Case No: 2002/1070

Neutral Citation No. [2002] EWCA Civ. 1408
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 14th October 2002

Before :

LORD PHILLIPS MR
LORD JUSTICE RIX
and
LORD JUSTICE SCOTT BAKER

- -

Between :

KULEK
Appellant

- and -

SECRETARY OF STATE FOR HOME DEPARTMENT
Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

- -

Mr Rick Scannell (instructed by Irving & Co) for the Appellant
Ms Julie Anderson (instructed by The Treasury Solicitor) for the Respondent

- -

Judgment
As Approved by the Court

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Lord Phillips MR :

This is the judgment of the Court.

Introduction

1. The appellant, Mr Kulek, a citizen of Turkey of Kurdish origin arrived in the United Kingdom on 8 October 2000 and claimed asylum on arrival. On 14 January 2001 the respondent, the Secretary of State, made a decision to refuse to grant him refugee status and to refuse to grant him leave to enter. The appellant appealed to an adjudicator, who allowed his appeal in a determination dated 13 September 2001. The Secretary of State appealed against that decision to the Immigration Appeal Tribunal. The Tribunal allowed the appeal in a determination dated 19 March 2002. The Tribunal refused permission to appeal to this Court.

2. On 26 June 2002 Sedley LJ, on a paper application, granted permission to appeal. In giving his reasons he stated:

> "There is a single live point of law here: is a respondent to a second appeal entitled to re-open the Adjudicator's fact findings without leave to cross appeal".

3. Sedley LJ went on explain that this case raised a procedural issue of general importance in relation to a conflict between two decisions. The first is *R v. The Immigration Appeal Tribunal, ex parte Badrol Bari* [1986] Imm. AR 264, a decision of Russell J sitting in the Divisional Court. The second is *Mohamed Iqbal v. Entry Clearance Officer, Islamabad*, (29 October 1991) a decision of the Immigration Appeal Tribunal. While this case raises that issue, we do not see it as central to the appeal.

THE BASIS OF THE CLAIM TO ASYLUM

4. The basis of Mr Kulek's claim for asylum has been helpfully summarised in a skeleton argument submitted on his behalf. He claims to have been a member of the DHKP/C, an illegal violent political organisation and, for that reason, to be wanted by the police. He asserts that if he is returned to Turkey, the authorities are likely to seek to prosecute him in respect of his membership of this organisation and his activities on its behalf. He will be at risk of being tortured during investigation and pending any prosecution. Thus it is claimed that he has a well-founded fear of persecution and that his removal to Turkey would conflict with the United Kingdom's obligations under the 1951 Refugee Convention and violate Article 3 of the Human Rights Convention.

5. The factual account given by Mr Kulek to support his case is to be found in the record of his initial interview on 20 November 2000, from an undated statement sent by his solicitors Irving & Company to the Home Office on 11 December 2000 and from the oral evidence that he gave to the Adjudicator, Professor Casson, on 15 May 2001. His case on the facts, as finally developed, can be summarised as follows. On the 23rd October 1996 the police raided Mr Kulek's house in Istanbul. He was out, but his wife, who was pregnant at the time, was detained. She was held at a police station for two weeks in the course of which she was tortured and suffered a miscarriage.

She was charged with helping members of an illegal organisation and detained for a further 21 days in Sakarya Prison. She was released, but the case against her has never been resolved. During a court appearance Mrs Kulek was questioned about her husband in terms which made it clear that he was suspected of being a member of DHKP/C. After his wife's release Mr Kulek moved with her to a different part of Istanbul and was careful not to register with the Mukhtar, although the law required this. For a while he did not engage in political activities, although he attended secret meetings of the DHKP/C. In 2000, however, he became politically active again, distributing illegal leaflets, putting up fly-posters and writing slogans on walls. The police went to a house of one of his brothers and to the house of a sister, as well as to the office of the Mukhtar, enquiring about his whereabouts. He then decided to leave and seek refuge in this country.

MR KULEK'S BROTHER

6. Mr Kulek has a brother, whose first name is Cafer. He arrived in this country in the back of a lorry in January 1997 and claimed asylum. His claim was rejected and an appeal to the Special Adjudicator dismissed. On 15 March 2000, the Immigration Appeal Tribunal, chaired by the President, Collins J, allowed his appeal. The factor which weighed most heavily with the Tribunal was the risk posed to Cafer by reason of the activities of Mr Kulek and his wife. The material parts of the Tribunal's decision read as follows:

> "The Appellant's account of the reasons why he had decided to leave Turkey and to seek asylum were essentially these. His family was politically active, being concerned with the DHKP which is an illegal organisation in terms of Turkish law. He said that his family was as a result targeted by the police and his sister-in-law, falsely described by the Special Adjudicator as his aunt, was sent to prison. He himself, was arrested when the police could not find those members of the family who they were seeking but was not detained for very long and was then released.
>
> ….
>
> What the Special Adjudicator did not do, unfortunately, was to consider whether, on return, the Appellant would fall foul of the authorities because of the involvement of his family with the DHKP. The Tribunal is aware from many cases involving Turkish Kurds that there is a real risk that on return they will be interrogated and indeed, may be detained for a period while interrogated. If there is no reason to connect them with any past activities which would have drawn them to the attention of the police, then the likelihood is that they will be released and there is no reason to believe that there is a real risk of persecution, notwithstanding the Turkish authorities propensity to engage in torture. But the situation may be somewhat different if there is a reason for the authorities to link the individual with activities of which the authorities disapprove and that clearly seems to us to be the position here, having regard to the activities of his family. We should say that although it is not entirely clear from the adjudication, it does not seem that the Special Adjudicator was rejecting the Appellant's account so far as it related to the involvement of his family.

> However, what concerns us most is the issue in relation to the family. We take the view that, as we have said, there is a real risk that he would be drawn to the particular attention of the authorities on his return who would be suspicious of him. In those circumstances the present situation in Turkey persuades us that there would be a real risk that the police would persecute him in the sense that they would indulge in their practice of torture."

DOCUMENTARY EVIDENCE

7. Before the Adjudicator Mr Kulek sought to rely upon a batch of documents, totalling 18 pages. These purported to be documents in Turkish, bearing dates in 1996, together with English translations. These included a record of a court appearance by Mrs Kulek on 4 November 1996 in which she denied having made a statement to the police which had been adduced in evidence. This statement included the following passage:

> "The individual who recruited me to the DHKP/C is my spouse Yusuf Kulek. He is a member of this organisation and he struggles for it. He is the individual who shelters the other members of the organisation and arranges meetings in our house. He told me that we waged a struggle on behalf of the DHKP/C organisation, opened our house to the members of the organisation and carried out activities for this organisation. One individual he brought to our house was Hasan Pinar, code name Riza, who was apprehended in August 1996 and is in prison. And other individuals Hasan Aydogan, code name Baris, and Turkan Ozen, code name Serpil also stayed in our house. I aided the DHKP/C organisation in this way."

THE ADJUDICATOR'S DECISION

8. Before the Adjudicator Kulek was represented by Mr Sidhu, a trainee solicitor. What occurred when he sought to rely upon the documents to which we have referred appears from the following passage in the Adjudicator's decision:

> "Mr Corradine, for the respondent, informed me that pages 218 to 232 had never been seen by the respondent before the hearing and that the documents were not accepted as genuine. Mr Sidhu said the documents had been sent to the Home Office. In my judgment, were that so, Irving & Co would have drawn the respondent's attention long before the hearing to the failure to include the documents in the Home Office bundle. I accept Mr Corradine's submission that the pages in question had not been submitted to the respondent and, following the judgment of Langley J in *ex p Nasir Qawium Khan* (CO 107/1999) I am not prepared to accept the documents as authentic in view of the circumstances and timing of their production."

9. The Adjudicator went on to consider the position if, contrary to his finding, 'some element of truth is found to emerge on the appellant's story'. He drew attention to inconsistencies in Mr Kulek's evidence as to what happened after 1996 and, in the light of these, concluded that Mr Kulek cannot have been of interest to the police during the years he spent in Istanbul.

10. The Adjudicator's provisional conclusions appear in the following paragraph:

> "I have concluded in the light of this evidence that the appellant is a liar and has presented a spurious claim to be in need of international protection. Were it not for the factor I now turn to, he would not persuade me according to the principles established by the House of Lords in *Sivakumaran* and by the Court of Appeal in *Karanakaran* and *Ravichandran* that he would have a well-founded fear of persecution for any reason within the United Nations Refugee Convention were he to return to Turkey at the present time. For the same reasons, I would not accept that there is a real risk that he would encounter a breach of his human rights on return."

The Adjudicator went on, however, to refer to the decision of the President in relation to Mr Kulek's brother Cafer, and went on to hold:

> "Although I have found the appellant to be not credible, and although the Tribunal stressed that its decision was not a precedent, I am compelled to conclude that it is not open to me to find that this appellant does not have a fear of persecution in Turkey when the Tribunal has found that his brother has such a fear. For that reason, and for that reason only, I allow the appeal. In my view it is desirable that the Tribunal should adjudicate on the correctness of my decision."

The Secretary of State obtained permission to appeal to the Tribunal.

THE DECISION OF THE TRIBUNAL

11. On 31 January 2002 Mr Kulek's solicitors wrote to the Tribunal asking permission, "in light of the credibility findings by the Adjudicator", to call Mr Kulek as a witness. The Tribunal refused that request.

12. In their decision, after reciting the background facts, the Tribunal made the following observation:

> "There has been no appeal on behalf of the claimant himself and it follows that the principal findings of the Adjudicator in relation to credibility are not before us, save insofar as the Adjudicator's whole reasoning process is in issue in this appeal."

13. In relation to the Adjudicator's reasoning process, the Tribunal went on to hold that this had been flawed. The Tribunal had been wrong to treat as an independent, and dominant, factor the prior decision in relation to Mr Kulek's brother:

> "We have considerable sympathy with both those arguments but we think that Mr Hodgetts' is the more appropriate and the more persuasive. If the Tribunal's determination of the brother's appeal was relevant at all, then it fell to be taken into account in conjunction with all the other material before the Adjudicator. It was wrong to put it aside until the end, to draw conclusions about the rest of the evidence and then to throw the Tribunal determination into the balance and find that it tipped the balance. It follows, therefore, that the Adjudicator's process of reasoning is one which we cannot endorse."

The Tribunal continued:

> "The question then arises to what extent, and for what purposes the Tribunal's determination of the brother's appeal was relevant. We accept Mr Hodgetts's submission and indeed, as we have indicated, it is also accepted in the Secretary of State's grounds, that the determination fell to be taken into account. Its relevance was, however limited and we take the view that the relevance of any other determination of a different appellant's appeal must always be limited, for two reasons.
>
> The first is that it is important that a person who is drawing conclusions on credibility, and in particular on the credibility of oral evidence which he receives, makes those conclusions independently of any other person's view of credibility, even of credibility of the same evidence, if that same evidence was given in a different case. It is not open to a person who is charged with a duty of deciding whether evidence is credible to rely either in favour of the evidence or against the evidence on the views of somebody else. The person who is to judge credibility must do it himself.
>
> The second factor rendering the relevance of the previous determination of limited importance is that it may in many cases be merely a matter of chance which determination is made first. It is important not to give undue priority to a finding of fact or credibility that happens to be made first."

14. Applying these considerations the Tribunal held that there was no possibility that if the Adjudicator had considered the Tribunal's determination in the brother's case, as he should have done, as part of the material before him as a whole, he would have reached a different conclusion on the credibility of the evidence tendered in support of Mr Kulek's claim. Accordingly, the Secretary of State's appeal was allowed.

THE ISSUES BEFORE US

15. We had the advantage of the advocacy of Mr Scannell on behalf of Mr Kulek and Miss Anderson on behalf of the Secretary of State. Unfortunately, however, neither had appeared before the Tribunal and neither was in a position to provide us with an informed account of precisely what transpired before the Tribunal.

16. Mr Scannell put at the forefront of his case the importance of the documents to which we have referred. Four pages had been included in the bundle of evidence prepared by the Secretary of State. The rest had been disregarded by the Adjudicator on the strength of Mr Corradine's assertion that they had never been seen by the Secretary of State prior to the hearing. These documents included the court record containing the extracts that we have cited above. Mr Scannell submitted that Mr Corradine had, unwittingly, misled the Adjudicator. Mr Sidhu had been correct in saying that the documents had been sent to the Home Office. The most important of these must have been overlooked, in error, when the bundle of evidence was prepared on behalf of the Secretary of State.

17. We are persuaded that Mr Scannell's submission was correct. On 11 December 2000 Irving & Co. wrote to the Immigration and Nationality Directorate itemising documents with translations enclosed in support of Mr Kulek's asylum application. They commented:

> "Given the fact that the Turkish authorities clearly have records of our client's association with an illegal political party in Turkey. We would submit that this in itself is enough to indicate that our client would face persecution on return to Turkey, particularly as he does not possess a Turkish travel document.

18. The documents itemised unquestionably include those documents which Mr Corradine said had not been seen by the Secretary of State. The covering letter is date-stamped received 15 December 2000. In Mr Kulek's supplementary statements he made express reference to enclosing this evidence. If the documents had not, in fact, been enclosed with the covering letter we would have expected the Directorate to have drawn attention to this fact at the time.

19. Mr Hodgetts, who appeared on behalf of Mr Kulek before the Tribunal, informed the Tribunal that the documentary evidence placed before the Adjudicator in Mr Kulek's case had been placed before the Adjudicator on his brother's appeal. We presume that he said this on instructions. Miss Anderson was, perhaps not surprisingly, unable to inform us whether or not this was correct. We can see no reason why it should not have been. Thus it seems to us that Mr Corradine was doubly wrong in asserting that these documents had never been drawn to the attention of the Secretary of State.

20. Mr Scannell submitted that these documents constituted evidence of high importance. They showed that, in 1996, Mr Kulek and his wife were accused by the police of being involved with DHKP/C. It was that involvement which had led the Tribunal to rule that Mr Kulek's brother, by reason of his family association, was entitled to asylum. The same evidence provided a stronger

case for the grant of asylum to Mr Kulek. That was the true significance of the Tribunal's decision in relation to Mr Kulek's brother. Had the Adjudicator adopted a correct approach to both the earlier decision of the Tribunal and to the evidence on which it was based he could not have failed to conclude that Mr Kulek had a well-founded fear of persecution if he were returned, without documents, to Turkey.

21. So far as the decision of the Tribunal was concerned, Mr Scannell submitted that they also had failed to have regard to the true significance of the earlier decision and, more particularly, to the documentary evidence which established a well-founded fear of persecution on the part of each of the brothers. He drew attention to the rather cryptic statement in the Tribunal's decision that, because there had been no appeal on behalf of Mr Kulek himself, the principal findings of the Adjudicator in relation to credibility were not before the Tribunal, save in so far as the Adjudicator's whole reasoning process was in issue. Mr Scannell submitted that the reference to the need for an appeal on behalf of Mr Kulek was misconceived. The rules made no provision for an appeal by a respondent. The only issue in this case was the credibility of Mr Kulek's evidence about events in Turkey. The Secretary of State's appeal re-opened that issue and Mr Kulek was fully entitled to make submissions in relation to it.

22. Miss Anderson, for the Secretary of State, asserted that the statutory scheme makes provision for either party, whether successful or unsuccessful, to appeal against adverse findings on individual issues. The Adjudicator's finding in relation to Mr Kulek's credibility related to such individual issue. The Secretary of State's appeal did not relate to the issue of credibility, it related to the method that the Adjudicator had adopted in reaching a decision adverse to the Secretary of State, notwithstanding his finding on credibility. If Mr Kulek had wished to re-open the question of credibility, he should have himself appealed against that finding. The same was true of Mr Scannell's complaint that due weight had not been given to the documents. Mr Kulek should have appealed against the Adjudicator's rejection of the documents had he wished to take that point.

23. More generally Miss Anderson submitted that the Tribunal had properly weighed in the balance the significance of the earlier decision in favour of Mr Kulek's brother and properly concluded that the Adjudicator's decision should stand.

THE CONFLICT BETWEEN *BARI AND IQBAL*

24. Each of these decisions was made under the regime of the Immigration Act 1971 and the Immigration Appeals (Procedure) Rules 1984. The relevant provision of the 1971 Act provided as follows:

> "20(1) Subject to any requirement of rules of procedure as to leave to appeal, any party to an appeal to an adjudicator may, if dissatisfied with his determination thereon, appeal to the Appeal Tribunal, and the Tribunal may affirm the determination or make any other determination which could have been made by the adjudicator".

That provision is preserved, essentially unchanged, as paragraph 22(1) of Schedule 4 to the Immigration and Asylum Act 1999.

25. *Bari* involved an appeal to the Immigration Appeal Tribunal by an applicant who had been refused entry clearance as a working holiday maker. The Tribunal held that the applicant's ground of appeal was well founded, but reconsidered findings of the Adjudicator made in favour of the applicant and reversed these, dismissing the appeal on that basis. The issue was whether, as a matter of procedure, this course had been open to the Tribunal. The nature of the issue, and the finding of Russell J in relation to it, appears from the following passage of his judgment.

> "Mr Riza concedes, as in my judgment he is really bound to concede, that the Tribunal is entitled to look at the case afresh - as this Tribunal did - and that they are entitled not only to review questions of law but to review issues of fact. The complaint, however, which is developed by Mr Riza is to the effect that the issues of fact on which there is to be a reassessment must be properly before the Tribunal. That, submits Mr Riza, can only happen when the party who is seeking to reverse those findings of fact puts the other side on notice as well as the Tribunal.
>
> Here it is submitted that the respondents to the appeal did not seek leave to appeal the decision of the adjudicator on the point with which the Secretary of State did not agree, the point which was in favour of the applicant. Nor was there at any stage any form of notice of appeal or cross-appeal entered by the respondent. It is not for the Tribunal, submits Mr Riza, of its own motion to review findings of fact upon which no point has been taken by way of notice of cross-appeal or any other notice.
>
> For the Tribunal, Mr Laws has referred me in particular to sections 19 and 20 of the 1971 Act as well as to the Immigration Appeals (Procedure) Rules. I have to say at once that I have searched in vain for any rule which requires a respondent to an appeal of this kind, whether the respondent be the applicant or the Secretary of State, to cross-appeal or serve a contrary notice. There is simply no provision for it in the Rules. Accordingly, I come to the conclusion that the Rules being devoid of any provision for the service of the cross-appeal or cross-notice, there is no obligation upon the Secretary of State in this or in any other case to do that which Mr Riza suggests has to be done."

26. In *Iqbal* the Entry Clearance Officer, Islamabad, had refused the applicant entry clearance to marry a lady in this country. The applicant appealed to the Adjudicator. The Adjudicator found in his favour in relation to the purpose of the marriage but dismissed the appeal on the ground that, at the date of the decision, the parties had not "met" within the meaning of the Immigration Rules. On appeal to the Tribunal it was conceded that this conclusion was unsustainable. The Entry Clearance Officer then sought to challenge the Adjudicator's finding on the purpose of the marriage. The issue arose of whether it was open to him to do so. The Tribunal held that it was not. The Entry Clearance Officer had been required to seek and obtain permission to appeal against the adverse finding if he was to seek to uphold the Adjudicator's decision on that ground. The Tribunal reached this conclusion by construing s.20 of the 1971 Act in the following fashion:

> "It is noticeable that section 20 is not couched in terms of an appeal by the person against whom the decision is given nor in terms of "an appellant" or "the appellant". It provides for an appeal by "any party" dissatisfied with the determination on the appeal. Dissatisfaction may be partial or total and there is no reason to read the provision as if it did refer only to the party who is the ultimate loser. Indeed, as we have said, there is every reason to construe the framework as providing for the ability to appeal in respect of each issue decided. We therefore disagree with Mr Wilmott when he submits that, under the statutory structure, a party dissatisfied with part of the determination may not appeal if the ultimate result of the appeal is in favour."

27. As to the decision of Russell J in *Bari*, the Tribunal had this to say:

> "With the greatest respect we have to say that if the learned Judge was taking the view that it was always open to the Home Office to resurrect at will issues on which the adjudicator has come to a positive conclusion on evidence given before him, the consequence would be chaotic. It would mean that subject to putting the other party on notice all matters were always subject to a re-run, and that there was no obligation on the Home Office to consider whether a matter was worth fighting before the Tribunal or any power in the Tribunal to declare that they would not listen to such a re-run. In *Bari* it is not entirely clear as to whether the adjudicator made specific findings on particular requirements of the rule. Secondly, in that case in the grounds of appeal to the Tribunal, the Home Office said generally that it did not agree with the adjudicator's construction of the particular rule. Thirdly, the argument and the learned Judge's comments go to the need for a respondent notice. In our view, there is no question of a 'respondent' seeking leave to appeal, for we read 'appellant' in the Act and the rules as referring to a party dissatisfied with any part of the determination of the adjudicator. While we entirely agree, with respect, with the learned Judge about the lack of any reference to a respondent's notice, it seems to us that the omission can only support the view we have taken."

28. The manner in which the Tribunal purported to distinguish *Bari* was not legitimate. In *Bari* Russell J had been dealing with a contention that the Respondents had been required to seek leave to appeal. The two cases are in conflict. We are in no doubt that *Bari* was correctly decided and *Iqbal* was not. The words "determination thereon" in Section 20 (1) of the 1971 Act bear the obvious meaning "determination of the result of the appeal". It is a perversion of language to read the phrase as meaning "determination of any issue arising on the appeal".

29. The statutory provisions that are now in force put the matter beyond doubt. Paragraph 22 of Schedule 4 to the 1999 Act provides:

> "(1) Subject to any requirement of rules made under paragraph 3 as to leave to appeal, any party to an appeal, other than an appeal under section

> 71, to an adjudicator may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal.
>
> (2) The Tribunal may affirm the determination or make any other determination which the adjudicator could have made."

30. The Immigration and Asylum Appeals (Procedure) Rules 2000, introduced pursuant to that Act, include in paragraph 2 the following definition:

> "Determination' means the decision of the Appellate Authority to allow or dismiss an appeal and the reasons for that decision;".

31. Miss Anderson valiantly sought to argue that "and" had disjunctive effect, so that any individual reason for a decision constituted a "determination", against which an appeal could be brought. We do not agree. Indeed, Miss Anderson conceded that her suggested interpretation could not readily be reconciled with the following requirement of Rule 18(4):

> "An application for leave to appeal shall be made by serving upon the Tribunal the appropriate prescribed form, which shall - identify the alleged errors of fact or law in the adjudicator's determination which would have made a material difference to the outcome, together with all the grounds relied on for the appeal."

CONCLUSIONS

32. The Tribunal was wrong to hold that because there had "been no appeal on behalf of the claimant himself" the principal findings of the Adjudicator in relation to credibility were not before them. While the precise purport of this finding is not clear, we consider that it may have led the Tribunal to adopt an unsound approach to the appeal. What was at issue before the Adjudicator and the Tribunal was the existence of facts giving rise to a well-founded fear of persecution should Mr Kulek be sent back to Turkey. An earlier Tribunal had found such a fear made out in relation to Mr Kulek's brother on the basis, in all probability, of documentary evidence which the Adjudicator wrongly discounted. Had the Adjudicator accepted that evidence, it could well have impacted upon his attitude to Mr Kulek's evidence as a whole. We propose to allow the appeal and remit this case to the Tribunal for reconsideration in the light of this judgment. It will be a matter for the Tribunal whether or not, in the unusual circumstances of this case, to permit Mr Kulek to give oral evidence.

33. When giving leave to appeal, Sedley LJ remarked that it did not follow that if *Bari* was right, every respondent could re-canvas the facts at will. Where an adjudicator has heard oral evidence, and made findings which reflect the credibility of that evidence, the Tribunal will not normally entertain a challenge to those findings. Where a respondent wishes to seek to uphold a determination of an adjudicator on alternative grounds, (and the respondent is normally likely to be the Secretary of State) it seems to us desirable that the rules should make provision for the service of a respondent's notice.

Order: Appeal allowed.
Case to be remitted to the Tribunal.
Respondent to pay appellant's costs to be assessed in accordance with Community Legal Services Costs Regulations 2000