ar Appeal No.HX37181-01

MO (McDowall-Reviewed-Objectivity) Turkey CG [2002] UKIAT 02583

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 30 April 2002

Date Determination notified:

12th July 2002.....

Before:

Mr J Barnes (Chairman)
Mrs J Harris

MEHMET OZDEMIR

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
For the appellants : Mr G. Hodgetts, counsel, instructed by Gotelee & Goldsmith
For the respondent : Ms C. Cooper, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Turkey of Kurdish ethnic or racial origin who was born on 2 February 1975. He arrived illegally in the United Kingdom on 24 November 1999 and claimed asylum on the following day. Following an interview in January 2000 and further representations by his representatives shortly thereafter, the Secretary of State refused his asylum application for the reasons set out in a letter dated 10 April 2001. On 12 May 2001 he issued directions for his removal to Turkey as an illegal entrant after refusal of his asylum application. He appealed against the decision on asylum grounds only and his appeal was heard on 20 November 2001 by an adjudicator, Mr E.F. Cousins, who dismissed his appeal. At the hearing before the adjudicator enlarged his grounds of appeal to assert also that removal would result in breaches of his human rights under Articles 3 and 4 of the European Convention on Human Rights.

2. The adjudicator did not believe that the appellant had ever been detained as he claimed and the grounds of appeal challenge his adverse credibility findings, particularly in relation to failure to take into account the medical evidence which was before him. They challenge also his failure to make any findings in relation to the expert report of Mr David McDowell, specific to the appellant, which had been produced to him. Finally, the determination was challenged on the basis of a failure to make any assessment of prospect risk on return of the appellant, highlighting that there was a lack of record of the oral evidence in which the appellant had claimed a further short detention in a general round-up; that the adjudicator had not made clear what of the appellant's claims he did accept, but only those which he specifically rejected; and that the adjudicator had rejected a potentially corroborative evidence because he did not accept primary evidence, and had therefore not looked at the evidence in the round.

3. Before us, it was common ground that the challenges mounted to the adjudicator's approach his credibility findings were well-founded and that it followed that his dismissal of the appellant's claims on the basis of those flawed findings was unsafe and could not stand. Mr Hodgetts urged that we should remit the case for hearing afresh before another adjudicator but we made it clear that we would follow this course only if we were persuaded that, taking the appellant's claims at their highest, it was arguable that the appellant was entitled to succeed, either by reason of prospective breach of the Refugee Convention or of his human rights on removal to Turkey. We therefore heard full submissions from both advocates predicated on the assumption that the appellant was to be regarded as a credible witness in relation to the specific acts of adverse attention which he claimed he had suffered.

4. We are satisfied that, even approached on this basis, the appellant would fail to discharge the evidential burden of proof on him to show a reasonable likelihood that his removal would lead to a breach of the United Kingdom's international obligations either under the Refugee Convention or the European Convention on Human Rights. Had we concluded otherwise we would, as we made clear to the parties, have remitted this appeal for rehearing.

5. Approaching the appellant's claim on the basis that, for the purposes of this determination he is being treated a credible witness as set out above, the basis of his claim is that he is an ethnic Serb, born and brought up in Karakocan in the province of Elaziag in eastern Turkey. This village is situated in the north eastern part of the province in what Mr McDowell describes as a salient sandwiched between the provinces of Bingol and Tunceli, the later remaining in one of the four provinces still within the state of emergency. He says that it is an area recognised by the authorities as having a high level of support for the PKK. Apart from generalised discrimination, the appellant claims that he has been detained on three occasions. The first was in 1994 when he was going to get medicine for his father. He says he was arrested and tortured for two days because it was believed that he was getting medicine for the PKK, although his claim was apparently subsequently accepted and he was released without charge. Although no date is given for the second arrest, it appears that

this happened fairly shortly after the first arrest. On this occasion he was arrested with others in the village after two PKK guerrillas had been killed there and was assaulted, with one severE blow by an officer, after being asked whether he was again taking medicine to the PKK – a clear reference to the earlier occasion – but says that he was then provided with medical treatment, released later on the same day, having again said that he was taking medicine to his father. His military service, which should have commenced in 1995, was deferred because he was looking after his parents in the village, but he subsequently served from February 1997 until August 1998, returning to the village on his discharge from service.

6. Although he made a general claim of arrests on numerous unspecific occasions, he also said that in the period from his discharge from service, he was able to avoid getting into any trouble with the authorities by maintaining a low profile, and the next occasion when he claims to have been arrested and detained was in August 1999 during a general round-up of males in the village when they were generally lectured about PKK support, and he claims that the authorities began torturing them, although he does not claim to have been ill-treated himself on that occasion and the first mention of it did not occur until late in cross-examination a the hearing before the adjudicator. Those detained were released without charge on the following day. After this he said that his parents advised him to leave the village and on 15 November 1999 he did so, travelling to Istanbul where he made arrangements to leave the country. When he left he left he had his Nufus card which he apparently still retains so that he is in a position to prove his identity if returned.

7. It was Mr Hodgetts' submission to us that, on the basis that the credibility of that account was accepted, the appellant would have a well-founded fear of persecution on return by reason of his imputed political opinion. He relied on a combination of the following factors: First, that the appellant would have no valid passport, although he would have his valid identity card, as we have noted above; secondly, his own past record of arrest and detention, albeit for short periods without charge; thirdly the fact that his uncle had, at some unspecified time, been arrested and tortured in detention for three months for having aided PKK guerrillas; the appellant said, however, that his father had no difficulties with the authorities and that his five younger siblings remained at home with his parents; thirdly, the fact that he came from Karakocan because of the known high level of PKK support in the area; fourthly, the fact that he had been abroad now sine November 1999. It was his submission that this combination of factors was reasonably likely to lead to suspicion that the appellant was a separatist. Finally, it was relevant to take into account that a Dr M.H. Gaddal, a consultant psychiatrist, had given his opinion that the appellant satisfied the criteria for diagnosis of post-traumatic stress disorder which he ascribes to his treatment at the time of his arrest in 1994. The doctor had recommended prescription of an anti-depressant and specialist counselling, although there was no evidence as to whether or not the appellant was currently undergoing any medical treatment.

8. It was Mr Hodgetts' submission, however, that because of this diagnosis there was a reasonable likelihood that the appellant would be less able to deal with interrogation on return and might place himself in further difficulties as a result. Mr Hodgetts accepted that the issue was whether there was a real possibility of treatment which was either persecutory under the Refugee Convention or would be in breach of Article 3 during initial enquires and interrogation on the appellant's removal and return to Turkey.

9. Even accepting all that the appellant says as to his past experiences in Turkey, this can hardly be described as a strong case. There were two major incidents but both occurred in or about 1994 but cannot, it seems to us, be regarded as in any way instrumental to the appellant's departure some five years later in late 1999. However improper the behaviour of the authorities at that earlier time, the appellant had remained in his home village looking after his parents as the eldest child and assisting on the farm without any further specific difficulties. The authorities had agreed to defer his military service because of the family circumstances. He had subsequently carried out that service and returned once more to his home village where he stayed for a further fifteen months. On his own account, he was able to avoid any further problems with the authorities from 1994 until August 1999 by keeping a low profile in his home village. His father had no difficulties with the authorities but one uncle did because, he claims, the authorities discovered the uncle had given some forced assistance to the PKK on one occasion. Although the uncle was detained and ill-treated, he was subsequently released and there is no suggestion that he has ever been re-arrested, it is not suggested that as a result of what happened to the uncle the appellant experienced any difficulties whilst in Turkey. The appellant claims that the reason he decided to leave his country was the overnight detention in the general round-up in village in August 1999, during which he has not claimed that he personally was ill-treated. We note also that this incident occurred at a time of heightened tension when Ocalan, the PKK leader, had been captured, returned and tried in Turkey, and that there were moves afoot for the PKK to declare a ceasefire at his request, following his conviction and sentence of execution, which has never been carried out.

10. The appellant has produced an expert report from Mr David McDowell, who has provided expert reports in relation to the situation of the Kurds in Turkey on many previous occasions. This report is specific to the appellant and is dated 31 October 2001. He says that the province of Tunceli is notorious as arguably the most recalcitrant part of Turkish Kurdistan and remains within the region of the state of emergency. As we have already noted, the appellant's home village is in a part of Elazig province, close to the province of Tunceli, although it appears that the main mountain ranges are somewhat to the north of the appellant's home area. We note that he says that the worst period during the 1990s was the second part of 1994

> '… when the security forces launched major operations in all three provinces, aimed not only at getting rid of PKK guerrillas but also aimed at intimidating the Kurdish population.'

11. He says that hundreds of villages were either wholly or partially empty in the area and that Karakocan was one of those emptied in 1994, although curiously the appellant makes no such claim himself and it is clear that he and his family lived there throughout this period, working the family farm.

12. In support of his views expressed as to the state of affairs in the appellant's home area, Mr McDowell then quotes at length from a statement he obtained as to the treatment of a former father from the province of Mus, to the east of Bingol province and therefore some distance from the appellant's home area, which relates to the treatment of him and his family there until they left the area in late 1993.

13. Harrowing though that account, we are bound to say that in our view it can have little relevance to the appellant's account of his own experiences from 1994 onwards at some remove from the area referred. It seems to us also significant that the appellant certainly has never claimed such treatment in his home area or any forced evacuation of his village such as is referred to in the anecdotal reference by Mr McDowell. With all respect to Mr McDowell, we cannot think that it assists us in accepting his report when he says in terms:

> 'This example provides a powerful indication not only of the kind of violations Mr Ozdemir has good grounds to fear, but also the dangers he faces if returned to Turkey.'

14. We therefore have some concerns about the degree of objectivity which can be attached to Mr McDowell's report.

15. We note that Mr McDowell says that the only bearing on the appellant's situation of his having carried out military service is 'that it will be seen that he is not evading his military service' and that he goes on to say:

> 'The vast majority of Kurds complete military service, most probably unwillingly as they cannot possibly agree with the prime purpose of the Turkish armed forces which is, and has been ever since 1925, to keep the Kurds in subjection.'

16. With all respect to Mr McDowell, this would again seem to call into question the objectivity of his report, having regard to the considerable percentage of the Turkish population comprising ethnic Kurds and the large numbers whom it is accepted are assimilated into Turkish society. That there may be many of those carrying out military service who do not agree with the aims of the Turkish government in relation to the Kurds, we accept will be the case, but to say of all Kurds that 'They cannot possibly agree with the prime purpose of the armed forces' does cause us some further concern.

17. Mr McDowell deals specifically with the question of return of the appellant in the following terms:

> "Being without a valid travel document, Mr Ozdemir will, if returned, be held at Istanbul airport. His name and details will be passed to the anti-terror police on Vatan Caddesi in Istanbul. They will contact the jandarma in Karakocan who will check their records and will probably also check the village he actually comes from. If there is no suspicion regarding him, he will be allowed to enter Turkey without further difficulty, but it is a very big "if", particularly bearing in mind that Karakocan is close to one of the last remaining "hot" areas of PKK or other armed activity.'

18. Pausing there, it is apparent that what Mr McDowell is saying is that if the appellant is not of adverse interest to the authorities, he will face no difficulty in returning to Turkey. There is, of course, evidence cited in the Home Office Country Information and Policy Unit (CIPU) assessment that there is no reasonable likelihood of adverse treatment whilst such enquires are being made. As we have already noted, the appellant will be in a position to prove his identity by production of his Nufus card and the thrust of the evidence before us is that the appellant was able to live in his home village in circumstances where he has not been the subject of any direct adverse attention since his original short period for detention in 1994, dealt with above. On the other two occasions he had been day without charge. It does not seem to us on the basis of that evidence that there is any reason to conclude that there is a reasonable likelihood of therein being caught up in a general round-up and released either on the same day or on the following any suspicion in relation to him.

19. It is right, however, to record that Mr McDowell goes to say that he is duty bound to remind the court of the warnings given by two human rights organisations in Turkey, the Human Rights Foundation of Turkey (TIHV) and the Turkish Human Rights Association (IHD). He says that they no more than any other body regarding what happens to returnees and that this led to them issuing explicit warning in March 1999 that no European country should return anyone who was refused asylum. He goes on to say that 'They did so primarily because they were alarmed at the cases of mistreatment on reactor about which they had heard and their belief, based on experience, that they only learn of a very small fraction of the total amount of mistreatment, probably under 10.'

20. He then refers to what was said by TIVH in March 1999, which referred to 'certain risks' for returned failed asylum seekers, adding that the risks 'had reached a peak at a time when substantial human rights violations are occurring at a sensitive period'.

21. It is appropriate to note at this point that this warning was issued shortly after Ocalan was forcibly returned to Turkey on 15 February 1999 and we accept that was indeed a highly sensitive period.

22. Speaking of matters at that time, it is clear that what is said by TIVH is anecdotal rather than derived from any direct evidence. They refer to the likelihood of detention on return, saying that it may last a few hours when the period is released but that 'there are examples of such detention practices leading to serious consequences'. They then go on to say:

> 'The risk of facing ill-treatment is very high for those who are deported to Turkey. In this matter, the examples reaching human rights organisations in recent times show that some of those who claim for political asylum and had been refused and sent back to Turkey, were subjected to torture and inhumane treatment.'

23. It is immediately apparent to us that, having started by claiming a high risk of ill-treatment for all those deported, this claim is then very much reduced within the same paragraph as being based on the fact that some of the returned failed asylum seekers were subjected to torture and inhumane treatment.

24. Perhaps the IAD, also issuing a statement in March 1999, may be seen to be more realistic because Mr McDowell reports that they criticised European governments repatriating Kurdish activists whose applications had been refused – a class where there may well be a greater degree of risk – but it seems to us that the validity of their position is then seriously undermined from the passage which Mr McDowell then quotes, which makes it clear that they regard deportation of Kurdish refugees as contrary to the Refugee Convention and the European Convention on Human Rights as a matter of principle. They say in terms: 'The IHD objects in principle to the deportation of any person to a country where such problems [routine and flagrant violation of the basic Articles of the European Convention] exist'.

25. The first obvious point is that European countries have been returning failed Kurdish asylum seekers, as have the United States, Canada and Australia. According to the CIPU table, over 7000 failed asylum seekers have been returned between 1989 and 2000. If there were routine ill-treatment of failed asylum seekers, we find it inconceivable that there would not be substantial evidence of this. In those circumstances, we are not particularly impressed by Mr McDowell's statement that he asked those two organisations in October 2000 whether they would now modify their warnings but they said that they would not. In any event, that was a year prior to the preparation of his report and is now eighteen months in the past as at the date of the hearing before us. Mr McDowell also refers to Amnesty International having expressed its concern over forcible return of asylum seekers, but makes it clear that the last such expressed concern was in a statement issued in early February 1994. He says that he spoke with an Amnesty official in October 2000 and understands that the reason the warning has not been updated 'is not that they believe it no longer to be applicable, but that they lack sufficient staff to maintain a close monitor on the asylum issue'. Included in the appellant's bundle are number of Amnesty International reports issued between August 1999 and 30 November 2000. They all express concerns about the treatment of those

detained in Turkey but there is no reference to any particular danger to returned failed asylum seekers. The position of the UNHCR is that failed Turkish asylum seekers may be returned provided that their cases have been properly investigated and they have been found not to be refugees or in need of international protection on other grounds.

26. So far as Mr McDowell's views are concerned, it also comes as a surprise to us that in a report obtained in October 2001, there should be such reliance on earlier material, particularly having regard to the absence of any reference at all to the capture, trial and conviction of Ocalan and to this call on 2 August 1999 to the PKK to withdraw its troops from Turkey and to cease military operations from 1 September 1999. Two days later the PKK Presidential Council confirm that PKK combatants would cease operations against Turkey and that appears to remain the position. Those are matters which must have such a clear bearing on the situation in Turkey that it does not seem credible to us that the independent report of an expert should fail to deal with them at all.

27. For all these reasons, we find ourselves unable to rely on Mr McDowell's view as being objectively based and we do not consider that his report adds any weight to the appellant's case.

28. Mr McDowell also dealt with the question of internal relocation and suggested that this was not an option for someone like the appellant, basing himself largely on the anecdotal evidence quoted at length of the Kurd from Mus province, to which we have already referred. It was clear, however, that he and his family were regarded as Kurdish activists from his own account. He had moved to a shanty town outside Istanbul where he had registered with the Mukhtar under a false address. It maybe that this man had good cause to be concerned, but what is apparent is that the appellant is not in a similar category since the authorities have shown no active current interest in him for many years. Many thousands of Kurds have, as a matter of fact, relocated within Turkey and we also place no weight upon Mr McDowell's views as to the ability of this appellant to move to other locations in Turkey should he so desire. We note from the current CIPU assessment (paragraph 7.26) that Turkish citizens generally enjoy freedom of movement domestically and (paragraph 7.31) that UNHCR are advised that, in general, Kurds fleeing south east Turkey have a possibility to relocate within Turkey provided that they are not at risk of being suspected of connection to or sympathy with the PKK, or have otherwise a political profile.

29. Having carefully considered the background evidence before us, including that to which we have not made specific reference, taking the facts at their highest, we find that the appellant has not discharged the burden upon him to show that he has a well-founded fear of persecution by reason either of his ethnicity or of any imputed political opinion if now returned to Turkey. We accept that he will be interrogated on his arrival to ascertain whether he is of any adverse interest to the Turkish authorities. Taking his claims at their highest, he fails to satisfy us that he is of such interest. We find that he had no subjective fear

of persecution for a Convention reason when he left Turkey and that he has no current well-founded objective fear if now returned.

30. For similar reasons, we find that there is no reasonable likelihood that on return he will be subjected to treatment in breach of his human rights under Article 3 of the European Convention or that there will be any other breach of his human rights. If he requires treatment for post-traumatic stress disorder arising from what happened to him in 1994, there is nothing to suggest that such treatment will not be available to him in Turkey where he was able to live until his departure in 1999 whilst so suffering. That the fact of such a condition may lead to any danger of ill-treatment to him on return, is, with respect to Mr Hodgetts, no more than speculation on his part. There is no evidence on the facts of this case to support such a submission.

31. For the above reasons we have concluded that the appellant cannot succeed in his claims even if his credibility is accepted unreservedly.

32. We accordingly dismiss his appeal.

J BARNES
VICE PRESIDENT