Case No: C5/2007/1164

Neutral Citation Number: [2007] EWCA Civ 1397
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM & IMMIGRATION TRIBUNAL
(AIT No: AA/09697/2005)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 2nd November 2007

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE TOULSON

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Between:

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

- -

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M E Grieves (instructed by Messrs Howe & Co) appeared on behalf of the **Appellant**.

Mr J Johnson (instructed by Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Toulson:

1. This is an appeal against the dismissal by an immigration judge of the appellant's claims for protection under the Refugee Convention and Article 3 of the ECHR.

2. The appellant is a Turkish citizen of Kurdish ethnic origin. His stated date of birth is 18 January 1967. He arrived in the UK by lorry on 17 May 2004 and claimed asylum on being stopped by the police. His application was refused by a letter from the respondent dated 29 August 2005; he appealed. His appeal was initially heard by an immigration judge in October 2005 but a rehearing was subsequently ordered. The present appeal is from the determination promulgated on 3 March 2007.

3. The judge accepted the truthfulness of the appellant's account of events up to his arrival in the UK. The main features of his account were these. He came originally from a village called Zillhan, where his family farmed land. He is married with two children. He has never belonged to a political party but he sympathised with the Kurdish cause and he helped HADEP and DEHAP at election times. Some, though not all, other members of his family were politically interested; and he was harassed and detained by the authorities on a number of occasions because of their concern that he was a PKK sympathiser and might be helping them. On an occasion in May 1995 he was stopped from taking sheep to the mountains in case he was going to help the PKK. He was stabbed in the leg and detained at a police station for two days. During that time he was subjected to torture.

4. In 1998 he moved home and went to live in Elbistan. After that there were three further occasions when he was detained by the police. One occasion was at an election time in 1999. He was at the HADEP election office when it was raided; he and others were detained overnight. The next occasion was in March 2004. He and others were travelling in a mini bus on their way to or from a Kurdish festival when it was stopped by the police. They were detained for some hours and he was kicked and beaten before being released.

5. The most serious incident was about two weeks later in May 2004. The appellant was distributing leaflets in Elbistan on behalf of a banned Kurdish organisation, which was either the PKK by another name or an affiliate of the PKK. The judge summarised what happened on that occasion in this way:

> "After distributing the leaflets, the Appellant went down to the market and was stopped by a police vehicle. He was taken away to a building and detained there for five days. During this period he was heavily tortured. This included having his hands tied behind his back and blindfolded and forced to stand on one leg for long periods. He was

> beaten and sprayed with pressurised water and at night he was made to stand on a piece of wood that was in water. After five days he was taken to the police station, where he was kept for about 2 hours and informed that he was in detention under the anti-terror department. He was told that he had been reported for distributing leaflets and that he was doing PKK propaganda. He was told that he would be released, but he was not allowed to change his address and had to inform them of terrorist activities in his neighbourhood in his village. He was threatened with bad consequences if he did not do so."

6. On a minor point, Mr Grieves on his behalf has drawn to our attention this morning that the appellant's actual account of what he was told about residence, according to his evidence, was that he was told not to change his address and to inform them of any terrorist activities in his neighbourhood. I doubt that the judge intended any different nuance by the words that he used. As already noted, he accepted the appellant's credibility on these issues.

7. On his release the appellant went to stay with a friend, and from that address made his way overland to the UK through engaging an agent.

8. The appellant has four siblings in Turkey: a brother and two sisters in Elbistan and a brother in Izmir. He is in regular contact with his wife by phone. He claimed that his wife told him that the authorities pestered her every two to three weeks with questions about his whereabouts. The immigration judge rejected that part of his evidence as embellishment. There has been some discussion in argument about how the judge's factual findings in relation to that matter should be interpreted. Both counsel have helpfully agreed that the fairest interpretation of the judge's findings in paragraph 33 of his judgment is that he accepted that the authorities showed some continuing interest in the appellant's whereabouts until, in 2005, he sent his family a copy of his IS Form which they passed onto the authorities as proof that he was in the UK, but that, on the judge's conclusion, they showed no continuing interest in where he was from that time onwards.

9. Having mentioned that issue, this is a convenient moment at which to refer to the sole issue before us regarding the primary facts found by the immigration judge. It was submitted by Mr Grieves that the judge was wrong to make a finding of embellishment against the appellant in that regard. I can see no error of law and accordingly I would not accept that ground of the appeal. There are more important grounds to which I will come.

10. The judge accepted that, in view of the appellant's past history, there was a real risk that he would suffer persecution or Article 3 mistreatment on return to his home area. However, he was not satisfied that there was a real risk of him suffering such ill treatment on arrival at the airport and he considered that

the appellant could safely live elsewhere in Turkey, eg in Istanbul or in Izmir. The nub of this appeal is that the judge failed, in reaching those conclusions, to pay proper regard to the country guidance case of IK (Turkey) [2004] UKIAT 00312. That case reviewed and superseded the previous country guidance decision of A (Turkey) [2003] UKIAT 00034. The judge referred to those decisions and quoted from IK at some length; but it is submitted that he failed properly to apply the relevant guidance.

11. As to what might happen at the airport the judge said at paragraph 40:

> "A real risk of torture arises if the returnee faces transfer to the anti-terror branch. The danger of being handed over to them depends on the outcome of initial inquiries that will be made of undocumented returnees such as the Appellant. From the evidence before me (which includes the section on the GBTS in the latest COI report), I consider that the Appellant's name is most unlikely to be recorded on the GPTS system or other records kept at the airport. After consideration of the Tribunal guidance and applying that to the particular facts of this case, I am satisfied that the Appellant is not at real risk of being handed over to the anti-terror branch. I am therefore not satisfied that he faces a real risk of persecution or Article 3 mistreatment on arrival at the airport."

12. It was submitted by Mr Grieves on the appellant's behalf that in effect the judge has concluded that, because the appellant's name was unlikely to be on records kept at the airport, therefore he would not be handed over to the anti terror branch through the process of initial inquiries, and therefore was not at risk. In adopting that approach, the judge fell into error because he failed to have regard to the relevant guidance in IK.

13. In IK at paragraph 13, the tribunal quoted this passage from its previous decision in A:

> "42. It will be clear from our assessment of the general issues above that we agree that there is a real risk that any history a person has of previous arrests, outstanding arrest warrants, criminal records or judicial preliminary enquiries or investigations by the police or Jandarma will be contained on the GBTS computer system. The typical returned Turkish asylum seeker will be travelling either on no documents or one-way emergency travel documents which we accept may place the authorities on notice that they return as someone who has sought asylum and has been unsuccessful. If however the claimant holds a current valid Turkish passport it is

> significantly less likely that this perception will arise.
>
> 43. Assuming possession of only a temporary travel document, it is likely that the returnee will be detained for interrogation at the point of entry while enquiries are carried out by them because they are identified as being a failed asylum seeker who may therefore have a history, or if the GBTS computer records reveal information regarded as relevant."

At paragraph 82 in IK, the tribunal went on to say, dealing with returnees whose details were not on the GPTS system, as follows:

> "As to other returnees, we conclude there is no good reason on the evidence before us, in answering this general question to depart from the general thrust of the conclusions of the Tribunal in paragraph 42 of **A (Turkey),** which we have already quoted. Thus if a returnee is travelling on a one-way emergency travel document (and no failed asylum seeker will be returned to Turkey by the British government without appropriate travel documentation), or if there is no border control record of a legal departure from Turkey, then there is a reasonable likelihood that he will be identifiable as a failed asylum seeker and could be sent to the airport police station for further investigation. This is so stated in the CIPU report at 6.242. It does not automatically follow that this would happen."

The tribunal then considered what such a person might be expected to say if facing non routine investigation. At paragraph 86 the tribunal said:

> "It will be for an Adjudicator in each case to assess what questions are likely to be asked and how a returnee would respond without being required to lie."

14. The submission made by Mr Grieves is that the judge ought to have recognised that in this case the appellant would fall into the category referred to in paragraph 42 of A and 82 of IK, that is to say, somebody returning on a one way emergency travel document who was likely to be a failed asylum seeker; and that there was therefore a real risk in his case that he would be subjected to what the tribunal there referred to as 'non-routine investigation'. The immigration judge should then, following the guidance in paragraph 86 of IK, have addressed the issue of what questions he was likely to be asked and what further information was likely to be obtained by the authorities as a result

of that. Relevant in this context also is the following passage from the general conclusions of the tribunal in IK at paragraph 133(5):

> "If a person is held for questioning either in the airport police station after arrival or subsequently elsewhere in Turkey and the situation justifies it, then some additional inquiry could be made of the authorities in his local area about him, where more extensive records may be kept either manually or on computer."

15. Mr Grieves submitted that in the present case a returning Kurd who was a failed asylum seeker would almost certainly be the subject of questions to test out whether he was a PKK sympathiser, and that it was highly likely that at the airport inquiries would be asked of his local area which would have revealed his past history. At all events he submitted that this was a ground which the immigration judge ought to have directed his mind to, and about which he ought to have made clear findings, but he failed to do so.

16. Mr Johnson on behalf of the respondent accepted that this appellant would fall within the category of people referred to in paragraph 82 of IK. But he relied on the words of the immigration judge in paragraph 40, in which he said that after consideration of the tribunal guidance and applying that to the particular facts of this case, he was satisfied that the appellant was not at real risk of being handed over to the anti terror branch. Mr Johnson accepted that this was a very economical way of stating his findings but that implicit in it was a finding that, whatever questions might be put to the appellant, he would be able to answer them in such a way that he would not be handed over to the anti terror branch.

17. Although the immigration judge referred to the tribunal guidance, I for my part do think that the natural way in reading his findings in paragraph 40 is that he concluded that, because the appellant's name would not show up on records at the airport, he was therefore not at risk at that point. If he had intended to accept that there was a real risk of the appellant being subjected to non-routine questioning, but that there was nevertheless no risk of his past history of activities connected with PKK emerging, or no risk of him being handed over to the anti-terror branch, one would certainly have expected him to say so. I conclude that the immigration judge did in this regard fall into error by failing to address adequately the guidance provided in IK.

18. As to material relocation, in the case of somebody who faced a real prospect of persecution or Article 3 treatment on return to his home place, it was necessary in my judgment that the immigration judge should spell out with clarity the facts which caused him to conclude that there was a possibility for the appellant safely to return elsewhere in the country. It is not satisfactory that a reviewing court should be left to speculate on what basis he might have reached such a conclusion.

19. As to what might happen to the appellant if he was able to leave the airport safely, the judge found at paragraph 42 as follows:

> "I consider it significant that the appellant has a brother in Izmir, who works and lives with his family there … If the appellant also went to Izmir (or for example Istanbul), I am not satisfied that he would face a real risk of persecution or Article 3 harm. He would not face the kind of scrutiny by the security forces that he may be subject to in his home area. Whilst he would be required to register with the local Mukhtar, I am not satisfied, after taking into account the above-quoted guidance from IK, that his material history would expose him to a real risk of persecution outside the Eastern parts of Turkey."

20. It is noted by Mr Grieves that although the immigration judge had cited certain passages from IK, he failed to cite a particularly critical passage and failed properly to follow the guidance of that case. In IK at paragraph 118, the tribunal said:

> "In general terms however we consider that one should proceed, when assessing the viability of internal relocation, on the basis that an individual's material history will in broad terms become known to the authorities at the airport and in his new area when he settles, either through registration with the local Mukhtar or if he comes to the attention for any reason of the police there. The issue is whether that record would be reasonably likely to lead to persecution outside his home area."

21. The tribunal had earlier noted at paragraph 75 that the Turkish authorities do in general seek and collate quite detailed information about people they consider to be of adverse interest to them. That information would be at its greatest in the area where they lived, and particularly so if they lived in any of the areas of conflict in the south and east of Turkey, as of course this appellant did.

22. The tribunal in IK then went on to draw a distinction between people coming from areas where the PKK was or had been active and who had suffered persecution or harassment of a generic kind, eg because they lived in a village where all the inhabitants were driven out and ill treated, and, on the other hand, individuals in relation to whom there was some positive reason to suspect them of PKK involvement or sympathy. At paragraph 120 the tribunal went on to affirm as consistent with its own approach, and as still relevant, the following observations from a UNHCR report in May 2001:

> "Kurds and members of Christian minorities from the southeast Turkey do have an internal flight alternative outside the region……. unless the case in question is of a prominent nature or is perceived by the authorities to have real or alleged linked with the PKK or other main Kurdish parties. UNHCR considers that the group most likely to be exposed to harassment/prosecution/persecution are Kurds suspected of being connected with or sympathisers of the PKK….
> In the context of internal flight 'it is essential to find out if Turkish asylum seekers if returned would be suspected of connection to or sympathy with the PKK. In this case they should not be considered as having been able to avail themselves of an internal flight alternative'."

23. This last passage was not referred to by the immigration judge. It was submitted on the appellant's behalf that his brother's situation was irrelevant. What mattered was how the authorities would perceive the appellant, and whether they would see him as somebody with PKK connections. If they knew of his past activities, the answer to that question would be yes. In that case it was not safe to regard him as having an internal flight alternative.

24. Mr Johnson submitted that the judge had considered all the relevant guidance material. He drew attention to the fact that, even in the appellant's own district, the judge did not consider that the appellant would be at immediate risk on his return; rather that he faced risk in due course, particularly if he continued with his past pro-PKK activities, and that the judge was entitled to conclude that the risk of him being seen as a danger outside eastern Turkey was sufficiently small that he could safely live there.

25. In my judgment the immigration judge did fall into error in his approach to this aspect of the case. He failed to concentrate on how this appellant would be perceived in the light of his past activities, and failed to address directly the question why he should be regarded as having an internal flight alternative if, as the local evidence on him would have indicated, he was somebody with some history of pro-PKK activities.

26. Accordingly, I would accept the criticisms made of the judgment in both fundamental respects, ie the risk to the appellant at the airport and his potential risk more broadly if he were to return to some other part of Turkey. It is agreed that if the court should reach that conclusion, the appropriate course would be to allow the appeal and remit the matter for reconsideration by a fresh tribunal. The basis of such reconsideration would be this: the immigration judge's findings on all matters of past fact would stand, with his findings in relation to what has happened since the appellant's return to the UK being as interpreted earlier in this judgment.

27. There will be no reopening of the issue of whether the appellant would face risk of persecution or Article 3 mistreatment in his own home area. The sole issue for reconsideration is whether, upon the facts found by the immigration judge, and on the basis that he would face a risk of persecution or Article 3 mistreatment if returned to his home area, he nevertheless could return safely to Turkey. There will be two limbs to that consideration: the first will be what real risk he would face at the airport; and the second aspect would be what real risk he would be exposed to if he passed through the airport stage safely. Whether any further evidence should be admissible in relation to those issues would be a matter for consideration by the tribunal. On that basis I would allow this appeal.

Lord Justice Mummery:

28. I agree

Lord Justice Lloyd:

29. I agree and we will make the order in the form proposed by Toulson LJ.

Order: Appeal allowed.