Case No: C1/2008/0458

Neutral Citation Number: [2008] EWCA Civ 1182
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE HOLMAN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 8th October 2008

Before:

LORD JUSTICE THORPE,
LORD JUSTICE KEENE
and
MR JUSTICE HEDLEY

- -

Between:

The Queen on the Application of TASKIN **Appellant**

- and -

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

- -

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Mr P Greatorex (instructed by Treasury Solicitor) appeared on behalf of the **Appellant**.

Mr P Richmond (instructed by Messrs Trott & Gentry) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Keene:

1. This is an appeal by the Secretary of State for the Home Department against a decision by Holman J, who quashed the appellant's decision that matters put forward on the respondent's behalf did not amount to a fresh claim for asylum. Holman J held that it was not rationally open to the appellant to reach that conclusion. The respondent is a Turkish citizen of Kurdish ethnicity. He arrived in the United Kingdom on 25 February 2003 and claimed asylum. That was refused and an appeal by him to an adjudicator was dismissed in September 2003. The adjudicator reached various conclusions as to the credibility of the respondent's account in events in Turkey, but the Immigration Appeal Tribunal (the "IAT"), as it then was, on appeal found that there were errors in law, in that some of the adjudicator's findings were not open to him. In effect, as Holman J noted, the IAT was prepared to proceed on the basis that the respondent's claims were, in essence, true. It was on that factual basis that it proceeded to assess whether he would be at risk if returned to Turkey. One can therefore use the respondent's version of events as the factual basis for this appeal.

2. He claimed that at university in Turkey he had sought to encourage fellow Kurdish students to vote for HADEP. On three occasions, namely April 1999, September 2001 and on 22 January 2003, he had been arrested and detained by the Turkish authorities and subjected to brutal torture. On that last occasion he was interrogated about the PKK and only released after five days when he agreed to become an informer. Following that last occasion, he left Turkey and arrived some days later in the United Kingdom.

3. The IAT, proceeding on the basis of these facts, concluded that he would nonetheless not be at risk on return. They referred to three earlier IAT determinations which dealt with the information available to the Turkish authorities about returnees, those being O or, more accurately, HO (Turkey) CG [2004] UKIAT 00038, AG (GBTS, "tab" and other records) Turkey CG **[**2004**]** UKIAT 00168 and KK (GBTS -- Other information systems -- McDowall) Turkey CG **[**2004**]** UKIAT 00177. Then the tribunal said this at paragraphs 17, 18 and 19:

> "17. We follow the Tribunal reasoning in O which has been confirmed but not to our knowledge undermined in any subsequent Tribunal determination. Accepting that the appellant does not have a current Turkish passport and assuming that he has not been able to obtain one, he will be returned with temporary travel documents from which the Turkish authorities are reasonably likely to infer that he is a returning failed asylum seeker. If they check on their GBTS records they will find nothing adverse to the appellant. If all that he claimed did happen including three periods of detention after which he was released without

> charge, this would not be recorded on the system. There is no suggestion that the authorities have instituted any formal and thus recorded procedure for his apprehension.
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> 18. Like the claimant in O, it is no part of the appellant's case that he has, since being in the United Kingdom, involved himself in politically related activities which would be perceived as hostile by the Turkish authorities.
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> 19. We can see nothing in the evidence and Miss Allen has not referred us to anything to indicate that since he left Turkey, the authorities have been or are still seeking the appellant. There is nothing to support Miss Allen's submission that were he to return to the areas of either of the family homes, or indeed any area in which he has lived in the past, the authorities would have any continuing adverse interest in him which might lead to persecution or infringement of his human rights."

4. The respondent sought permission to appeal to the Court of Appeal against that decision. While his application was pending before the IAT, that tribunal's decision in IK (Returnees -- Records -- IFA) Turkey CG [2004] UKIAT 00312, a country guidance case, was published. It is a lengthy and thorough examination of the evidence as at late 2004 of, in particular, the availability at Istanbul airport of information about returning Turkish nationals. It was referred to by the vice president of the IAT, Mr Moulden, when refusing permission to appeal on 15th December 2004 from the IAT's decision, a refusal in somewhat unusual terms. Mr Moulden first stated that the IAT had properly followed the country guidance cases referred to in its determination and so there was no error of law. Then he went on to add this in a second paragraph:

> "However, since the hearing of this appeal, the Tribunal has, on 2 December 2004, promulgated an updated Country Guidance case, IK (Returnees -- records -- ISA) Turkey CG [2004] UKIAT 000312 which addresses, inter alia, the matters raised in the grounds of appeal. This states, in paragraph 14 of the summary of generic conclusions that the former country guidance cases as set out in paragraph 15 of the determination in this appeal (and others) have been updated and replaced."

5. The respondent and his advisers, perhaps not unnaturally, took those somewhat Delphic comments as encouraging them to submit a fresh claim for asylum, which they duly did on 14 February 2005. They did not, however, take any further steps to challenge the IAT's determination and did not seek

permission to appeal from this court. The claim submitted on the respondent's behalf in February 2005 contended that the IAT had, in effect, proceeded on the basis that none of the respondent's detentions would come to the attention of the authorities at Istanbul airport and that the determination in IK showed that that was not necessarily right.

6. By letter dated 18 October 2005 -- the subject matter of the judicial review claim -- the Secretary of State determined that those representations did not amount to a fresh claim. The crucial parts of the letter are paragraphs 8 and 9, which read as follows:

> "8. You have raised an application stating your client is in fear of persecution in Turkey, based on a UK IAT determination that was not available at the time of your client's appeal. It is considered that even if your client is investigated on arrival at the airport and his past arrest and detention is made known to the authorities, the fact that he was not charged and he was released on the three occasions would indicate that he is of no adverse interest to the authorities. There is certainly no evidence to suggest that your client is involved with the separatists even abroad, or that he would resume his politically related activities on return, and this had already been considered by the adjudicator (paragraph 18-19 of the determination);
>
> 9. It is considered that the IK determination findings you have cited have no specific relation to your client's individual case. This is because the risk on return was considered in relation to those being returned being suspected separatists. Your client is not considered as a separatist and it is noted that your client has no outstanding warrants and has not been officially charged with any offence in Turkey. It is not considered that your client would be suspected as a separatist and as such will not be at risk on return to Turkey."

7. The issue in this appeal is whether the Secretary of State was entitled to reject the representations of 14 February 2005 as a fresh claim. The law on this is well established. First, paragraph 353 of the Immigration Rules must be taken as the starting point. The material part of that paragraph provides:

> "The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

> (i) has not already been considered; and
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

Secondly, this court in WM (DRC) v SSHD [2006] EWCA Civ 1495 emphasised that the test involves considering what an adjudicator might conclude. Buxton LJ giving the judgment in that case said this at paragraph 7:

> "The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, the adjudicator himself does not have to achieve certainty but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision makers, the Secretary of State, the adjudicator and the court must be informed by the anxious scrutiny of material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution."

In the light of those remarks, Buxton LJ then continued at paragraphs 10 and 11:

> "10. Whilst therefore the decision remains that of the Secretary of State and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly a court, when reviewing a decision of the Secretary of State as to whether a fresh claim exists, must address the following matters:
>
> 11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator applying the rule of anxious scrutiny thinking that the applicant will be exposed to a real risk of persecution on return. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point of that enquiry, but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind."

8. Holman J adopted that approach in the present case and asked himself whether the Secretary of State could rationally conclude that, in the light of a decision in IK, there was no realistic prospect of success. The judge, as I have indicated, decided that that was not rationally a conclusion open to the Secretary of State. He took the view that the decision in IK did make a material difference, particularly when compared with the decision in O relied on by the IAT here. The judge emphasised that IK had specifically replaced the decision in O.
9. The Secretary of State in her challenge to Holman J's decision is at least in part concerned that the judge's approach in this present case might be thought to indicate that a fresh claim is likely to arise whenever a new country guidance case is promulgated by what is now the Asylum and Immigration Tribunal. In this written argument on behalf of the Secretary of State, Mr Greatorex argues that:

> "…the decision stands as authority for the proposition that all cases where the AIT (or IAT as it then was) applied any of the seven cases replaced by IK now have a realistic prospect of success. The judgment could even be interpreted more widely as saying that failed asylum seekers whose determinations applied decisions which are subsequently updated, 'inevitably' then have a realistic prospect of success, and as such a fresh claim."

For that proposition, reference is made to a sentence in paragraph 21 of Holman J's judgment where he said that:

> "…the decision in IK inevitably meant and means, on the particular facts, in the present case that a fresh claim from an adjudicator does have a reasonable prospect of success…"

10. If that is what concerns the Secretary of State, at least in part, I can for my part set her mind at rest. Clearly the mere fact that a new country guidance case has replaced an earlier one, or several ones, does not automatically mean that a fresh claim arises. Holman J cannot have meant that and, given his reference in the passage I have just cited to "the particular facts in the present case", I am satisfied that he did not mean that. When such a situation occurs, one has to ask whether and to what extent the new country guidance case has modified the earlier guidance and then whether that requires a fresh consideration of the claimant's case. The answer to that last question will depend on the facts of the individual case. Sometimes the test for a fresh claim will be met, sometimes it will not.

11. So far as the present case and its facts are concerned, Mr Greatorex rightly submits that the change in country guidance brought about by IK related to the nature and extent of record-keeping in Turkey by the authorities. It has for

some time been recognised that the computerised information system available to those scrutinising arrivals at Istanbul airport -- a system known as "GBTS" -- does not record mere detentions by the security forces as such; it records arrests, which is a term of art in the Turkish procedures. It has a special meaning -- that is to say, a situation where there has been a court decision or charge. So, as the IAT in the present case found in paragraph 17 quoted earlier, a check on the GBTS records would produce nothing adverse to this respondent because, after each of his three detentions, he was released without charge.

12. That indeed was the approach adopted in the case of O followed by the tribunal here. But as Mr Richmond on behalf of the respondent rightly submits, and it is not really an issue, IK did break some new ground. The tribunal there, after an extensive review of the up-to-date evidence, found that there were other information systems available to varying degrees, two somewhat limited ones in the immigration booths at Istanbul airport (see paragraph 65), and others which the anti-terrorist police and the Turkish intelligence service ("MIT") would have access to (paragraphs 73 and 76). The latter, said the IAT at paragraph 76, would be:

> "…reasonably likely to include detentions of persons who were considered to be of material significance by the security forces even if they were thereafter released without judicial involvement."

At paragraphs 77 and 78 of IK the AIT concluded as follows:

> "77. However whether the records are transferred to a central computer system or not, and whether they are maintained locally in a computerised form that might be accessible elsewhere in Turkey or not, we accept that if a person is detained either in the airport police station after arrival or subsequently elsewhere in Turkey, and the circumstances justify it, some further inquiry beyond the information in the GBTS could be made of the authorities in his local area about him. Also, if the circumstances so justify, an enquiry could be made of the anti terror police or MIT to see if an individual is of material interest to them.
>
> 78. On this basis, we consider that the starting point in any enquiry into risk on return should normally begin, not with the airport on return but with whether the claimant would be at any real risk of persecution or a breach of Article 3 in his home area as a consequence of his material history there. If the answer to that is "no", then the claim cannot normally succeed, unless of course the risk arises from or is aggravated by other factors, such as his

> material activities abroad or in other parts of Turkey. Any real risk would arise only from a person's material history, to borrow Mr Grieves' expression, and this history will in most normal circumstances be at its most extensive in the individual's home area. If on the other hand the answer to that question is "yes", then the separate question of internal relocation elsewhere in Turkey (and the question of risk of return to Istanbul airport which turns on similar principles) has to be considered on the basis of whether there are particular factors in the home area creating greater risk of ill-treatment there, that would not give rise to the same degree of risk at the airport or elsewhere."

The tribunal then went on to deal with what would happen if the answer to that question about the home area was in the affirmative.

13. It is submitted by Mr Greatorex that, while the decision in IK does, to an extent, modify the guidance about the information available or attainable at the airport, it does not modify the guidance about the levels of risk arising. He draws attention to the IAT's finding at paragraph 19 in the present case, which I have quoted earlier, that there was nothing to show that the authorities in the respondent's home area had any continuing adverse interest in the respondent. That finding, it is submitted, stands unchallenged. It follows therefore that if further enquiries were made locally about the respondent by those at Istanbul airport, the reply would not put the respondent at risk. This is the course, it is said, advocated in IK at paragraph 78. Thus the Secretary of State was rational to conclude that IK would not realistically be able to lead to any different result on these facts.

14. For the respondent, Mr Richmond argues that the heart of the IAT decision here was that the airport authorities would find nothing on the GBTS, and the IAT did not contemplate further enquiries being made. IK, he says, has changed that. The objective facts show that this respondent, who would be a returned asylum seeker of Kurdish ethnicity, coming from south east Turkey originally, detained three times in the past and tortured, would be at risk because he would be seen as suspicious. He had been suspected in the past of separatist sympathies. Mr Richmond concedes that there has been no new evidence about the risk to the respondent in his home area since the IAT decision but he argues that even if there is no recent adverse interest in this young man, an official at the airport would look at all the evidence and might well have concerns about his political sympathies.

15. I could see the force of the respondent's submissions to which I have just referred if one were approaching the issue of risk to him *de novo* or on an appeal against the IAT determination. But that is not the situation here. The issue on this appeal is whether the Secretary of State could rationally refuse to treat the February 2005 representations as a fresh claim.

16. A new factor since the final determination by the IAT of the earlier claim was the decision in IK. That, as I have indicated, updated and modified the advice on the checks that would or might be made at Istanbul airport. They would not necessarily be confined to GBTS, but in some circumstances could involve enquiries being made of the authorities in a returnee's home area in Turkey. But that is not the end of the story. Let us assume that further enquiries would be made locally about this respondent when he arrived at Istanbul airport. It has already been determined and, in the absence of fresh factual material finally determined, that there is no adverse interest in the respondent locally in his home area (see paragraph 19 of the IAT determination). Nothing since that determination in the present case could lead to a difference in the attitude of the authorities in his local area because there is no additional factual material on that aspect. So the response to any such additional enquiries beyond the GBTS must be seen as not putting the respondent at risk.

17. In short, doing what the IAT advocated in paragraph 78 of IK and seeking to find what the risk in his home area would be would not identify any such real risk to him of persecution or other material ill treatment. We have to proceed on the basis of that finding in paragraph 19 of the IAT determination because it stands and because there is no new material which provides any basis for challenging it, and it was not successfully appealed. So, although IK does change the situation to a certain degree, with the possibility of additional enquiries being made beyond the GBTS, particularly in a returnee's home area, that change does not assist this respondent on the facts of this case. It follows that in my judgment the Secretary of State was entitled to find that the representations did not amount to a fresh claim under paragraph 353 of the Immigration Rules. In so concluding, I bear fully in mind the approach which she was required to adopt as a matter of this court's decision in WM (DRC), but she was entitled to take the view that there was no realistic prospect of an adjudicator or immigration judge finding a real risk of persecution on return, given the limited extent of the changes since the AIT's determination in this case. Consequently, for my part I conclude that the Secretary of State did not act irrationally in making the decision of 18 October 2005 and I would allow this appeal.

Lord Justice Thorpe:

18. I agree, though I must confess to having found my way to this conclusion on the specific facts of this case far from easy. Apart from any instinctive sympathy one may have for the respondent's case, I was troubled as to the extent that the Immigration Appeal Tribunal's finding in paragraph 19 to which my Lord has referred, namely that there was no evidence of the authorities having any continuing adverse interest in the respondent, the extent to which that might be dependent on the absence of information referred to in paragraph 17 of their reasons, and therefore whether the position might well have been affected by the subsequent decision in IK, bearing in mind the context of the "modest test" involved in the determination. However, in the end I am satisfied that that view is not tenable on a fair reading of the reasons

of the Immigration Appeal Tribunal and accordingly, for the reasons given by my Lord, I too agree that this appeal should be allowed.

Mr Justice Hedley:

19. I agree that the appeal should be allowed for the reasons given by my Lord Keene LJ.

Order: Appeal allowed