Case No: C5/2008/1534

Neutral Citation Number: [2008] EWCA Civ 1189
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
[AIT No: AA/08747/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 15th October 2008

Before:

LORD JUSTICE RICHARDS

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Between:

MY (TURKEY)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr D O'Callaghan (instructed by Duncan Lewis & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(Draft for Approval)

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Lord Justice Richards:

1. The court has before it an application for permission to appeal against a decision of the Asylum and Immigration Tribunal dated 11 April 2008. The applicant sought asylum in the United Kingdom in September 1999. His application was refused but his appeal was allowed, in October 2007, by Immigration Judge Markham David. Reconsideration was then ordered, however, on the application of the Secretary of State.

2. At the first-stage reconsideration it was found that the first immigration judge had erred in his assessment of risk on return and that the case should proceed to a second stage of reconsideration, though on the basis of the first immigration judge's findings of fact. At the second stage no new evidence was called. The panel, presided over by Immigration Judge Vaudin d'Imecourt, found against the applicant on the issue of risk on return and dismissed his appeal. That is the decision now under challenge.

3. To summarise briefly, the first immigration judge found that the applicant was ill-treated by the security forces in Southeastern Turkey, where he came from, between 1994 and 1997. The applicant then left his home area and relocated in Istanbul, where he experienced no further problems between 1997 and 1999. It was then found that some time in 1999 his home was searched in his absence by security forces, as a result of information given by a PKK activist who had been arrested earlier that year. The police went to the applicant's home on suspicion that he was involved in PKK activities. However, the Immigration Judge rejected the applicant's claim that the police had produced an arrest warrant against him.

4. The panel, on reconsideration, proceeded on the basis of those findings of fact. In a lengthy decision it referred to relevant country information and to the Country Guidance cases of <u>IA & Ors (Risk-Guidelines-Separatist)</u> [2003] UKIAT 00034 and <u>IK (Returnees-Records-IFA)</u> [2004] UKIAT 00312. It found that the applicant would not be at risk at the airport because any checks on the relevant system, the GBTS, and other information available at the airport would not show him to be of any interest of the authorities in Turkey. Each detention in the past had resulted in release without charge. The enquiries in Istanbul in 1999 had not been followed by the issue of an arrest warrant, and there was no evidence that the authorities had shown any interest in him since his departure and there was nothing since his departure to bring him to the adverse attention of the authorities.

5. As to the position within the country, the panel found that if he registered with a local mukhtar in Istanbul or elsewhere, there was no evidence that he would be reported to the authorities and, even if he were, after this length of time and given his age -- he was now 52 -- it was not reasonably likely that he would be at risk of persecution. His problems in the past had been very much localised. If the authorities had any serious concerns about him they would have issued an arrest warrant against him, but since his departure there was no evidence they had shown any form of interest in him. If he feared returning to Istanbul, there was no evidence that he could not relocate in one or other of the large cities of Turkey such as Ankara or elsewhere. He had four daughters living in different places in Turkey. He might wish to relocate near one of them. In all the circumstances it would not be unreasonable to expect

the applicant, who had lived most of his life in Turkey, where he was fluent in the language and had close relatives still living, to relocate in such an area.

6. The challenge to that decision has been put forward to this court by Mr O'Callaghan, who has provided both a written skeleton argument and a written statement for the purposes of this renewed hearing. He has been commendably focused in his presentation of the case orally but I think that in order to put some of his submissions in context I will also have to refer back to the written submissions.

7. The first point that Mr O'Callaghan has taken is an issue under Article 8. It relates to grounds 3 and 4 of the Grounds of Appeal. It arises in this way. At the first stage of reconsideration the Tribunal stated in its reasons:

> "The Immigration Judge made no finding at all on Article 8, having allowed the appeal on asylum grounds and under Article 3. The appellant's previous solicitors, Vahib & Co did not, however, include any grounds invoking Article 8 in their notice of appeal. The grounds of appeal may be varied with leave under Rule 14 of the Procedure Rules, but Rule 14 does not apply to the reconsideration of an appeal. Article 8 will therefore not be an issue at the 'second stage.'"

8. At the second stage the Tribunal observed that it was limited to the issues mentioned in the pink form of the first-stage reconsideration: that is to say, the setting-out of the tribunal's first-stage reasoning; and the tribunal went on to say in relation to what happened at the second-stage hearing:

> "Given the reasons mentioned in the pink form at the first stage of the reconsideration hearing, and the limits placed on us at the second stage of this reconsideration hearing, Mr Nelson-Iye, for the

> appellant, decided to call no new evidence and instead to make submissions on the facts and the law."

Mr Nelson-Iye was the solicitor-advocate appearing at that time for the present applicant.

9. So what happened was that the tribunal kept within the bounds of what had been ordered at the first stage, and that meant that it did not consider Article 8. The way in which the case was put in the written material settled by Mr O'Callaghan was that the Tribunal erred at the first stage in ordering that Article 8 could not be reconsidered and in addition erred at the second stage by fettering itself, in that it was not bound by the order made at the first stage if a clear and obvious issue existed. He referred to AH (Sudan) v SSHD [2006] UKAIT 00038.

10. What is said is that there was here a plain and obvious point under Article 8. The scope of the potential argument under Article 8 is said to have related to family life. The applicant and his wife have a family with a son, daughter-in-law and grandchildren in this country. I will come back to how the son and his family come to be here. There was evidence of the parents having suffered from depression in 2000. It is said that there is no evidence to support to this, that the position on that is not changed. It is also said that they are showing signs of dementia. Again, there is no supporting evidence. With regard to proportionality it is submitted that consideration would have to be given to the possibility of an application to remain with the son, who is himself a refugee, under the policy on family reunion under which the Secretary of State may exceptionally allow other members of the family, such

as elderly parents, to come to this country if there are compelling compassionate circumstances. It is said that the delay of eight years in considering the applicant's asylum claim and the failing health of him and his wife may place them in that position. As regards the possible relevance of delay, reference is made to the decision of the House of Lords in EB (Kosovo) v SSHD [2008] UKHL 41.

11. The reaction of Longmore LJ to those grounds, when considering the matter on the papers, was that this was a new point. The applicant's legal representative before the Tribunal could have pointed out to the Tribunal that the applicant was entitled to rely on Article 8 if he thought there was anything in the matter. "As it is", said Longmore LJ, "the applicant has family members in Turkey so there is nothing in the point. It is also too late to rely on delay for the first time." Part of the submission made by O'Callaghan is that the Article 8 point is not a new point, but the main way in which he puts the case is that there was sufficient before the Tribunal at the second-stage reconsideration that it ought to have allowed the matter to be ventilated at that stage, and it fettered itself by confining itself to the terms of the first-stage direction.

12. As to the fact that it is not a new point, Mr O'Callaghan refers to the original Grounds of Appeal from the Secretary of State's decision, in which it is true there is a reference to Article 8. It was alleged in bare terms that the applicant's removal would be in breach of his Article 8 right to private life. There was not, I would note, any mention of family life. Although there was that bare reference to Article 8 in the Grounds of Appeal, it seems to me clear

that the matter was not canvassed before the first immigration judge, and I do not understand Mr O'Callaghan to take issue with that view. When describing the applicant's case, the first immigration judge refers to an alleged breach of the ECHR with "particular reference to Article 3 thereof": see paragraph 5 of his decision. He makes no reference there to Article 8. In his conclusions he makes no suggestion that he does not need to deal with an issue that has been raised under Article 8 because of the findings he has already reached under Article 3.

13. There is absolutely nothing to show that the point was pursued before the Immigration Judge at all. It is true that thereafter in the replies submitted on the applicant's behalf to the order for reconsideration, Article 8 arguments were raised as providing an alternative ground for allowing the appeal from the Secretary of State's decision in the event that the first immigration judge's findings were not upheld. That seems to me the first point at which any detailed case -- and even then it was not very detailed -- under Article 8 was advanced. The fact that it was advanced at that point explains why the issue was addressed at the first-stage reconsideration and lies behind what is said in the decision of the Tribunal at the first stage from which I have already quoted.

14. Whilst the reasons given at the first-stage reconsideration for not allowing Article 8 to be pursued may not be altogether satisfactory, it seems to me that the Tribunal was right in the result it reached, and that if there was any error of reasoning it was not material. There was no justification for allowing the applicant to run an Article 8 point on reconsideration which had not been run

before the first immigration judge, even assuming that it could be said to have been engaged by the bare reference to the Article 8 right to private life in the original Grounds of Appeal from the Secretary of State's decision. It might have been different indeed, as I think Mr O'Callaghan would contend, if the Article 8 point was an obvious one on which the applicant had a real prospect of success and one could bring in the approach in Robinson v SSHD [1997] Imm Ar 568, but I have to say that like Longmore LJ I regard the point as a very weak one and I certainly do not regard it as an obvious one. The fact that the applicant's son and family are in this country is not a very strong feature in itself. The Tribunal pointed to the presence of several of the applicant's daughters in Turkey, suggesting that he might wish to relocate near one of them. What is said about the medical condition of the applicant and his wife is unsupported by evidence and gets nowhere near making out a case under Article 8, whether by itself or in conjunction with the other factors relied on. I stress that the decision taken by the Tribunal has to be assessed by reference to the material that was before the Tribunal, and on that there was very little evidence indeed concerning the health and situation of the applicant and his wife.

15. I therefore consider that there was no error in relation to the scope of the reconsideration ordered at the first stage. Accepting, at least for the sake of argument, that it was still open to the Tribunal at the second stage to allow points to be raised even though not within the scope of the order made at first stage, I see no arguable error of law in the Tribunal proceeding as it did at the second stage. The Article 8 issue was not raised further on the applicant's behalf at the second stage. There is nothing to show there was an attempt to

go behind the order made at the first stage and, for the reasons I have already given in saying that the decision at the first stage was lawful, I do not regard this as a point that the Tribunal should have taken for itself, assuming that it was free to do so. It seems to me that there was no arguable error of law in the Tribunal proceeding as it did on the basis of the order made at the first stage, which excluded consideration of the Article 8 issue. Accordingly, I am satisfied that grounds 3 and 4 relating to the Article 8 issue have no real prospect of success.

16. I turn to the second main point advanced by Mr O'Callaghan in his oral submissions, which is ground 2 of the Grounds of Appeal. It is submitted that the Tribunal fell into error by failing to consider the implications of the fact that the applicant's son, whom I have already mentioned briefly, had been successful in an appeal to the Tribunal in 2003 and had himself been granted refugee status. The son accompanied his parents to the United Kingdom in 1999 when he was aged 21. The Tribunal ought to have been concerned, it is submitted, that because the son had established a well-founded fear of persecution, the parents might be at risk of persecution consequent upon their relationship with him. In SD (Turkey) v SSHD [2007] EWCA Civ 1514, it was held that the Tribunal had erred in law in failing to make factual findings as to whether there would be records concerning family members which would prove of interest to the Turkish authorities when they asked questions at the airport on return. Here too Longmore LJ, in refusing permission on the papers, pointed out that this was a new point made by fresh counsel. The applicant's legal representative before the Tribunal did not seek to rely on the son's success in being able to stay in the United Kingdom. Mr O'Callaghan

accepts that that was so. His response to Longmore LJ’s observations is to submit that the Tribunal should have taken this point of its own motion in accordance with Robinson principles. It was, he says, an obvious point, in the sense explained in that case, since the son travelled over with the applicant and had been successful in his own asylum claim, and since the claims of father and son both relate to Turkey, the Tribunal ought to have been aware of the potential impact upon the parents of the family relationship with the refugee son and ought to have endeavoured to find out more.

17. For my part, I am unable to accept that submission. The information before the Tribunal concerning the son was very limited indeed. It was known that he had come across to this country with his parents. There was an answer by the applicant to a question in his original interview in 2001 when he was asked whether any member of his family had ever been arrested, charged with an offence or detained. He said:

> “My son…was involved in politics. I do not know the details as he became involved after he had left our home. He is now an asylum seeker in the United Kingdom.”

18. In a further interview in 2005 he said that his son had got married to a British girl but that he had got his citizenship through asylum. It is clear that by that stage he held a British passport, and the Secretary of State’s refusal letter to which Longmore LJ referred contains a passage showing that the son was given leave to remain and had a British passport. That, as it seems to me, was the limit of the information about the son. There was no evidence before the Tribunal as to what the son’s activities in Turkey might have been. There was

no evidence as to what records might exist in that country in relation to the son. There was nothing to show how the position of the son might in practice impact upon the parents. It seems to me that the exiguous nature of the information that was available about the son was not sufficient to raise an obvious point that the Tribunal ought to have pursued of its own motion. If the point was to be raised at all, it should have been raised expressly on the appellant's behalf and plainly it should have been supported by additional evidence. No new evidence was put in. The Tribunal was entitled to deal with the matter upon the basis on which the case was argued before it. I do not think that it could be said to have erred in law in failing to address this point for itself.

19. There remains Ground 1 of the Grounds of Appeal. Mr O'Callaghan does not pursue that orally, acknowledging that if he failed on the other grounds it was not likely to provide a basis by itself on which he could expect to get permission to appeal. I regard that as an entirely realistic and very sensible course. I do not propose to set out the details under ground 1; suffice it to say that I have considered the matters that are raised and I am satisfied that they establish no arguable error or law.

20. For all those reasons the renewed application is refused.

Order: Application refused