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Heard at Field House

MK (Proportionality - Application of Edore) Turkey [2003] UKIAT 00116

On 23 July 2003
Prepared 23 July 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

....24/10/2003.....

Before:
Mr H J E Latter (Chairman)
Mr L V Waumsley

Between

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Appearances
For the Appellant: Ms T. Hart, Home Office Presenting Officer
For the Respondent: Mr T. K. Mukherjee, Counsel instructed by Wilson & Co., Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Mr B W Dawson, who allowed the Respondent's appeal on article 8 grounds against the decision made on 28 January 2002 refusing him leave to enter and making removal directions for Turkey. In this determination the Tribunal will refer to the Respondent to this appeal as the Applicant.

2. The Applicant arrived in the United Kingdom as long ago as 15 July 1996. He had travelled to Bulgaria and then Romania, before travelling by lorry across Europe to the United Kingdom. He claimed asylum on arrival. He did not receive a decision on his application until 28 January 2002.

3. In the meantime he had married Beyhan Bulutcok (Mrs Koc) on 19 July 1997. She is also a citizen of Turkey who arrived in the United Kingdom in December 1994. She has also claimed asylum. A daughter Kardelen

was born on 22 November 1998. She and her daughter were granted exceptional leave to remain in the United Kingdom on 24 January 2000 until 24 October 2003 under the backlog policy then in force. Their son, Ali Denise born 22 March 2001, has also been granted exceptional leave.

4. The Applicant appealed on both asylum and human rights grounds and his appeal was heard by the Adjudicator on 12 March 2003. For the reasons which he gave the Adjudicator was not satisfied that the Applicant was entitled to asylum nor that there would be a breach of the United Kingdom's obligations under article 3 if he were to be return to Turkey. There is no challenge to these findings. The Tribunal are concerned with the Adjudicator's finding that there would be a breach of article 8 if the removal directions were put into effect. In paragraph 4 of the Adjudicator's determination, he raised the issue of whether the Respondent's policy DP3/96 would apply as the Applicant had married on 19 July 1997. This provided that deportation or illegal entry action should not normally be initiated where the subject has been in a genuine and subsisting marriage with someone settled here for at least two years before the commencement of enforcement action. It was argued on behalf of the Secretary of State that the policy did not apply to those refused leave to enter and further that the Applicant's wife was not settled. This is indeed the case. The grant of exceptional leave is not the same as being settled.

5. The Respondent's representative before the Adjudicator is recorded as acknowledging that it was reasonably likely that after four years exceptional leave Mrs Koc would be granted indefinite leave to remain and in consequence would be settled. The issue of settlement is of course relevant in considering whether it would be open to the Applicant to make an application within the Immigration Rules on return to Turkey. In order to qualify as a spouse he must show that his wife is a person present and settled in the United Kingdom. Mrs Koc did not fall within that category at the date of decision nor at the hearing before the Adjudicator, nor indeed at the date of the hearing before the Tribunal.

6. When considering the issue of article 8 the Adjudicator heard evidence from Mrs Koc. She adopted her witness statement at R13-16. She confirmed that she had arrived in the United Kingdom in 1994 when she was aged fourteen. She asserted that her sister and niece were in prison in Turkey. They had been prosecuted for supporting the PKK. They had given a statement made under torture admitting to this. She claimed that he had been taken to Goksun Gendarme Station where they tried to force her to make a statement confirming their involvement with the PKK. Her sister and niece were sentenced to thirty-six years imprisonment. She claimed that because of her suspected involvement with her sister and niece she would be at risk of persecution in Turkey.

7. Mrs Koc was not cross examined on these issues and there was consequently no challenge to her account. The Adjudicator commented that it hardly lay with the Home Office to say that she could be returned to Turkey because her claim had been dealt with under the backlog

policy and by implication her account had been untested. There was an opportunity of testing the account at the hearing before him. In the absence of any inherent improbability, he said that he should accept her account. He was satisfied that there were insurmountable obstacles to her joining the Applicant in Turkey. He went on to write as follows:

> "I am therefore concerned with the split up of a couple who have been together in a genuine and subsisting marriage since 1997, of which there are two children. The couple have been in a relationship for six and a half years. By October it is probable that Beyhan will be granted ILR. I would find little difficulty in reaching the conclusion the Appellant was/is an illegal entrant having regard to his method of entry therefore entitled to be considered under DP3/96. But having regard to the length of the relationship alone, coupled with the considerable delay in the Home office dealing with the Appellant's application, I do not think it proportionate for the purposes of immigration control to require the Appellant to leave. It cannot even be said that he could make application for entry clearance in Istanbul to return to his wife since he is faced with the prospect of imprisonment and subsequently military service which will delay his return for some time.
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> It is for these reasons I consider article 8 would be violated if the Appellant is returned. My recommendation is that the Appellant's leave be brought in line with that of his wife."

8. In the grounds of appeal it is argued that the Adjudicator has failed to take into consideration the case of **Mahmood** [2001] IMM AR 229. It is argued that the Adjudicator also failed to consider the fact that at the time the Applicant married, he and his wife were both asylum seekers, with no immigration status in the United Kingdom. The Adjudicator had placed undue weight on the fact that his wife had exceptional leave to remain and had speculated on her future immigration status when he commented that it was probable that she would be granted indefinite leave to remain. It is argued that the Adjudicator was incorrect to make an assessment of his wife's claim at the appeal. This is a challenge to the finding that there were insurmountable obstacles to her returning to Turkey with the Applicant.

9. Finally it is argued that the Applicant could apply for entry clearance to return to the United Kingdom as a spouse. The Adjudicator was wrong to attach weight to the prospect that the Applicant would face imprisonment and subsequently military service which would delay his return. It was primarily this ground which led Dr Storey, Vice President, to grant leave to appeal. He commented that it was difficult to follow the Adjudicator's reasoning in relation to the issue of entry clearance delay caused by the Applicant having to perform military service in Turkey when that was a lawful requirement which a state could impose on its citizens which inevitably caused a degree of interference in a couple's married life and it could not be in the interests of the UK government

within the meaning of article 8 (2) considerations to obstruct another country in requiring its citizens to perform lawful obligations.

10. At the hearing before the Tribunal Ms Hart adopted the grounds of appeal. She submitted that the fact that Applicant may have to serve a short sentence of imprisonment and then undertake military service on return to Turkey did not make his removal disproportionate. This was the position for all Turkish citizens undertaking military service. The Adjudicator was wrong to speculate as to whether the Appellant's wife would be granted indefinite leave to remain. The Adjudicator should have considered both whether there was an insurmountable obstacle to family life in Turkey, and if there was, whether the Applicant should be expected to return and make an application for entry clearance. The Adjudicator should not have made findings on what was effectively his wife's asylum claim in reaching his conclusions.

11. Mr Mukherjee submitted that the Adjudicator's conclusions were properly open to him. He was entitled to take into account the long delay in reaching the decision. There were two small children whose interests had to be considered. There was no indication that the Adjudicator had failed to follow the guidelines in **Mahmood**. It was not wrong for him to infer that indefinite leave would in all likelihood be granted. It was for the Adjudicator to assess whether there was an insurmountable obstacle to family life in Turkey. Having made that finding he was entitled to take the view this was an exceptional case having regard to the length of the relationship coupled with the considerable delay. The Adjudicator's recommendation was that the Applicant's leave be brought in line with that of his wife. Although this was only a recommendation, it indicated the Adjudicator's view that it would disproportionate for the family to be split prior to the decision being made on the wife's position in the United Kingdom following the expiry of her period of exceptional leave.

12. The Adjudicator did not have the benefit, which the Tribunal have, of judgments from the Court of Appeal dealing with the approach to be adopted when considering appeals on article 8 grounds. In **Blessing Edore** [2003] EWCA Civ 716, Simon Brown LJ approved the analysis of Moses J in **Ismet Ala** [2003] ECHC 521 (Admin) that where there was no issue of fact an Adjudicator on an appeal based on article 8 was concerned only with the question of whether the Secretary of State had struck a fair balance between the need for effective immigration control and the claimant's rights under article 8. The question in issue was whether the decision of the Secretary of State was outwith the range of reasonable responses.

13. In paragraph 20 of his judgment, Simon Brown LJ summarised the issue in the following way:

> "Where the essential facts are not in doubt or dispute, the Adjudicator's task on a human rights appeal under section 65 is to determine whether the decision under appeal….was properly within the decision maker's discretion, i.e. was a decision which could reasonably be

> regarded as proportionate and striking a fair balance between the competing interests in play."

14. His approach was confirmed by the Court of Appeal in **Razgar** [2003] EWCA Civ 840 where the court also dealt with the proper approach if the facts found by the Adjudicator were fundamentally different form those determined by the Secretary of State. In paragraph 41 of the court's judgment, Dyson LJ wrote as follows:

> "Where the essential facts found by the Adjudicator are so fundamentally different from those determined by the Secretary of State as subsequently to undermine the factual base of the balancing exercise performed by him, it may be impossible for the Adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such case, when it comes to deciding how much weight to give to a policy of maintaining an effective immigration policy, the Adjudicator should pay considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses, and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of **Blessing Edore**, we would hold that the correct approach is (a) in cases except where this is impossible because of the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the Adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes."

15. The Tribunal also reminds itself of the judgment in **Oleed** [2002] EWCA Civ 1906 and in particular paragraph 29 of the judgement of Schiemann LJ that the Tribunal should only set aside a decision of an Adjudicator who has heard the evidence if it is plainly wrong or unsustainable. We have also taken into account the judgment of the Court of Appeal in **Shala** [2003] EWCA Civ 233 dealing with the issue of delay when assessing an appeal under article 8.

16. Against this background the Tribunal turn to the submissions made on behalf of the Secretary of State. It is argued firstly that the Adjudicator has failed to take into consideration the judgments in **Mahmood**. There is no substance in that assertion. **Mahmood** gives valuable guidance in paragraph 55 on the factors to be taken into account when assessing the potential conflict between the respect for family life and the enforcement of immigration control. The first guideline is that the removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided there are no insurmountable obstacles to the family

living together in the country of origin of the family member excluded even when this involves a degree of hardship for some or all members of the family. It is clear that the Adjudicator did consider this issue: see paragraph 34 of his determination. The fourth guideline refers to the length of time that family life has been established and the fifth to the knowledge on the part of the spouse at the time of the marriage that the right of residence was precarious. It is clear from his determination that these issues were considered by the Adjudicator.

16. The second ground of appeal deals specifically with the issue of whether the Adjudicator considered the fact that at the time the Respondent got married both he and his wife were asylum seekers with no immigration status in the United Kingdom. The Adjudicator was certainly aware of that fact. He could hardly have been unaware of it in the light of the discussion about exceptional leave and the witness statement from the Applicant's wife. It is argued that he placed undue weight on the fact that the Applicant's wife had been granted exceptional leave to remain. This was not in dispute. It was for the Adjudicator to what weight to attach to this factor. Ground 2 also argues that the Adjudicator should have considered the merits of the case as they were at the hearing and not speculate about the future immigration status of the Applicant's wife. In our view the Adjudicator was entitled to assess the future situation of the Applicant's wife, and to take it into account, particularly in the light of the acknowledgment made at the hearing before him, that it was reasonably likely that after four years exceptional leave she would be granted indefinite leave. This is not a case of the Adjudicator speculating about future immigration status but drawing a reasonable inference from the evidence.

17. It is argued that the Adjudicator was incorrect to make an assessment of the Applicant's wife's claim. This is how ground 3 is phrased. Certainly it is not for the Adjudicator to determine Mrs Koc's asylum claim as such. That matter was not before him. However, in assessing whether there is an insurmountable obstacle to her returning, he is entitled to take into account her evidence as to why she says she cannot return to Turkey. In our view there was an obligation on the Adjudicator to assess Mrs Koc's circumstances in his overall assessment of whether there would be a breach in article 8. Indeed this was at the heart of the appeal. If there was no insurmountable obstacle to Mrs Koc and the children returning to Turkey, there would be no interference with family life.

18. The Adjudicator heard evidence from Mrs Koc. It was not challenged. It was for him to assess that evidence and he came to the conclusion that there was an insurmountable obstacle to her joining her husband in Turkey. In our view it is impossible to argue that this finding was plainly wrong or not sustainable on the evidence.

19. The final ground raised by the Secretary of State is that the Adjudicator was wrong to attach weight to the fact that the Applicant was faced with the prospect of a period of imprisonment for evading military service and would then have to carry out his military service and that would

delay his return. As a matter of general principle if it is reasonable for the Applicant to return to Turkey to make an application for entry clearance, it would he reasonable for him to take the consequences of any draft evasion and to undertake his military service before making an application for entry clearance. Removal in these circumstances would either not amount to an interference with family life or would not be disproportionate. However, the Adjudicator's comments in this respect were expressed in the alternative. At present the Applicant is not in a position to apply for entry clearance as his wife is not settled in the United Kingdom.

20. It was also argued before the Tribunal whether the Adjudicator should have followed approach (a) or (b) in **Razgar**. Mr Mukherjee argued that the Adjudicator should have followed approach (b) as the Adjudicator had more information about the family circumstances and the facts were essentially different.

21. The Tribunal do not agree. In our view, it cannot be said that the facts before the Adjudicator were fundamentally different from those determined by the Secretary of State. There was no real dispute of fact at all. It was common ground when the Applicant and his wife arrived in the United Kingdom, when they married, when the children where born, and the fact that the marriage was subsisting. It was for the Adjudicator to assess whether the Secretary of State's decision was within the range of reasonable responses.

22. When the decision was made in January 2002 the Applicant was married. The marriage took place in July 1997 with two children born in November 1998 and March 2001. The Applicant had been in the United Kingdom since 1996 only receiving a decision in January 2002. His wife had been granted exceptional leave to remain until October 2003. The Adjudicator found that there were insurmountable obstacles to his wife returning to Turkey. In our judgment the Adjudicator was properly entitled in these circumstances to come to the view that removal would be disproportionate. It was for him to assess in the particular circumstances relating to the Applicant whether the considerable delay coupled with length of the relationship took the decision outside the range of reasonable responses on the issue of proportionality.

23. The Adjudicator clearly took the view that the Applicant's future should be considered together with that of his wife and young children. This is clear from his recommendation that the Applicant's leave should be brought in line with that of his wife. In the light of all the evidence, the Adjudicator's findings and conclusions were properly open to him on the evidence and it follows that the decision reached by the Secretary of State was outside the range of permissible responses

24. In these circumstances the appeal by the Secretary of State is dismissed.

H J E Latter
Vice President