Case No: C5/2007/0327

Neutral Citation Number: [2007] EWCA Civ 1535
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/19661/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 5th November 2007

Before:

LORD JUSTICE WARD
LORD JUSTICE BUXTON
and
LORD JUSTICE LAWS

- -

Between:

AB (TURKEY)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr R Fortt (instructed by Messrs Paragon Law) appeared on behalf of the **Appellant**.

Miss S Broadfoot (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Buxton:

1. This is an appeal by Mr AB, who is a citizen of the Republic of Turkey, against a determination of the Asylum and Immigration Tribunal entered on 11 December 2006. That was, in turn, an appeal from a determination of an adjudicator, as he then was, Mr T R P Hollingworth, promulgated on 21 February 2005.

2. It is very painful to have to record that Mr B came to this country on 14 October 1999 and immediately claimed asylum. Eight years later his status still remains uncertain. The reasons for those delays are to some extent apparent on the papers before us. The first part of the period was substantially caused by what appears to have been a serious administrative error in the Secretary of State's department. Some of the later delays are broadly (but not entirely) explicable by the necessary difficulties caused in the judicial system by a number of changes in the law. What can, however, be said (apart from deploring the situation) is that none of the delays are to be laid at the door of Mr B, or of any of the (fairly numerous, as it now is) persons who have advised him.

3. He complains of two errors in Mr Hollingworth's conduct of the case in his determination, neither of which was seen to be such by the Asylum and Immigration Tribunal. Those were as follows. First, a procedural decision by Mr Hollingworth in the course of the hearing before him. As I shall have to explain in somewhat more detail, the appellant's case alleges involvement in Turkey with the PKK, an organisation well known in this jurisdiction, and a number of attacks on him and ill-treatment of him on that ground by the authorities, as a result of which he says he has a well-founded fear of that persecutory attitude being continued should he be returned to Turkey.

4. The form of the proceedings before Mr Hollingworth were, as he describes in paragraph 9 of his determination, that there was in his view no satisfactory statement before him at the opening of the proceedings from the appellant; but he agreed to counsel then representing him (not Mr Fortt, who appears for him today) to perfect the statement, dating it 4 February 2005, and that stood as Mr B's evidence in chief. He was cross examined on one or two matters by the Home Office Presenting Officer. Apparently the adjudicator did not ask him any questions, but he was not challenged in cross examination or asked further about the substance of his case, which is as I have just very briefly summarised it. It is right to say that the Secretary of State had from the first disbelieved Mr B's account as being implausible and unsubstantiated, and the Home Office Presenting Officer gave no indication that that had ceased to be the Secretary of State's position.

5. The hearing proceeded in that form. When counsel came to address the adjudicator about the merits of the case, the adjudicator then indicated that he did not believe the account given in the witness statement. We have no record of the detail in which that indication was given at that stage, but it was given

with sufficient clarity to cause counsel to say that if the adjudicator was concerned about certain aspects of his client's evidence, he would wish to recall his client (who, of course, was still sitting there in court), so that points of difficulty could be put to him. The adjudicator declined to allow that step. The hearing completed, and then when the adjudication was published it became clear that the adjudicator had indeed effectively disbelieved (I think it is fair to say) virtually the whole of Mr B's case. The first complaint made is that it is unfair (indeed, to the extent of being an error of law) for the adjudicator to reach those conclusions, adverse to the appellant, without his having had a chance to be examined upon them, as his counsel requested. That is the first ground of appeal.

6. The second ground of appeal is more detailed. It relates to the handling of a newspaper article that was produced in evidence by the appellant. Part of the appellant's case was and is that the reason or one of the reasons why he was targeted by the authorities was because his family, or part of it, had been identified as PKK sympathisers, and in fact one of his cousins was known to have joined the PKK, and had effectively gone into resistance on their behalf. Part of the appellant's case was and is that that hostility to the family had manifested itself, and in particular in that his brother had in 1994 been murdered by the state authorities, he having had difficulty previously because of his connection or perceived connection with the PKK.

7. The evidence that was said to demonstrate that event -- the attack and killing of the brother by the security forces -- took the form, quite apart from the appellant's assertion to that effect, of a newspaper article describing the events that had occurred. Now, it will be necessary to come in due course to the content of that article and what it did or did not prove, but the complaint that is made about it is this. When an indication was given to the adjudicator that it was sought to adduce such an article, he made a statement in open court, vouched for both by counsel then appearing and by a gentleman who was acting as interpreter, broadly to the effect that he (the adjudicator) did not give much weight to or was not inclined to pay attention to newspaper articles. The complaint is that that indicated bias on his part at an inappropriately early stage, which, as it would seem to be the argument, disqualified him thereafter from making findings about this article, or at least making findings about it adverse to the appellant. In due course, when he gave his determination, the adjudicator did address the article, and did not accept that it established that which the appellant said it established that the brother had been killed by the security forces.

8. The second ground of appeal, therefore, is to do with the mishandling by the adjudicator of the article; and in particular, that he mishandled it because he had what in law was definable bias. I will deal with those points in the order that I have just set them out.

9. I have already summarised the nature of the case put forward by the appellant in his witness statement, which was his evidence in chief. The adjudicator identified that he needed to look first at the basis of the claim; that is to say, that the appellant was targeted because of his family connections and because

of his relationship with the PKK. He explained in a number of respects, both in his initial interviews and in the statement, how he had assisted the PKK. The adjudicator was sceptical both about the extent of his assistance and about the relationship of his cousin with the PKK, which he did not feel was adequately substantiated. Against that background, however, the appellant described four incidents: one in either January or November 1994 (the uncertainty about the date does matter, and I will come back to it -- that is in paragraph 79 of his witness statement); an occasion in July 1997 (witness statement paragraph 17); December 1998, which is paragraph 18 of the witness statement; and June 1999, which is paragraph 19 of his witness statement (that being, it will be noted, a short time before he came to this country). The appellant gave a graphic account in his statement of serious acts of torture, prolonged and aggressive on at least three of those occasions. I do not go into the details of the allegations; if they were in any way accurate, they were certainly deplorable beyond expression, and would clearly indicate a seriously persecutory attitude on the part of the authorities of the state of Turkey. On all of those occasions, as I have said, he was detained for periods up to a week, but then released.

10. The Immigration Judge, as I have said, found really the whole of this account unconvincing. He had a general concern about its general implausibility, but in more detail he could not understand how it could be that if this man was seriously regarded as an adherent of the PKK, which at that time was regarded by the Turkish state as a terrorist organisation, he would have been released, apparently without further formal surveyance, on each occasion. The Immigration Judge did, however, also indicate a significant number of specific difficulties: either inconsistencies, or matters that were unexplained in the account given by the appellant. It is necessary to go through those.

11. The first is the question of the actual date of his detention in 1994. Now it is fair to say that the Immigration Judge drew attention to a number of other discrepancies between the dates given in the SEF form, those given in interview, and those attributed in the witness statement. But for my part, those seem to me to be difficulties not of a central nature, and I do not see that the Immigration Judge placed very great weight upon them. He did, however, place weight upon the fact that in his SEF form the appellant said that he was first detained in November 1994, but in his witness statement he said that that had happened in January. He explained that discrepancy, as he explained a number of other discrepancies, in these terms (paragraph 7):

> "In my Statement of Evidence Form I stated that I was detained by the authorities in November 1994. That was incorrect and an error by my previous solicitor. I was in fact detained in January 1994 and this is what I told my previous solicitors. This was the first time that I was detained".

12. Now that is important, because in paragraph 25 of his determination the adjudicator pointed out that the date of the cousin joining the PKK had been given as 1992; and then said:

> "Although paragraph 5 of his most recent statement contends that he faced problems because of his cousin's relationship (with the PKK) he does not say he was approached by the authorities and condemned because of this."

That is important, because the reality of the appellant's position is that it was not until November 1994, if his SEF form is to be believed, that he was first detained, or January 1994, which is what he said at paragraph 7 of his most recent statement when he blamed his solicitors for making a mistake. A period of between four and five years must therefore have gone by whilst he was engaged in this activity, ostensibly without difficulty.

13. The adjudicator returned to the question of what was the real date in the next paragraph, having pointed out that the appellant had signed the SEF form, saying it was consistent with his instructions, and also pointing out that although he had said in his interview that parts of the SEF form were incorrect, he did not say that of the question of the detention in 1994. The adjudicator continued at the end of his paragraph 26:

> "I therefore find the SEF form was correct as far as this aspect of the Appellant's case is concerned. What has happened is that he has realised it may be more favourable to him to indicate detention in January 1994 as opposed to November which was his original account. This inconsistency undermines his credibility."

14. The next issue that the Immigration Judge had difficulty with was the fact mentioned in paragraph 27 of his determination, that the appellant had not given details of the injuries he suffered as a result of the beating and torture in 1994, simply saying he had gone to see a doctor and received basic treatment. The adjudicator said that he attached some weight to that omission, in connection with the claim to provide a credible account of the first detention.

15. Next, although the appellant had spoken of the detention with his brother in his witness statement at paragraph 11, having said that that had occurred in 1994, the adjudicator at paragraph 29 pointed out that it had not been stated that there were any immediate repercussions from that on the part of the appellant or his family, which the adjudicator would expect to have been the case if the appellant's brother had been seen as an outright supporter of the PKK. Next, at paragraph 31, the adjudicator regarded as an indication of the implausibility of the story that the appellant chose to go back in 1997 to the same village from which he claimed to have fled because of persecution. That was regarded by the adjudicator as something unexplained, and to undermine the appellant's reliability.

16. Next, in paragraph 33 of the Immigration Judge's determination he regarded the whole of the appellant's claims to be linked with the PKK because of the claimed death of his cousin in July 1997 as something upon which he could not act. He was surprised to see that the appellant had said that he does not know the details of the cousin's death. That, he thought, indicated that the appellant was not telling the truth about the connection with the cousin and the PKK, and the persecution of him.

17. And finally, in respect of events in 1999, he regards as incredible the fact that the appellant did not seek medical attention in respect of those injuries, if they occurred. What the appellant had said in paragraph 19 of his witness statement, towards the end of it, was, having said that he was released:

> "I did not seek medical attention again because I was afraid. There were strict checkpoints because the authorities knew the PKK would be around and moving about. I knew that if I went to the doctor, the doctor would have given me pain killers and some medicine. I would not have been allowed to even take these into the village because there was a rationing on medicine also."

18. Accordingly, some explanation had been given of that failure to seek medical attention -- an explanation, however, that the adjudicator said was implausible on its face.

19. The thrust of the complaint is that it was not open in terms of basic fairness, much less of anxious scrutiny, for the adjudicator to have drawn all those conclusions, including conclusions about the honesty of the applicant; most particularly, in regard to the dispute about the date of the 1994 arrest, and also to point to lacunae and implausibilities in the evidence without the appellant having been given an opportunity to explain those matters, and in particular having been given an opportunity to defend his probity.

20. The AIT dealt with that complaint comparatively shortly in paragraph 25 of its determination, by pointing out that it had always been clear that both the Secretary of State and the Home Office Presenting Officer did not concede any part of the appellant's evidence. I think that they emphasised that point because it is fairly clear that before them there were two complaints raised in this respect: first of all, that failure to cross-examine was some sort of concession of the truth of the evidence in chief; and secondly, the complaint I have already indicated, that the treatment was in any event unfair.

21. In well-judged submissions before us this morning, Mr Fortt has made it clear that he does not support the first of those complaints, and he is right not to do so. It is obvious that the case is not conceded simply by not cross-examining the witness. The greater difficulty in this case, however, is that there was really an extensive attack (I think that is the right word) on the evidence by the adjudicator, some part of which could at least potentially to be met by further

evidence from the appellant. Of course, I accept that the appellant had the very significant and general difficulty that the adjudicator pointed to: that the story in itself from start to finish, and leaving aside the details, raised serious questions of plausibility. That is the sort of question that is not particularly well repaired by further examination, which might well simply take the form of argument. But there was sufficient additional concern expressed by the adjudicator in the respects that I have listed in the preceding paragraphs of this judgment to render it necessary that the appellant should have been recalled, at least to explain the significant matters about which the adjudicator was concerned. Whether that took the form of cross-examination, whether it took the form of the adjudicator indicating that he wished to hear further evidence on a number of points -- for instance, about the failure to obtain medical help or about the extent of the injuries in the 1994 event -- would be a matter for the adjudicator himself. This need not have been a long process, but in my judgement fairness and proper scrutiny of the case required it.

22. I am reluctant to extend this process any further, but I fear that on the matters relating to background I do not think that the adjudicator's determination can stand, and I do not think that the way in which it was addressed by the AIT (perhaps understandably, in view of what may have been the emphasis of the case before it) sufficiently meets the difficulty. For my part, therefore, I would think that the case needs to be remitted to the Asylum and Immigration Tribunal in its new form, so that those questions and the evidence of the appellant can be properly tested.

23. I turn to the newspaper article. This is quite short, and it is necessary to read a translation of it in full. It is headed "Taken out of Tractor and Executed" and then reads as follows:

> "[MB] (43) was gunned down by unknown attackers in the Mazgirt district of Dersim. Mr [B]'s house had been raided by special security forces one week ago…[MB] was travelling in his tractor from Mazgirt/Dersim when he was attacked. The father of three was driving towards his village of Dersim and shot by a group of gunmen at 19.30. It is reported that his attackers had laid heavy rocks on the road where he was driving along and shot him when he stopped to remove the rocks out of the way. It is believed that the attackers attempted to set fire to the tractor but the tractor did not catch fire. Mr [B] was shot 3 times. His body was taken to the Ilasi forensic centre for full autopsy. (Sub heading) Special security forces had raided his house. According to local sources, Mr [B]'s house had been raided frequently by special security forces and had been taken to the police station for questioning regarding his alleged connection to the PKK. It has been reported that 3 M-16 bullets have been

> recovered from the scene. M-16 type of rifles is usually used by the special security forces".

I have already said what the adjudicator was reported to have said when that document was originally put in evidence before him.

24. Mr Fortt says that his hostility (if I may use that word) to the idea of newspapers articles as evidence in general is sufficient in itself to establish a case of bias. The AIT was wrong not to make a specific finding as to whether or not there was an appearance of bias in the adjudicator's observation. As Mr Fortt summarised it:

> They should have made a specific finding. Either they thought it did not create an appearance of bias in the estimation of the right thinking person. If so, they would have been wrong. If they thought, as they should have done, that it did create an appearance of bias, then that was sufficient in itself to disqualify the adjudicator's finding as to the effect of the article and as to its status as proof.

25. In making that latter submission Mr Fortt has confused the two broad heads under which questions of bias are considered. The first is what one might call interest bias; that is to say, that the judge has an interest of some sort in the outcome of the case. A very obvious example of that is the Pinochet case. The second sort of case is where the judge forms a premature and unfair view about the merits of the case. The most obvious example of that is what was originally alleged in Porter v McGill [2002] 2 AC 357. In the first type of case, once it is established that the judge has an interest in that sense, or might reasonably be thought by the observer to have an interest, then I accept that that does disqualify him thereafter from considering the case, and this necessarily disqualifies from consideration the conclusions to which he reaches. That is not true of what I would call the subject matter bias, or adjudicatory bias, of the Porter v McGill type, as Porter v McGill itself establishes. Of course, what the House of Lords made clear in Porter v McGill was that one had to look at the whole conduct of the judge in the case. If he had expressed a premature view, one still had to ask whether at the end of the case it is shown that that view had affected the conclusion to which he came to the extent that the conclusion would not be upheld.

26. That, effectively, is how the AIT addressed this particular complaint, and they were right to do so. There was what I think in the end was a side issue, as to whether this report referred to the brother at all. The adjudicator was clearly not particularly happy that it did, but he was content, as was the AIT, to proceed upon the assumption that the report was indeed about the appellant's brother.

27. The adjudicator did not, when he came to give his final determination on this point in paragraph 41 of the determination, say that the newspaper report was not authentic; he said the contrary, as had been accepted by the

Secretary of State. Nor did he say that it was disqualified as evidence just because it was a newspaper report. What he did do was look at it critically. He did not find within the report any sufficient demonstration that this attack on the brother had been perpetrated by the security forces. Now, speaking entirely for myself, had I been taking that decision, I would not have taken the view of it that the adjudicator did; but I find difficulty in saying that it was not open to him at all to say that there is no sufficient demonstration from the newspaper report that the attack had been perpetrated by special forces in Turkey, as opposed to simply criminal elements. As I say, that was not an easy point, but I have difficulty in saying that the adjudicator could not reach the view that he did.

28. That then really left the question of whether there was any other evidence that Mr MB had been killed by the security forces. The only evidence in that regard was the statement of the appellant, and the adjudicator was not prepared to believe the appellant about anything. So he therefore found that it had not been demonstrated that Mr MB had been so killed.

29. The Asylum and Immigration Tribunal concluded that there had been no error of law in the treatment by the adjudicator, but then went on to say, in paragraph 29 of their determination, that even if Mr MB had been killed by the security forces, that would not assist the appellant. They pointed out that since August 2004 four brothers and four sisters of the appellant had been living in Turkey; there was no evidence that any of them had suffered aversely as a consequence of or a collateral element in the death of Mr M; and therefore, even if he had been killed by the authorities, that was no evidence of risk to the appellant on his return to Turkey.

30. Mr Fortt says that that assumption is ill founded because it does not discriminate between the members of the family who had had previous problems with the authorities, and the members of the family, including the women, who had not. He points out that the evidence was, if his client was to be believed, that because of the activities of the cousin, M and this appellant here had been targeted by the authorities in the way that they were. Therefore, if (as the determination on the first part of his appeal requires us to assume for the moment) the adjudicator had been wrong in his handling of the newspaper article, then it would be no sufficient answer to give the answer that was given in paragraph 29 of the AIT's determination.

31. What should therefore happen in this case? I had already indicated that the matter in my view needs to be remitted to the Asylum and Immigration Tribunal, because of what happened at the hearing with regard to the appellant's evidence. I have sufficient uncertainty about whether I am right that the adjudicator was justified in the conclusions that he reached about the death of Mr MB to think that as the matter is being remitted in any event, that question also should be reconsidered by the Asylum and Immigration Tribunal.

32. I would therefore remit the whole of the matter to the Asylum and Immigration Tribunal, expressing the hope that it can really be considered

at an early date, in view of the quite exorbitant length of time this man has already been in this country. I would allow the appeal in those terms.

Lord Justice Ward:

33. I agree that this appeal should be allowed and the whole matter remitted to the Asylum and Immigration Tribunal for it is to be hoped an early determination. I agree with the reasons for this conclusion that have been given by my Lord Buxton LJ, though I should say I have some more difficulty than I think he has in relation to the conclusions of the adjudicator as regards Mr M and the newspaper article.

Lord Justice Laws:

34. I agree that this appeal should be allowed and the matter remitted on all questions. Had it been my decision, like Buxton LJ I might have come to a different view about the meaning of the article, but that must all go back and will be judged without undue weight being placed upon my views on that question. So the appeal is allowed; the matter is remitted for a complete rehearing.

Order: Appeal allowed