CO/1832/2006

Neutral Citation Number: [2008] EWHC 244 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 28th January 2008

B E F O R E:

HIS HONOUR JUDGE MACKIE QC
(sitting as a deputy judge of the High Court)

- -

THE QUEEN ON THE APPLICATION OF OKKES BAYDAK
Claimant

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

- -

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Tel No: 020 7404 1400 Fax No: 020 7831 8838
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Ms R Baruah (instructed by Messrs Trott & Gentry, London N1 8EG) appeared on behalf of the **Claimant**
Mr P Patel (instructed by Treasury Solicitor, London WC2B 4TS) appeared on behalf of the **Defendant**

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J U D G M E N T

1. JUDGE MACKIE: This is an application for judicial review of a decision by the Secretary of State refusing to grant a fresh claim for asylum for reasons set out in a letter dated 23rd February 2006.

2. The brief background is as follows. The claimant came to the United Kingdom in February 2004 and claimed asylum within a couple of days. His asylum claim was refused on 1st March, and his appeal was in turn refused on 18th May 2004. His subsequent appeal to the Immigration Appeal Tribunal was refused on 30th July 2004, and he made a fresh claim for asylum on 9th February and, as I say, that was refused on 23rd February.

3. An application for permission to apply for judicial review was refused by Gibbs J on 15th May 2006, but was granted following an oral hearing before Mr Rabinder Singh QC, sitting as a deputy High Court judge, on 4th August.

4. The facts of the claimant's case are not greatly in dispute and are set out in the adjudicator's determination. The adjudicator found the claimant to be a credible witness on all material matters. The claimant is of Kurdish ethnicity and was a low-level DEHAP supporter. His father was detained by the local gendarmerie in 1996 and 1997 and was severely ill-treated. His father was accused and interrogated about a connection with the PKK.

5. The claimant was a supporter of HADEP. He was stopped in early 2000, in circumstances to which the adjudicator refers. He was ill-treated. For example, he was slapped and punched. He was detained and tortured in March 2002, being subjected to high-pressure hosing with cold water and beatings with what he felt were truncheons and sticks. He was again detained in September 2003 and again in January 2004. On that occasion he was asked to be an informer. He was again subjected to torture. The claimant says that he was not prepared to act as an informer and so fled to the United Kingdom.

6. The adjudicator set out the conclusions which he reached on the facts, essentially accepting the evidence of the claimant. But then he carried out the assessment, which has understandably been the centre of this application. He considered the question of past persecution, weighed up the considerations in the balance and found that, when considered in the round, the harassment which the claimant had suffered was of a nature and degree sufficient to constitute persecution under the Convention, by reason of his actual or imputed political opinions.

7. The adjudicator then considered the matter of persecution or severe ill-treatment in the future, and said this:

> "(1): ON ONE SIDE OF THE SCALES:
>
> (a) The Appellant was detained and severely ill-treated on three occasions as previously found, the last being in January 2004; but released without charge.
>
> (b) He was released from his last detention in early 2004 on

condition that [he] would become an informer.

(c) He left Turkey illegally.

2: ON THE OTHER SIDE OF THE SCALES:

(a) The Appellant was not regularly or routinely detained by the authorities.

(b) After each of his detentions he was released without charge.

(c) Since arriving in the UK in early 2004, the Appellant has not participated in any political or other activities which would suggest that he is opposed to the Government of TURKEY or which would bring him to the adverse attention of that government.

(d) The Appellant does not have a criminal conviction or criminal record nor (as far as the evidence discloses) are any of his relatives so affected.

(e) The Turkish authorities do not persecute returned failed asylum seekers simply because they are asylum seekers.

(f) The Appellant comes from an area where the Kurds form only about 20 per cent of the population.

(g) The Appellant was a low level HADEP then DEHAP supporter.

(h) As far as the evidence discloses DEHAP remains a legal organisation in Turkey.

(i) It is unlikely that the police or security authorities would wish to interrogate the Appellant solely or mainly because he is known to be a DEHAP supporter.

(j) On arrival in Turkey, returned asylum seekers are not routinely abused during initial questioning.

(k) It is not likely that Turkey's GBTS system will show the Appellant to be of any interest to the authorities.

(l) There is not normally a real risk that there would be routinely handed over to the Anti-terrorist branch for questioning on arrival in Turkey returned asylum seekers from the Gaziantep area who are discovered to have been low level supporters of HADEP (such as this Appellant).

(m) There is NOT a real risk that this Appellant will be handed over to the Anti-Terror branch for interrogation.

(n) The Appellant has the opportunity to flee to other parts of Turkey where he is unknown to local gendarmes and where it is unlikely his past history would be known to the authorities."

8. The adjudicator then goes on to conclude, at paragraph 13.3:

> "For the foregoing reasons and from the evidence in the round I find that OBJECTIVELY the Appellant has FAILED to prove to the required standard that he has a well-founded fear of persecution by the Turkish state or its agents if forcibly returned there."

9. In paragraph 14, when considering internal flight and returnability regarding the Refugee Convention, the adjudicator says this:

> "14.1: The question of internal flight only arises when a claimant has a well founded fear of persecution in his/her own home area. If he/she has no such fear the possibility of his/her movement (internal flight) elsewhere does not arise.
>
> 14.2: I have found that the Appellant does NOT have a well-founded fear of persecution in the home territory if forcibly returned there. Consequently the issue of internal flight; and the related issue of undue harshness for internal flight do not arise."

The adjudicator then goes on with questions of ability to move elsewhere, which are irrelevant to this appeal.

10. Before turning to the basis upon which the appeal is brought by counsel for the claimant, Mr Baydak, I should remind myself of the legal issue which arises. There has been no controversy about the relevant case law and Rule 353 of the Immigration Rules, but it is just helpful if I remind myself of Rule 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."

11. The relevant case law, as I say, is not in dispute. To save extensive citation, I simply remind myself of the questions posed by Buxton LJ in WM (Congo) v Secretary of State for the Home Department [2006] EWCA Civ 1495:

"11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return ... Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny?."

12. The essence of the case, ably presented by the claimant's counsel, is that the adjudicator's finding that the claimant's background would not be information that would come to light at border control at Istanbul Airport, or some other airport, does not now accord with the written concessions and the evidence and findings of the Tribunal in the country guidance case of IK (Returnees - Records - IFA) Turkey CG [2004] UKIAT 00312. The fresh evidence is the material now to be found within the case.

13. Before turning to the competing submissions, I will summarise briefly the relevant parts of this important and necessarily detailed case. The case is appealed under IK. The decision, after setting out the background and the risk factors identified in the case of A (Turkey) CG [2003] UKIAT 00034, turns to a passage headed, "Subsequent Developments in the Country Guidance of the Tribunal." The decision refers to new evidence emerging about the scope of the records held on a system known as GBTS, and states that it is going to go on to review that matter in light of decisions, in particular the decision HO, in which conclusions are reached which I shall mention shortly, about the maintenance of records.

14. Having considered the more and greater material available, at paragraph 62 the decision sets out its conclusions from the evidence about the GBTS and other information systems available and about the border control available, about the NUFUS records, about judicial records and about Tab records, and it reaches conclusions. Rather than set out those conclusions about the records from the text, I take the relevant part of the summary of generic conclusions, at paragraph 133:

"1. The evidence of Mr Aydin ... accurately describes the defined and limited ambit of the computerised GBT system. It comprises only outstanding arrest warrants, previous arrests, restrictions on travel abroad, possible draft evasion, refusal to perform military service and tax arrears. 'Arrests' as comprised in the GBTS require some court intervention, and must be distinguished from 'detentions' by the security forces followed by release without charge. The GBTS is fairly widely accessible and is in particular available to the border police at booths in Istanbul airport, and elsewhere in Turkey to the security forces.

2. In addition, there is border control information collated by the national police ... recording past legal arrivals and departures of Turkish citizens, and information about people prohibited from entering Turkey as a result

of their activities abroad, collated by MIT."

15. The conclusions go on to refer also to the Judicial Record Directorate keeping records and to the NUFUS registration system. The Tribunal went on to say this, at 133(5):

> "5. If a person is held for questioning either in the airport police station after arrival or subsequently elsewhere in Turkey and the situation justifies it, then some additional inquiry could be made of the authorities in his local area about him, where more extensive records may be kept either manually or on computer. Also, if the circumstances so justify, an enquiry could be made of the anti terror police or MIT to see if an individual is of material interest to them.
>
> 6. If there is a material entry in the GBTS or in the border control information, or if a returnee is travelling on a one-way emergency travel document, then there is a reasonable likelihood that he will be identifiable as a failed asylum seeker and could be sent to the airport police station for further investigation."

16. Returning to the decision, the Tribunal concludes that the information systems appear to be more sophisticated than had been found to be the case previously. The Tribunal says this:

> "78. On this basis, we consider that the starting point in any enquiry into risk on return should normally begin, not with the airport on return but with whether the claimant would be at any real risk of persecution or a breach of Article 3 in his home area as a consequence of his material history there. If the answer to that is 'no', then the claim cannot normally succeed, unless of course the risk arises from or is aggravated by other factors, such as his material activities abroad or in other parts of Turkey. Any real risk would arise only from a person's material history ... and this history will in most normal circumstances be at its most extensive in the individual's home area. If on the other hand the answer to that question is 'yes', then the separate question of internal relocation elsewhere in Turkey (and the question of risk of return to Istanbul airport which turns on similar principles) has to be considered on the basis of whether there are particular factors in the home area creating greater risk of ill-treatment there, that would not give rise to the same degree of risk at the airport or elsewhere. We shall return to this subject later."

17. The decision then goes on to consider whether or not the guidance of the Tribunal in A requires review in the light of subsequent developments, and concludes that it is premature for that to happen.

18. Returning to the summary of generic conclusions, paragraphs 12 and 13 read as follows:

> "12. The proper course in assessing the risk for a returnee is normally to decide first whether he has in fact a well founded fear of persecution in his home area based upon a case sensitive assessment of the facts in the

context of an analysis of the risk factors described in A (Turkey). If he does not then he is unlikely to be of any real risk anywhere in Turkey.

13. The risk to a specific individual in most circumstances will be at its highest in his home area for a variety of reasons, and particularly if it is located in the areas of conflict in the south and east of Turkey. Conversely the differential nature of the risk outside that area may be sufficient to mean that the individual would not be at real risk of persecution by the state or its agencies elsewhere in Turkey, even if they were made aware of the thrust of the information maintained in his home area by telephone or fax enquiry from the airport police station or elsewhere, or by a transfer of at least some of the information to a new home area on registration with the local Mukhtar there. Internal relocation may well therefore be viable, notwithstanding the need for registration in the new area. The issue is whether any individual's material history would be reasonably likely to lead to persecution outside his home area."

19. Against that background, the claimant submits that the fresh evidence that merits reconsideration in this case is what counsel submits is the greatly increased risk upon return at Istanbul airport, which one sees from looking at the risk factors set out in IK. Counsel contrasts the case of O and that of A with IK. She submits that what happened in IK was that O was withdrawn as a country guidance case, as indeed it specifically was, and A was restored as a country guidance case, although it does seem to me, when one looks at the test before the adjudicator and the other cases, A never really went away.

20. What counsel focuses on is the issue of what evidence regarding failed asylum seekers would be available to the Turkish authorities at Istanbul airport when they were returned. She contrasts the view of O (Turkey), which was before the adjudicator, with the material now available, in particular in paragraphs 66, 75, 76, 77 and 82 of IK, and points to the factor that if a returnee is travelling on a one-way emergency travel document or there is no border control record of illegal departure from Turkey, then there is a reasonable likelihood that he will be identifiable a failed asylum seeker and could be sent to the airport police for further investigation. That is a real risk. Her client being a truthful man, he could not be expected to lie about his background. As a consequence, the risks which he faces at the airport are of an altogether different scope than the adjudicator understandably had in mind, guided (as he was at that point) by O (Turkey). There has to be a proper assessment of the increased risk of information about her client being available to those at the airport. She says that that is a reason why this fresh evidence requires the matter to be properly re-examined. Miss Baruah submits that the information about what happens at the airport is of itself material which points to a greatly increased risk, which the adjudicator could not have had in mind and did not.

21. The submission made on behalf of the Secretary of State is that the Secretary of State was entitled to conclude that the new material would not create a realistic prospect of success given the findings of the adjudicator, first, that the claimant would not be at risk in his home area, secondly, that the claimant would not be handed over to the anti-terror

police at the airport and, thirdly, in any event the claimant would be able to relocate within Turkey safely. What is submitted on behalf of the Secretary of State is that IK, in essence, does this. First, it states that the focus of the assessment of risk should start in the home area rather than at the airport. Secondly, the information available to the authorities at the airport and elsewhere is potentially greater than had been considered to be the case hitherto, and that is accepted. It is submitted by Mr Patel that the Immigration Appeal Tribunal concluded that risk should be assessed as a cumulative exercise weighing up individual risk factors set out in A, that the exercise was properly carried out by the adjudicator and that it was upon that assessment that he came to the conclusions which he did. He properly concluded that the claimant, a low-level supporter of DEHAP, from an area in which the Kurdish population was a minority, would not be of interest to the authorities at the airport as a separatist on his return to Turkey.

22. As I said at the outset, the submissions made on behalf of the claimant are attractive, but are convincing only when one looks at particular passages in IK and not at others or the effect of this case as a whole. The decision in IK certainly replaces HO. So far as HO addressed the information systems available to those receiving asylum seekers at the airport, it is now seen to give a picture too benevolent for a returning asylum seeker.

23. But as IK makes clear, the proper course is to decide, first, whether there is a well-founded fear of persecution in the claimant's home area based on a case-sensitive assessment of the facts in the context of an analysis of the risk factors described in A. Well the adjudicator carried out precisely that case sensitive assessment of facts and reached the considered and explicit conclusion that he did not have such a well-founded fear of persecution. If one follows the guidance in IK then the next stage is the last sentence at 12, "If he does not then he is unlikely to be of any real risk anywhere in Turkey." So it would follow from IK that the claimant would be unlikely to be at any real risk anywhere in Turkey. Paragraph 13, as I say, emphasises the reasons why the risk is going to be at its highest in the home area and has in mind, it seems to me, matters like the airport because it expressly says in paragraph 13 "even if they were made aware of the thrust of the information maintained in his home area by telephone or fax enquiry from the airport police station or elsewhere". Where the answer to the first question, on the approach set out in IK, is "no", one does not need to move on to consider the other matters.

24. As part of the argument from counsel, I was passed a decision of the Court of Appeal (a court comprising of Mummery, Lloyd and Toulson LJJ) in the case of MT (Turkey) dated 2nd November 2007, [2007] EWCA Civ 1397. In that case, the successful appellant was someone whom the judge had accepted, in view of his past history, faced a real risk that he would suffer persecution and Article 3 mistreatment on return to his home area. It followed that the answer, as it were, to the first question was "yes" and it was therefore vital to move on to answer the other questions, and the approach in IK is then followed by the Court of Appeal, see paragraph 27:

> "27. There will be no reopening of the issue of whether the appellant would face risk of persecution or Article 3 mistreatment in his own home area. The sole issue for reconsideration is whether, upon the facts found

> by the immigration judge, and on the basis that he would face a risk of persecution or Article 3 mistreatment if returned to his home area, he nevertheless could return safely to Turkey. There will be two limbs to that consideration: the first will be what real risk he would face at the airport; and the second aspect would be what real risk he would be exposed to if he passed through the airport stage safely."

25. As I have already observed, unlike the case of the appellant in MT, the claimant in this case does not face persecution or Article 3 mistreatment in his own home area, as the adjudicator found, so it is then unnecessary to move on to the next two questions.

26. If I had had to move on to the second question (as the Court of Appeal put it "the airport stage"), then the submissions made on behalf of the claimant in this case would have had much greater merit.

27. It follows that in my judgment the Secretary of State was acting entirely within the scope of her discretion and acting lawfully in concluding that there was no realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant would be exposed to a real risk of persecution on return.

28. In those circumstances, this application is refused.

29. MS BARUAH: My Lord, the claimant is legally aided and I am instructed to apply for leave to appeal, my Lord.

30. JUDGE MACKIE: Very well.

31. MS BARUAH: Thank you.

32. MR PATEL: My Lord, I am asked to apply for costs, whether it is enforced is another matter. But for the record the Secretary of State asks for her costs.

33. JUDGE MACKIE: In principle you are entitled to your costs, but if he is legally aided then --

34. MR PATEL: My Lord, that is a separate matter. But in terms of the order....

35. JUDGE MACKIE: In principle you are entitled to your costs.

36. MR PATEL: Thank you.

37. MS BARUAH: My Lord, if I could have legal aid assessment?

38. JUDGE MACKIE: Yes, of course. Anything else?

39. MS BARUAH: Just in relation to the leave application. I presume your Lordship....

40. JUDGE MACKIE: In relation to...?

41. MS BARUAH: Leave to appeal, my Lord.

42. JUDGE MACKIE: You want leave to appeal to the Court of Appeal?

43. MS BARUAH: Yes, my Lord.

44. JUDGE MACKIE: On what basis?

45. MS BARUAH: My Lord, in relation to the judgment of the adjudicator in respect of his consideration of the GBTS system and thereafter his consideration — if your Lordship bears with me a moment I will just find the relevant paragraph. In respect of the consideration of the risk factors after paragraph 13.4(k), when considering whether the claimant would appear on any other system based (inaudible) that would place him at risk.

46. JUDGE MACKIE: Sorry, what you have to do is outline some reason why I have got it wrong. What do you say?

47. MS BARUAH: My Lord, I am simply saying that in relation to the home risk — the risk within the home area, that whilst of course we are stuck with the judgment in so far as it was appealed and leave to appeal was refused, and indeed it was renewed before the High Court and permission was refused in respect of that, there are the findings of credibility, as it were. We say that, notwithstanding the finding that he would not be at risk in his home area, he would be flagged up for questioning at Istanbul Airport and he would be transferred to the airport police station. We say that there is a failure of the immigration judge to properly consider that issue when looking at the question of the other side of the scales, at paragraph 13.4(2)(k) of his determination, although I accept what your Lordship has to say in relation to the actual finding of fact that was made that he would not be at risk in his home area. Clearly in respect of the fresh claim I cannot do anything about that my Lord, that was a past finding that was made in 2004.

48. JUDGE MACKIE: Your application for permission to appeal appears to relate to the substance of the asylum claim, and it does not seem to be an appeal against my refusal to grant judicial review. All I can do is grant or refuse an application for permission to appeal to the Court of Appeal.

49. I am grateful for your submissions. I am going to refuse your application for permission to appeal on the grounds that there is no reasonable prospect of my decision being reversed, following, as I have IK and the approach to IK adopted by the Court of Appeal as recently as November 2007.

50. MS BARUAH: So be it, my Lord.

51. JUDGE MACKIE: Thank you very much.