Neutral Citation Number: [2007] EWCA Civ 1357

Case No: C4/2006/1307

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COPURT OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2007

Before :

LORD JUSTICE LATHAM
LORD JUSTICE JACOB
and
MR JUSTICE MANN

- -

Between :

HK TURKEY	**Appellant**
- and -	
SSHD	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Rabinder Singh, QC, & Ms Stephanie Harrison (instructed by **Messrs Bhatt Murphy**) for the **Appellant**
Jenni Richards (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing dates : 26th November 2007

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Judgment

Lord Justice Latham:

1. The appellant is an Alevi Kurd who was born in Turkey on the 8th March 1968. He arrived clandestinely in the United Kingdom on the 13th April 2005 concealed in a lorry. On the 28th April 2005 he claimed asylum at the Croydon Screening Unit and was interviewed shortly. The basis on which he was claiming asylum was recorded in the following terms:

> "Mr brother was killed in 1996 by an illegal organisation. They threatened to kill me because I made a complaint to the authorities."

2. He was released and required to return on the 30th April 2005 when he was interviewed at great length. During the course of this interview he complained of torture. When asked whether he was in good general health, he was noted as having said "No. (Swollen right leg due to torture)". When asked if he had a current medical condition the notes record that he said: "Yes – nightmares of his (sic) tortures he suffered".

3. Later, in interview, the following questions and answers are recorded:

> "(Q) What do you mean that they tortured "me"?
>
> I have proof on my body.
>
> (Q) Have you any health problems?
>
> Yes… my legs … they swell and get painful …. And I have frequent nightmares.
>
> (Q) Have you medical evidence to prove about your legs?
>
> In Turkey I visited a doctor but I do not have a report with me.
>
> (Q) "My legs swell" Is it both legs?
>
> No….. my right leg upper thigh. I also have hot iron marks on my shoulder."

4. He was again released and required to return on the 4th May 2005. When he attended on that day, he was served with a form notifying him that he was liable to detention and removal as an illegal entrant and that he would be detained at the Oakington Detention Centre because he met the criteria for his application for asylum to be considered on the fast track procedure. The reasons given for "Initial Detention" included the following:

> "Subject claims to suffer swollen legs and nightmares but is not currently taking medication"

He was then taken to Oakington where he arrived at about 3 a.m. He asked to see a doctor because he was unwell. But on the screening questionnaire he indicated that his health problem was not urgent. The Reception Report recorded that he had no obvious injury, illness or visible marks.

5. At about 10 a.m. on the 6th May 2005, the appellant saw a nurse who noted his allegations of torture and referred him to a doctor, who saw him later that day. The Doctor's record was that there was evidence of torture and injury, noting scars on the back of his head and neck consistent with burns inflicted with a hot iron, and a swollen right leg. He suggested that a referral to a vascular surgeon was needed for the damage to the right leg. The Refugee Legal Centre at Oakington made representations on his behalf that he was unsuitable for the fast track procedure because of his claim to have been tortured. For the purposes of this appeal, I do not need to go into further detail other than to say that he was ultimately released from Oakington on the 10th May 2005, having by then obtained an appointment to see the Medical Foundation for the purposes of obtaining a report in relation to his allegations of torture. In other words it was by then accepted that his claim was not one which could be dealt with under the fast track procedure.

6. His original claim was wide ranging. He sought a declaration that his detention was unlawful and compensation for the whole period that he was held in custody. His claim was heard by Davis J in conjunction with another claimant D. Davis J made a declaration that the proper procedures had not been followed at Oakington and if they had been, the appellant would have been released on the 7th May 2005. Accordingly he made an order that the appellant was entitled to compensation for the loss of his liberty for four days. He found, however, that the appellant's original detention was lawful. It is in relation to that conclusion that the appellant appeals. It is submitted to us, as it was to the judge, that the respondent, having been put on notice in the original interviews that the appellant was not only claiming to have been tortured but also that the marks of torture could be readily seen, should have immediately appreciated that his was not a proper case for the fast track procedure in the light of the policy then in force.

7. The power to detain the appellant is contained in paragraph 16 of Schedule 2 to the Immigration Act 1971. The appellant accepts that he was a person liable to detention under that paragraph. His case is that the power can only be exercised by the respondent in accordance with hrs stated policies, and that for detention to be lawful the detainee's situation must meet the relevant policy criteria and the respondent is under a duty to take all reasonable steps to inform himself of matters relevant to those criteria.

8. This case concerns the policy of detaining those liable to be detained in detention centres for short periods of time, originally 5 to 7 days, subsequently 10 to 14 days, for the purpose of determining their asylum claims. The policy objective was to enable decisions to be made speedily in an environment where the asylum seeker, although detained, was provided with reasonable accommodation, access to medical care, and access to legal

advice through staff from the Refugee Legal Centre on site. This became known as the fast track procedure; and Oakington was one of the detention centres.

9. The policy has always been controversial. And this case as originally argued before Davis J highlighted serious deficiencies in the way the policy was operated at the time. But, as Mr Rabinder Singh, QC accepts on behalf of the appellant, the policy itself is a lawful polic,y see *Saadi –v- Secretary of State for the Home Department* [2002] 1 WLR 3131 (House of Lords). And in July 2006 the European Court of Human Rights in a Chamber decision rejected a claim that the policy failed to provide the safeguards against detention contained in Article 5 of the Convention: *R(Saadi) –v- SSHD Application Number 13229/03* Judgment dated 11 July 2006.

10. But, he says, where there is clear evidence of torture, the case falls outside the criteria for the fast track procedure. The appellant had complained of torture at an early stage, and indicated that there was an objective means of verifying his account by a straight forward medical examination. When he had such an examination, it became apparent that there was sufficient evidence to justify the matter being considered by the Medical Foundation as a result of which he was released. If any examination had taken place before he was detained, it would therefore have been immediately apparent that he did not meet the criteria for the fast track procedure and he would not have been detained. Mr Rabinder Singh points out that there is repeated emphasis, in particular in Schedule 2 to the 1971 Act to the fact that those entering through ports may be required to submit themselves to a medical examination. Why, he asks rhetorically, in these circumstances was there no medical examination at the time of interview or shortly thereafter?

11. Turning to the fast track policy, its genesis was the White Paper published in 1998 entitled "Fairer, Faster and Firmer". The main criterion for determining whether the fast track was appropriate in any given case was whether or not it appeared that the application could be dealt with quickly. In Chapter 12, it said "evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release whilst an individuals asylum claim is being considered," in other words would indicate that the fast track procedure was inappropriate.

12. The general position was set out in a document issued in February 2000 entitled "The Oakington Process Document". Amongst other matters which were said to militate against the suitability of a case for Oakington was the following:

> "Any case which does not appear to be one in which a decision can be reached.
>
> Any case which has complicating factors or issues which are unlikely to be resolved within the constraints of the Oakington process model."

13. On the 16th March 2000 Barbara Roche (then Minister of Immigration) made a Ministerial Statement in which she said:

> "Oakington Reception Centre will strengthen our ability to deal quickly with Asylum applications, many of which prove to be unfounded. In addition to the existing detention criteria, applicants would be detained at Oakington when it appears that their application could be decided quickly, including those that made a certified manifestly unfounded. Oakington will consider applications from adults and families with children, for whom separate accommodation has been provided, but not from unaccompanied minors. Detention will initially be for a period of about seven days to enable applicants to be interviewed and an initial decision to be made. Legal advice will be available on site.
>
> If the claim cannot be decided in that period, the applicant will be granted temporary admission, or if necessary in line with existing criteria, moved to another place of detention……"

14. On the 16th September 2004, Barbara Roche's successor Des Browne said as follows:

> "A key element in the Government's strategy to speed up the processing of asylum claims has been the introduction of the fast track asylum process operated initially at the Oakington Reception Centre and now also at Harmondsworth Removal Centre and other locations. The use of detention to fast track suitable claims under these processes is necessary to achieve the objective of delivering decisions quickly. This ensures, among other things, that those whose claims can be decided quickly can be removed as quickly as possible in the event that the claim is unsuccessful…… When deciding whom to accept into fast track processes account is taken of any particular individual circumstances known to us which might make the claim particularly complex or unlikely to be resolved in the timescales however flexibly arrived…."

15. So far as the question of torture was concerned, Lord Filkin made the following statement to the House of Lords in 2002:

> "We made it clear in our 1998 White Paper, Fairer Faster and Firmer, that evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release when deciding

whether to detain while an individual's asylum claim is being considered. That remains the case.

The instructions to staff authorising detention are clear on that. Independent evidence that a person has a history of torture is one of the factors that must be taken into account when deciding whether to detain and would normally render the person unsuitable for detention other than in exceptional circumstances. Such evidence may emerge only after the detention has been authorised. That may be one of the circumstances referred to by the noble Lord Hylton. If that happens, the evidence will be considered to see whether it is appropriate for detention to continue.

We reinforced that in the Detention Centre Rules 2001. Rule 35(3) specifically applies for the medical practitioner at the removal centre to report on the case of any detained person who he is concerned may have been a victim of torture. There are systems in place to ensure that such information is passed to those responsible for deciding whether to maintain detention and to those responsible for the considering the individual's asylum application.

However, unfortunately, there cannot be a blanket and total exclusion for anyone who claims that they have been tortured. There may be cases in which it would be appropriate to detain somebody who has a history of torture. For example, the person concerned might be a persistent absconder who is being returned to a third country. It might be necessary to detain such a person to effect removal. There will be yet other cases in which the particular circumstances the person justified such an action. There will be other cases in which we do not accept that the person concerned has been a victim of torture. Despite that, I repeat my earlier comments about the importance of seeking to interpret these cases with the utmost care and not lightly using the exceptions to which I have referred."

16. These general statements of policy are reflected in the Operating Enforcement Manual which sets out the instructions of the respondents to those operating the system. In Chapter 38, it is emphasised that the policy is that the applicants may be detained at Oakington where "it appears that the claim is straightforward and capable of being decided quickly." Further relevant passages from the Chapter are as follows:

"38.3 Factors influencing a decision to detain:

1. There is a presumption in favour of temporary admission or temporary release.

…

3. All reasonable alternatives to detention must be considered before detention is authorised.

4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

5. Each case must be considered on its individual merits.

6. The following factors must be taken into account when considering the need for initial or continued detention.

…….

Against detention:

…..

Has the subject a history of torture?

…..”

17. In paragraph 38.4, a more detailed description is given of the process to be undertaken, which includes reference to a document called the Detained Fast Track Processes Suitability List. This is essentially a list of countries, claims from nationals of which it is expected can be dealt with quickly. The November 2004 List, included claims from Turkish nationals based, inter alia on ethnic Kurdish origin or involvement of a family member in an illegal organisation. No mention of torture was made in the list operative at the time of the appellant's claim for asylum, but the amended list issued in February 2006 identified as unsuitable for the fast track procedure, cases "where there is independent evidence that the claimant has been tortured".

18. This change reflected what was in fact contained in the Operational Enforcement Manual at the relevant time which identified "a history of torture" as a factor against detention as can be seen above. Paragraph 38.10 gave more particulars of those considered unsuitable for detention, including those "where there is independent evidence that they have been tortured."

19. Those being the relevant statements of policy, Mr Rabinder Singh took us to the witness statement of Ian Martin, an Inspector in the Immigration and Nationality Directorate in the Oakington Project Management at the time he made the statement in April 2001. It was made for the purposes of the *Saadi* proceedings. Of particular relevance to this case are the following paragraphs:

> "10. The thinking behind Oakington was as follows. There was to be a centre at which asylum applications could be decided quickly, within about seven days. In order to achieve that objective for significant numbers of Applicants, an intensive consideration and decision process was

required. In particular it was considered essential that Applicants should be available for an early interview and to submit any further representations that may be judged necessary. It was also considered important that they should be readily available to be served. The Home Office's experience is that many applicants, particularly those likely to be unfounded, are unwilling to comply with fast-track asylum procedures. In the Government's view, the aim of considering and deciding asylum claims within about seven days for substantial numbers of applicants were best achieved by requiring Applicants to reside at Oakington under the exisiting immigration powers……"

Suitability

I have explained what the basis for detention at Oakington is. The question is whether it appears to Immigration Officers that the Asylum application can be decided quickly. In other words the speed with which a decision can be taken is the primary consideration in assessing cases for Oakington…..

Screening

32. I turn now to describe the process which is designed for application in Oakington cases to screen those cases which are suitable for Oakington. As I said in IL GN 17/OC (April 2000):

> "The screening process is of paramount importance in determining the success of the Oakington Project and to ensure that we weed out unsuitable or complicated cases at the outset.

……"

20. In dealing with the part of the appellant's claims with which we are concerned, the judge held as follows:

"Decision to transfer to Oakington

80. Mr Rabinder Singh's first submission on behalf of D and K was that the decision to transfer D and K to Oakington was in each case unlawful as being contrary to published policy, the case of K he says it was also irrational.

81. In support of his argument on this aspect of the case, Mr Rabinder Singh relied heavily on a sentence culled from the speech of Lord Diplock in *Secretary of State for Education and Science –v- Tameside MBC* [1977] AC 1014 where, in a case having facts very different to the present, Lord

Diplock said: "Or, put more compendiously, the question for the courts is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? Mr Rabinder Singh also emphasised "the paramount importance" which, according to the statement of Mr Martin cited in the Saadi case, was to be ascribed to the initial screening stage.

82. Mr Rabinder Singh further submitted that the question of detention where there was independent evidence of torture and the question of whether or not the case is too complicated for the fast track proceedings are not necessarily the same and should not be elided. I agree with that: although that is clearly the potentiality for overlap in some cases.

83. However, I have come to the conclusion, on the facts of these particular cases, that the initial decision to send each of D and K to Oakington under the fast track procedure was a proper and lawful one.

84. It is true that there is a presumption in favour of release. It is also true that cases with complicating factors would generally not be thought suitable for the Oakington fast track procedure. But it is also to be born in mind that, as is conceded, the making of an allegation of torture does not of itself mean that it is a case unsuitable for the fast track process.

…….

86. The case of K, I would accept, is rather different. Here K was alleging torture in the initial screening interview. Mr Rabinder Singh says that at least in this case, the Home Office was on notice that his claim was not straight forward and needed more investigation; and so was not suitable for fast tracking.

85. I do not agree. It is true that K was claiming to have been tortured. But, as is conceded, the claim of torture was not in itself enough to prevent fast tracking, even though in his case the claim seemed to have prompted further questions in interview. In susbstance Mr Rabinder Singh's submission that the case of K was too complex to be suitable for the fast track procedure really derives from the allegations of torture: nothing else. But in the light of the concession, it cannot be said that the allegation of torture ipso facto made the claim too complex or otherwise unsuitable for fast tracking. Further, there was at that time no clear medical presentation or other evidence, so far as K

> – who had himself said that he had not seen a doctor for 6 or 7 years – was concerned, to indicate that the fast track procedure was inappropriate. Moreover, Immigration Officers could legitimately, in my view, in a case where torture is alleged bear in mind that if such claim is maintained, and an examination becomes desirable, then such should in any event be provided within 24 hours under rule 34: an approach in line with Lord Filkin's statement. It seems to me that the Claimant's submissions here required altogether too great a degree of pro-activity at the initial screening stage, with a view to assessing whether the fast track procedure may be appropriate, than was practicable or requisite."

21. Mr Rabinder Singh essentially makes three points by way of criticism of the judge's reasoning. First, he submits that, although the judge recognised that the basis of the appellant's claim was the statement of the respondent's obligations as a matter of good administration, set out in Lord Diplock's speech in *Tameside,* his judgment no where deals with that argument.

22. Secondly, he says the judge was simply wrong to say that arranging for a medical examination in the light of the answers in interview would have required "too great a degree of pro-activity". He reminds us of the parts of Schedule 2 to the 1971 Act dealing with the requirement that those presenting at ports should be prepared for a medical examination. And such an examination would undoubtedly have produced independent evidence of torture, as the conclusions of the Doctor who in fact examined the appellant at Oakington records.

23. Finally he submits that the judge's reliance on Rule 34 was wholly misplaced, in view of his conclusion (with which we are not directly concerned) that Rule 34 was in practice being honoured in the breach and not the observance.

24. In my view the judge came to the right conclusion on this issue. The statement of principle by Lord Diplock in *Tameside* has always to be placed in context. What is the "right question" to be asked by the administrator? This needs to be determined in the light of the statutory or policy structure within which he is operating. In *Patterson –v- London Borough of Greenwich* [1994] 26 HLR 159, the context was one in which there was a requirement on the Local Authority to make appropriate enquiries. In *R (Q) –v-Secretary of State for the Home Department* [2004] QB 36, the officials had to make a decision as to whether to provide support. The court, not surprisingly, considered that that did require what might be described as "pro-active" questioning in view of the consequences to the asylum seekers.

25. But the context here is quite different. The question that had to be answered was whether or not, on the face of it, a quick decision one way or another could be reached. The appellant fell into the category of those considered suitable, in that he was an Alevi Kurd who claimed that his brother had been killed for political reasons. At the time the allegation of

torture was not supported by independent evidence. And there was nothing to suggest that the question of whether or not there was evidence of torture could not be resolved quickly (whether Rule 34 was strictly complied with or not). Once it was accepted, as it inevitably had to be in this case, that a mere assertion of torture could not be sufficient to render a case unsuitable for the fast track procedure, there could be no obligation on the respondent to have a medical examination. The medical examinations envisaged in the Schedule to the Act have nothing to do with this case. The appellant did not arrive at a port, he entered clandestinely. And the medical examination in question is one to ensure public health, in other words it is an examination to determine whether or not the would-be immigrant poses any danger to the health of others.

26. The European Court of Human Rights, in its judgment in *Saadi*, helpfully set out the nature of detention under the fast track procedure in the following terms:

> "40. Detention of a person is a major interference with personal liberty, and must always be subject to close scrutiny. Where individuals are lawfully at large in a country, the authorities may only detain if – as the court expressed the position in *Vasileva* – (referred to above) - a "reasonable balance" is struck between the requirements of society and the individual's freedom. The position regarding potential immigrants, whether they are applying for asylum or not, is different to the extent that, until the application for immigration clearance/and/or asylum has been dealt with, they are not "authorised" to be on the territory. Subject, as always, to the rule against arbitrariness, the court accepts that the state has a broader discretion to decide whether to detain potential immigrants than is the case for other interferences with the right to liberty. Accordingly, and this finding does no more than apply to the first limb of Article 5 paragraph 1(f) to the ruling the Court has already made as regards the second limb of the provision, there is no requirement in Article 5 paragraph 1(f) that the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary, for example to prevent his committing an offence or fleeing. All that is required is that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or seek asylum, and that it should not otherwise be arbitrary on account of its length.

> 45. It is plain that in the present case the applicant's detention at Oakington was a bona fide application of the policy on "fast track" immigration decision. As to the question of arbitrariness the Court notes that the applicant was released once his asylum claim had been refused, leave to enter the United Kingdom had been refused, and he had submitted a notice of appeal. The detention lasted for 7 days, which the court finds not to be excessive in the circumstances. The court is not required to set a maximum period of permitted detention, although it notes that the present form of detention is ordered on administrative authority alone."

27. In my judgment this puts into proportion the question with which we are concerned. It underlines the fact that the question that had to be asked was simply whether or not, on its face, the appellant's claim for asylum could be dealt with properly under the fast track procedure in accordance with the published criteria. For the reasons that I have given, it seems to me that the officials who authorised the appellant's detention were perfectly entitled to conclude that the issues likely to be raised by his application could be speedily resolved one way or the other. I would accordingly dismiss this appeal.

Jacob LJ: I agree.

Mann J: I also agree