fair to say, not strenuously supported by Mr Deller before us) is unattractive for at least three reasons. It appears to be based on the provisions of paragraph 353 of the Immigration Rules, which is as follows:

> "**Fresh claims**
>
> 353. When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
> (i) had not already been considered; and
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
> This paragraph does not apply to claims made overseas."

Paragraph 353 is the one paragraph in Part 12 of the Immigration Rules, entitled "Procedure" (and, if we have understood the effect of numerous changes in the Immigration Rules, Part 12 is placed, for some reason, between Part 11 and Part 11A). Paragraph 353 does indeed deal with procedure: it sets out the process for

dealing with what it calls "further submissions". The starting point for the application of paragraph 353 is that "a human rights or asylum claim has [already] been refused". But that means that, when paragraph 353 applies, the claimant must be a person who has made an asylum or human rights claim. It is difficult to see why the fact that there is a procedure for not treating a *new* claim as a different claim means that the *old* claim is to be disregarded for the purposes of s92(4)(a).

16. The second objection to the Secretary of State's position is that it appears to assume that the amendments made by the 2006 Act to s113 are already in force. We have set out those amendments above, and it is apparent that they exclude from the definition of "asylum claim" and "human rights claim" any "further submissions" which are not treated as a "fresh claim" under paragraph 353 or any successor of that paragraph introduced in connection with the coming into force of the statutory amendments. The fact that those amendments were apparently thought appropriate, ought to require us to exercise considerable caution before taking the view that the unamended provisions bear the same meaning as they will when amended. We have to observe, however, that it is very far from clear that the prospective amendments will have very much effect on the meaning of s92(4)(a). The amendments exclude the possibility of a *repetition* of a claim being treated as an asylum or human rights claim for the purposes of that section; they do not exclude from consideration the *original* claim whose existence is a precondition to the application of the Immigration Rules to which they refer.

17. The third objection to the Secretary of State's position is that it is unnecessary. The 2002 Act provides, in s96, for removal of a right of appeal by certification in cases where the claimant has previously been subject to an appealable immigration decision. The statutory scheme preserves the possibility of preventing clearly unmeritorious repeat appeals: but that is to be achieved by certification rather than by a tendentious reading of s92(4).

18. It does not appear to us that the Secretary of State has established any basis for restricting the meaning of s92(4)(a) to a narrower compass than that of the clear literal meaning of the words used. It follows that a person has, because of that section, an in-country right of an appeal against an immigration decision if he is a person who has, at any time in the past, made an asylum or human rights claim within the meaning of that section whilst in the United Kingdom.

19. The position put by the appellant emphasises the strength of the appellant's claim to have an in-country right of an appeal in the present case, but is, in our judgment, unnecessary. He has an in-country right of appeal not because the immigration decision against which he appeals is a response to the further representations, but because he is a person who has made a human rights claim whilst in the United Kingdom.

20. We need say little more. The Immigration Judge was wrong to conclude that the appellant had no in-country right of appeal. The appellant has such a right, and he

has exercised it. Contrary to the Immigration Judge's view, there was a pending appeal before him. His dismissal of it without considering the merits was a further error of law. Because he did purport to dismiss it, however, he has been deprived of what is essentially a level of appeal, because, by s103A(2)(b), an appeal cannot be reconsidered twice. We shall order that this appeal proceed to full hearing by way of reconsideration.

C M G OCKELTON
DEPUTY PRESIDENT
Date: