Case No: C5/2006/1992

Neutral Citation Number: [2007] EWCA Civ 1536
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/74298/2002]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 6th November 2007

Before:

LORD JUSTICE WARD
LORD JUSTICE BUXTON
and
LORD JUSTICE LAWS

- -

Between:

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

- -

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Ms L Hooper (instructed by Messrs Wilson & Co) appeared on behalf of the **Appellant**.

Mr J Clark (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Laws:

1. This is an appeal with permission granted on 20 October 2006 by Sir Paul Kennedy against the decision of the Asylum and Immigration Tribunal (the AIT) dated 20 June 2006 by which on a reconsideration they dismissed the appellant's appeal against the Secretary of State's decision taken as long ago as 8 May 2001 to remove the appellant to Turkey as an illegal entrant.

2. The appellant is a Turkish national. He is or claims to be an ethnic Kurd. He follows the Alevi faith. He arrived in the United Kingdom on 2 March 2001 and claimed asylum the same day. The nature of his claim is succinctly summarised in the Secretary of State's decision letter, as follows:

> "You have claimed that you have been persecuted in Turkey because of your political opinion, Kurdish race and Alevi religion. You have stated that you have been arrested and detained on around eleven occasions since 1998 for periods not exceeding 24 hours. You have claimed that you have been beaten and subjected to falakah (beating on the soles of the feet). You have claimed to be a supporter of HADEP (People's Democracy Party) and while putting up posters for them you were stabbed in the chest by people who [you] have described as fascists and spent 3 days in hospital. You have stated that as a result of the attack you spent four days in hospital. You have claimed that you are shortly eligible for your military service and have avoided attending the required medical examination. You have stated that you do not wish to complete your impending military service."

3. The Secretary of State did not believe that the appellant feared persecution and accordingly refused the claim both under the Refugee Convention and Article 3 of the European Convention on Human Rights. The appellant appealed. His appeal first came before an adjudicator whose decision was promulgated on 3 April 2003. At that time the statutory appellate scheme was such that appeals lay on grounds of fact as well as law. The adjudicator found that the appellant had not been persecuted for a Convention reason and would not be so persecuted if he were returned. Likewise, he would not face ill-treatment contrary to Article 3. Accordingly the adjudicator dismissed the appeal. He found in fact that the probable reason for the appellant's leaving Turkey was his desire to avoid military service.

4. In the course of his reasoning the adjudicator made certain findings, on which, in circumstances I will explain, the appellant (by Miss Hooper of counsel) now seeks to rely. He said at paragraph 20:

> "I accept that on the lower standard of proof he may have been detained on at least a few occasions by the authorities. However he was never detained for more than 24 hours and sometimes less. All that, of course, must be viewed against his own evidence about being questioned about slogans being written in the neighbourhood on walls. Such slogans were probably treated as graffiti. The appellant goes on to state that he regarded such slogans to be written as a legitimate expression of his political opinion and, as I have said before, he said in his statement: 'I never participated in any criminal activity for gain'. I find every possibility that some of those occasions when he was taken into detention had more to do with his writing of slogans than any other reason."

And then paragraph 21, the last two sentences:

> "As I have said before that his admitted fly posting and what I can only call graffiti on behalf of HADEP was much more likely to have resulted in the detentions than any other reason. I find as a fact -- as indeed was conceded in argument -- that he was a low-level supporter of HADEP."

I should also read at this stage part of paragraph 28, last sentence:

> "More to the point I am of the view that the main interest the authorities had of him was due to his activities which, although he may not have regarded them as a crime, were probably regarded by the authorities as such."

So the adjudicator was finding that the appellant had been detained because, effectively, he had been putting up posters or graffiti on behalf of HADEP of which he was a low level supporter.

5. It is to be noted that, as his conclusion on the case of course demonstrates, the adjudicator was very far from regarding these matters as carrying the day for the appellant. Indeed these very findings in paragraphs 21 and 28 are intertwined with findings against the appellant, if I may so put it. Returning to paragraph 21, the adjudicator says:

> "Of crucial significance, in my view, is that his last detention was in August 2000, the date he gives in interview, but his evidence as to that was broadly the same. He did not leave Turkey until about February 2001. If he had a well-founded fear of persecution by the authorities he would not have

> waited so long to leave Turkey. I accept that he told me that he could not leave until he had the necessary money for an agent, but I am of the view that the gap of several months in remaining in Turkey is not consistent with a general fear of persecution."

And then at paragraph 28, starting in the first sentence but omitting some words:

> "…it seems to me that the appellant's involvement [I interpolate that as to say, in HADEP] was small, that his detentions are now sometime ago, and there was a significant gap between his last detention and his leaving the country. He was never charged with an offence, or required to report to the authorities, and there is no evidence he was monitored by the authorities nor did he come from one of the four named areas of Turkey. There is no reason why he should be viewed as a suspected separatist, and that he had no family connections with a prominent member of either the PKK or HADEP."

The adjudicator proceeded to decide, as I have indicated, that the appellant had no well-founded fear of persecution and was not at risk of ill-treatment contrary to Article 3, and so dismissed the appeal.

6. The appellant sought to appeal against this 2003 decision of the adjudicator, but leave was refused. However, judicial review proceedings were instituted and in February 2004 an order was made by consent quashing the refusal of leave and remitting the matter to the AIT. It appears that the reason was so that the tribunal could "reconsider the case in the light of recent case law". Miss Hooper for the appellant tells us (and there is some material to support this) that the concern was that there had been insufficient focus on the issue of risk on return in the adjudicator's consideration of the case. At length on 17 February 2006 a senior immigration judge ordered reconsideration. This is of course the process under the present statutory regime, which by this time had replaced that prevailing when the 2003 adjudicator's decision had been made.

7. So it was that the matter came before the AIT leading to the decision of 20 June 2006 now under appeal.

8. Under the present statutory regime, such a reconsideration is limited (at least in the first instance) to the question whether the earlier decision was flawed by an error of law. However because this case had been extant since before the new appeal measures took effect, the AIT's jurisdiction on the reconsideration was not so limited. They could consider fact as well as law. It is to be noted that in the determination of 20 June 2006 now under appeal, the AIT said this :

> "4. The width of our jurisdiction was not, it must be confessed, appreciated by anyone when the appeal came before us, and we heard argument confined to whether the adjudicator had committed an error of law. But as we shall endeavour to explain below, the outcome would have been the same had we heard argument on fact as well as law."

9. The AIT on 20 June 2006 took exception to the particular findings of the adjudicator, on which (as I have foreshadowed) the appellant now seeks to rely and which I have set out. The AIT said this:

> "12. But where the adjudicator clearly went wrong was in thinking at paragraph 20 of his determination that *'some of those occasions when he was taken into detention had more to do with his writing of slogans than any other reason'*, and at paragraph 28 that *'the main interest that the authorities had of (sic) him was due to his activities which, although he may not have regarded them as a crime, were probably regarded by the authorities as such'*. The adjudicator is referring here to the appellant's fly-posting and graffiti-writing which the appellant told him at the hearing were not activities which ought to be regarded as a crime.
>
> There is no proper evidential basis for the adjudicator's finding that *any* of the detentions undergone by the appellant (nine or ten, according to the interview record) were due to his fly-posting or leafleting."

10. However, the AIT (paragraph 14) regarded the adjudicator's error (if error it was) as immaterial. They considered that the adjudicator's conclusion, that the appellant's true motive for leaving Turkey was to avoid the draft, was sustainable (paragraph 16). Their determination concludes as follows:

> "17. The grounds of appeal settled by Miss Cronin, and advanced before us by Miss Hooper, take as their starting point that the appellant was detained, on at least a few occasions, as a low-level supporter of HADEP. We have found that on the appellant's own evidence, that was not the reason for his detentions. We are nevertheless urged to find that the treatment meted out to the appellant while in detention amounted to persecution".
>
> "18. We find it unnecessary to reach a concluded view on the matter. While it is trite law (Demirkaya is cited) that past persecution is indicative of future

> risk, in the present case there is more than a real risk that the appellant will be detained on return. But it will not be as a suspected separatist, or for other political reasons. It will be as a draft-evader, and the condign punishment for that does not engage either Convention. Miss Hooper referred us to the *'country guidance'* in IK [2004] UKIAT 312 and the check-list therein of potential risk factors for returning asylum seekers. But this is of little use in the present appeal. We know that the appellant is very likely to be detained as a draft-dodger. We know that he has no history of being detained as a HADEP supporter, or any sort of political profile. He therefore does not face treatment worse than that meted out to the average draft-dodger. The adjudicator was right to find that return to Turkey will not expose him to a real risk of treatment breaching either the Refugee or the Human Rights Convention."

11. The first complaint that was launched by the appellant was that the AIT had no business departing from the adjudicator's findings of fact in the way and to the extent that they did. Reliance was originally placed on Rule 62.7 of the Asylum and Immigration Tribunal Procedure Rules 2005, but this court has held that sub-rule to be invalid (AM (Serbia), MA (Pakistan), MA (Sudan) v SSHD [2007] EWCA Civ 16). It is thus unnecessary to say any more about it, save to note in passing that one reason why the case has taken so long to come on is that it was stood out until the rule 62.7 cases had been decided in this court.

12. It is also said that the AIT were wrong to depart from the adjudicator's findings because there were insufficient objective grounds to justify that being done. The skeleton argument cites Subesh & Others v SSHD [2004] EWCA Civ 56. There is nothing in that. The AIT proffered such grounds (see paragraph 13, which I will not read).

13. There is however a good deal more in the next point: that is, that there was here no complaint of the adjudicator's findings advanced by the Secretary of State. The matter was not raised in the grounds of appeal to the AIT or at the hearing. It seems to me that if this actual or putative error by the adjudicator was to be treated as material to the result of the case, the IAT should have put the appellant on warning of it. That, I think, is a conclusion reinforced by what appears to have been the original misapprehension of all parties and the tribunal as to the scope of its jurisdiction (see paragraph 4 of the AIT's determination, which I have already read). The AIT did not put the appellant or anyone else on warning of the fact that they proposed to depart from the adjudicator's findings in the respects I have described. It seems to me, as I have said, that if that was to be treated as a material error they should have done so.

14. However, that is not the end of the matter. The substantial issue upon which we have heard argument this morning is whether the IAT were entitled to treat the actual or putative error as in truth immaterial, and thus to conclude the appeal as they did. First it is to be noted, as Miss Hooper submits, that the AIT's reasoning, despite their disallowal of the adjudicator's findings as immaterial, in fact depended on their rejection of those findings (see paragraph 18 which I have read). I reread two sentences for convenience:

> "We know that the appellant is very likely to be detained as a draft-dodger. We know that he has no history of being detained as a HADEP supporter, or any sort of political profile."

15. The second point there described -- "no history of detention as a HADEP supporter" -- is a contradiction of the adjudicator's findings, and so far as the conclusions in paragraph 18 appear to rely on the statement there made, they rely on the adjudicator having been in error.

16. That said the essence of the case in my judgment effectively comes to this. The AIT were not entitled in any event to treat the adjudicator's findings as immaterial unless his conclusions were anyway sustainable; but it is submitted by Miss Hooper that his conclusions might only be sustainable if at least he had confronted matters raised in the ground of appeal, especially the question whether the appellant had been tortured while detained for those periods of 24 hours or less and (it may be to a lesser extent) the fact that the organisation HADEP has since the appellant left been proscribed. That may have an impact on the fate awaiting its supporters when returned to Turkey.

17. Miss Hooper submits that unless those matters were confronted by the adjudicator and findings made in relation to them, he was in no position to assess the risk of return that this man might face when he got back to Turkey, and the IAT were not entitled to sidestep the problem by their overturning of the adjudicator's findings for the very reason that they did not put the appellant on warning of their intention to do that. It is right (and this was much canvassed in the course of argument this morning) that the adjudicator held (see paragraphs 21 and 23) that the appellant's actual motive for leaving Turkey was not a fear of persecution at all but to avoid the draft. However, it is plain that the appellant -- while accepting, as it seems to me, a desire to avoid the draft -- was simultaneously asserting that if he were returned he would be persecuted on political grounds.

18. The adjudicator, summarising the evidence of the appellant before him, records this at paragraph 11(h):

> "At paragraph 32, he [that is, the appellant] says: 'Were I sent back I would be imprisoned for my objection to military service and persecuted due to my political opinions and ethnic origins as before'".

19. Accordingly, for my part I am not persuaded that the facts that the adjudicator found (that the true motive for the appellant's leaving Turkey had nothing to do with persecution) as it were relieved him of the obligation to consider all matters reasonably relevant to risk on return, not least given the procedural background here, which includes the judicial review proceedings of the later order for a reconsideration apparently directed to the necessity to consider these very matters.

20. Mr Clark for the Secretary of State addressing us this morning placed great emphasis on paragraph 28 of the adjudicator's decision which I have read. The reasons there given for the adjudicator's conclusion that in truth the appellant was likely to be of little or no interest to the authorities are (so far as they go) compelling enough. But they do not, as it seems to me, fill the gap left by a want of consideration of those points in the grounds of appeal relating to persecution during detention and the proscription of HADEP.

21. The live events of this case took place a very long time ago. It may be that the appellant's claim on the merits is to say the least a weak one. But given the well-known approach to be taken by this court and the appellate authorities, requiring an anxious scrutiny of asylum matters, it seems to me in the end inescapable that the points to which I have referred in the grounds of appeal needed to be considered if the AIT was to treat the adjudicator's findings about the reasons for detention as immaterial.

22. For those reasons I would allow the appeal. If my Lords agree, no doubt there will have to be an order for remission.

Lord Justice Buxton:

23. Paragraphs 21 and 28 of the adjudicator's determination read on their face, present a formidable, it might even be said insurmountable, difficulty in the way of this appellant. However, I am persuaded, broadly for the reasons given by my Lord, that because of the procedural difficulty, and the fact that in reaching those conclusions the adjudicator cannot be said to have expressly addressed two matters in particular (first and most prominently the allegations of ill treatment during detention; and secondly, the impact of those allegations, if correct, of risk on return), it is not possible to say that findings in paragraphs 21 and 28 in themselves put the procedural errors to which I have already drawn attention out of court. For that reason, I would therefore agree that this case must be reconsidered. I say no more about the prospects of the appellant during that reconsideration than can perhaps be drawn from the judgments in this court.

Lord Justice Ward:

24. I agree with my Lords, and so the appeal is allowed and the matter is remitted.

Order: Appeal allowed