OUTER HOUSE, COURT OF SESSION

[2007] CSOH 182

P1396/04

OPINION OF C. J. MacAULAY, Q.C.

Sitting as a Temporary Judge

in the petition of

B G

Petitioner;

for

Judicial Review of

against

(i) a Determination of an Immigration Appeal Adjudicator

and

(ii) the refusal of an application for leave to appeal by an Immigration Appeals Tribunal

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Petitioner: Devlin; Allan MacDougall SCC
Respondent: Drummond, C. Mullin, Office of the Solicitor to the Advocate General

15 November 2007

Introduction

[1] This is an application for judicial review of a determination of the Immigration Appeal Tribunal ("IAT") dated 20 January 2003 refusing leave to appeal against the

determination of an adjudicator dismissing the petitioner's appeal against the decision of the Secretary of State for the Home Department in refusing his application for asylum.

[2] The petitioner (DOB 7 February 1978) is a Turkish national of Kurdish ethnicity. He entered the United Kingdom on 19 January 2001 and claimed asylum on that day in the United Kingdom in terms of the Refugee Convention. His application for asylum was refused on 12 March 2001.

[3] In his appeal to the adjudicator, the petitioner argued that he had a well founded fear of persecution under the 1951 UN Convention Relating to the Status of Refugees ("the Refugee Convention") and that removal would breach his rights under the European Convention on Human Rights ("ECHR").

[4] Parties were agreed that, if the petitioner's challenge against the determination of the IAT was well-founded, I should pronounce an order reducing that determination. It would follow from such an order that the determination of the IAT would be rendered void *ab initio* and the petitioner's appeal would be deemed to be a pending appeal and fall to be reconsidered by another tribunal.

Background

[5] The basis upon which the petitioner sought asylum can be summarised shortly. The petitioner claims to have lived in the village of Derbent in Elbistan in the south of Turkey. He alleged that he had suffered persecution in Turkey because of his involvement with the pro-Kurdish People's Democracy Party ("HABEP") and because he had provided food and shelter to Kurdish guerrillas from the PKK. He claimed that he had been arrested on two occasions, 5 November 1997 and 20 December 2000 and detained for 4 days and 2 days respectively. He also claimed that he had been tortured. In his initial interview record he said that he had been beaten in the vehicle at the time

of his second detention with the butt of riffle and left naked and had cold water poured over him. He also said in that interview that he had been beaten with wooden stakes during that second period of detention. After that second release in December 2000 he returned to his village and three days later the PKK guerrillas arrived at the village and were given food and shelter. In his interview the petitioner also said that the following day, in his absence from his village, soldiers had appeared in the village looking for him. It was after that episode that the petitioner left his village and made his way to Istanbul. Having obtained money from his father he travelled along with his wife by lorry for some 7 to 8 days before arriving in the United Kingdom on 19 January 2001. When asked specifically what he feared would happen to him if he remained in his village he replied by saying that he would have been put in prison and "not be able to get out again".

[6] In the course of the hearing before the adjudicator no witness statement was lodged on behalf of the petitioner, reliance being placed on his evidence at interview. The petitioner at that hearing was represented by a member of the English Bar and she was allowed to lead evidence from the petitioner. That required to be done in Turkish through an interpreter.

[7] The relevant paragraphs of the adjudicator's determination for present purposes are as follows:

> *"21. I turn to consideration of the evidence.*
>
> *22. The Appellant claims to come from the village of Derbent in Elbistan which is in the south of Turkey. He claims to have suffered persecution in Turkey because of his activities with the political party HADEP and because he provided food and shelter to Kurdish guerrillas from the PKK. He claims to have been arrested twice (5 November 1997 and*

20 December 2000) and detained for four days and two days respectively in respect of the latter activity. He claims to have been tortured. He claims to fear persecution from the Turkish authorities on return.

23. *I found the Appellant's claim to lack credibility for the following reasons.*

24. *The CIPU country assessment (R2. Annexe A and paras. 5.108-109) states that HADEP (Halkin Demokrasi Partisi - People's Democracy Party) was founded in 1994 and is a legal Pro-Kurdish nationalist political party which campaigns for greater cultural rights for Kurds and a peaceful solution to the Kurdish issue. Although predominantly supporting the Kurds, it emphasises democratic socialism and a democratic society in Turkey as a whole as its aim. It has never resorted to violence.*

25. *R2. Annexe B states that the PKK (Kurdistan Workers' Party) is an illegal political organisation, which advocates armed struggle inside and outside Turkey, in order to achieve an independent Kurdish state. The PKK's armed operations have included attacks on civilians, on military targets and human rights violations. The Turkish authorities have taken a tough stance against the organisation.*

26. *The Appellant stated in evidence that between the time of his completing his military service (26.7.99) and his second arrest on 20.12.2000, the PKK guerrillas came twice requiring food and shelter, and that they came to his village after his second release on about 22/23.12.2000. He further claimed that between the date of his first*

arrest and the commencement of his military service (November 1997 to March 1998) he was also visited three times by them.

27. *However, the objective evidence (R2. para. 3) shows that in August 1999, the PKK leader, Abdullah Ocalan, called on PKK fighters to end their armed struggle and to withdraw by 1 September 1999 to beyond Turkish borders. The PKK guerrilla forces agreed to cease operations against Turkey. The number of PKK fighters in Turkey, thereafter dramatically decreased and the armed conflict between the government and the PKK effectively came to an end in 1999, with only a few clashes reported thereafter. The PKK was "almost completely inactive during 2000". The Appellant was asked in cross examination why there should still have been PKK guerrillas coming to his village looking for support when they had ceased military operations. The Appellant did not answer this and only stated that they were not just coming to him, but to relatives and other villagers for support.*

28. *Against the background of cessation of armed struggle between the PKK and the Turkish authorities, I did not find plausible without an explanation, which was not provided, the Appellant's claims that the PKK guerrillas had visited the village as many times at the time of and after the ceasefire as they had done when they were actively engaged in armed struggle. The Appellant claimed that Turkish soldiers had arrested him on the second occasion on 20 December 2000 and that it was Turkish soldiers who had come to the village after his release, and caused him to flee. I did not believe this. Without explanation, which was not provided, it was not plausible that, against the background of*

cessation of armed struggle between the PKK and the Turkish authorities, the Turkish authorities would have been sufficiently concerned about the activities of PKK guerrillas to visit the Appellant's village twice in a matter of days in December 2000. The objective evidence also states that in October 2000 the Turkish Armed Forces announced that they had successfully completed their struggle against the PKK and that police and Jandarma would henceforth be taking over any necessary security operations (R2.3.24). Accordingly, it is unlikely that in December 2000, soldiers would have arrested him and then returned to the village a few days after he had been released.

29. *The Appellant claimed for the first time in cross examination that on his second detention, he had actually been charged and released pending a court date. However, he maintained that he had not been told the charges and that he was not released on bail, just released "the normal way". I did not find this believable. The Appellant claimed that the authorities had detained him on 20 December 2000 and tortured him for two days, upon the accusation that he was feeding and sheltering PKK guerrillas. They then decided to charge him. The Appellant claimed not to know what the charges were. However, as his involvement with the PKK was the only matter regarding which he was arrested, it is not unreasonable to suppose that the basis of the charges would be his assistance of terrorists. In that event, it was not credible that they would have released him at all pending trial or, if they release him, it was not credible that he was not required to provide bail. It was not explained why this material part of his account, namely*

his charge and release pending a court date, had never before formed part of his asylum claim. It was not explained why the Appellant had maintained in examination in chief that he had not been charged on the second occasion but been told that the next time he "would be charged and put away", and that he was warned that if he was caught again the authorities would "never leave [him] alone" and would "keep [him] here for good".

[8] The relevant grounds of appeal submitted to the IAT were in the following terms:-

"*4. The Adjudicator's findings on credibility and fact are stated at paragraphs of the determination. In the case of Grine (13868) the Tribunal stated '...a decision which concentrates primarily on findings of credibility for its outcome is in general more likely to be found to be flawed ....In our view it is safer for the adjudicators first to look at the story to see whether if it were true the appeal would succeed and then proceed to examine it against the background of the country in question'. In the case of Mendes HX/70739/94 'the exercise involves an objective assessment of the plausibility of the Appellant's tale. It is set in the scene of the overall background which an adjudicator has drawn to his attention or is aware of ....what is often difficult to avoid, expressly or implicitly, as re-characterising a risk based in perceptions of reasonability and plausibility from the vantage point of the country of adjudication'.*

6. It is submitted that the Adjudicator failed to specify any consistent or plausible findings capable of supporting the Appellant's claim during

the course of extensive cross-examination by the Respondent. The Adjudicator has singularly ignored al the consistent aspects of the Appellant's evidence. It is submitted that from the face of the determination, it cannot be ascertained why the Adjudicator rejected the credibility of the following facts

- *That the Appellant was a supporter of HADEP*
- *The Appellant's involuntary activities in support of HADEP*
- *That the Appellant had been detained on several occasions.*

7. *The Adjudicator makes several references to "I do not believe this" in particular at paragraphs 28 and 31. The Adjudicator's findings and conclusions upon credibility are fundamentally flawed in her references to believability of the Appellant's evidence. It is submitted that her task is not to decide upon the truth as she states but upon reasonable likelihood.*

8. *Paragraph 28 of the determination shows a complete failure by the adjudicator to comprehend the arbitrary and violent way in which power is exercised by the authorities - also the inherent difficulty the Appellant has in giving an account of them. The Tribunal has acknowledged that some applicants will not be able to provide a logical account as to why they are at risk ..."*

The relevant law

[9] There was very little disagreement between the parties as to the legal rules that required to be applied in a case of this kind. It was agreed that in judicial review the normal guidance for the legal challenge of an administrative decision as stated in *Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1

KB 223 was to be applied. However having regard to the decision in *R v Home Secretary, ex p. Bugdaycay* [1987] 1 AC 514 when an administrative decision under challenge is one which may put the applicant's life at risk "the basis of the decision must surely call for the most anxious scrutiny" (per Lord Bridge of Harwich at page 531G). The standard of proof in deciding whether an applicant for asylum had a reasonable fear of prosecution for a Convention reason was also agreed as being whether there was a reasonable degree of likelihood of such a well founded fear. Furthermore, in relation to questions of credibility, there was no significant difference between the parties that an adjudicator when assessing the credibility of an applicant for asylum must adopt a commonsense approach but with sensitivity and that "lack of credibility, on peripheral issues or even on material issues, is not to be made an easy excuse for dismissing a claim by an applicant who comes from a state or situation in which persecution is an established fact of life" (*Asif* v *Secretary of State for the Home Department* 2002 SC 182 per Lord Coulsfield at pages 188-189).

Submissions for the petitioner

[10] Counsel for the petitioner submitted that the IAT erred because no reasonable immigration tribunal could have found that the petitioner had no reasonable prospect of success. At the heart of that submission was his contention that properly considered the adjudicator did not apply the correct standard of proof when determining the petitioner's application. He accepted that in her determination the adjudicator does state the proper standard but he submitted that she did not apply it and that that was evident from the language used. He submitted that the adjudicator's repeated use of the word "believe" and words such as "believable" and "plausible" did not satisfy the reasonable likelihood test. Applying anxious scrutiny it could not be said from the language used that she did in fact apply the correct test. In developing this limb of his

submissions counsel for the petitioner relied upon the decisions in *Chirculescu* v *The Secretary of State for the Home Department* (IAT, unreported, 15 November 1994), *Tiako* v *The Secretary of State for the Home Department* (IAT, unreported, 10 May 1995), *Valenti* v *The Secretary of State for the Home Department* (IAT, unreported, 31 January 1996) and *W321/01A* v *Minister for Immigration and Multicultural Affairs* [2002] FCA 210. He also referred to *Kingori* v *The Secretary of State for the Home Department* [1994] Imm. AR 539 and submitted that that case was distinguishable from the present case because in *Kingori* the adjudicator appeared to have believed nothing that the applicant had put forward whereas here the same could not be said.

[11] In any event counsel for the petitioner argued that the approach taken in *Kingori* was erroneous and inconsistent with what was said in *Karanakaran* v *The Secretary of State* [2000] 3 All ER 449 and in particular what was said by Brook LJ at pages 469-470 that

> *"It would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision maker believes, on what may sometimes be some what fragile evidence, that they probably did not occur."*

[12] So far as the adjudicator's approach to credibility was concerned, Counsel for the petitioner was particularly critical of what she set out in paragraphs 27 and 28 of her determination. Under reference to the CIPU Country Assessment and in particular paragraph 3.24 he submitted that in assessing the background information available the adjudicator had overstated the extent to which the PKK guerrilla forces had ceased their activities in 1999 and 2000. Paragraph 3.24 disclosed that the PKK still claimed the right to fight in self defence and that clashes still took place between the Turkish army and dissident PKK groups. Also, the reference in paragraph 3.24 to the PKK being "almost completely inactive during 2000" implied that some activity was in fact

taking place. The fact that the PKK may have ceased operations did not mean that members of that group would not require food and shelter. Furthermore, there was nothing in the CIPU Country Assessment to suggest that the Turkish army ceased to have any interest in the PKK. The thrust of his attack was the adjudicator had concluded by way of speculation that members of the PKK would not have visited the petitioner's village in circumstances in which it could not be said that the struggle in which they had been engaged upon had been completely finished. Counsel also referred to paragraph 4.46 of the CIPU Country Assessment that:

> *"For the purposes of combating the PKK, the armed forces have some 200,000 troops stationed in the south-east including highly trained commanders."*

[13] A particular point of criticism made by counsel for the petitioner was directed at what was said by the adjudicator in paragraph 28 to the effect that *"Police and Gendarme would **henceforth** be taking over any necessary security operations"*. He submitted that paragraph 3.24 did not say in terms that the security operations would be taken over "henceforth".

[14] So far as what the adjudicator said in paragraph 29 was concerned counsel for the petitioner accepted that the adjudicator was entitled to rely upon the fact that it was only for the first time in cross examination that in relation to his second detention the petitioner claimed that he had been charged and released pending a court date. However, he criticised as speculation that it was not credible that the petitioner would not know what the charges were or that he was not released on bail. He submitted that there was simply no evidence before her upon which to assess the form of charges in Turkey or about bail.

[15] The second main submission advanced by counsel for the petitioner was that the adjudicator had failed to make adequate findings in fact and give adequate reasons

for her decision. He drew attention to the terms of paragraph 18 of the petition as to what findings ought to have been made but he submitted that the "meat" of his submission was whether the adjudicator gave adequate reasons for her decision. He argued that the informed reader was left in a real or substantial doubt regarding the reasons and considerations taken into account. In particular there was no indication as to why it was incredible that the petitioner would not know the precise terms of the charge or why not be released on bail.

[16] The third submission advanced on behalf of the petitioner was that the IAT erred in not concluding that the petitioner's appeal had a real prospect of success. He submitted that the grounds of the appeal before the IAT disclosed *probabalis causa*. In relation to this submission counsel relied upon what he had already said in relation to his other two main submissions.

[17] Counsel for the petitioner concluded his submissions by making some observations as to what the position might be if some of the points he made were successful and some were not. If I was satisfied that the adjudicator had applied the incorrect standard of proof then the decision of the IAT would fall to be reduced. In the main his position was that the approach taken by the adjudicator in paragraphs 28 and 29 was flawed and her ultimate decision could not be disentangled from that flawed approach. He invited me to sustain the second plea-in-law for the petitioner and to reduce the decision of the IAT.

[18] In the course of his submissions counsel for the petitioner also referred to *Campbell* v *Dunoon & Cowal Housing Association Limited* 1992 SLT 1136, *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374, *R* v *Secretary of State for the Environment ex p. Nottingham County Council* [1986] AC 240, *R* v *Chief Constable of Sussex ex p. International Traders Ferry Limited* [1999] 2 AC 418,

R v *Secretary of State for the Home Department ex p. Daly* [2001] 2 WLR 1622, *R (Farrakhan)* v *Secretary of State for the Home Department* [2002] QB 1391, *R* v *Minister of Defence ex p. Smith* (1996) QB 517, *R* v *Secretary of State for the Home Department ex p. Sivakumaran* [1988] AC 958, *Hariri* v *Secretary of State for the Home Department* [2003] EWCA Civ. 807, *Wani* v *Secretary of State for the Home Department* 2005 SLT 875, *Singh* v *Secretary of State for the Home Department* 2000 SC 219, *R* v *Lewisham London Borough Council* [1988] 1 All ER 938, *R* v *Broadcasting Complaints Commission* [1985] 1 QB 1153 and *R* v *Immigration Appeal Tribunal ex p. Shokrollahy* [2000] Imm. AR 580. In the course of his submissions he also made reference to Fordham, *Handbook of Judicial Review* (4th ed.), Symes and Jorro, *Asylum Law and Practice* and MacDonald & Webber, *Immigration Law and Practice*.

[19] In the course of his submissions counsel for the petitioner sought leave to amend the petition by inserting new paragraphs 18 and 19. The main effect of that amendment was to elaborate upon the existing paragraphs 17 and 18. Counsel for the respondent did not object to that proposed amendment and accordingly I allowed the petition to be amended in terms of the minute of amendment.

Submissions on behalf of the respondent

[20] Counsel for the respondent began her submissions by focussing upon Rule 18.4 of the Immigration and Asylum Appeals (Procedure) Rules 2000 and in particular the provision that the IAT shall not be required to consider any grounds of appeal other than those included in the applicant's application. She accepted that that did not mean that the IAT was confined to the grounds of appeal before it but that also obvious points that would have had a strong prospect of success could be entertained. On that issue she referred to *R* v *Secretary of State for the Home Department ex p.*

Robinson 1988 QB 929. She submitted that the grounds of appeal set out in the petition did not properly reflect the grounds of appeal put before the IAT. In the petition, as paragraph 16 discloses, the argument advanced is that the adjudicator applied the wrong standard of proof and she accepted that paragraph 7 in the grounds of appeal before the IAT reflected that particular attack. However she submitted that the petitioner's attack on paragraphs 28 and 29 of the adjudicator's determination as set out at paragraph 17 of the petition and the attack made that the adjudicator failed to make adequate findings as set out in paragraph 18 were not foreshadowed in the grounds of appeal lodged with the IAT and were not readily discernible or obvious points for the IAT to consider.

[21] In relation to the attack made on the adjudicator's use of language such as "believe" and "plausible" counsel for the respondent submitted that it was clear that the adjudicator simply did not believe any aspect of the petitioner's account and that read as a whole she provided perfectly adequate reasons for that conclusion. Under reference *Kingori* v *Secretary of State for the Home Department* she submitted that the standard of proof was not engaged when the petitioner's account was totally rejected as incredible. Furthermore, counsel argued that the adjudicator had properly directed herself on the appropriate standard of proof, in particular in paragraphs 15, 16, 34 and 37 of her determination.

[22] In examining the adjudicator's reasons for concluding the petitioner lacked credibility she submitted that the petitioner's failure to answer in cross examination why PKK guerrillas would come to his village looking for support when they had

ceased military operations was of some importance. The adjudicator was seeking to test the petitioner's account against the background information that she had and he had plainly failed to provide any adequate explanation. It was clear from paragraph 28 of her determination that she did seek to test the petitioner's account against the background evidence, and in the absence of an adequate explanation rejects his evidence. That was, she submitted, a perfectly appropriate approach to take. Also, as the adjudicator set out in paragraph 29, it was plain that the petitioner had changed his account, initially claiming that he had not been charged, and then, in cross examination, maintaining that he had. She also pointed out that the comments made by the adjudicator in paragraphs 30, 31 and 32 and the reasons given by her for not believing the petitioner's account had not been challenged by counsel for the petitioner.

[23] Counsel for the respondent invited me to sustain the third plea-in-law for the respondent and to refuse the prayer of the petition.

[24] In the course of her submissions counsel also made reference to *Bulut* v *Secretary of State for the Home Department* (1999) Imm. AR 210, *Singh* v *Secretary of State for the Home Department* 2000 SC 288, *Wani* v *Secretary of State for the Home Department* 2005 SLT 875, *W321/01A* v *Minister for Immigration and Multicultural Affairs* [2002] FCA 210 and *Valenti* v *Secretary of State for the Home Department* (IAT, unreported, 31 January 1996) *Essen* v *Secretary of State for the Home* Department [2006] CSIH 23 (unreported) and MacDonald & Webber, *Immigration Law and Practice*.

Reply by the petitioner

[25] In his reply counsel for the petitioner dealt in particular with the issue whether what was set out in paragraphs 17 and 18 of the petition as amended was

foreshadowed in the grounds of appeal submitted to the IAT. He submitted these paragraphs of the petition were foreshadowed by paragraphs 5 and 6 of the grounds of appeal. He argued that he had been entitled to raise all the matters that he had raised in his attack on the adjudicator's determination.

Decision

[26] It is perfectly clear from reading the determination of the adjudicator that she simply did not accept as credible the evidence presented to her on behalf of the petitioner. In *Esen* v *Secretary of State for the Home Department* Lord Abernethy, in delivering the Opinion of the Court at paragraph 21, in a passage that draws upon what was said in earlier cases, provides important guidance as to how credibility is to be approached:

> *"Credibility is an issue to be handled with great care and with sensitivity to cultural differences and the very difficult position in which applicants for asylum escaping from persecution often find themselves. But our system of immigration control presupposes that the credibility of an applicant's account has to be judged (Asif* v *Secretary of State for the Home Department 2002 SC 182). Credibility is a question of fact which has been entrusted by Parliament to the adjudicator. The adjudicator is someone specially appointed to hear asylum appeals and has the benefit of training and experience in dealing with asylum-seekers from different societies and cultures. Of course an adjudicator must give his reasons for his assessment. A bare assertion that an applicant's account is implausible is not enough (W321/01A* v *Minister for Immigration and Multicultural Affairs [2002] FCA 210). But an adjudicator is entitled to draw an inference of implausibility if it is based on the evidence he has heard and in coming to his conclusion he is entitled to draw on his*

common sense and his ability, as a practical and informed person, to identify what is or is not plausible (Wani v *Secretary of State for the Home Department 2005 SLT 875)."*

[27] Although the arguments advanced on behalf of the petitioner ranged over a variety of different issues, the critical question in my opinion is whether the adjudicator erred in rejecting as not credible the petitioner's account in her consideration of the relevant background material available to her. In that regard, paragraphs 27 and 28 of her determination are of particular importance to the position adopted by her. I have set those paragraphs out in full at paragraph [7]. It is in these paragraphs that the adjudicator begins to test the credibility and reliability of the petitioner's claims. She relies on section 3 of the CIPU country assessment. Section 3.24 of the CIPU country assessment *inter alia* contains the following information:

"....two days later the PKK presidential council answered his appeal and confirmed that the PKK combatants would indeed cease operations against Turkey. The statement was supported the following day by the People's Liberation Army of Kurdistan (ARGK), the armed wing of the PKK, which confirmed that it would abide by Ocalan's decision, although it claimed the right to fight in self defence if attacked.

The armed conflict between the Government and the PKK effectively came to an end in 1999, and only a few clashes between the Turkish army and dissident PKK groups were reported. In October 2000 the Turkish Armed Forces announced that they had successfully completed their struggle against the PKK; the struggle had reduced to a level which could be taken over by the police and the Jandarma. The PKK was almost completely inactive during

2000, and in 2001 there were, according to the military, only about 45 armed clashes."

[28] Having regard to that information it seems to me that the following conclusions were possible for the adjudicator to draw. Firstly, at the time the petitioner claimed to have been first arrested in 1997 the PKK activities had not ceased. Secondly, as at the time of his claimed second arrest in December 2000 the PKK were "almost completely inactive". That suggests that some PKK activity was still going on. Thirdly, about 45 armed clashes were reported by the military in 2001. Fourthly, although the PKK presidential council had confirmed that PKK combatants would cease operations against Turkey, that was qualified by a statement that the armed wing of the PKK claimed the right to fight in self defence, if attacked.

[29] In giving the adjudicator's determination the anxious scrutiny that I am enjoined to give it, I am of the view that the adjudicator, in an unreasonable way, has understated the degree of activity that might still have been taking place involving the PKK and the Turkish Armed Forces when testing the possible reliability of the petitioner's claims. Contrary to what she states in paragraph 28, in my opinion, it cannot be said that the concerns of the Turkish authorities would have decreased to the extent that they would not continue to retain sufficient concern about the activities of certain members of the PKK. Also, the hostilities may have ceased at a formal level but it is difficult to conclude that the Turkish Government's interest in dissident PKK groups who remained active would not extend to those who provided them with food and shelter. Furthermore, I consider that counsel for the petitioner was correct in saying that the adjudicator had overstated the information provided in the CIPU country assessment when she concluded that the police and Jandarma would "henceforth" take over the security arrangements. She uses that conclusion to find as

not credible the petitioner's account that it was soldiers who arrested him in December 2000 and who subsequently came to his village after his release. The CIPU country assessment does not say in terms that the police and Jandarma had in fact taken over from soldiers as at December 2000 and it is worth noting that the CIPU country assessment in paragraph 4.46 discloses that for the purposes of combating the PKK some 200,000 troops were stationed in the south east of Turkey. That the PKK confirmed that it would act in self defence and that dissident PKK members were not prepared to participate in the ceasefire, suggests that the armed forces may very well have retained an interest and be involved.

[30] In paragraphs 27 and 28 of her determination, the adjudicator places significant reliance on the petitioner's failure to explain why PKK guerrillas would come to his village looking for support "when they had ceased military operations". However, for the reasons I have just put forward in the preceding paragraph, the premise for the question put to the petitioner was not an absolute one as the CIPU country assessment does disclose that some PKK members in fact did remain active after the ceasefire had been announced.

[31] So far as this particular issue is concerned, the question is whether the approach adopted by the adjudicator is one which a reasonable adjudicator would have adopted having regard to the available material, and for the reasons I have set out I consider that the adjudicator failed that particular test. Furthermore, I consider that this was sufficiently raised in the grounds of appeal submitted to the IAT, and in particular by paragraphs 4, 5 and 6. No doubt the challenge as developed by counsel for the petitioner in his submissions before me could have been further developed in the grounds of appeal to the IAT but it does seem to me that challenging the

adjudicator's reliance on the background material provided the IAT with sufficient notice of the nature of challenge being made.

[32] On the other hand, I am satisfied that the attack made by counsel for the petitioner on the adjudicator's reasoning as set out in paragraph 29 of her determination in relation to adjudicator indulging in speculation about what might happen to someone in the petitioner's position if charged and whether or not he would be released on bail, was not foreshadowed in the grounds of appeal to the IAT. Nor do I consider that the challenge made by counsel for the petitioner on the manner in which the adjudicator sought to test the petitioner's credibility on the issues dealt with by her in paragraphs 30-33 of her determination were foreshadowed in the grounds of appeal submitted to the IAT. Furthermore I do not consider that these points were so obvious as to be seized upon by the IAT in the absence of direct challenge in the grounds of appeal.

[33] Although counsel for the petitioner presented a highly detailed submission on the issue of the correct standard of proof and whether the adjudicator had applied the correct standard, in my judgement, that argument only served to cloud what I considered to be the essential question as to whether the adjudicator erred in the approach she took to the factual material in the CIPU country assessment. There is nothing in the language used by the adjudicator to suggest that she did not have in mind the appropriate standard of proof - her simple error that no reasonable adjudicator should have made was to understate the degree of PKK activity that might have existed on the ground when she came to test the petitioner's credibility. But for that error I do not consider that her use of language such as "believe" or "plausible" could be faulted in the context of her determination as a whole.

[34] In dealing with the issues of the standard of proof, and whether the adjudicator failed in not making findings in fact, the decision in the case of *Kingori* featured large in the submissions advanced on behalf of the petitioner. In that case, the applicant, a Ugandan citizen, who had lived for many years in Kenya, had his application for asylum refused by the Secretary of State. On an appeal that eventually made its way to the Court of Appeal, it was argued that the special adjudicator had failed to state the standard of proof he had applied in assessing whether the applicant had a well founded fear of persecution. In delivering the main judgment Glidewell L.J. said at page 544:

> *"In this case the learned judge in the Court below was of course obliged to consider what the adjudicator had said about the credibility of the applicant. It was the whole basis of the adjudicator's decision. While Hutchison J. was not himself finding facts, he was required to consider whether there was material upon which the adjudicator could properly come to the decision he did, as there clearly was. For my part, I agree that there may well be cases in which the precise nature of the standard to which an adjudicator has to direct himself in finding whether there is a reasonably founded fear of persecution becomes material. But when, having heard the applicant, he says in effect, 'I do not believe anything this man says that is material to the question', then questions of standards do not come into it. Whatever standard one applied the answer would still be the same: 'he has not made out this case because I do not believe him'. With a man who starts by coming in on a false passport and goes on maintaining that it is his passport for some time, and then gives the other accounts with their inherent improbability to which the adjudicator has*

referred, there is ample material upon which the adjudicator, who is the tribunal of fact, could properly find that he did not believe him.

It is then submitted that the adjudicator did not set out the issues and therefore his approach was inadequate. Again, it is correct that he did not say in terms, 'I have to decide the following issues'. But he is a special adjudicator doing one job, and one only. He has deciding an asylum application. He had to decide, first of all, whether the facts that he found to the required standard, might be established. Having found that he did not believe what the applicant said, it is quite clear that in relation to the central issue: has he made out his claim to asylum? He was entitled to be satisfied that he had not".

Leggett, L.J. and Sir Michel Kerr agreed.

[35] Counsel for the petitioner submitted that the approach in *Kingori* could not stand in light of what was said in *Karanakaran* v *Secretary of State for the Home Department*. He founded in particular on the following passage in the judgment of Brooke L.J. at page 469-470:

"This approach does no entail the decision-maker (whether the Secretary of State or an adjudicator or the Immigration Appeal Tribunal itself) purporting to find 'prove' facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not

happen (although believing that they probably did) unless it has no real doubt that they did in fact happen.

For the reasons much more fully explained in the Australian cases, when considering whether there is a serious possibility of persecution for a Convention reason if an asylum-seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur".

[36] It does not seem to me that anything that was said in *Karanakaran* v *Secretary of State* undermines the approach taken by Glidewell L.J. in *Kingori*. The passage to which I have just made reference in the preceding paragraph in the judgment of Brooke L.J. is dealing with the thought process that an adjudicator may have to undergo before evidence is accepted or rejected. In *Kingori* the decision-maker had come to the conclusion that the applicant could not be believed on any material aspect of his claim for asylum. That is why Glidewell L.J. is able to say that the question of standard of proof did not arise. In this case, the adjudicator has advanced some detailed reasoning as to why she considered that she could not believe the petitioner. It is hardly surprising, therefore, that in such circumstances she was unable to make any findings on matters that might have been material to the petitioner's claim for asylum.

[37] The critical question is whether the error into which the adjudicator fell when considering the CIPU country assessment demonstrably exercised an influence on her decision on credibility that would now justify interfering with the IAT's refusal to grant leave to appeal. In *R* v *Lewisham London Borough Council* Neill L.J. required to consider an application for the judicial review of a decision by the Borough Council

to adopt a policy of boycotting all Shell products subject to alternative products being available on reasonable terms. He concluded that the decision of the Council had been influenced by an extraneous and impermissible purpose and that that vitiated the decision as a whole even although the Council was entitled to decide that trade with a company should cease because of that company's links with South Africa. The Shell Group's policy towards South Africa was not in fact unlawful. In deciding that the decision should be quashed Neill L.J. said at page 951-952:

> *"But where the two reasons or purposes cannot be disentangled and one of them is bad or where, even though the reasons or purposes can be disentangled the barred reason or purpose demonstrably exerted a substantial influence on the relevant decision the Court can interfere to quash the decision. This proposition is recognised in the authorities referred to by May L.J. in the Broadcasting Complaints Case and by that decision itself. Indeed, on this aspect of the case, the principles of law are not in dispute."*

I consider that to be the correct approach. In my opinion it is apparent from the adjudicator's approach in assessing the petitioner's credibility that she does regard as significant the inconsistencies she considered went to undermine his account as tested against her interpretation of the CIPU country assessment. She begins her analysis of the petitioner's credibility by deciding that the petitioner's account when so tested was not credible, and although she advances other reasons which have not been competently challenged, or challenged at all, I do not consider that her flawed approach at the outset of her analysis of credibility can be severed from the rest of her reasoning so as to leave her ultimate conclusion untainted and intact.

Conclusion

[36] In the circumstances I am satisfied that the IAT erred in law in rejecting as not

arguable the petitioner's challenge to the adjudicator's reasoning on credibility and accordingly I shall uphold the petitioner's second plea-in-law to the extent of granting decree of reduction of the IAT's determination dated 20 January 2003.