

CO/2421/2006

Neutral Citation Number: [2008] EWHC 2539 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 24 September 2008

B e f o r e:

HIS HONOUR JUDGE INGLIS

Between:

THE QUEEN ON THE APPLICATION OF K

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr A Mackenzie (instructed by Lawrence Lupin) appeared on behalf of the Claimant
Mr P Patel (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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

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1. JUDGE INGLIS: This is a claim by Mr K for judicial review of a decision of the Secretary of State for the Home Department made in a letter of 1 November 2006 as he had made no fresh claim for asylum and no fresh human rights claim such as would bring paragraph 353 of the Immigration Rules into play and require the consideration of his claims.
2. The claimant is a national of Turkey of Kurdish ethnicity. On 5 November 2001 he arrived in the United Kingdom illegally. On 27 November 2001 he applied for asylum. On 29 January 2002 the application was rejected. On 24 April 2003 the adjudicator promulgated his decision for rejecting the claim for asylum and on human rights grounds. On 11 June 2003 the Immigration Appeal Tribunal refused permission to appeal. In June 2004 the claimant agreed to return to Turkey voluntarily but did not do so. On 6 March 2006 he made a fresh claim for asylum after removal directions had been given. On 15 March 2006 that claim was rejected.
3. On 17 March this claim for judicial review was launched. It was launched by reference to an earlier rejection of the claim and the material upon which the claim is now based has developed and moved on. But in the claim as it stood Mrs Justice Dobbs refused permission on the papers on 22 June 2006. Thereafter the claimant renewed the application, asking for an oral hearing but the claim was stayed by consent because it was anticipated that further submissions would be made requiring a new response from the Secretary of State.
4. On 25 September 2006 a further letter was sent to the Secretary of State enclosing further documents, including a report from Dr M G Wright about the causation of scars that the claimant had on his body especially on his private parts, and evidence from Miss Sheri Laizer, an expert on the Middle East including Turkey.
5. On 1 November 2006 the Secretary of State maintained the decision that the material, including this new material, did not give rise to a fresh claim. That is the decision that it is now sought to review.
6. On 19 January 2007 amended grounds were filed. On 8 February 2007 Mrs Justice Black, at an oral hearing, gave permission to make the application.
7. The adjudicator Mr Parker, on 24 April 2003, made a number of findings to which reference can be made. First, he found that the claimant in Turkey had been arrested and sentenced for having illegal weapons. That is accepted as being true. The claimant had been sentenced to 4 years and 2 months' imprisonment, a sentence that he had not served. He was released pending appeal. Whilst he was at large he had left the country and come to the United Kingdom.
8. Secondly, the adjudicator found that there were no connections between the claimant and the separatist Kurdish organisation, the PKK, and also that the state authorities in Turkey believed that the claimant had no connections with the PKK.

9. The adjudicator reviewed the evidence, including paragraph 6 of the witness statement in which the claimant said he did not fear persecution from the Turkish authorities on the basis of alleged involvement with the PKK. His fear was of a different nature, that is a vendetta against him and his family by three families in the village in which he lived which had brought and would in the future bring his life into danger.
10. In proceedings before the adjudicator it appears from the reasons that the claimant became equivocal about whether he acknowledged paragraph 26 as being his evidence. But the finding Mr Parker made quite clearly, having heard all the evidence, was that the claimant had no connections with the PKK and the Turkish authorities did not believe he had any such connections either.
11. Thirdly, and following from those primary findings, a suggestion being put forward that he would be persecuted by the state because of suspected PKK activities was described as seriously flawed and so therefore plainly rejected.
12. Fourthly, that the fear of ill treatment arose not from the possible connection with a subversive organisation but from the three families who have a vendetta against him and his family.
13. As to the ill treatment which the claimant said amounted to torture because he had electric shock treatment and beatings, the adjudicator did not fully deal with that and said that there is some evidence of ill treatment but none that required hospitalisation. He did not deal in terms with the allegation, but I think it is fair to say that the finding (given that the claimant's credibility was seriously lacking in a number of respects) did not go the distance as to finding that the claimant had been subjected to torture. He found that it was likely that if returned to Turkey the claimant would have to face the fact that he was a convicted person and had a sentence yet to serve, and the consequences of that were that that was likely to happen but did not amount to a breach of Article 3 or a ground for asylum.
14. As appears, the new material since the adjudicator's decision has developed at different stages. The first tranche, being the material of 6 March 2006, led to a rejection shortly afterwards and to these proceedings being begun. It is not necessary to refer to that material. It is not relied on now, save to say that it was in the form of a reported letter from the claimant's father and a reported letter from a man called Abdul Amit who was supposedly one of the enemies in this vendetta. Both those letters are directed, as it appears, to his risk not from government authorities but from these other families. That is not pursued.
15. On 25 September 2006 there were two items of new material: one was a report from Sheri Laizer dated 12 September 2006 and a second report of Dr Wright dated 24 August 2006. Miss Laizer is a writer and journalist on Middle Eastern matters. She gave an analysis of the position that she thought the claimant might find himself in by reference to her knowledge of the circumstances that prevail in Turkey. It is not necessary to analyse what she said because her evidence is not relied upon now as amounting to material that would support a fresh claim.

16. It is worth referring to the facts because the decision letter which is now impugned deals also with the matter that she raised as well as the report of Dr Wright. Dr Wright's report was dated 24 August 2006. He had seen the claimant at his consulting rooms in Harley Street on 24 August in order for him to examine the claimant to ascertain whether he had scars that would support the history of him having been tortured. In his report he found some scars. After setting out the history as given to him by the claimant which included electric shock torture, [it is stated]:

"On the left side of the shaft of the penis there was well-healed scar measuring 3 cms in length.

On the glans penis there was a small circular indentation scar, which was depigmented.

On the right side of the penis on the shaft there was a linear scar measuring 1 cm with a broadening of that scar anteriorly."

There is reference to a scar on the knee, a scar on the left foot and also - more relevantly to the doctor's findings -

"Around the umbilicus was a hernia to the left of the mid line said to be due to beating."

17. In his comments and conclusions the doctor said:

"Mr K described a period of detention in which he was beaten and tortured by the application of electric shocks. He has scars on the penis, which I believe are compatible with his history. I am unable to think of any other obvious cause for the scars. They do not appear to have been caused by surgery or disease.

The umbilical hernia is unusual in that such hernias, if they occur spontaneously, do so, in my experience, in the mid line. Mr K's hernia is to one side suggesting that some form of trauma, such as beating, has caused it."

18. The decision letter of 1 November 2006 dealt with Dr Wright's evidence as follows in paragraphs 27 and 28:

"27 Consideration has been given to the medical report of Dr Wright. It is noted that the account of ill-treatment your client provided to the doctor is also inconsistent with the account given in your client's signed witness statement dated 18 March 2003. Likewise the comments and conclusion the doctor has provided are inconsistent with your client's account. For example, your client made no mention of any injuries to his penis as a result of the ill-treatment he suffered.

28 The report does not provide any evidence as to the age of scars and his conclusions and comments are based on your client's own account of his

asylum claim and is considered to be self-serving, and found to be not credible by the adjudicator. In any event the adjudicator accepted that there was some evidence of ill treatment but did not accept your client's claims with regards to further risk of ill treatment on his return to Turkey."

19. As to ill treatment in the claimant's statement which is referred to in the decision letter, in his witness statement before the adjudicator which had been adopted by him in this respect as in most respects the account had been that after his arrest in 1999 for a firearms matter he had been subjected to torture, including electric shock torture, when being questioned about possible involvement with terrorism. In the statement at paragraphs 16 to 19 he stated:

"16 In October 1999 I returned to Selime. I had been working in Mersin. But the three families began to cause more trouble. I avoided them. They made a complaint to the prosecutor and accused me of smuggling weapons to the PKK. The police came to the house and I was arrested and the weapons were confiscated. I was in custody for four days and I was interrogated in the Anti-Terror Headquarters at Aksaray.

17 I was beaten and questioned. They wanted to know if I was a member of an organisation. They said if I told them I was I would be released. I was electrocuted. I was taken to a tiled room. I was told to undress. It looked like a bathroom. I was handcuffed and secured to the floor. They put a metal belt on me. It went across my waist and between my legs. They then pressed a button and I received electricity.

.....

19 I can't remember how long I was electrocuted for. It is difficult to recollect. I was released on the fourth day and taken to court

20. There were aspects of the claimant's account that the adjudicator found unreliable and his credibility generally was poor. The adjudicator made no specific finding about this level of treatment or course of it, confining himself to saying there was some evidence of ill treatment but none that required hospitalisation, a finding which cannot, I think, fairly be found to be regarded as a finding that he had been tortured whereas his description was plainly of torture.
21. The new grounds based on this material were put forward in January 2007 at paragraphs 21 to 25:

"21 The claimant bases his present case on a combination of the positive findings by the adjudicator concerning his arrest on weapons charges and the fresh medical evidence of Dr Wright.

22 It is accepted that the adjudicator was entitled to take the view he did of the claimant's previous history, and there is no challenge to his findings of fact on that or any other point, save as regards the medical

evidence."

It is also accepted that Miss Laizer's report need not come into the case for consideration. At paragraph 25 it is stated:

"25 it is submitted that the [Secretary of State's] treatment of the findings of Dr Wright are not reasonable. Those findings, taken in context, should have led the Secretary of State to the view that it was at least arguable that there was a real risk of the claimant being subjected to further treatment contrary to Article 3 if removed, and accordingly that he ought to be entitled to put that argument before an immigration judge."

At paragraph 32 there is a summary of the way in which the case is now put, namely -

" that the claimant is entitled to argue, on the basis of the facts accepted by the adjudicator and those at least arguably established by the new evidence, that:

i He is wanted by the authorities in connection with the weapons offence.

ii He is at least reasonably likely to be detained as a result if returned to Turkey.

iii He has previously been tortured when originally arrested for this offence.

iv Had the adjudicator been in possession of the full facts of the torture, it is unlikely that he would have treated it as being of minor significance.

v Past ill treatment is a serious indicator of further risk, and torture of detainees remains a very serious problem in Turkey.

vi At least some of the risk factors identified in IK Turkey are relevant to his case.

vii The Secretary of State for the Home Department therefore cannot reasonably take the view that there is no realistic prospect of an immigration judge finding a real risk that the claimant would be tortured again if he were returned to Turkey."

22. In support of that view, on the basis that it would be open to the possibility that the immigration judge would find the level of treatment was more serious than Mr Parker found in 2003, reference was made to paragraph 339 of the Immigration Rules and also to the Country Guidance IK Turkey [2004] UKAIT 312. Paragraph 339 K provides:

"The fact a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of

persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

23. The grounds are developed in the skeleton argument and oral argument, on behalf of the claimant, by Mr Mackenzie. First, it is submitted that the way in which Dr Wright's evidence was treated at paragraphs 27 and 28 was wrong and that there is a real possibility that the immigration judge would find, on the basis of that evidence, that even taking into account the surrounding circumstances relating to the claimant's credibility that the treatment was more serious than the immigration adjudicator found.
24. Secondly, more serious treatment amounted to torture taken in the context of the findings already made and the likelihood of the claimant having to serve a prison sentence if returned to Turkey should have led to the view that it was at least arguable that there was a real risk of breach of Article 3.
25. Thirdly, if there was a finding of torture, that the adjudicator did not himself reach, paragraph 339 K gives as a starting point that that is a serious indication of such risk in the future which has to be considered in terms. At paragraph 38 of his written submissions Mr Mackenzie repeats the list of matters that are in the grounds at paragraph 32.
26. The submission emphasises the finding that he had been tortured gives rise to real risk of torture in the future. Nothing suggests that torture in Turkey is confined to political suspects or to political prisoners. Reference is made to a State Department document of 2007 which reveals that torture is not so confined and so if he goes back as what may be described as an ordinary criminal prisoner, as someone likely to be treated as such, the risk of breach of Article 3 still exists. It is not right to make an assumption that on application to the Asylum and Immigration Tribunal the assessment of the risk of previous torture would fail to have any effect.
27. The Secretary of State's submission starts with the new material itself, the suggestion that the account given to Dr Wright was inconsistent with the account in the witness statement and the claimant had made, as is the case, no mention in the witness statement at the earlier hearing that he had suffered injuries, physical injuries, that could have been investigated. It is submitted that there are clear findings by the adjudicator that are not affected by the material: first, that the claimant generally is not credible; secondly, there are no connections with the PKK and the authorities believe there are no such connections. He was not suspected of being involved with them. The allegation that he would be persecuted on his return by the state because of PKK activities has been found to be seriously flawed and none of that is affected by credible evidence about the extent to which he was in fact mistreated as now evidenced by the doctor's material.
28. The position about risk to returnees, it is submitted, has to be considered against the guidance given in the two cases: A (Turkey) [2003] UKIAT 24 and IK [2004] UKIAT 312 (to which reference has already been made).

29. In his oral submissions, as in his detailed grounds for opposition, Mr Patel founded himself on the facts established by the adjudicator and would not be affected by Dr Wright's evidence: no connection with the PKK, no government suspicion, no reason to believe he would be finding himself in the hands of the anti-terror police. The ground actually advanced previously - as is expressed, a vendetta - is not relevant. It is submitted that the evidence of Dr Wright, taken at its highest, could not affect the adjudicator's core findings. Mr Patel accepts that there is general risk of torture in Turkey. It is discussed in the authorities to which reference has been made. It is suggested that the issue is whether there is a realistic prospect of the Asylum and Immigration Tribunal finding that there is a real risk in the claimant's case. As far as the authorities referred to are concerned, A is in July 2003 and establishes the position that all decision makers still have to have regard to, that torture is endemic in Turkey. There has been movement towards reform that has not led, so far, to benefit to individuals potentially at risk that can be taken into account.
30. I accept the analysis of the approach of that case as applied to the claimant's case. The focus is on what is likely to happen to him when he returns, when he is in the first instance at the airport. He is likely to be arrested and interrogated. There is a real risk that the criminal record and details of the previous investigation will be revealed. Ill treatment cannot be ruled out at that stage but it would be unlikely to be in breach of the Convention. If there is a suspicion of PKK membership he would be handed over to anti-terror branch and there would be a real risk of breach of his human rights.
31. The basis upon which suspicions often may arise depends on the number of cumulative factors to be considered.
32. The second case is IK, repeated and adopted expressly in the approach of A the year before. That was concerned in large part with the state of records and the database available to police from which they were likely to find out things that adversely affected the person with whom they were concerned. Those are not, it seems to me, relevant here because it may be assumed, as the adjudicator found, that on his return the claimant's record of his unserved sentence would be revealed and that that would lead to a detailed scrutiny of him and information available about him.
33. Those two decisions came after the adjudicator's decision in this case. He referred to and analysed his position by reference to the then recent case of Polat [2002] UKAIT 04332 which covered much the same ground as in A but focussed on returnees who had some level of involvement in the separatist organisation - page 39 of his decision. He dealt with the list of considerations which arose from that case, which is quite similar to the list of considerations at paragraphs 46 and 47 of A which themselves focus on reasons why a claimant might be ill treated especially by reference to an association with a separatist organisation.
34. The legal issues for the court on this application in the context of what the Secretary of State has decided are set out in paragraph 353 of the Rules which provide:

"When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will make

any further submissions and, if rejected, will then determine whether they amount to a fresh claim. 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) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

35. In WM (DRC) v Secretary of State [2006] EWCA Civ 1495 the Court of Appeal set out the approach that resulted from paragraph 353. It is acknowledged that the threshold for reconsideration of the claim was "somewhat modest". The question is: was there any realistic prospect of success in the application before the immigration judge, but not more than that? The decision maker must conduct an anxious scrutiny of the material. That is what the Secretary of State has to do. The task of the court, on review of the decision whether there is a fresh claim, is a judicial review test: can the decision be impugned on Wednesbury grounds?
36. The court should look to see whether the Secretary of State has dealt with two questions. First, has he asked the correct question, namely whether there is a real prospect of an immigration judge, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution if returned to the country concerned? Secondly - if the right question has been asked - has the Secretary of State, in reaching the decision, satisfied the requirement of anxious scrutiny?
37. Insofar as the Secretary of State's reasons at paragraph 27 and 28 giving reasons why Dr Wright's report would not make any difference to the factual basis of the adjudicator's conclusions as to ill treatment, I think those reasons are wrong and outside the scope of the conclusion that can properly be arrived at. The objective evidence of interest which was not before the adjudicator was not only consistent with the account the claimant was giving but was not obviously explained in some other way.
38. The suggestion that the account given to the doctor was inconsistent with the account given in the witness statement adopted before the adjudicator seems to me to be simply wrong. It is difficult to see even if the claimant's credibility starts in a poor state, but given the embarrassing nature of what it is he would have to describe and would have had to describe in legal proceedings, it seems to me that it is not possible to say that an immigration judge dealing with this material as a whole could not come to the view that what the claimant suffered should be categorised as torture on the basis of details given by him and, as I read paragraph 40 of the decision, the judge definitely fell short of finding that.
39. Accordingly, as far as paragraphs 27 and 28 of the decision maker's decision thinks that the material produced by Dr Wright would have been of no effect in establishing the factual basis of what had happened to the claimant, I do not think that is right. And he

is really substituting the judgment of the decision maker for that that might be made by the immigration judge considering the matter as a whole.

40. Paragraphs 29 to 45 of the decision letter deal with a number of matters, but in considerable part deal with what is described as "relevant country information to which regard has been had". The burden of that is said to be that the situation in Turkey is improving. The fact it is improving is one of the matters that was taken into account. The final decision is made in paragraph 48.
41. The discursive treatment of the question of conditions in Turkey and whether they are improving - in one instance in one paragraph there is reference to an article in The Economist magazine that was read by the decision maker - may have been prompted by the fact that Miss Laizer's evidence was also being considered by the decision maker and dealt with, and her evidence did deal in considerable part with what might be called country evidence. If it is the case, as it appears to me, that anything in the nature of country evidence - either that to be gleaned from the two authorities to which reference has been made or external material such as that referred to by the decision maker and, in his submissions, by Mr Mackenzie - it would emphatically be something for an immigration judge considering the material and would not be something that would really fall for consideration on the question of whether the paragraph 353 hurdle was overcome.
42. The reasons however did address in paragraphs 31 and 32 the crucial findings of the adjudicator. It would not be affected by a finding that the treatment that the claimant had suffered amounted to torture. In my judgment, although the decision letter in considerable part reads as if the author is making a decision rather than considering what the tribunal might do with the material, the right question is asked at paragraph 48 and the answer given does proceed on the basis of consideration of the evidence and the findings that have been made by the adjudicator.
43. The decision maker did not consider the position that would arise were the Asylum and Immigration Tribunal to find that the treatment inflicted on the claimant amounted to more serious treatment than the adjudicator found. I acknowledge the danger of substituting for the reasons given by the letter the analysis put forward by Mr Patel in this application that it is not his analysis but the reasons actually given that are being reviewed. But the points actually made by Mr Patel are referred to in paragraphs 31 and 40 to 42 of the decision letter.
44. It is necessary to focus on the actual threat to the claimant and whether the evidence of Dr Wright could itself give rise, with all the other findings of facts, to a realistic prospect of success in an application to the Asylum and Immigration Tribunal when added to the material in the case and on which - quite independently of that issue, that is the medical evidence now available - the adjudicator came to the conclusion it gave right rise to no real threat of ill treatment to a relevant degree in the claimant's case. The risk is not considered in a vacuum and not generally by reference to a country as applying to all who may go there but by reference to an individual.

45. I do not think that bearing in mind the decisions that could be made on the evidence that are not affected by Dr Wright, the Secretary of State can be said to have been wrong in saying that the new material does not give rise to a reasonable prospect of success before the immigration judge. For that reason this application to review the decision letter of 1 November 2006 fails and is dismissed.
46. MR PATEL: There is no application for costs. There should be no order for costs.
47. MR MACKENZIE: On the subject of costs, may I seek a detailed assessment?
48. JUDGE INGLIS: Yes, detailed assessment of the claimant's costs.
49. MR MACKENZIE: To preserve my position rather than anything else, may I seek permission to appeal particularly on the question of the impact of paragraph 339 K which I suggest is a matter of wider importance notwithstanding the detailed consideration your Lordship has given to the matter?
50. JUDGE INGLIS: I do not hold you to it but sometimes it is helpful to have what you think the grounds of appeal might be. It is difficult for someone in your position. If I have got something wrong, it might help.
51. MR MACKENZIE: Broadly, my Lord, on the basis that I put it to you before that paragraph 339 K provides that past ill treatment is a serious indicator of future risk. I submitted that that provided a presumption which was to be rebutted and potentially could be rebutted before the Secretary of State by the immigration judge. Once you have found that, as I understood you to do, the treatment of Dr Wright's evidence was not sufficient by the Secretary of State, whether it was then necessary for the Secretary of State and in the longer run potentially an immigration judge to consider whether that evidence therefore gave rise to consideration of future risk. (Pause)
52. JUDGE INGLIS: Yes. I will give you permission.
53. MR MACKENZIE: Thank you.
54. JUDGE INGLIS: I have written in the box "Although I reached the conclusion that I did, the point that the decision maker should have considered IR 339 K in terms and that its implications should have altered the outcome may be arguable".
