Neutral Citation Number: [2010] EWCA Civ 625

Case No: C5/2009/1391

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE ASYLUM AND IMMIGRATION TRIBUNAL
Senior Immigration Judge McKee
Tribunal Number A5/00065/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/06/2010

Before :

LORD JUSTICE WILSON
LORD JUSTICE SULLIVAN
and
SIR PAUL KENNEDY

- -

Between :

Secretary of State for the Home Department	**Appellant**
- and -	
IA (Turkey)	**Respondent**

- -
- -

Mr Alan Payne (instructed by Treasury Solicitors) for the Appellant
Ms Rebecca Chapman (instructed by **Messrs Luqmani Thompson & Partners**) for the Respondent

Hearing date : Friday, 14th May 2010

- -

Judgment

Lord Justice Sullivan :

Introduction

1. This is the Secretary of State's appeal against the Determination dated 24th January 2009 of Senior Immigration Judge McKee allowing the Respondent IA's appeal against the Secretary of State's decision dated 27th June 2008 to refuse to vary IA's leave to remain in the United Kingdom on the basis that the refusal was not in accordance with the law. In remitting IA's application to the Secretary of State for her to grant the appropriate period of leave, Senior Immigration Judge McKee stated that:

> "It is no longer open to the Secretary of State to invoke Article 33(2) as justifying a refusal to grant leave, or the grant of a lesser period of leave than is normally vouchsafed to refugees. On the other hand, a grant of asylum can be revoked under paragraph 339A of the Immigration Rules if the Secretary of State is satisfied that one of the circumstances listed thereunder obtains. Only in that way, it seems to me, can a grant of leave be lawfully refused in the present case. But the procedure set out at rule 339BA must be observed."

Background

2. There is a lengthy procedural history. For present purposes it can be summarised as follows. IA is a Turkish citizen. He arrived in the United Kingdom on 20th April 1988 and was granted leave to enter for six months as a visitor. On 23rd September 1988 he applied for asylum. His application was refused, but the Secretary of State granted him Exceptional Leave to Remain (ELR) until 27th January 1994, subsequently extended to 27th January 1997.

3. On 11th May 1996 IA travelled to Turkey to see his mother who was ill. While he was there he was arrested, detained and subjected to human rights abuses. He returned to the United Kingdom on 24th May 1996. On being refused leave to enter he again applied for asylum.

4. On 3rd August 1996 IA was arrested in connection with possession of heroin with a street value of between £2-£6 million. On 27th April 1997 he was convicted of possessing Class A drugs with intent to supply. He was sentenced to 16 years imprisonment (reduced to 14 years on appeal), and was recommended by the Court for deportation.

5. On 13th December 2002 the Secretary of State refused IA's application for asylum. By letter dated 29th July 2003 the Secretary of State informed IA that it had been decided to make a Deportation Order against him. IA appealed against both of these decisions and his appeals were allowed by an Adjudicator, Mr Denson, in a Determination promulgated on 16th December 2003 (the 2003 Determination).

6. Mr Denson found that IA was a credible witness and accepted that he had been persecuted for a Convention reason, both before he left Turkey in 1988 and when he had returned to see his mother in May 1996. Mr Denson had no doubt that if IA was returned to Turkey he would be closely questioned by the authorities which would lead to his detention "and the inevitable ill-treatment that sadly occurs in Turkey under these circumstances". He therefore concluded that removing IA to Turkey would cause the United Kingdom to be in breach of its obligations under both the Refugee Convention and Article 3 of the European Convention on Human Rights (ECHR).

7. Although the Secretary of State's decision in 2003 to make a Deportation Order had been based on IA's conviction in 1997, the decision in 2002 to refuse his application for asylum did not refer to Article 33.2 of the Refugee Convention which qualifies the prohibition of refoulement. Article 33 provides:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." (emphasis added)

Article 33.2 was not raised before Mr Denson.

8. The Secretary of State appealed against the 2003 Determination. It was submitted that in assessing IA's credibility the Adjudicator had wrongly excluded consideration of the fact that IA had previously given accounts, both to an immigration officer and at his trial, which had not been believed. The Immigration Appeal Tribunal rejected that submission, and concluded in paragraph 6 of its Determination notified on 15th July 2004 (the 2004 Determination):

> "Our decision, therefore, is that so far as credibility is concerned and hence so far as the findings of fact are concerned, the Adjudicator's determination stands. The Claimant is entitled to be regarded as a person who has a well-founded fear of persecution for a Convention reason in Turkey and a person whose return to Turkey would breach the United Kingdom's obligations under Article 3 of the European Convention on Human Rights."

9. It is clear that Article 33.2 was referred to at the hearing before the Immigration and Asylum Tribunal on 18th June 2004. In paragraphs 7 and 8 of its Determination dismissing the Secretary of State's appeal the Immigration and Asylum Tribunal said:

> "7. Mr Saville [on behalf of the Secretary of State] has briefly referred to Article 33 of the Refugee Convention which enables a person who is a refugee to be returned, even to a country of persecution, if there are *"reasonable grounds for regarding him as a danger to the security of the country in which he is or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".* It is important to recognise that that sub-Article does not exclude a person from consideration as a refugee. It merely deprives him of one of the benefits of refugee status: that is to say, the right not to be refouled to a country of persecution.
>
> 8. The position in the present case is that the Claimant has established his claim to be regarded as a refugee and whilst he remains in this country, subject of course to any change in the circumstances of his home country, he remains as a refugee. The fact, if it be a fact, that he could be refouled under Article 33, does not affect his claim to remain here under Article 3 of the European Convention on Human Rights. It follows, however distasteful the result may be to the Secretary of State, that while the Claimant is here, he is here as a refugee with everything that that entails."

10. In a reasons for refusal letter dated 6th September 2004 sent to IA's Solicitors, the Secretary of State referred to the Immigration Appeal Tribunal's decision to dismiss the appeal against the Adjudicator's decision to allow IA's appeal, and continued:

> "Your appeal was allowed on the basis that you are a refugee, as defined by the 1951 Convention on the Status of Refugees (referred to in the rest of this letter as "the Refugee Convention"). The Secretary of States's normal practice is to grant recognised refugees Indefinite Leave to Remain in the UK. However, for the reasons given in this letter, he has decided not to do that in your case. Article 33(2) of the Refugee Convention provides that the UK is not prohibited from expelling or returning a refugee to his or her own country if,

> "having been convicted by a final judgement of a particularly serious crime, [the refugee] constitutes a danger to the community of [the UK]."
>
> The Secretary of State deems that this provision applies to you as, on 27 April 1997, you were convicted of possessing a large quantity of heroin (a Class A controlled drug) with intent to supply it, and were sentenced to 16 years' imprisonment-reduced on appeal to 14 years. This was clearly a very serious crime, as was reflected in the eventual sentence. Taking this into account, together with the serious negative consequences that the illegal supply of Class A drugs brings to society, the Secretary of State considers you to be a danger to the community of the UK.
>
> For this reason, you are not entitled to remain here under the provisions of the Refugee Convention. The Secretary of State will therefore not be granting you Indefinite Leave to Remain."

The letter said that IA would be granted Discretionary Leave to Remain in the UK for 6 months.

11. The reasons for refusal letter was accompanied by two other letters dated 6th September 2004. One of those letters was a Discretionary Grant of Leave to Remain until 6th March 2005. The other letter was a formal "Determination of [IA's] Asylum Claim". It stated that IA's claim for asylum had been refused for the reasons given in the reasons for refusal letter, but that in the particular circumstances of his case it had been decided to grant him leave to remain in the UK "on a discretionary basis outside the Immigration Rules for a specified period". The letter said that this decision was not an appealable decision under section 82 of the Nationality, Immigration and Asylum Act 2002. For convenience, I will refer to these three letters as the 2004 Decision.

12. IA made no complaint about the 2004 Decision. He did not apply for permission to challenge it by way of judicial review. On 4th March 2005, shortly before his 6 months leave was due to expire, IA's Solicitors asked for an extension of his discretionary leave on the basis that circumstances had not changed since he was granted leave, and his removal to Turkey would be in breach of Article 3. The Secretary of State failed to make a decision on IA's application. In a letter dated 4th September 2007 IA's Solicitors, having summarised the procedural history, asked the Secretary of State for an explanation for the "continuing failure to reach a decision of an extension of time for discretionary leave", and said that if no response was received they would have to consider judicial review proceedings.

13. The Secretary of State's reply said that IA's application would be dealt with in due course as one of 450,000 "legacy" cases. IA's Solicitors

were, understandably, not satisfied with that reply, and commenced judicial review proceedings. The Grounds of Challenge dated 29th December 2007 referred to the 2004 Decision and submitted:

> "that given that the Claimant has been recognised as a refugee that they should not be left waiting for their status to be determined, either by way of a further discretionary grant of leave to remain or a grant of indefinite leave, or alternatively, with an acknowledgement that the Claimant is a refugee and entitled to remain. This has not occurred and it is submitted that the period of delay coupled with the Claimant's status has effectively rendered the Secretary of State's behaviour as unlawful."

In his Claim Form IA sought a declaration that the Secretary of State's failure to make a decision on his 2005 application was unlawful, and a mandatory order requiring the Secretary of State to determine the application within a reasonable period of time. The judicial review application was withdrawn by consent on 9th June 2008 upon the Secretary of State's agreeing to reach a decision within 3 months.

14. IA's application for further leave to remain in the UK was refused in a decision letter dated 27th June 2008 (the 2008 Decision). The letter stated that the Secretary of State had had regard to all known relevant factors under paragraph 395C of the Immigration Rules. IA's criminal conviction was one of the factors referred to in the letter. The letter said that IA would no longer be at risk if returned to Turkey, and that internal relocation was possible. It did not refer to Article 33.2 of the Refugee Convention. As a result of this decision IA had no leave to remain in the UK. It was therefore an immigration decision against which IA could appeal. He did so.

15. Shortly before IA's appeal was due to be heard on 30th September 2008, his Solicitors wrote to the Secretary of State on 21st August 2008 contending that he had a further claim to remain in the UK under the "standstill" provisions in the Ankara Agreement. While this further claim is not relevant for the purpose of this appeal, the understanding of IA's Solicitors as to the effect of the 2004 Determination is relevant. In summarising the history of IA's case, his Solicitors said:

> "Our client was recognised as a refugee by the Immigration & Asylum Tribunal (as was) some years ago, but he was excluded from receiving refugee status due to his criminal conviction. He was allowed to remain in the UK with Discretionary Leave on the basis that removing him to Turkey would be a breach of the UK's obligations under the European Convention on Human Rights."

When dealing with "Immigration History and previous conduct of applicant" the letter said that IA's "asylum claim was eventually

successful, to the extent that it was recognised by the Tribunal that his removal to Turkey would breach Article 3".

16. IA's appeal against the 2008 Decision was dismissed by Designated Immigration Judge Wilson in a Determination dated 7th October 2008. For present purposes, the relevant submissions made on behalf of IA were as follows:

(1) The 2004 Decision was unlawful. Applying Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ.977, the Secretary of State's decision not to give IA 5 years leave to remain was inconsistent with the Immigration Appeal Tribunal's 2004 Determination.

(2) The Secretary of State had unlawfully revoked the grant of asylum to IA otherwise than in accordance with paragraph 339BA of the Immigration Rules.

(3) IA was still at risk of persecution under the Refugee Convention and/or ill treatment under Article 3.

17. Designated Immigration Judge Wilson accepted submission (1). But, having concluded that the 2004 Decision was unlawful, he said (para.9 Determination):

> "That was not challenged by the Appellant within any accepted time limit and moreover an application was then lodged to renew that limited leave. I also note that in a subsequent application for judicial review this point was not raised at all. Having regard to those points I find that the Appellant cannot now litigate and raise points of unlawfulness as to the Respondent's decision not to grant him full leave."

Designated Immigration Judge Wilson rejected submission (2) because:

> "The Appellant never had refugee status. All the Respondent ever gave the Appellant was limited leave. As I have commented above there is a clear difference between a Tribunal decision and an executive grant. It is only the latter that formally confers the status." (para.10 Determination)

Designated Immigration Judge Wilson rejected submission (3). He concluded that if IA was returned to Turkey in 2008 he would no longer face a risk of persecution or ill treatment contrary to the Refugee Convention and/or Article 3.

18. IA Applied for reconsideration. Reconsideration was ordered by Plender J. The reconsideration hearing came before Senior Immigration Judge McKee on 23rd January 2009. In his Determination dated 24th January

2009 (the 2009 Determination) allowing IA's appeal Senior Immigration Judge McKee concluded that:

(1) Designated Immigration Judge Wilson's conclusion that the 2004 Decision was unlawful applying this Court's judgment in TB (Jamaica) was correct (para.8).

(2) The unlawful decision in 2004 to grant only six months leave "must infect the subsequent decision [in 2008] not to grant any leave at all". (para.8)

(3) IA had "continued to have refugee status since his asylum claim was finally determined in July 2004, so the decision now under appeal not to give him any leave at all is not in accordance with the law". (para.12)

(4) The Secretary of State was precluded from invoking Article 33.2 as justifying a refusal to grant leave or the grant of a lesser period of leave than is normally granted to refugees. (para.13)

(5) The matter must be remitted to the Secretary of State for her to grant an appropriate period of leave reflecting IA's refugee status (para.12); or a decision might be taken to revoke the grant of asylum under paragraph 339A of the Immigration Rules, but this could be done only if the procedure set out in rule 339BA was observed (para.13).
On 9th March 2009 Senior Immigration Judge McKee granted the Secretary of State permission to appeal to this Court.

The Secretary of State's Grounds

19. On behalf of the Secretary of State, Mr Payne submitted that:-

(1) The Asylum and Immigration Tribunal had no jurisdiction to consider IA's challenge to the lawfulness of the 2004 Decision. The statutory right of appeal to the Asylum and Immigration Tribunal was limited to challenges to "immigration decisions" as defined by section 82 of the 2002 Act. The 2004 Decision was not an immigration decision. The only such decision before the Asylum and Immigration Tribunal was the 2008 Decision.

(2) Senior Immigration Judge McKee's conclusion that IA had had refugee status since the final Determination of his asylum claim in 2004 was perverse because IA's appeal against the 2008 Decision on the ground that it was "tainted" by the 2004 Decision was predicated on the unlawful failure of the Secretary of State in 2004 to grant IA refugee status.

(3) Senior Immigration Judge McKee (and Designated Immigration Judge Wilson) had erred in failing to distinguish

TB (Jamaica). The 2004 Decision was not inconsistent with the 2004 Determination, when the latter was properly understood.

(4) Senior Immigration Judge McKee had erred in concluding that the Secretary of State was barred from relying on Article 33.2.

(5) Senior Immigration Judge McKee had failed to explain why (a) applying TB (Jamaica) rendered the 2004 Decision unlawful; and (b) Designated Immigration Judge Wilson had erred in concluding that IA could not challenge the lawfulness of the 2004 Decision in an appeal before the Asylum and Immigration Tribunal some 4 years later.

Discussion

20. In my view, this appeal raises three principal questions:

(1) Was the 2004 Decision not to grant Indefinite Leave to Remain unlawful?

(2) If it was unlawful, did Designated Immigration Judge Wilson err in concluding that it was not permissible to challenge it in 2008?

(3) Did the Asylum and Immigration Tribunal (Senior Immigration Judge McKee and Designated Immigration Judge Wilson) have jurisdiction to consider question (1)?
I will consider these three questions in turn.

Was the 2004 Decision unlawful?

21. I have set out the relevant part of the 2004 Decision in paragraph 10 (above). The letter correctly states that IA's appeal had been allowed on the basis that he was a refugee. It sets out the Secretary of State's normal practice in 2004: to grant recognised refugees Indefinite Leave to Remain in the UK. It then explains why the Secretary of State decided not to follow that normal practice in IA's case: because the Secretary of State considered that Article 33.2 of the Refugee Convention applied to IA. Ms Chapman, who appeared before us on behalf of IA, accepted that the Secretary of State was, in principle, entitled to depart from the normal practice in 2004 provided he gave adequate reasons for the departure. She did not submit that, if lawful, the Secretary of State's explanation for departing in IA's case from the normal practice was inadequate. She confirmed that the sole reason why it was contended that the reason given – reliance on Article 33.2 – was unlawful was because, applying TB (Jamaica), it was inconsistent with the 2004 Determination.

22. In TB (Jamaica), the Asylum and Immigration Tribunal on 12th September 2005 had allowed on both Refugee Convention and ECHR grounds TB's appeal against the Secretary of State's decision to make a Deportation

Order. In 2003 TB had been sentenced to 4 years and 3 months (reduced on appeal to three years and ten months) imprisonment for drugs offences, but there was no reference to Article 33.2 at the hearing before the Asylum and Immigration Tribunal. In a decision letter dated 25th January 2006 the Secretary of State raised, for the first time, the issue of Article 33.2. TB's Solicitors replied by letter dated 22nd February 2006 contending that this was "an abuse of process and power" by the Secretary of State. The Secretary of State adhered to her position, and TB's Solicitors challenged her decision to give him only temporary admission (subsequently changed to periods of Discretionary Leave for up to six months at a time) rather than the 5 years leave to remain that would normally have been granted to a person with refugee status in 2006. Bean J. held that the Secretary of State's decision was an abuse of process. The Court of Appeal dismissed the Secretary of State's appeal. Stanley Burnton LJ (with whom Rix and Thorpe LJJ agreed) said in paragraph 32 of his judgment that:

> "As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the Immigration Appeal Tribunal by administrative decision. If she could so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme."

Having considered a number of authorities Stanley Burnton LJ said in paragraph 36 that the expression abuse of process was usually reserved for abuses of the processes of the courts.

> "The Secretary of State's action might be castigated as an abuse of power, but I would prefer to avoid pejorative expressions of uncertain denotation and application and to hold simply that the Secretary of State was bound by the decision of the Immigration Judge and that her subsequent action was unlawful on the ground that it was inconsistent with that decision."

23. In R (on the application of Boroumand) v Secretary of State for the Home Department [2010] EWHC 225 (Admin), Beatson J., after a careful analysis of the relevant authorities, concluded that the decision in TB (Jamaica) was "based on inconsistency [the Secretary of State's Decision must not be inconsistent with that of the Asylum and Immigration Tribunal] rather than notions of abuse of process or failure to take the point." (para.79). I agree, although the issue is academic in the present case because Article 33.2 clearly was raised before the Immigration Appeal Tribunal in 2004 (see para.9 above). Was the 2004 Decision inconsistent with the 2004 Determination?

24. Ms Chapman submitted that it was: the Immigration Appeal Tribunal had dismissed the Secretary of State's appeal against Mr Denson's

Determination and had concluded that IA was "entitled to be regarded as a person who has a well founded fear of persecution for a [Refugee] Convention reason in Turkey and a person whose return to Turkey would breach…. Article 3…." That submission focuses upon the formal order of the Immigration Appeal Tribunal dismissing the Secretary of State's appeal. When deciding whether a subsequent administrative decision by the Secretary of State is inconsistent with a Determination by the Immigration Appeal Tribunal (now the Asylum and Immigration Tribunal) it is appropriate to have regard to the reasons given by the Tribunal for reaching its decision. IA's submission ignores paragraphs 7 and 8 of the 2004 Determination (para.9 above).

25. Article 33.2 was raised, if only briefly, on behalf of the Secretary of State before the Immigration Appeal Tribunal. The Tribunal did not reject the Secretary of State's submission on the basis that it found that Article 33.2 had no application to IA's case, or because it was too late to raise the issue. The Immigration Appeal Tribunal left the Article 33.2 point open because it felt that it was unnecessary to resolve it.

> "The fact, <u>if it be a fact</u>, that he could be refouled under Article 33 does not affect his claim to remain here under Article 3 of the ECHR." (emphasis added)

It was unnecessary to resolve the point because, as Mr Ockleton explained in paragraphs 7 and 8 of the 2004 Determination, even if Article 33.2 applied IA would still be a refugee; Article 33.2 would merely remove his right not to be refouled; but he could not be returned to Turkey in any event because of Article 3.

26. <u>TB (Jamaica)</u> is clearly distinguishable. In the present case the Article 33.2 issue was raised before the Immigration Appeal Tribunal, and the Tribunal, for pragmatic reasons, left that issue open. The 2004 Decision was not, therefore, inconsistent with the 2004 Determination. This conclusion is sufficient to dispose of the appeal in favour of the Secretary of State.

<u>Was it permissible to challenge the 2004 Decision in 2008?</u>

27. There is another distinction between <u>TB (Jamaica)</u> and the present case. In <u>TB (Jamaica)</u> the lawfulness of the Secretary of State's decision was promptly challenged in judicial review proceedings. Ms Chapman accepted that, if her submission that the 2004 Decision was unlawful was correct, it could have been challenged by way of judicial review. The 2004 Decision was not unlawful on its face. It had to be treated by all parties, including the Asylum and Immigration Tribunal, as a lawful decision unless and until it was quashed by a Court of competent jurisdiction. Designated Immigration Judge Wilson's conclusion that IA could not challenge the lawfulness of the 2004 Decision in proceedings in 2008 was plainly correct, even assuming (see para.28 below) that the Asylum and Immigration Tribunal did have jurisdiction to determine its lawfulness. This was not a case where there had simply been a very

lengthy, and unexplained, delay in challenging the lawfulness of the 2004 Decision. The application in 2005 for an extension of Discretionary Leave was premised on the lawfulness of the 2004 grant of Discretionary Leave, as were the judicial review proceedings. It was not suggested in those proceedings or at any stage prior to the hearing before Designated Immigration Judge Wilson that the 2004 Decision was unlawful, or that the Secretary of State was bound to grant IA Indefinite Leave to Remain because he was a refugee (see paras.13 and 15 above). Having failed to challenge the lawfulness of the 2004 Decision in the judicial review proceedings which had been compromised by a Consent Order as recently as 9th June 2008, it was an abuse of process (whether or not the Asylum and Immigration Tribunal had jurisdiction to decide the issue) to challenge the lawfulness of the 2004 Decision at the hearing on 30th September 2008, less than 4 months later.

Did the Asylum and Immigration Tribunal have jurisdiction to consider the lawfulness of the2004 Decision?

28. In the particular circumstances of this case I would also accept Mr Payne's submission that the Asylum and Immigration Tribunal did not have jurisdiction to consider the lawfulness of the 2004 Decision. It is common ground that it was not an "immigration decision" as defined by subsection 82(2) of the 2002 Act. There was, therefore no right of appeal against it to the Asylum and Immigration Tribunal. The only immigration decision before the Asylum and Immigration Tribunal was the 2008 Decision. The Tribunal had to consider (inter alia) whether that decision was "not in accordance with the law": section 84(1)(e), 2002 Act. In view of my answers to questions (1) and (2) (above), an attempt to define the precise extent to which the Asylum and Immigration Tribunal is entitled to determine the lawfulness of a prior decision or action if that decision or action has been relied upon in reaching the immigration decision appealed against under section 82, is unnecessary. I would accept that earlier unlawfulness may, in principle, be capable in some circumstances of "tainting" a subsequent immigration decision. But those circumstances do not exist in the present case. An earlier immigration decision by the Secretary of State which might have been appealed to the Asylum and Immigration Tribunal, but which has not been appealed, or not been appealed in time must subsequently be treated by all parties as lawful. If that is so, it is impossible to see how it could be within the Asylum and Immigration Tribunal's jurisdiction to review the lawfulness of an earlier decision by the Secretary of State which was not an immigration decision, which could not have been the subject of an appeal to the Tribunal, and which could have been challenged only by way of judicial review.

29. It follows that Designated Immigration Judge Wilson did err in considering the lawfulness of the 2004 Decision and in concluding that it was unlawful, but those errors were not material because he correctly concluded that, even if the Tribunal had jurisdiction so to conclude, it was too late in 2008 to argue that the 2004 Decision was unlawful.

Other matters

30. Ms Chapman submitted that Senior Immigration Judge McKee's conclusion that the Secretary of State could lawfully refuse a grant of leave to IA only by revoking his grant of asylum under rule 339A, in accordance with the procedure in rule 339BA, was correct. The Immigration and Asylum Tribunal did not grant IA asylum. It decided that he was a refugee. It was for the Secretary of State to decide whether to grant IA asylum. He decided not to do so because, although IA was a refugee, Article 33.2 applied to him, so refoulement would not be in breach of the Refugee Convention (although it would be in breach of Article 3). The reason why it was submitted on behalf of IA that the 2004 Decision was unlawful was precisely because it did not grant him asylum under rule 334. Whether the 2004 Decision was lawful or unlawful there was, and is, no grant of asylum to revoke under rule 339A. For the sake of completeness, I should add that the 2004 Decision was not on its face contrary to rule 334 (as it was in force in 2004). Rule 334 stated that a refugee would be granted asylum if (inter alia) refusing his application would mean that he would be refouled "in breach of the Convention". While refusing IA's application would have resulted in him being returned to Turkey where he would have faced persecution, that would not have been in breach of the Refugee Convention because, in the Secretary of State's view, which was not challenged at the time (see para.27 above), Article 33.2 removed the prohibition of refoulement.

31. In his application for reconsideration of the 2008 Determination IA contended that Designated Immigration Judge Wilson had materially erred in law in concluding that IA was no longer at risk of persecution under the Refugee Convention and/or ill treatment under Article 3 and that he was not entitled to remain under the Ankara Agreement. Because of his conclusions as to the lawfulness of the 2004 Decision and its effect on the 2008 Decision Senior Immigration Judge McKee did not consider it necessary to deal with those grounds ("the remaining grounds").

Conclusion

32. I would allow the appeal, quash the 2009 Determination, and remit the matter to the Upper Tribunal (Immigration and Asylum Chamber) to consider whether there was a material error of law in the 2008 Determination on the remaining grounds.

Sir Paul Kennedy

33. I agree.

Lord Justice Wilson

34. I also agree.