Case No: C4/2008/2477

Neutral Citation Number: [2009] EWCA Civ 660
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(HIS HONOUR JUDGE INGLIS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 28th April 2009

Before:
LORD JUSTICE WALLER
(VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION))
LORD JUSTICE LONGMORE
and
LORD JUSTICE RICHARDS

- -

Between:

THE QUEEN ON THE APPLICATION OF K **Appellant**

- and -

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

- -

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Mr A Mackenzie (instructed by Messrs Lawrence Lupin Sols) appeared on behalf of the **Appellant**.
Mr P Patel (instructed by Treasury Sols) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Richards:

1. This is an appeal against a decision of HHJ Inglis sitting as a deputy High Court judge in the Administrative Court whereby he dismissed the appellant's claim for judicial review of a decision of the Secretary of State refusing to treat representations on behalf of the appellant as a fresh human rights claim. The appeal is brought with permission granted by the judge himself.

2. The appellant is a 36 year old Turkish national of Kurdish ethnicity. He arrived in the United Kingdom in November 2001 and applied unsuccessfully for asylum. An appeal on asylum and human rights grounds was dismissed by an adjudicator in April 2003. The appellant's case at that time was based on an alleged fear of a vendetta against him and his family by three families in the village in which he lived.

3. Part of his evidence was that the three families had complained in 1995 that he and his family were PKK sympathisers, as a result of which he was detained for a short period and then kept under scrutiny. He was not in fact a PKK sympathiser and nothing was found against him. Subsequently, it would seem in 2001, the families made a further complaint against him, accusing him of smuggling weapons to the PKK. He did in fact have weapons at his house, or at least he had an unlicensed gun, but they were nothing to do with assisting the PKK. His evidence was that the police came to his house, he was arrested

and the weapons were confiscated. He was held in detention for four days and was interrogated in the anti-terror headquarters at Aksaray.

4. In his witness statement he described, as follows, the treatment he received on that occasion:

> "I was beaten and questioned. They wanted to know if I was a member of an organisation. They said if I told them I was I would be released. I was electrocuted. I was taken to a tiled room. I was told to undress. It looked like a bathroom. I was handcuffed and secured to the floor. They put a metal bolt on me. It went across my waist and between my legs. They then pressed a button and I received electricity."

Following that, he was released and taken to court and was subsequently remanded in custody in a probation centre, but there was no further allegation of ill-treatment. He was convicted on a charge of possessing illegal weapons and was sentenced to four years and two months' imprisonment together with a fine. He was released pending an appeal against sentence. While he was in Istanbul awaiting the appeal he was given help to flee the country and come to the United Kingdom.

5. The adjudicator found that by the appellant's own evidence the authorities did not suspect him of involvement with the PKK and that the police had found no evidence to support PKK involvement. As to his claim to fear persecution from the three families, even if his story was credible (which the adjudicator did not believe it to be), internal relocation was available to him and there was

sufficiency of protection. The sentence passed on him for possession of the weapon was not unduly severe.

6. In concluding paragraphs concerning the position on return, the adjudicator observed that the appellant had been placed on reporting restrictions and did face charges and that "there was some evidence of ill-treatment but none required hospitalisation". He went on to state that the appellant would not face any harm or ill-treatment based on association with the PKK, and he added a little later that it was clear that the appellant's past arrest had not led to the authorities viewing him as a suspected terrorist and there was no evidence that he would be seen as a political activist. He said that the computer records would be checked at point of entry and they were likely to show that the appellant had an outstanding conviction, which was subject to appeal. The appellant, who did not have a valid passport, would also be treated as a failed asylum seeker. He was likely to be detained for interrogation. The questioning might be unpleasant but this was not likely to amount to persecution or to inhuman or degrading treatment. On the information available it was unlikely that he would be handed over to the anti-terrorist branch. That was the basis on which the adjudicator dismissed both the asylum and the human rights claims.

7. In March 2006 the solicitors then acting for the appellant sought to make a fresh claim for asylum. The Secretary of State's rejection of that attempt led to the present judicial review proceedings. In practice, however, the focus of the proceedings changed over time as further representations were made on

the appellant's behalf and led to further refusal decisions. The matter with which HHJ Inglis was concerned and to which the present appeal relates is a letter of representations submitting a medical report by Dr M G Wright in September 2006, and the Secretary of State's refusal by letter of 1 November 2006 to accept the evidence of Dr Wright as giving rise to a fresh human rights claim.

8. Dr Wright is a consultant rheumatologist and an expert on soft tissue injuries. His observations on the scars revealed in the course of his medical examination of the appellant included the following:

> "On the left side of the shaft of the penis there was a well-healed scar measuring 3cm in length.
>
> On the glans penis there was a small circular indentation scar, which was depigmented.
>
> On the right side of the penis on the shaft there was a linear scar measuring 1cm with a broadening of that scar anteriorly."

9. In his comments Dr Wright stated that the appellant had described a period of detention in which he was beaten and tortured by the application of electric shocks. In the doctor's views the scars on the penis were compatible with that history; he was unable to think of any other obvious cause for the scars, which did not appear to have been caused by surgery or disease. In addition to the scars on the penis, Dr Wright referred to certain other matters which are not relied upon and I need not detail.

10. The submissions based on Dr Wright's report were considered by the Secretary of State by reference to the relevant test in paragraph 353 of the Immigration Rules, which provides as follows in relation to fresh claims:

> "353. When a human rights or asylum claim has been refused and any appeal relating to that appeal is no longer pending, the decision-maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content (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 decision letter of 1 November 2006 dealt with the medical report in a section which the judge described as "discursive", charitably stating that this may have been prompted by the fact that another expert report, irrelevant to the judicial review proceedings, was also being considered in the letter. The most pertinent passages of the decision letter are these.

12. At paragraphs 27-28 the letter dismissed Dr Wright's report on the basis that the account of ill-treatment given by the appellant to the doctor was inconsistent with that given by him in his original witness statement (where, for example, he made no mention of any injury to his penis as a result of the ill-treatment he suffered). The letter referred at paragraph 29 to objective information concerning steps taken in the Turkish penal code and code of criminal procedure to strengthen provisions against torture and ill-treatment, and it stated in paragraph 30 that it was therefore not accepted that the

appellant would be persecuted or subject to ill-treatment by the Turkish authorities. Paragraph 31 cited passages from the adjudicator's decision showing the absence of any connection between the appellant and the PKK and other passages relevant to the absence of risk on return.

13. Paragraph 35 referred to the assertion that the evidence of individualised past persecution is generally sufficient, though not a mandatory means of establishing prospective risk, and to the contention that the evidence of torture suffered by the appellant while in detention was itself an indication of risk of persecution on return. It noted that the adjudicator did not accept that the appellant was persecuted, and it distinguished the case of IK (Returnees - Records - IFA) Turkey; CG [2004] UKIAT 00312 on the basis that, unlike the appellant's case, IK concerned risk as a perceived PKK sympathiser.

14. Paragraph 38 referred to the claim that the appellant's prosecution had led him to be tortured while in detention pending trial and to criticisms of the sentence of the legal system -- criticisms which it rejected. At paragraphs 40-43 the letter pointed out that the appellant had admitted to a crime, having been found in possession of illegal weapons, and referred to a passage in the adjudicator's decision which stated that the appellant had a reason for fleeing in that he did not want to go to prison for his criminal activities. It went on to say that the adjudicator took into account in addition the fact that the appellant would be checked at point of entry. The records were likely to show an outstanding conviction and he would be treated as a failed asylum seeker. It was likely he would be detained for interrogation; he would have to serve his prison

sentence on return. The letter stated also that the objective information suggested that the Turkish authorities did not condone ill-treatment of prisoners and had put in place measures and procedures to combat what were diminishing problems. The adjudicator had concluded that the appellant would not face any harm based on alleged association with the PKK.

15. The letter continued at paragraph 45:

> "Although your client may have been ill-treated previously there is no evidence that he will [be] ill-treated again. Likewise, although there are problems in Turkey with regard to ill-treatment, the situation is improving and the authorities have a policy of zero tolerance of torture …"

The letter concluded at paragraph 48 that it was not considered that the appellant's further submission had a realistic prospect of success.

16. In considering the challenge to that decision, the judge directed himself by reference to the guidance given in the case of WM (DRC) v SSHD [2006] EWCA Civil 1495. I should mention in particular paragraphs 7 and 11 of the judgment of Buxton LJ, but I do not need to quote them because it is not contended in this case that the judge misdirected himself having regard to the guidance given in WM. We were also referred to the decision of the House of Lords in ZT (Kosovo) v SSHD [2009] UKHL 6, but it was not suggested that the reasoning of their Lordships contained anything with a material impact on the present case.

17. The judge took the view that the reasons given in paragraphs 27-28 of the decision letter for dismissing the doctor's report were wrong. In short, the judge regarded the injuries described by the doctor as consistent with the appellant's account and not obviously explained in any other way. In his view the report was capable of making a difference to the factual basis of the adjudicator's conclusions as to the ill-treatment suffered by the appellant, and in particular it was possible that an immigration judge might come to the view that what the appellant suffered should be categorised as torture, which the adjudicator had fallen short of finding.

18. The heart of the judge's subsequent reasoning is at paragraphs 42-45 of his judgment:

> "42. The reasons however did address in paragraphs 31 and 32 the crucial findings of the adjudicator. It would not be affected by a finding that the treatment that the claimant had suffered amounted to torture. In my judgment, although the decision letter in considerable part reads as if the author is making a decision rather than considering what the tribunal might do with the material, the right question is asked at paragraph 48 and the answer given does proceed on the basis of consideration of the evidence and the findings that have been made by the adjudicator.
>
> 43. The decision maker did not consider the position that would arise were the Asylum and Immigration Tribunal to find that the treatment inflicted on the claimant amounted to more serious treatment than the adjudicator found. I acknowledge the danger of substituting for the reasons given by the letter the analysis put forward by Mr Patel in this application that it is not his analysis but the reasons actually given that are being reviewed. But the points actually made by Mr Patel are referred to in paragraphs 31 and 40 to 42 of the decision letter.

> 44. It is necessary to focus on the actual threat to the claimant and whether the evidence of Dr Wright could itself give rise, with all the other findings of facts, to a realistic prospect of success in an application to the Asylum and Immigration Tribunal when added to the material in the case and on which -- quite independently of that issue, that is the medical evidence now available -- the adjudicator came to the conclusion it gave rise to no real threat of ill-treatment to a relevant degree in the claimant's case. The risk is not considered in a vacuum and not generally by reference to a country as applying to all who may go there but by reference to an individual.
>
> 45. I do not think that bearing in mind the decisions that could be made on the evidence that are not affected by Dr Wright, the Secretary of State can be said to have been wrong in saying that the new material does not give rise to a reasonable prospect of success before the immigration judge. For that reason this application to review the decision letter of 1 November 2006 fails and is dismissed."

19. There are two grounds of appeal against that judgment, though as I shall explain the argument ultimately shifted away from those grounds and towards a new way of putting the case. The first ground -- for which the judge himself was persuaded rather too easily, in my view, to give permission to appeal -- is an alleged failure by the judge to consider paragraph 339K of the Immigration Rules which provides as follows:

> "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

20. This was an important plank in the appellant's case before the judge and is indeed referred to in the judge's summary of Mr Mackenzie's submissions on the appellant's behalf. The submission advanced and maintained before this court was that the fact that the appellant could be shown to have been tortured in the past ought, on the plain wording of paragraph 339K, to have been a serious indicator of future risk. It was plausible, as the judge accepted, that on appeal to the tribunal it might be accepted by an Immigration Judge in the light of Dr Wright's evidence that the appellant had been tortured; it would then be for the Secretary of State to show reasons why the appellant was not at risk of a repetition, but that would be quintessentially a matter for the Immigration Judge. It was not open to the Secretary of State to assume that an Immigration Judge would not find a risk in the future based on past ill-treatment. It is submitted that the judge below erred in failing to consider this aspect of the case.

21. It is true that the judge did not deal with paragraph 339K in his reasons, but in my view that paragraph does not undermine in any way the conclusion that the judge reached. That past persecution or ill-treatment is an indicator of future risk was well-established before the adoption of paragraph 339K, albeit that paragraph expresses the point in a particularly emphatic form. It seems to me that both the adjudicator in his original decision and, more importantly, the Secretary of State in the decision now under challenge had proper regard to the relevance in this respect of past ill-treatment. The adjudicator accepted that there was some evidence of ill-treatment of the appellant while interrogated by the anti-terror police, but, for the reasons he gave, he did not

consider that there was a real risk of a repetition of ill-treatment on return to Turkey. A crucial part of his reasoning was his assessment that it was not likely that the appellant would be handed over to the anti-terror police when questioned at the airport, an assessment that was entirely understandable and sustainable in the light of his finding that the appellant had no perceived connections with the PKK and would not be seen as a political activist. His conviction would be discovered on a check of the records and he would have to serve his sentence, but it was not the appellant's case before the adjudicator that he faced ill-treatment simply on account of his conviction or in serving an ordinary prison sentence. This is a point to which I will return.

22. The Secretary of State's decision letter had specific regard to the argument based on past persecution or ill-treatment and in particular the argument that the evidence of torture on the previous occasion was an indication of risk on return, but the letter concluded that notwithstanding past ill-treatment there was no evidence that the appellant would be ill-treated on return, again having regard to all the material before the Secretary of State including, in particular, the matters covered in the adjudicator's decision. This formed a clear part of the reasoning that led to the conclusion that the appellant's further submission had no realistic prospect of success. In my judgment that was a perfectly rational conclusion to reach; Dr Wright's evidence provides support for the appellant's account of ill-treatment at the hands of the anti-terror police and might be capable of leading to a finding that the ill-treatment suffered on that occasion amounted to torture, but it was not capable of altering the

adjudicator's conclusion that there was no real risk of further such ill-treatment on return.

23. The crucial point, as I see it, is that the appellant was handed over to the anti-terror police and suffered ill-treatment at their hands in 2001, immediately after weapons had been discovered at his home and he had been arrested. It is evident that the purpose of the interrogation on that occasion was to establish whether he had any links with the PKK. It is equally evident, as found by the adjudicator, that the authorities accepted that he did not have any such links, and he was not thereafter suspected of PKK involvement. There was, on the adjudicator's findings, no reason why he should be handed over to the anti-terror police or be at risk of ill-treatment from them on return.

24. In oral submissions today Mr Mackenzie has sought to argue that the appellant would be at risk of torture as an ordinary prisoner when serving the sentence imposed on him for possession of illegal weapons. I shall look further at that submission in a moment, but, in the context of the first ground of appeal, it suffices to say that previous ill-treatment -- even if amounting to torture at the hands of the anti-terror police when they were seeking to establish whether he had links with the PKK -- can be of no relevance to future risk of ill-treatment as an ordinary prisoner serving a sentence for a non-political offence. The two contexts are completely different and the factors that led to ill-treatment in the one context would have no part to play in the other.

25. For those reasons, I do not accept that the judge's omission to deal with paragraph 339K is of any materiality or affects the conclusion he reached.

26. The second ground of appeal is that the judge's own findings should have led him to the view that the Secretary of State's decision was unsustainable as a whole; that once he had found as he did that (a) the Secretary of State had made unsustainable findings on Dr Wright's medical evidence, (b) it was possible that an Immigration Judge would take the view that the appellant had been ill-treated more seriously than the adjudicator had appreciated, and (c) the Secretary of State had failed to consider the consequences for an appeal if an Immigration Judge were to reach just that view, then, it is submitted, the claim should have succeeded and the Secretary of State's decision should have been quashed. The error in the Secretary of State's treatment of the medical evidence meant that a key element in the decision-making process had effectively been removed.

27. For my part, I do not consider there to be any force in that second ground. The decision letter's erroneous dismissal of Dr Wright's evidence did not vitiate the conclusion that there was no real prospect of success before an Immigration Judge. For the reasons I have already given when dealing with the first ground, such a conclusion was inevitable even if Dr Wright's evidence was accepted. In summary, the medical evidence reinforces what the adjudicator said about ill-treatment and could elevate a finding of ill-treatment into a finding of torture, but it is not capable, in the circumstances, of providing a realistic prospect of success because, on the evidence as a whole,

there is simply no basis on which an Immigration Judge could find a real risk of the appellant on his return being handed over to the anti-terror police for further interrogation.

28. Strictly, Mr Mackenzie needs permission to advance that second ground, and I would refuse permission.

29. In the course of his submissions, Mr Mackenzie was forced to acknowledge the difficulties he faced in relation to any contention that the appellant would be at risk of being handed over to the anti-terror police on his return, and also to acknowledge the irrelevance of Dr Wright's report to any wider case as to risk of ill-treatment at the hands of the Turkish authorities. Nevertheless, he sought to argue, as a point distinct from the case erected on Dr Wright's report, that the appellant would be at risk of torture as an ordinary prisoner. That argument does not depend on any special feature of the appellant's case but on the generality of prison conditions in Turkey. If correct, it would apply equally to the return of any person to Turkey to serve an ordinary prison sentence without any additional political element.

30. In support of the argument, Mr Mackenzie referred us to passages in the US State Department Country Report on Turkey for 2007, which detail instances of torture and other cruel, inhuman or degrading treatment in Turkey. The relevant section starts with a statement that the constitution and law prohibit such practices but that members of the security forces continued to torture, beat and otherwise abuse persons. In relation to the particular

argument here under consideration, we are not, of course, concerned with the security forces but with those who operate the ordinary prison system. As to that, it is fair to say that the report does detail a few instances of torture or beatings by prison officials or prison guards, though not on a scale, as it seems to me, to sustain a case that anyone serving an ordinary prison sentence in Turkey is at real risk of Article 3 ill-treatment.

31. More importantly, however, this is a new way of putting the case for the appellant and in my view it is advanced at far too late a stage in the proceedings to avail the appellant. It was not contended before the adjudicator that the appellant would be at risk of Article 3 ill-treatment as an ordinary prisoner serving a sentence for the offence of which he had been found guilty; nor was any such contention advanced in the representations made on the appellant's behalf to which the decision letter under challenge in these proceedings responded. It is true that the decision letter itself did touch on the general issue of treatment of prisoners, referring in fact to improvements in the position. In summarising the letter I have referred to a number of passages that do touch on that issue, but the challenge to the decision, as set out in the claim form and developed in argument before the judge, was based squarely on the new evidence contained in Dr Wright's report and the implications of that evidence, rather than on the existence of country information of the kind now relied on before us by Mr Mackenzie, let alone on any suggestion that prison conditions had changed materially for the worse since the date of the adjudicator's decision. Thus the judge did not deal with the point now advanced for the simple reason that the case was not advanced in that way

before him, and similarly the point does not feature in the grounds of appeal against his decision.

32. In those circumstances, it is simply not open to Mr Mackenzie, in my judgment, to take the point for the first time now at the hearing of the appeal; and, even if he were allowed to take it, it could not provide a basis for successfully impugning the Secretary of State's decision which was responding to representations that did not take the point.

33. For all those reasons I would dismiss this appeal.

Lord Justice Waller:

34. I agree.

Lord Justice Longmore:

35. I also agree.

Order: Appeal dismissed