KH
Heard at Field House

ZK (International Reaction-Aydogdu) Turkey CG [2004] UKIAT 00036

Date: 18 February 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

2 March 2004

Before :

Mr A R Mackey (Chairman)
Mr M J Griffiths
Mrs E Morton

Between

APPELLANT

And

Secretary of State for the Home Department

RESPONDENT

Representation:

For the appellant: Miss N Nnamani, solicitor, Howe & Co.
For the respondent: Mr J Morris, Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, a citizen of Turkey, appeals with permission against the determination of an Adjudicator, Mrs H S Coleman, promulgated in March 2003, wherein she dismissed an appeal against the decision of the respondent who had refused a human rights claim made by the appellant.

The Appellant's Determination

2. The Adjudicator found that the appellant had arrived in this country in July 1993 and claimed asylum on arrival. His application had been refused in May 1995. An appeal against that decision was dismissed in January 1997.

3. It appears that soon after that he was detained in this country on criminal charges and was still in custody at the time of this hearing although he explained he would be due for a parole hearing in approximately two months time.

4. The basis of the appellant's claim was that there would be a breach of Articles 3, 6, 8, 10, 11 and 14 of the ECHR if he were returned. The nub of his claim was that during the time he had been absent from Turkey he had been called up for military service. He had not undertaken that service and thus on return, due to his failure to report, would be treated as an absconder. He produced documents dated November 1998 in support of that. He also produced a document stating that on 6 November 2000 a notice was given to him stripping him of his nationality, apparently for failure to complete military service. He had gone on to state that his elder brother and mother had been pressurised to give information about him and as to his whereabouts. He claimed that his brother had been detained and had gone missing and that his father had been killed because of torture.

5. He explained that he did not wish to carry out military service because he was Kurdish and considered that he would be sent to fight Kurds and could possibly be killed. No mention of his objection to military service had been carried out when he was initially interviewed. He claimed that he had not been asked.

6. The Adjudicator had before her relevant objective country information and the leading determination in Sepet and Bulbul as well as the determination of this Tribunal in Devaseelan. In dealing with the credibility of the appellant the Adjudicator followed the determination in Devaseelan and did not consider that the 1997 asylum decision was too old to be relied on. Indeed she considered that the first Adjudicator was in a much better position to assess credibility and the concerns relating to the discrepancies in the appellant's previous interviews were reasonable. She noted therefore that the applicant was not to be considered as truthful when giving evidence in his asylum appeal. However, the appellant now relied on documents sent to him by his family which resulted from more recent contact with them. However, because of differing stories told as to his contact with his family the Adjudicator did not find there was any new evidence upon which she could overturn the original findings. Turning then to the fear claimed by the appellant as an absconder from military service the Adjudicator found that the appellant had been identified as someone who had failed to reply to the draft and

would be treated as an absconder. In regard to the notice saying that he had been stripped of his nationality she noted paragraph 5.88 of the November 2002 CIPU Report which specifically stated that it was clear that thousands of Turks had forfeited their citizenship over the course of the years, and, paragraph 5.81 which stated that according to military services within Turkey it had been decided in the second half of 2001 that Turkish citizenship would no longer be withdrawn from Turks living abroad before the age of thirty eight. The Adjudicator however noted that this appellant appeared to have lost his nationality long before that decision. She went on to find however that despite him being an absconder and having had his nationality withdrawn the fact of his apparent statelessness would not be a breach of his human rights. She found that the objective material indicated that it would however be likely that the appellant would be sent off to do his military service on return and that he would not, at that time, undergo cruel, inhuman or degrading treatment contrary to Article 3 of the ECHR. She noted the CIPU Report did not indicate systemic discrimination against Kurdish conscripts and that the punishment for the avoidance of military service on the objective evidence before her was not in breach of Article 3.

7. She therefore concluded that there would not be a breach of Articles 2 or 3 on his return nor would there be a breach of Article 8 of the ECHR. She therefore dismissed the appeal.

The Appellant's Submissions.

8. The prime basis of the appeal to this Tribunal was that there had been a failure by the Adjudicator to consider the determination of this Tribunal in Aydogdu [2002] UKIAT 06709 which had been included in the appellant's bundle before the Adjudicator. Ms Nnamani, who had not appeared before the Adjudicator, was unable to advise us as to whether the appellant's representative before the Adjudicator had specifically raised the issues set out in Aydogdu or submitted that the case should be followed. However, noting the conclusions of Mr Latter, Vice President, in that determination, she submitted that this appellant was in a similar situation. At the time when he was due to perform military service, the Turkish Army was still pursuing its "civil war" in south east Turkey against Kurdish separatists in the PKK. Accordingly the appellant's refusal to undertake military service then could be viewed as a valid basis for an asylum claim, given that the activities of the Turkish Army, at that time, were internationally condemned as contrary to basic laws of human conduct. Thus any imprisonment of this applicant on return should amount to persecution for a Refugee Convention reason based on actual or implied political opinion.

9. Ms Nnamani recognised that in the determination of the Application for permission to appeal to this Tribunal the Vice President had only allowed permission to appeal on the first ground, relating to Aydogdu and not on the other ground relating to the deprivation of citizenship.

The Respondent's Submissions

10. Mr Morris submitted that in this case we should look at the current threat to the appellant on return and not the historic threats, as appeared to be the situation set out in Aydogdu. He submitted that we were not bound to follow Aydogdu as it was a determination by another Vice President. It should either be distinguished or we should choose not to follow it. He submitted therefore that the Adjudicator had been correct in following the leading determination in Sepet and Bulbul. At that time it had been a Court of Appeal determination. However, it has since been confirmed by the House of Lords as good law. In this situation, on return, while this appellant may be recognised as a person who has evaded or avoided military service, the objective country information indicated that he would be prosecuted and the resultant detention would not constitute a breach of Article 3 of the ECHR. Beyond that he would then have to serve his military service under the current Turkish Army regime.

11. In reply, Ms Nnamani submitted that there were risks to this appellant on return to the airport in Istanbul and that consideration should be given as to whether the risk to the appellant at that time, given his background and profile, would place him in a situation where there could be a breach of Article 3 of the ECHR.

The Issues

12. We found the issues before us to be:

a) was this appellant in a similar situation to the claimant in Aydogdu, and should we follow that determination? If not,

b) noting that the appellant's case is solely based on the risks he submits he faces for failure to undertake military service, are there substantial reasons for concluding that there would be a real risk of a breach of Articles 2 or 3 of the ECHR?

Decision

13. At the outset we note a crucial difference between the situation of this appellant and the claimant in Aydogdu. At paragraph 20 of the determination in Aydogdu it states,

"20. Mr Scannell's submission put at its simplest, is that any form of imprisonment would be wrong for someone who has evaded the draft because he genuinely objects to taking part in activities which were internationally condemned and were contrary to the basic laws of conduct. The Tribunal accept that this is a valid proposition and that in such circumstances punishment would amount to persecution for a Convention reason, an actual or imputed political opinion. In the light of the Adjudicator's findings on credibility, we are satisfied that the appellant did have a genuine objection to this particular type of military service and we are satisfied on the evidence before us that there was a real risk that he might have been involved in such activities. To be punished for a refusal to serve the military in such circumstances, would amount to persecution."

14. As can be seen Mr Latter relied on the findings of positive credibility by the Adjudicator in that case. With this appellant the situation is quite different. In paragraphs 13, 14 and 15 the Adjudicator deals with the issues of credibility and finds it correct, following Devaseelan (starred), that the evidence of the appellant was not truthful and indeed his more recent evidence was also untruthful. This appellant therefore lacked the essential credibility finding at the outset and so this case is clearly distinguishable from Aydogdu.

15. In addition to this we have doubts that the conclusions in Aydogdu reached by Mr Latter, with all due respect, are correct in all situations where an applicant has refused to undertake the draft when the activities of the military in which he must serve are internationally condemned as contrary to the basis laws of human conduct. While we would agree that if the activities of that military service are still continuing to be so internationally condemned, it must be recognised that the risk that is being evaluated, either in an Article 3 ECHR or refugee status claim, is at the time when the decision is being made and return is about to be undertaken. It is therefore essential to consider the activities of the military service to which the appellant is required to undertake service at the time of the decision and the period immediately before that. If the objective evidence indicates that the military service, as is the situation in Turkey, no longer undertakes an internationally condemned war or activities, then clearly the applicant will have had the opportunity to return to his country and undertake military service in a situation where breaches of internationally condemned activities are no longer still continuing. With this appellant that would certainly appear to be the case. Since 1999, when the ceasefire with the PKK came into force, internationally condemned activities do not appear to have been continued by the Turkish military.

Indeed, even with the recent statement by the PKK (in its current guise), that the ceasefire would no longer be observed by them, they have stated that their activities will not continue in the same manner as previously and in addition the Turkish military have certainly given no apparent indications that they intend to carry out activities repugnant to the basic laws of human conduct. This appellant, therefore, while he may have been in the situation where at the time when he was initially called up for the draft, could have validly objected has clearly been in a situation for several years now where that situation no longer prevailed and he could have undertaken military service, as he was required to do, without placing himself in a situation of potentially carrying out repugnant activities. The fact that this appellant may have been serving a criminal sentence in this country for drug related offences we do not consider it is a valid reason for claiming that he could not have carried out the military service as obviously he brought the detention in this country upon himself through his own criminal behaviour.

16. In summary, therefore, we consider in situations such as this it is imperative to give consideration to the risks on return at this time, and the totality of the history of the military service in which the applicant has evaded service, before reaching a conclusive determination. With respect to the determination in Aydogdu, even taking into account positive credibility findings, we consider that there has been possibly an oversight in this regard.

17. Accordingly, we find that even though the Adjudicator may apparently have overlooked the determination in Aydogdu that was before him, it does not alter the outcome of the appeal and accordingly the grounds upon which this appeal have been based do not have merit. We have gone on to consider the risks, under Articles 2 and 3 of the ECHR on return to the Istanbul Airport by this applicant and find, particularly following the determination in Sepet and Bulbul that any potential risk to this appellant for his evasion of military service would not constitute a breach of either Article 2 or 3. The punishment, on prosecution, that the appellant would be liable for would not go to the extent of being torture, inhuman or degrading treatment in the manner set out in the Strasbourg jurisprudence.

18. This appeal is accordingly dismissed.

A R Mackey
Vice President