C1/2002/0091

Neutral Citation Number: [2003] EWCA Civ 1059
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2

Tuesday, 15th July 2003

B E F O R E:

LORD JUSTICE ALDOUS
LORD JUSTICE MAY
LORD JUSTICE KEENE

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BULENT POLAT

Appellant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Respondent

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(Computer-Aided Transcript of the Palantype Notes of
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MR M GILL QC and MR J COLLINS (instructed by Messrs Sheikh & Co, London N4 3NX) appeared on behalf of the Appellant
MR P SAINI (instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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

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1. LORD JUSTICE ALDOUS: I invite Lord Justice May to give the first judgment.

2. LORD JUSTICE MAY: Bulent Polat was born on 1st February 1974. He is a citizen of Turkey, of Kurdish origin and an Alevi. He arrived in the United Kingdom on 29th December 2000. On his arrival he claimed asylum. He was interviewed on 24th January 2001. The Secretary of State refused his asylum application on 14th March 2001. He appealed to an adjudicator and his appeal was heard by Mr CH Bennett on 18th March 2002. In a determination promulgated on 23rd May 2002, the adjudicator dismissed Mr Polat's appeal both under the Asylum Convention and the Human Rights Convention. The adjudicator's determination and reasons were very detailed indeed.

3. On 25th June 2002, the Immigration Appeal Tribunal granted Mr Polat leave to appeal. The hearing before the Tribunal took place on 12th September 2002, the Chairman being Dr HH Storey. By a determination notified on 20th September 2002, the Tribunal dismissed the appeal. The Tribunal subsequently refused Mr Polat's application for leave to appeal to this court, but Dyson LJ gave permission on 17th February 2003. In doing so he wrote that he had given permission principally on the main ground of appeal to which I shall refer and that he would not have given permission if other points had stood alone.

4. The appellant's factual case before the adjudicator had a number of strands. One was that his family had connections of various strengths with the separatist organisation known as the PKK. One of his cousins had been a member of the PKK. He himself had allowed fugitive people to stay in his house and he had collected funds for the PKK. His father had been under pressure from the police and an extreme nationalist organisation because they were of Kurdish origin and Alevis. Another strand was that he himself had postponed or evaded military service. He had been arrested on three occasions - in March 1995, January 1997 and July 1998. On each of these occasions he had been detained for two or three days. After he was released he was not required to report back to the police. Under the Refugee Convention, he claimed that he had a well-founded fear of persecution for one or more Convention reasons if he were to be returned to Turkey. Under the Human Rights Convention, he claimed that he would be subjected to inhuman and degrading treatment by the Turkish authorities or other organisations in Turkey if he were returned. In particular, it was suggested that he would be tortured. He gave evidence that in July 1998 one of his toenails had been pulled out by a police officer. While he was in custody, he had been stripped naked and blindfolded. He produced to the adjudicator a medical report from a Dr Yacob dated 17th March 2002. This indicated that he had a deformed toenail on one of the toes of his right foot, a missing upper premolar tooth with the root still in place and haemorrhagic spots consistent with his account that he had been kicked in the testicles.

5. Mr Polat produced to the adjudicator a copy of what he claimed was a warrant for his arrest issued on 22nd March 2000. There were two versions of this warrant. The adjudicator was not satisfied that either was a genuine warrant for Mr Polat's arrest. He gave very extended reasons for reaching this conclusion.

6. Mr Polat told the adjudicator that nine days after he had arrived in the United Kingdom, he had learnt that his father was dead. His father had been missing for three days and had then been found handing from a tree in the family garden. The adjudicator accepted that it was sufficiently established that a death certificate produced for his father had been properly issued by the authorities in Turkey. He was not however satisfied that the police were responsible for Mr Polat's father's death. The country assessment for October 2001 indicated that the PKK had enemies other than the police and army, some at least of which were prepared to use unlawful force against them. Even if he were wrong as to the death of Mr Polat's father, the adjudicator was not satisfied that his death was any guide to what might happen to Mr Polat if he were returned to Turkey.

7. As to Mr Polat himself, the adjudicator accepted that, if he were to return to Turkey, it was reasonably likely that he would be detained on arrival as a person who had evaded military service. He was not satisfied that Mr Polat had been arrested or detained other than on the three occasions to which he had referred. He was not satisfied that he was kept under surveillance at any time. He accepted that he had been involved in helping the PKK and its members, but that what he said he was doing was at the lowest levels. The police had released him on each of the three occasions on which he had been detained. The adjudicator concluded that on none of those occasions were the police satisfied that he was involved in or guilty of any wrongdoing. The adjudicator was not satisfied that at the time Mr Polat left Turkey, the police had an interest in him for any reason other than his failure to undertake military service.

8. The adjudicator then considered at length extracts from the country assessment for Turkey of October 2001. This dealt with the cessation of armed conflict between the Turkish Government and the PKK in 1999; with amendments to the Turkish constitution designed to pave the way for EU membership; and the likely treatment of those returning to Turkey who had evaded military service. Even if a sentence of imprisonment was imposed, the adjudicator was not satisfied that it would be of such severity as to amount either to persecution or to

inhuman or degrading treatment or punishment. Nor was the adjudicator satisfied that Mr Polat was reasonably likely to be tortured while serving such a sentence or before.

9. Having considered more material from the country assessment, the adjudicator concluded that he was not satisfied that Mr Polat was a "suspected separatist" or that he was wanted for any criminal offence. He further concluded that Mr Polat would be arrested on arrival and sent into military custody to start his military service. But he was not satisfied that it was reasonably likely that he would be maltreated while he was in detention at the airport. Nor was he satisfied that it was reasonably likely that he would be maltreated after his delivery into military custody.

10. The adjudicator then considered statistical evidence indicating that a very small percentage of failed asylum seekers returned to Turkey from a number of European countries including the United Kingdom and Germany were reported to have been maltreated on arrival. He finally concluded that he was not satisfied that there was a reasonable likelihood that Mr Polat would be the victim of any unlawful violence at the hands of right wing extremists on his return to Turkey or at any time in the future.

11. Upon these findings, which I have briefly summarised, the adjudicator was not satisfied that Mr Polat was genuinely in fear of persecution either on account of his political opinions or of his Kurdish origin, nor that any fear of persecution which he might have was well founded. Nor did he consider that there was a reasonable likelihood that Mr Polat would be tortured or subjected to inhuman or degrading treatment or punishment if he returned to Turkey. His appeals under the Human Rights Convention and the Refugee Convention accordingly failed.

12. The grounds of appeal to the Immigration Appeal Tribunal raised certain challenges to the adjudicator's factual findings. These details, however, do not appear to have been pursued and the appeal proceeded on the basis that the adjudicator's factual findings were correct. The main burden of the appeal was to challenge the adjudicator's assessment of Mr Polat's likely treatment if he were to return to Turkey. In their determination, the Immigration Appeal Tribunal recorded Mr Polat's case as based on his contention that he would not be viewed simply as a failed undocumented asylum seeker. The authorities would have a record of his previous detentions and the reasons for them and would thus treat him as falling directly within the suspected separatist category. They would also have a record connecting him to his father again as someone considered to be a suspected separatist.

13. The Tribunal recorded that in a number of previous determinations the Immigration Appeal Tribunal had taken the view that anyone who had a record of involvement with a separatist organisation such as the PKK would be at real risk of persecution as a suspected separatist. These decisions included the case of Almalikuyu [2002] UK IAT 00749 and Elidimir [2002] UK IAT 00300. The Tribunal was urged to take a different view by counsel representing the Secretary of State, who referred to other decisions including Kurucan [2002] UK IAT 03175; Aktas [2002] UK IAT 03136; and Guzel [2002] UK IAT 03743. The Tribunal itself also referred to Tasyurdu [2002] UK IAT 03722.

14. The Tribunal considered that it had to take a view about how the authorities in Turkey would react to returnees with a record of involvement in separatist organisations such as the PKK and HADEP.

15. There were competing considerations which the Tribunal had to seek to reconcile. The Tribunal considered that the determinations in Atkas, Guzal and Tasyurdu more accurately reflected the current situation. While there remained a real risk that persons who were considered as suspected separatists would continue to face ill-treatment at the point of return, it was not reasonably likely that the authorities would include in that category all persons who have a record of involvement in separatist organisations irrespective of the degree and nature of that involvement.

16. The Tribunal then set out what were or have become guideline considerations for cases such as that of Mr Polat. It is not necessary in this judgment to recite the guidelines in full. But the Tribunal summarised one of their effects as being:

> "... we are satisfied that a Turkish appellant of Kurdish origin cannot succeed unless he can show, by reference to factors of this kind, something more than that the authorities will have a record of his involvement in or sympathy for a separatist organisation."

17. As to the particular circumstances of Mr Polat's case, the Tribunal concluded that on his return, it was reasonably likely that the authorities would have a record on Mr Polat and that they would interrogate and briefly detain him in order to make further inquiries. However the Tribunal was satisfied that the authorities would not conclude

that he came within the suspected separatist category. The adjudicator was accordingly right to conclude that he would not face a real risk of persecution or treatment contrary to his human rights.

18. Grounds of appeal were submitted on behalf of Mr Polat to the Tribunal on an application for permission to appeal, which the Tribunal refused. Application for permission was then made to this court supported by a skeleton argument. As I have said, certain points of detail did not impress Dyson LJ, but he gave permission on wide considerations. The first main ground concerned judicial consistency. There were tribunal cases including that of Okur in which the view was taken that a Turkish Kurd with a political profile would be likely to be the subject of interrogation upon return and, to quote the decision of the then President of the IAT, such interrogation "may well be accompanied by torture; such is the way of the Turkish police." In Elidimir, the Tribunal was requested on behalf of the Secretary of State to depart from the general approach to Turkish cases taken in Okur and other cases. The Tribunal was not persuaded to do so, saying that they were not aware of any reliable study of returnees that had sought to distinguish, as they believe the Turkish authorities would, between the fate of ordinary returnees and that of returnees with political connections such as HADEP and the PKK. It was submitted that there had been no reliable study between that decision in January 2002 and the Tribunal's decision in the present case which could have persuaded the Tribunal to depart from the previous general approach. It was submitted that little objective evidence was available since the decision of this court in Turgut [2001] 1 All ER 719 in which Simon Brown LJ had said that a great wealth of material available showed grave human rights abuses still regrettably occurring in Turkey. In any event, it was pointed out that paragraph 6.182 of the November 2002 CIPU assessment indicated that "there has been no change in the Turkish Authorities' attitude towards the PKK since it withdrew its fighters outside Turkish borders, altered its objectives and renounced violence." Other paragraphs in that document indicate that hundreds of ordinary members of HADEP as well as officials had been detained and that even relatives of HADEP members might be closely watched.

19. Further reliance is placed on a paper by David McDowall, a specialist in Middle East affairs with particular interest in the Kurds. This paper dated October 2002 contains detailed observations on the IAT determination in the present case. This includes the observation on page 2 that:

> "There is no evidence I am aware of to indicate either that the level of institutionalised torture has diminished or that the security forces have largely lost interest in pursuing those suspected of assisting the PKK, regardless of whether they operated at a high or low level."

20. We are told that the Tribunal decision in Mr Polat's case assumed great importance in that it has, until recently, been taken to be the position of the IAT as to the factual situation in Turkey in respect of Turkish Kurds with a political profile. It has been followed in this respect in a number of IAT decisions and has been relied upon by the Secretary of State in opposition to appeals to adjudicators and the Tribunal in similar cases.

21. However, things have moved on. On 6th March 2003, a differently constituted Immigration Appeal Tribunal determined the appeal of Meral Hayser [2002] UK IAT 0783. The appellant in that case was Kurdish and an Alevi. She was found by the adjudicator to be a low level supporter of HADEP who established a subjective fear of the Turkish authorities. The adjudicator had concluded that she had not established a well-founded fear of persecution for a Convention reason or that her human rights were likely to be infringed. Submissions on behalf of the Secretary of State relied on the guidelines in the present IAT determination in Polat. In the Hayser appeal, the Tribunal noted that substantial additional country information had become available since the adjudicator's decision in that case and since the Tribunal's decision in the case presently before this court. This included the November 2002 country assessment, an Amnesty International report of 2002 and Mr McDowall's report dated 18th October 2002, to which I have referred. The Tribunal in Hayser considered this material at length. In paragraph 69 of the determination it reached some general conclusions from this evidence. These are quite lengthy but they include, first, that torture is still endemic in Turkey; and second, in sub-paragraph (x) of paragraph 68 that:

> "If as a result of the information discovered during the initial computer check, subsequent interrogation at the point of entry, or received as a result of the inquiries referred to in the last paragraph, an individual suspected of membership of the PKK (now KADEK), HADEP, left wing radical organisations ... militant Islamic groups, or of giving support to one of these organisations he or she is likely to be regarded as an actual potential separatist and is likely to be handed over to the anti-terror branch."

22. Factors which might give rise to the suspicions mentioned in the paragraph which I have just quoted were set out in suggested modifications to the Polat guidelines. The Polat guidelines needed to be modified in the light of the country information and expert evidence which had become available since that appeal was heard and it was useful to identify and add specific features relating to religion and ethnicity. The Tribunal then set out modified and extended guidelines. It is not necessary for present purposes to set them out in full. It is however suggested

on behalf of Mr Polat that the Hayser guidelines withdraw the attribution of "prominent" as a description of the returnee's membership or support of a separatist organisation. Applying the modified guidelines to the Hayser appeal, the Tribunal concluded that the appellant's ethnicity in that case, religion, home area, the central computer record of one arrest and detention (even if she was released after two days), her return from a period abroad and the local information that she was involved with HADEP, even at a low level, were likely to give rise to a suspicion of involvement in separatist activities. She was likely to be transferred to the anti-terror branch where she would face a real risk of torture. Her appeal succeeded.

23. To put it at its lowest, the modified guidelines in the Hayser case and their application to the facts of that case seem to me to call in question the critical determination in the case of Mr Polat that "a Turkish appellant of Kurdish origin cannot succeed unless he can show, by reference to factors of this kind, something more than that the authorities will have a record of his involvement in or sympathy for a separatist organisation."

24. By letter dated 27th June 2003, to the appellant's solicitors, the Treasury Solicitor wrote as follows of the present case:

> "... we accept that before any decision to remove your client to Turkey could be taken, the Secretary of State would need to be satisfied on the basis of the current evidence you have referred to, that there would not be a breach of the Refugee Convention or European Convention on Human Rights. In that regard, the Secretary of State will consider your client's claim in light of the November 2002 and April 2003 CIPU Reports. In addition, you will be aware that since the decision in your client's case the Tribunal in Hayser [2002] UKIAT 07083 has modified the POLAT guidelines. It follows that even if your client's appeal was dismissed, the Secretary of State would have to undertake this exercise of considering the most recent evidence and Tribunal decisions.
>
> In the particular circumstances of your case, it is open to you to make a fresh claim on asylum and/or human rights grounds based on the above-mentioned evidence and decisions. Further, if your client is unsuccessful following consideration of his fresh claim based on this evidence, on the particular circumstances of your case, a further immigration decision will be made and your client will enjoy full appeal rights before the Adjudicator. It is of course in your client's interest to make any such claim as soon as possible. If you agree to withdraw the present appeal the Secretary of State is willing to allow two weeks from the date of this letter during which a fresh claim can be submitted without takings steps to remove your client from the United Kingdom."

25. That is a clear acceptance on behalf of the Secretary of State that the Tribunal's decision in the present case cannot be determinative without reconsideration. It is a further necessary acceptance that any such reconsideration must take account of the additional material which the Tribunal in Hayser took into account.

26. Mr Gill QC on behalf of Mr Polat does not accept that the present appeal is academic. In a further written skeleton submission, he has subjected the Tribunal determination in the present case to very detailed scrutiny. He submits, first, that a proper application of the Hayser modified guidelines should result in this appeal being allowed to the extent that this court would make an asylum determination in favour of Mr Polat. He submits alternatively that instead of being required to start all over again with a fresh asylum application, the case should be remitted to the Immigration Appeal Tribunal for reconsideration in the light of material currently available. In reality this alternative is, I think, Mr Gill's main position since he accepts, first, that his substantive submissions need to rely on matters of fact which did not feature in the adjudicator's decision and, second, that the Immigration Appeal Tribunal, not this court, is the specialist tribunal properly able to assess those facts in the light of a full consideration of up-to-date objective material relating to conditions in Turkey.

27. In the alternative to his submission that the appeal is academic, Mr Saini on behalf of the Secretary of State adopts a position of principle that this court's jurisdiction on this statutory appeal is limited to questions of law material to the Tribunal's original determination. Within these limits, he submits that this court should not admit new material which was not before the Tribunal. He submits that the Tribunal in the present case was entitled and obliged to consider the factual material before it and that it was not obliged to treat as decisive a selection of previous Immigration Appeal Tribunal decisions on related but not identical facts. As to the later decision of Hayser, he submits that this did not alter the factors listed in the present case. It only added to them. The modified guidelines still regard the level of the appellant's involvement with a separatist organisation as a relative factor. Mr Saini submits that the decision in the present case was not irrational and one which was not available to it on the evidence. His formal position is that the appeal should be dismissed. We reach the position, therefore, where both parties accept that Mr Polat's case has got to be reconsidered. In my view, the proper forum for such reconsideration is the Immigration Appeal Tribunal. Mr Saini accepts that it would be wasteful to start again with a fresh determination by the Secretary of State and a further appeal to an adjudicator,

when the facts particular to Mr Polat have already been found and are not under challenge. Mr Saini would, however, stand on the submission that this court's jurisdiction is limited by statute to questions of law; that the Tribunal in the present case made no error of law on the material before it; and that this court should not admit fresh evidence, which has come to light since the Tribunal's adjudication.

28. Mr Saini's submission on fresh evidence is difficult, to say the least, in the light of a number of previous decisions of this court in which in similar cases fresh evidence has been admitted where it was obviously just to do so. These include A v Secretary of State for the Home Department [2003] EWCA Civ 175; Khan v Secretary of State for the Home Department [2003] EWCA Civ 530; and R v Secretary of State *ex parte* Turgut [2001] 1 All ER 719, a pre-Human Rights Act judicial review case. I have no doubt at all but that in an asylum case such as the present, which requires the court's most anxious scrutiny and where the appellant's basic human rights are central, the court should have regard to material of this kind. It is possible that having regard to it could have different theoretical consequences upon a judicial review application to quash a decision of the Immigration Appeal Tribunal to refuse permission to appeal from an adjudicator and upon a statutory appeal to this court whose jurisdiction is limited by statute to points of law. The suggestion that previous decisions of this court may have been *per incuriam* may need to be considered upon full argument in a case in which it really matters. This is not such a case, not least because both sides accept that Mr Polat's case has to be reconsidered.

29. Mr Gill submits that a number of points of law arise in this case capable of enabling this court to quash the decision of the Tribunal and remit it for reconsideration. This may well be so, but we have not heard full submissions and I would not therefore base any decision upon them. However, Mr Saini does accept on instructions that there was at least an error of law upon which a sensible outcome can be achieved in the present case. Mr McDowall's report was submitted to the Tribunal in the present case at the time when it was considering the application for permission to appeal to this court. The decision refusing leave to appeal did not allude to the report. Rule 27(5) of the Immigration and Asylum Appeals (Procedure) Rules 2000, in operation at the material time, gave the Tribunal power, instead of granting leave to appeal, to set aside the determination appealed against and direct that the appeal to the Tribunal be reheard. Mr Saini accepts that, in the exceptional circumstances of this case, it was an error of law not to take account of Mr McDowall's report with a view to directing a rehearing. Upon this concession, I conclude that the court has jurisdiction to take the obviously sensible course.

30. For these reasons, I would quash the decision of the Immigration Appeal Tribunal and remit the matter to them for reconsideration.

31. LORD JUSTICE KEENE: I agree.

32. LORD JUSTICE ALDOUS: I also agree.

ORDER: Appeal allowed; order of the IAT quashed and the matter remitted back to the IAT; no order as to costs, save for detailed assessment of the claimant's Community Legal Services Funding certificate.

(Order not part of approved judgment)

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