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CO/8985/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 22nd September 2008

B e f o r e:

HIS HONOUR JUDGE JARMAN QC

Between:
THE QUEEN ON THE APPLICATION OF E
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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Mr M S Gill QC and Mr J Collins (instructed by Sheikh & Co) appeared on behalf of the **Claimant**
Miss S Broadfoot (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. JUDGE JARMAN QC: This claim by "E" against the Secretary of State for the Home Department came on for substantive hearing, listed for one day, this morning. At the outset Miss Broadfoot, who appears on behalf of the defendant, invited the court to adjourn the hearing for two reasons essentially: firstly, that the Secretary of State, somewhat belatedly, had taken the view that the asylum claim of the claimant ought to be reconsidered and accordingly, depending on the outcome of that process, this hearing may become academic; and secondly, that the Secretary of State had not had an opportunity properly to consider the points put forward in the amended grounds in March 2008, and in particular points relating to the *vires* of certain rules and policies.

2. I refused that adjournment and gave my reasons for that decision. Miss Broadfoot then indicated that, as her instructions were limited to seeking an adjournment, she would ask to withdraw. I expressed the view that it was somewhat surprising that a Government department should limit instructions in that way which would prevent the court gaining assistance from counsel for that department, and I gave Miss Broadfoot an opportunity to seek further instructions. She took that opportunity and, as a result of doing so, she has remained in court throughout the hearing and made limited submissions at the end of Mr Gill QC's submissions. Mr Gill appears for the claimant. I am very grateful to Miss Broadfoot for so doing. I entirely sympathise with her very difficult position and it is a matter of regret that she has been put in that position.

3. The facts of the case can be summarised fairly shortly. The claimant is a Turkish national. He was born in 1966. He is a Kurd and an Alevi by religion. He claims to have suffered persecution and/or ill-treatment in the past when he was living in Turkey due to his ethnicity, his political opinions, his religious beliefs, as well as his association with a particular social group. As a result of that, he travelled to the United Kingdom in August 1996, arriving at Gatwick airport, and immediately claimed asylum.

4. His claim was refused in December 1997 following asylum interviews and his appeal was heard and then dismissed by an Adjudicator approximately 12 months later. That Adjudicator accepted the claimant's credibility. He accepted that the claimant was an activist who had been detained several times and for whom there was an outstanding arrest warrant arising out of association with the Kurdish Workers Party, otherwise known as PKK. However, that Adjudicator concluded that the claimant's claimed fear of persecution was not well-founded objectively. It appears that the Adjudicator was influenced heavily by the fact that the claimant, having been arrested in Turkey, had been released by the prosecution for lack of evidence. As that was an appeal which took place before October 2000, human rights issues as such were not considered. The claimant sought leave to appeal to the Immigration Appeal Tribunal but that was refused.

5. Members of the claimant's family have obtained leave to remain in the United Kingdom, either as refugees or as persons on exceptional leave to remain. Some of those family members have obtained indefinite leave to remain and that includes the claimant's parents, one of his sisters and two of his brothers. Other members of his family have become British citizens and they include another sister, another brother and

a sister-in-law. He now has no close relatives remaining in Turkey. Whilst in the United Kingdom the claimant formed a relationship with a British woman, "K", and as a result of that relationship a son was born in September 1999.

6. On 24th October 2004 the claimant committed a criminal offence of blackmail. He demanded what he claimed were unpaid wages from his then employer. He threatened to report that employer to the Department of Social Security for financial irregularities if his demands were not met. It appears that he used a knife in the course of those threats. He was arrested and he was charged.

7. Shortly after that, he applied for indefinite leave to remain under the family amnesty policy which was announced in October 2003 and modified in August 2004. That policy was designed to deal with a large number of cases in which families were present in the United Kingdom. The amended policy provided that in order to qualify, the person had to be an adult who had made an asylum claim before 2nd October 2000 and had at least one dependant, other than a spouse, aged 18 in the United Kingdom on 2nd October 2000 and on 24th October 2003. The claim was refused under that policy, but on the ground that the policy did not apply to those with criminal convictions.

8. In June 2005 the claimant was sentenced to 18 months' imprisonment for offences of threats to kill committed in October 2004. No recommendation for deportation was made by the sentencing judge. The claimant was released on licence after serving nine months, but he was immediately detained. He was held in Her Majesty's Prison in Winchester for two days and then moved to Dover Detention Centre. In February 2006 he made an application for leave to remain on the basis that his removal from the United Kingdom would be in breach of his human rights, in particular his Article 3 and Article 8 Convention rights. Later on in that month his application was refused without any right of appeal being given.

9. His solicitors immediately complained about the way that decision had been taken and, as a result of that, a right of appeal to an Adjudicator on human rights grounds was provided, as from 2nd October by section 67 of the Immigration and Asylum Act 1999. Shortly after that came into force the Secretary of State for the Home Department gave an undertaking to the Tribunal in the case of **Pardeepan v Secretary of State** [2000] INLR 447 that failed asylum seekers whose appeals had been heard before October 2000 without giving them a full right of appeal on human rights grounds would not be removed.

10. In March 2006 the Immigration Service confirmed that the claimant was entitled to appeal and enclosed the necessary forms. Accordingly, in June that year Immigration Judge Cary allowed the claimant's appeal. The judge proceeded on the basis of the previous Adjudicator's findings that the claimant was credible and considered the risk on return, in light of the available country background information in relation to Turkey.

11. Despite being pressed to grant leave in light of the Immigration Judge's decision, the defendant failed to take any action to give the claimant his status papers and to give him leave to remain from the Secretary of State in line with the outcome of the appeal.

In October of that year the claimant commenced the current proceedings, but it was not until the observations of the judge considering permission that the defendant offered six months discretionary leave to the claimant on 24th January 2007. At the same time, reasons were given for not granting humanitarian protection and that is the decision which the claimant challenges. He later agreed to accept discretionary leave without prejudice to this claim and to his claim that he was entitled to a longer period, but despite attempts to persuade the defendant to grant a longer period, she has refused to do so.

12. By letter dated 22nd October 2007 the defendant finally issued status papers, namely a residence permit, again with only six months' discretionary leave running from 7th August 2007 to 7th February 2008. Accordingly, the claimant maintains the challenge on five grounds, as set out in amended grounds of challenge in March of this year.

13. Firstly, it is said that it was an abuse of process for the defendant, in granting only six months' leave to remain, now to seek to rely upon a conviction (the one that I have referred to) which could and should have been raised by the Secretary of State before Immigration Judge Cary. Secondly, the claimant should have been given five years' leave on the basis of humanitarian protection or three years' discretionary leave before the rules were tightened in October 2006. Thirdly, on the basis of the findings by Immigration Judge Cary, it is clear, it is submitted, that the claimant has been a refugee since leaving Turkey. Fourthly, exclusion from protection of those who would otherwise be entitled to humanitarian protection on the grounds of having committed offences can only be justified when the crime is so serious that presence in the United Kingdom cannot be tolerated. Finally, it is unlawful to adopt rules and policies which only grant six months' leave to remain when there has been a finding of a risk of ill-treatment which amounts to a breach of a claimant's Article 3 rights.

14. In respect of that latter submission, Mr Gill indicated at the outset of his submissions that, having regard to the fact that Miss Broadfoot was not properly instructed to deal with that point, and in the absence of full argument, he would not press this court to make a determination on that point.

15. I turn now to the law. I first of all refer to the Convention Relating to the Status of Refugees made at Geneva on 28th July 1951. Article 1 of that Convention, so far as is relevant for present purposes, reads as follows:

> "Article 1. Definition of the term 'Refugee'.
>
> A. For the purpose of the present Convention, the term 'refugee' shall apply to any person who . . .
>
> (2) As a result of events occurring before 1st January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

16. Section 72 of the Nationality, Immigration and Asylum Act 2002, again so far as is relevant, provides as follows:

> "(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is --
>
> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least 2 years.
>
> (3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if --
>
> (a) he is convicted outside the United Kingdom of an offence,
>
> (b) he is sentenced to a period of imprisonment of at least two years, and
>
> (c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.
>
> (4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if --
>
> (a) he is convicted of an offence specified by order of the Secretary of State, or
>
> (b he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).
>
> (5) An order under subsection (4) --
>
> (a) must be made by statutory instrument, and
>
> (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person . . .

(8) Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c.24) (no need to consider gravity of fear or threat of persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies.

(9) Subsection (10) applies where --

(a) a person appeals under section 82, 83 or 101 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c.68) wholly or partly on the ground that to remove him or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, and

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The Adjudicator, Tribunal or Commission hearing the appeal --

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

17. The Immigration Rules, in dealing with asylum, refers to the grant of asylum under rule 334. That says:

"An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that --

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii)he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;

(iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community

of the United Kingdom; and

(v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

335. If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain."

Then under the heading "Grant of humanitarian protection" the following is provided:

"339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that --

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and

(iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of --

(i) the death penalty or execution;

(ii) unlawful killing;

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Then finally, so far as is relevant under the heading "Exclusion from humanitarian protection", the following is provided:

"339D. A person is excluded from a grant of humanitarian protection under paragraph 339C(iv) where the Secretary of State is satisfied that --

(i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes . . . "

I need not read further, because the defendant in the course of these proceedings has made it clear in writing that it is that ground which is relied upon in saying as she does that the claimant is excluded from a grant of humanitarian protection.

18. Council Directive 2004/83/EC of 29th April 2004 sets minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection in the context of the protection granted. The third recital provides that the Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees. Article 12 deals with exclusion and under paragraph 2 provides that:

"A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that --

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of United Nations."

19. Chapter V deals with qualification for subsidiary protection and that equates, submits Mr Gill, to humanitarian protection for the purposes of the rules applicable in the United Kingdom. Article 15 goes on to deal with serious harm and Article 17 deals with exclusion. It provides:

"1. A third country national or stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that . . .

(b) he or she has committed a serious crime . . . "

So the distinction between subsidiary protection and refugee status, so far as exclusion is concerned, is whether the crime was committed in the country to which return is contemplated.

20. Humanitarian protection and discretionary leave were introduced on 1st April 2003 following the abolition of exceptional leave on 31st March 2003. On 30th August 2005, the policy on humanitarian protection was revised in line with new policies on the granting of refugee leave. Then finally for present purposes, on 9th October 2006 the policy changed again to reflect the requirements of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees.

21. In dealing with humanitarian protection, it is clear that the defendant's policy, as set out in paragraph 3.6 on exclusion, is that a person will not be eligible for a grant of humanitarian protection if he is excluded from it because of one of the following provisions in paragraph 339D of the Immigration Rules apply:

> "(i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
>
> (ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;
>
> (iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; and
>
> (iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime."

"Serious crime" for these purposes is:

> "• one for which a custodial sentence of at least twelve months has been imposed in the United Kingdom; or
>
> • a crime considered serious enough to exclude the person from being a refugee in accordance with Article 1F(b) of the Convention (see the API on Exclusion); or
>
> • conviction for an offence listed in an order made under section 72 of the nationality immigration and asylum act 2002."

22. In relation to discretionary leave, the defendant's policy in relation to applicants excluded from refugee status, humanitarian protection or discretionary leave is set out as follows:

> "Where an applicant would have established that they were a refugee under the 1951 Convention or eligible for a grant of humanitarian protection but for the fact that they were excluded from that protection, they should normally be granted discretionary leave for six months. Cases in which Article 33(2) of the 1951 Convention applies should be treated in the same way. The criteria for exclusion from refugee status and the operation of Article 33(2) are explained in the Asylum Instruction on Exclusion."

Then further down:

> "Individuals excluded from humanitarian protection will usually be granted discretionary leave for six months. See the Humanitarian Protection Asylum Instruction for the grounds of exclusion from humanitarian protection."

23. Finally, in relation to the standard period for different categories of discretionary leave it is provided as follows:

> "It will normally be appropriate to grant the following periods of discretionary leave to those qualifying under the categories set out above. All categories will need to complete at least six years in total, or at least ten years in excluded cases, before being eligible to apply for ILR [indefinite leave to remain].
>
> Article 8 cases -- three years
>
> Article 3 cases -- three years
>
> Other ECHR Articles -- three years"

24. I was referred by Mr Gill to a number of authorities which he submits are relevant in this case. The first is **R (S and Others) v Secretary of State for the Home Department** [2006] INLR 575. Those claims referred to Afghan nationals who had hijacked an internal flight in Afghanistan in order to flee the Taliban. When the aircraft arrived in the United Kingdom in February 2000 they claimed asylum. They were charged and convicted of various offences relating to the hijacking and sentenced to periods of up to five years' imprisonment. The case was initially decided by Sullivan J. There was an appeal and the Court of Appeal upheld the judgment of Sullivan J, saying that the claimants could only be placed on temporary admission under the Immigration Act 1971, Schedule 2, paragraph 21, as an alternative to detention if they were persons to whom paragraph 16 applied. In the course of giving his judgment, Brooke LJ said this at paragraph 45:

> "That the statutory scheme of immigration control postulated that

someone who successfully maintained that their removal would constitute a violation of their European Convention rights should be entitled to leave to enter, for however limited a period, became apparent from the clear submissions addressed to the court by Mr Rabinder Singh QC, who appeared for the respondents. In short, the essence of his argument is that those who do not have the 'right of abode' here must obtain 'leave' in order to enter the country . . .

(46) Mr Singh pointed out that, where such applicants are refused leave to enter, they have a right of appeal. If their appeal succeeds, on asylum or human rights grounds, they are entitled to leave to enter and to remain here, in the latter case, until they can be safely returned without violation of their European Convention rights. This status cannot be taken away from them by the Secretary of State conferring on them a new status which does not in this manifestation form any part of the statutory scheme. We accept Mr Singh's submissions."

25. Then in **R (Boafo) v Secretary of State for the Home Department** [2002] WLR 191, the Secretary of State refused the claimant's application for indefinite leave to remain in the United Kingdom. The appeal from that decision was allowed by the Adjudicator, but he failed to give directions to the Secretary of State pursuant to section 19(3) of the Immigration Act 1971 for giving effect to his determination. Mr Gill referred to section 87 of the Nationality, Immigration and Asylum Act 2002 which provides that if the Tribunal allows an appeal under section 82, it may give a direction for the purpose of giving effect to its decision. No such direction was given in this case. In giving his decision in the Court of Appeal in that case, Auld LJ said this at paragraph 25:

"Nevertheless, it is a salutary example of the importance, as Rose J emphasised in **Ex parte Yousuf** [1989] Imm AR 554, 558, of the executive making use of available machinery of appeal when seeking to challenge the decision of an Adjudicator, rather than attempting to circumvent it by reconsidering the matter, whether on evidence going to the original or new facts. That is especially so where, as in a case like this, any fresh executive decision is unappealable save by way of judicial review.

(26) On the question whether, as a matter of law, the Secretary of State was entitled to disregard the Adjudicator's determination and to consider the matter afresh because it was not accompanied by directions, I take the first two propositions of the judge as starting points. First, this appellate machinery is one of review, not rehearing, and both an Adjudicator and the Tribunal are normally bound to determine appeals on the facts as they were at the date of the decision under challenge. And, second, an unappealed decision of an Adjudicator is binding on the parties. However, I disagree with the judge in his decision that an Adjudicator's decision without directions is, *by reason of their absence*, not binding on the Secretary of State and that he may, in consequence, consider the matter afresh in the light of new information."

26. Finally, an authority upon which Mr Gill placed a great deal of reliance is the recent authority of **Secretary of State for the Home Department v TB (Jamaica)** [2008] EWCA Civ 977. That was an appeal from a decision of Bean J at first instance which was considered by the Court of Appeal. It was the Home Secretary who appealed from the judgment of Bean J. Bean J held that it had been an abuse of process and unlawful for the Secretary of State to have refused to grant the respondent refugee status and five years' leave to remain in this country on the ground that he constituted a danger to the community within the meaning of Article 53 of the 1951 Convention relating to the status of refugees, and section 72 of the Nationality, Immigration and Asylum Act 2002. That case also raised the question of the compatibility of section 7(2) with the asylum Convention. That issue was not pursued before the Court of Appeal. It has been raised in another case which Mr Gill tells me is due for consideration by the Court of Appeal shortly.

27. In the course of the judgment of Stanley Burnton LJ, the learned judge said this at paragraph 27:

> "Just as applicants in asylum and immigration cases are required to put forward all the matters on which they rely by the 'one-stop' warning which they are given, so must the Secretary of State bring forward his entire case when the applicant appeals to the AIT. Otherwise, the applicant is relegated to seeking judicial review of the Secretary of State's decision to invoke Article 33(2) and section 72, which, as Mr Jay (who appeared before the judge as he appeared before this court) realistically accepted was a less advantageous remedy which would make it more difficult for him to succeed. Accordingly, the judge held that the Secretary of State's decision had been unlawful."

Further down the learned Lord Justice said this:

> "(30) This demonstrates that it was open to the Secretary of State to seek to establish that Article 33(2) applied to TB on the hearing of his appeal; and it was open to the Secretary of State to seek to appeal the determination of the Immigration Judge on the ground that in failing to apply the statutory presumption she erred in law. She did not do so, and it is not easy to see why, if she is bound by the Immigration Judge's decision, she should be able to take the same point subsequently. I asked Mr Jay why, if she can take the Article 33(2) point after an adverse determination by an Immigration Judge, she could not take any other point under the Refugee Convention after an adverse determination, and I do not think he was able to provide a satisfactory answer. I see no basis on which it could be said that section 72 confers on Article 33(2) any special status that enables that provision to be relied upon when others cannot.
>
> (31) Moreover, the Immigration Judge considered, as she had to, whether TB's criminal conviction justified interfering with his Article 8 rights. She held that it did not. Her findings, set out in paragraphs 101 to 104 of

her determination, are inconsistent with his constituting a danger to the community. It is evident, therefore, that if section 72 and Article 3(2) had been raised before her, she would have held that the statutory presumption of dangerousness had been rebutted.

(32) As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by an administrative decision. If she could do 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".

Further into his judgment, at paragraph 35, this is said:

"Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in **Boafo** at (28). But this is not such a case."

In short, Mr Gill submits that this present case is not such a case either. He argues that, on the reasoning of the Court of Appeal in the **TB** case, the Secretary of State could and should have raised any issue in relation to the claimant's conviction at the hearing before the Immigration Judge. Accordingly, it is necessary for me to examine in a little bit more detail that decision.

28. The decision is dated 5th June 2006. The claimant was represented by counsel. There was no appearance for the defendant. Originally, the defendant was due to be represented by a member of the Home Office Presenting Officers Unit. It appears that that person was unable to attend due to illness. The Immigration Judge records in the decision that that unit were unable to provide alternative representation, but they did provide what the judge described as a standard letter prior to the hearing, inviting the judge to dismiss the claimant's appeal. It is recorded that the defendant's decision to refuse the claimant's application under the European Convention is set out in a very brief letter of refusal dated 28th February 2006 and the judge took the view that no detailed reasons for the refusal appeared in the letter.

29. Having noted the status of the claimant's family in this country, to which I have already referred, the judge also had regard to the fact that the claimant's son was not well and that he kept in regular contact with his son, the fact that the claimant confirmed that he had been convicted of a criminal offence which appeared to be threats to kill on 10th June 2005, that he had been sentenced to 18 months' imprisonment, and that the judge who sentenced him did not make any recommendation for deportation.

30. The judge referred to various witnesses who were called such as K and also the claimant's father. The claimant's father gave evidence that he had returned to Turkey on a couple of occasions, the last being in May 2006. He said that he was unable to

travel beyond Istanbul and that he had been asked about the claimant's whereabouts; that is the whereabouts of his son. He confirmed that there were no other relatives left in Turkey and said that if the claimant returned to Turkey he would be thrown into prison.

31. The judge referred to the Adjudicator's assessment of the claimant in his application for asylum in 1998 as a credible witness. The Adjudicator accepted that the claimant had been detained for one month in the summer of 1996, but had been released. The Adjudicator accepted that there was an arrest warrant outstanding. The judge was clearly entitled to have regard to the Adjudicator's conclusion of fact at that hearing, particularly in view of the decision in **Saleem v Secretary of State for the Home Department** in 2002. The judge recorded that there was no evidence before him to suggest that the views reached by the Adjudicator on the claimant's credibility or his experiences in Turkey are in any way misconceived.

32. The judge then referred to various documents and pieces of evidence which the claimant had filed in that hearing. Examples are a recent US Department of State country report published on 8th March 2006, which confirmed that although the government in Turkey respected the human rights of its citizens, and although there had been improvements in a number of areas, serious problems remained. In particular there were problems of unlawful killings, torture and beatings and other abuses of persons by security forces and arbitrary and lengthy pre-trial detentions. The judge noted that the PKK was still active in Turkey and that Human Rights Watch reported in World Report 2006, published on 18th January 2006, that political violence by that organisation had flared up, increasing tension and provoking heavy-handed responses including human rights violations by state forces. The five year truce between the Government and the PKK ended in June 2004 and there were news articles referring to rebels and Turkish soldiers dying in the fighting.

33. For all those reasons, the judge concluded that it was reasonable that the claimant may be at risk of persecution or ill-treatment sufficient to engage the protection of Article 3 of the European Convention. It was the judge's view that there was a reasonable likelihood that the claimant would come to the attention of the authorities on his return, and referred to the computerised GPT system which contains details of any outstanding arrest warrants. In referring to the Article 8 point, the judge accepted that removal from the United Kingdom would amount to an interference with his right to private and family life in this country, but considered that such an interference would be proportionate when balanced against the need of the defendant to maintain effective immigration control.

34. Reference was made to whether the circumstances were truly exceptional in accordance with the case of **Huang and Others** [2005] EWCA Civ 105. Mr Gill submits that that case has now been considered by the House of Lords, who made it clear that there is no room for the test of truly exceptional circumstances and what has to be considered is whether Article 8 is engaged or not.

35. Finally, the judge came to the view that the claimant's conviction and imprisonment did not deprive him of the protection of Article 3. The judge concludes thus:

> "There was of course no recommendation for deportation by the trial judge but perhaps more importantly the issue was never raised by the respondent in his letter of refusal. In any event, the right not to be tortured or subjected to inhuman or degrading treatment contrary to Article 3 is an unqualified right and can never be balanced or give way to competing considerations. If the respondent had felt that the appellant's conviction was in any way relevant the matter should have been raised either before me or in the letter of refusal. The plain fact is that it was not."

36. In those circumstances, submits Mr Gill, having regard to the fact that no point was taken by the Secretary of State during the hearing before the Immigration Judge, and no application was made by the Secretary of State to seek reconsideration, it is now unlawful for the Secretary of State to seek to rely upon that conviction. In my judgment, that submission is a sound submission. Based on the reasoning, which is clear from the Court of Appeal in the case of **TB**, in my judgment, the Secretary of State has acted unlawfully in this case.

37. In those circumstances, Mr Gill made it clear that if I were to come to that conclusion, he would not press the second ground that refers to delay and, in any event, it would not give his client, the claimant, the relief which he sought. It is also apparent, in my judgment, that, having made that finding, it is unnecessary for me to decide what would have happened had the Secretary of State raised the question of the claimant's conviction at the hearing. I would observe that it would be difficult, in my judgment, on the information before me, to come to the conclusion that it would have made no difference. The reason I say that is that it is quite clear from the judge's decision that the failure of the Secretary of State to raise the point was a weighty factor in the conclusion which the judge came to.

38. As I have indicated, in light of the way in which this case came on for hearing and the difficult position of Miss Broadfoot, I do not make any findings in relation to Mr Gill's fifth point.

39. Miss Broadfoot, in helpful brief submissions indicated that if I came to the conclusion that relief were appropriate in this case, the most appropriate form of relief would be that sought at paragraph 10(3) of the substituted grounds for judicial review:

> "A declaration that the claimant is entitled to five years' leave to remain, either as a refugee or a person entitled to humanitarian protection."

I accept that submission. When I asked Mr Gill as to when that five years should run from, he submitted that it should run from the date of the decision of the Immigration Judge, and in my judgment that is a sound submission which I accept.

40. One final matter which Mr Gill did pursue was the issue of damages. He fairly accepted that on the state of the authorities, as they are at the moment, it is extremely rare that damages for delay would be appropriate. Having regard to the declaratory relief which I have given, in my judgment this cannot be said to be an exceptional case.

Mr Gill relied upon the fact that the delay and the uncertainty may have given rise to interference with family life, it may have given rise to difficulties with the claimant's employment prospects, not to mention the stress which it caused, and Mr Gill invited me to adjourn the issue of damages. But, as I have indicated, in my judgment this is not a the sort of exceptional case which authority contemplates as giving rise to a right to receive damages and, in my judgment, the declaratory relief which I am inclined to give is a sufficient disposal of the claimant's judicial review claim.

41. MISS BROADFOOT: Sorry, my Lord, before my learned friend asks for costs, can I just mention in relation to when the declaratory relief runs from. I do not know if it is possible to retrospectively give somebody leave to remain, which is effectively what is being asked for. From my experience, I think that is not possible. I am just wondering whether we could temper in some way the judgment so that if it is possible it is done, but if it is not because you cannot retrospectively award somebody permission to be here when --

42. JUDGE JARMAN QC: My judgment is simple that declaratory is declaratory. It seems to me that what I am saying is that I am declaring that the decision of the Secretary of State was unlawful and that that was the entitlement. I am not granting leave myself, I am just granting a declaration. The alternative way of doing it would be to say for some period to run from today which would equate with five years from June 2006. But it does not seem to me that that is necessary. Mr Gill, do you wish to say anything about that?

43. MR GILL: My Lord, no. What your Lordship has said I entirely accord with. I have seen examples where it has been back-dated but I do not want to press the point.

44. JUDGE JARMAN QC: You mentioned, Mr Gill, that in another case you settled a draft minute of order. Is that an appropriate and reasonable way forward in this case? Perhaps Miss Broadfoot is not instructed to deal with that.

45. MR GILL: I am quite content with the way in which your Lordship has put it, that there be a declaration granted that the claimant was entitled to five years' leave to remain. There is no need to put a label on it.

46. JUDGE JARMAN QC: From 5th June 2006?

47. MR GILL: That is right. How the Secretary of State then implements that is a matter which will have to be dealt with in due course.

48. JUDGE JARMAN QC: Very well. Are there any other matters?

49. MR GILL: My Lord, the only other matter is an application for detailed assessment of the claimant's publicly funded costs, and a claim for costs to be paid by the defendant, we would submit, on an indemnity basis. This is a case in which, contrary to what is said in the footnote to the substituted grounds, the claimant is on a nil contribution. I think it was mentioned in a footnote that he may be making some contribution, but it is a nil contribution.

50. As regards the indemnity costs, we say that there has been repeated failures of action by the Secretary of State in this case and the matter has dragged on for an extraordinarily long period of time. Even though I will not seek to put all of that period at the door of the Secretary of State, most of it can be explained in that way. A number of judges of this court have had to press the Secretary of State into action. Even after such detailed grounds were filed in early March of this year and the matter listed in consultation with everybody's clerks, no defence was filed in this case in what would seem to be flagrant denial of the court's orders, or at least under the CPR there is a power in the defence to file the further grounds if they wish to rely on them.

51. Even when the matter was raised in correspondence more recently, and we invited them to even now put in a defence last week, still no defence. One is faced with a situation where the claimant is put, by this behaviour, in greater and greater distress. All of this ought to get some sort of response from the court and that should be indemnity costs.

52. JUDGE JARMAN QC: In reality, Mr Gill, it is all public money. That is one of the unfortunate consequences.

53. MR GILL: My Lord, the White Book does indicate that even in such a situation --

54. JUDGE JARMAN QC: Yes, I know.

55. MR GILL: Otherwise the court's power to take action is really set at nought in such scenarios.

56. JUDGE JARMAN QC: So are you asking that the defendant pay the claimant's costs, to be the subject of a detailed assessment if not agreed (and it will have to be a publicly funded detailed assessment), and you are asking for it on an indemnity basis?

57. MR GILL: Yes.

58. JUDGE JARMAN QC: Miss Broadfoot, are you going to resist the principle of costs?

59. MISS BROADFOOT: I cannot resist principle.

60. JUDGE JARMAN QC: What about indemnity?

61. MISS BROADFOOT: I do resist that. Yes, there has been delay. The grounds which form the basis of this application were filed in March 2008, which in itself quite a long time after the claim was originally made. The court has effectively expressed its disapproval of the Secretary of State's inability to put its case together by refusing the adjournment. In my submission, it would be heavy-handed to now make the Secretary of State pay costs on an indemnity basis in circumstances where, on one view, they have had less work to actually do because there has been no defence filed, my Lord. In my submission, this is not one of those cases where it is appropriate to use this really extreme power to make the Secretary of State pay costs on that basis.

62. JUDGE JARMAN QC: Mr Gill, do you wish to reply?

63. MR GILL: My Lord, the point that may have been concerning your Lordship about public money is in the White Book at 66, paragraph 22. This is effectively saying just because it means the lawyers get a wrinkle, does not stop the court from exercising the power.

64. JUDGE JARMAN QC: I am not inclined to order that the defendant should pay costs on an indemnity basis. There is no doubt in the case that there has been delay, and it appears that the defendant is in breach of directions made in this case for the filing of defences. But nevertheless, the substituted grounds were filed in March 2008 and involved considerable amendment of the original claim. The matter is far from straightforward, in my judgment, and in the circumstances I do not consider it is a case for indemnity costs. Is there anything else?

65. MR GILL: No, thank you, my Lord. I am most grateful.

66. JUDGE JARMAN QC: I am grateful to you, Mr Gill for your submissions. Miss Broadfoot, I am very grateful to you.