Case No: C5/2007/2294

Neutral Citation Number: [2008] EWCA Civ 477
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/04987/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 8th April 2008

Before:

LORD JUSTICE BUXTON
LORD JUSTICE CARNWATH
and
LORD JUSTICE LLOYD

- -

Between:

MY (TURKEY) **Appellant**

- and -

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

- -

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Mr D Jones (instructed by Wilson & Co) appeared on behalf of the **Appellant**.

Mr A Nawbatt (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent.**

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Judgment

Lord Justice Buxton:

1. When he granted permission for this appeal Richards LJ said that it was a case which demonstrated the difficulties that can be caused to immigration judges by the system of second-stage reconsideration. Our further consideration of the appeal, with the benefit of helpful submissions both from Mr David Jones and Mr Nawbatt, has underlined the apposite nature of that observation.

2. Mr Y is a citizen of the republic of Turkey who came to this country in June 2004 and claimed asylum shortly thereafter. The basis of his claim was that he had been ill-treated, and feared further ill-treatment on return by the Turkish authorities, because he was of Kurdish ethnicity and was a supporter of a Kurdish political organisation called DEHAP. That application was refused by the Secretary of State and the matter came eventually before an immigration judge, Immigration Judge Buckwell. He believed in large part, though not entirely, the evidence that he was given by Mr Y. The aspect that he did not believe was in relation to Mr Y's liability for military service. In paragraph 43 of his determination Immigration Judge Buckwell summarised his findings by saying that Mr Y had been detained and ill-treated on six occasions: three times before he joined DEHAP, and three times after he became a member of DEHAP, the Immigration Judge thinking that Mr Y's involvement had been at a comparatively modest level. He was never charged with any offence and never claimed to have assisted any actually outlawed organisation such as the PKK. What was, however, lacking was any evidence that the appellant had been required to report to the authorities as a condition of his release and any evidence that he had left Turkey in breach of any reporting conditions.

3. The Immigration Judge also pointed out that Mr Y had not demonstrated that any enquiries had been made about him since he had left Turkey, nor had any of his family members been harassed and he, the Immigration Judge, thought that if such evidence had been available it undoubtedly would have been brought forward.

4. On the basis of his evidence about ill-treatment the Immigration Judge found, paragraph 45, that if Mr Yilmas returned to his home area he might be subject to harassment and further arbitrary detention. But in the view of Immigration Judge Buckwell further relocation to a different area was available to Mr Y, and he set out in brief terms in paragraph 45 why he thought that that was so. For that reason he did not think that Mr Y was entitled to international protection and dismissed his appeal.

5. An application for reconsideration was initially unsuccessful, but was then ordered by Bean J. It is a slightly surprising aspect of this case that the ground upon which Bean J said that the Tribunal should reconsider its decision was that, on the basis of the Immigration Judge's findings about six instances of ill-treatment, he should have considered, under the principle in Iftikhar Ahmed v SSHD [2000] INLR 1, whether it followed from that that there would be ill-treatment on return. That point appears to have disappeared from this case

thereafter, because when the matter came for reconsideration before Senior Immigration Judges Mackey and Deans in November 2006 the matter that they identified as an error of law on the part of Immigration Judge Buckwell and which they thought needed further consideration was that the Immigration Judge had not made adequate findings or expressed adequate reasons in respect of the possibility of internal relocation; and in particular that no assessment had been made of the potential risk to Mr Y should he continue his political activities in whatever area it was to which he was relocated. They ordered reconsideration on that point. They also considered that the Immigration Judge had not made sufficient findings in respect of the risk to the appellant of mistreatment in his home area, though I am bound to point out that Immigration Judge Buckwell does in fact seem to have made a finding in paragraph 45 to that effect. They then said this in paragraph 15:

> "In our view further evidence is required to consider the risk to the Appellant on return and, in particular, the implications for the Appellant of the dissolution of DEHAP. We consider that the positive credibility findings made by the Immigration Judge as to the Appellant's past mistreatment should stand as we find no error in respect of the Immigration Judge's findings on this matter."

Further evidence was therefore envisaged.

6. In order to explain one aspect of that further evidence (that is to say, the reference to the dissolution of DEHAP) we were told from the bar, and this is a matter that will have to be borne in mind when this matter is reconsidered, that the implication of that was that it was suggested that DEHAP had been dissolved by the Turkish authorities because it had been identified as being associated with the PKK. To that end, or in that context, further country information was put forward by Mr Y's solicitors, which is contained in bundle C which is before us and which we were told was before the Immigration Judge on reconsideration. Apart from that the Secretary of State, as we understand it, put in no further evidence. Mr Y submitted a further statement and gave evidence consistently with it at the reconsideration hearing. That statement was dated 27 June last year and, put shortly, said that he had been informed by his parents that since he had left Turkey soldiers had come to the house looking for him. A certain amount of circumstantial evidence was given in paragraph 4 of the statement in support of that. That statement was no doubt put forward in the light of Immigration Judge Buckwell's observation that he had not received any such evidence of events post-leaving Turkey, which he would have expected to find.

7. In the light of that position the matter came for reconsideration before Immigration Judge Miller. He had to be guided by the observations of this court in DK (Serbia) in what was in this case, if I may so describe it, a partial

not a complete reconsideration. At paragraph 22 of his judgment in DK (Serbia) Latham LJ said this:

> "…The right approach, in my view, to the directions which should be considered by the immigration judge ordering reconsideration or the Tribunal carrying out the reconsideration is to assume, notionally, that the reconsideration will be, or is being, carried out by the original decision maker.
>
> 23. It follows that if there is to be any challenge to the factual findings, or the judgments or conclusions reached on the facts which are unaffected by the errors of law that have been identified, that will only be other than in the most exceptional cases on the basis of new evidence or new material as to which the usual principles as to the reception of such evidence will apply..."

8. Counter to an ill-judged intervention of my own in the course of argument, Latham LJ was envisaging two sorts of challenge to the original factual findings. First, whether there is a "most exceptional" case; and secondly, when such findings can be challenged on the basis of new evidence or new material. In our case Immigration Judge Miller heard evidence from Mr Y in the terms of his statement with regard to what had happened after Mr Y had left Turkey. Put shortly, Immigration Judge Miller disbelieved everything that Mr Y said to him on that point and concluded that the incorrectness of his evidence had not been simply an error understandable under pressure but, as Immigration Judge Miller put it in his paragraph 27, "It was thus a deliberate attempt to deceive."

9. That in my view should have led Immigration Judge Miller to find, and properly to find, that there was simply no evidence one way or the other as to searches for, interventions with, Mr Y and his family after he had left Turkey. How then should he have proceeded? What the directions of the reconsideration tribunal required Immigration Judge Miller to do, read in the light of DK (Serbia), was first of all to accept that the findings of past persecution should stand. The Tribunal ordered no new evidence in respect of that, and therefore no new evidence should be considered. Secondly, he had to consider the risk on return in the light of the evidence that had been before Immigration Judge Buckwell, plus any new evidence, and also consider relocation in the light of that new evidence. What he in fact did was to say this. In paragraph 22 he said, correctly if I may say so:

> "In considering the Appellant's case at this stage, I have regard to the fact that IJ Buckwell's determination forms a starting point and that, at the first-stage hearing on the 15th November 2006, the tribunal took the view that 'the positive credibility

> findings made by the Immigration Judge as to the Appellant's past mistreatment should stand as we find no error in respect of the Immigration Judge's findings on this matter'"

But then Immigration Judge Miller went on to say this:

> "23 I find it impossible, however, to disregard the recent evidence of the Appellant, and I have to look at it in the round, together with the evidence which has been previously given, and the findings which have been made."

10. Having explained how he disbelieved what he had been told by Mr Y, to the extent that he found Mr Y was a person whose credibility could not be relied on, Immigration Judge Miller then said this at paragraph 25:

> "Whether IJ Buckwell, or the Tribunal which heard the Appellant's first-stage reconsideration…, would have been able to reach this view had they seen the Appellant's recent statement and heard his evidence, I very much doubt".

11. That led Immigration Judge Miller to say, without it being expressly stated, and this is the effect of his judgment, that he rejected the appellant's claim to have been mistreated when he was in Turkey, something that Immigration Judge Buckwell had accepted. He therefore did not go on at all to reconsider, in the light of the evidence, either risk on return or the practicability of relocation more particularly in the context of the current position with regard to HADEP. That course was not in my view open to the Immigration Judge. Mr Nawbatt argued that it was open to him to review what Immigration Judge Buckwell had found because there was new evidence, one of the situations envisaged by Latham LJ in DK (Serbia). But the new evidence was simply the evidence of Mr Y that had been rejected; it was not new evidence in the sense that facts had been produced that showed that what Immigration Judge Buckwell had found was clearly wrong. All that it showed was that in the respects upon which Immigration Judge Miller had heard him Mr Y was not a person whose evidence could be trusted; but it is a long leap from that to say that therefore it necessarily follows, and that Immigration Judge Miller is entitled to find, that the evidence given to Immigration Judge Buckwell about previous events was itself untrue. That is underlined by the fact that the reconsideration tribunal had made a specific finding, or given a specific ruling, that the findings of Immigration Judge Buckwell should stand and therefore the second reconsideration should have started from that assumption, granted that neither of the conditions for going behind those factual findings posited by Latham LJ were present.

12. In my view therefore Immigration Judge Miller was wrong to proceed as he did. As I have said, what he should have done was to accept and start from

Immigration Judge Buckwell's findings as to past persecution, but then to consider the position on Mr Y's return and the matter of internal relocation in the light of the evidence that was before him.

13. It is unfortunate this matter has to be drawn out yet again but I do not think it is possible for the determination of Immigration Judge Miller to stand. For my part I would allow this appeal to this extent, that I would discharge the order of Immigration Judge Miller and order that the matter be remitted to the Asylum and Immigration Tribunal to be heard again by an immigration judge other than Immigration Judge Miller according to the directions laid down by, the reconsideration tribunal on 15 November 2006. The parties have already been given an opportunity to put in further evidence and I would not allow any further evidence over and above that to be submitted; but I have no doubt that the immigration judge who hears this matter will wish to have before him the oral evidence, and not merely the statement, of Mr Y. What view he takes of it, what view he takes of the other evidence that is available including the medical evidence and the evidence as to events in Turkey, will be entirely a matter for him. Other than that I would not give any further directions as to how he should proceed. Those directions have already been given to him by the reconsideration tribunal. On those terms I would allow this appeal.

Lord Justice Carnwath:

14. I agree that the appeal must be allowed to that extent. I would just add one comment on the medical evidence. There was in support of the application a report from a Dr Seear. That was potentially relevant to two matters. One was as evidence of scarring which supported the applicant's account of ill-treatment; the other was as evidence that he was suffering from post-traumatic stress disorder and a major depressive episode which meant that to return him would be contrary to his human rights.

15. The Secretary of State dealt with that latter aspect in the original decision on June 2005 at paragraph 28. There was no challenge to the qualifications of Dr Seear but it was said that there were adequate facilities to deal with any such psychiatric condition on return.

16. Before the first Immigration Judge the medical evidence was relied on in support of the case of ill-treatment (see paragraph 24). The Immigration Judge indicated at paragraph 39 that he accepted the report as being supportive and he accepted Dr Seear's qualifications. However, at paragraph 47 he accepted the Secretary of State's case that there were adequate medical facilities to deal with any psychiatric condition.

17. On the order for reconsideration there was no challenge to the medical evidence, as I read it. It was recorded at paragraph 12, indeed, that the representative of the Secretary of State said that medical evidence had been properly assessed. I assume that he was principally directing his attention there at the evidence of facilities in Turkey but nonetheless there was certainly no challenge to the evidence supportive of the applicant's case. When it came to IJ Miller, however, he at paragraph 23 made criticisms of Dr Seear's

evidence and qualifications and went as far as to say that he did not regard the evidence as being impartial and at paragraph 28 he said that he felt able to give Dr Seear's evidence little weight.

18. For my part it does not seem to me that it was properly open to Mr Miller to reopen the question of the medical evidence. What was to be made of the conclusion stated by Dr Seear, insofar as it had any relevance to the issue before Judge Miller, was something for him, but it seems to me to have been inappropriate at this stage to reopen the issue of the reliability of Dr Seear's evidence. That was simply not an issue which was before him. For that reason and the reasons given by Buxton LJI agree that the matter must go back to the tribunal.

Lord Justice Lloyd:

19. I also agree that for the reasons given by Buxton LJ the appeal should be allowed to the extent that he has stated and I would also agree with the comments of Carnwath LJ on the medical evidence.

Order: Appeal allowed