STUART-SMITH LJ:

This case has a protracted and unfortunate litigation history. The appellant, who is a Turkish Kurd, arrived in the UK on 6 October 1993. He immediately applied for asylum. His claim was refused by the Secretary of State for the Home Department by letter, dated 1 June 1994. He appealed. The appeal was heard over 2 days by a special adjudicator, Mr Curzon-Lewis, on 20 September and 15 November 1995. His determination, dismissing the appeal, was not promulgated until 15 August 1996. The Immigration Appeal Tribunal ('the Tribunal') granted leave to appeal and allowed the appeal on 28 October 1996. They found that the inordinate delay between hearing the evidence and the promulgation of the decision was in itself sufficient to demand that the special adjudicator's determination be set aside. The appeal was remitted to be heard by another adjudicator.

The appeal was heard by special adjudicator Mr Pulling on 1 May 1997. A determination dismissing the appeal was promulgated in early July 1997. The Tribunal refused leave to appeal. It is unnecessary to go into the details of those decisions because on 9 February 1998 Moses J, on an application for judicial review, quashed the Tribunal's refusal of leave. The appeal was heard on 24 August 1998 and the determination, dismissing the appeal, promulgated on 18 September 1998. The Tribunal refused leave to appeal; but I granted it on 28 January 1998.

The effect of the Tribunal's decision was that they accepted the appellant's account of what had happened to him in Turkey, but they concluded that if he were returned to Turkey he would not face persecution and therefore he had no well-founded fear of it. It is a notable feature of the Tribunal's decision that, although they accepted the appellant as a credible witness, nowhere do they set out his account of what had happened to him. Indeed, when they summarised the position as they saw it, they stated:

'(4) He was arrested twice in 1993 but he was released without charge.'

When one considers what in fact happened to him during these two periods of detention, as I shall shortly relate, this seems to me to be a masterpiece of understatement.

The appellant was born in Gurun in Eastern Central Turkey in January 1956. He became a non-violent sympathiser and PKK activist who campaigned for the organisation by collecting funds, distributing publicity material and taking part in meetings and rallies. While in the country he also took food to the guerrillas in the mountains. In 1975 and 1976 he was arrested on a number of occasions and subjected to falaka, beaten up and deprived of food and water by the local gendarmerie. On one occasion in about 1975 he was subjected to a particularly vicious attack when his back was sliced by a bayonet. Mr Curzon-Lewis saw 35 vertical scars about 2 foot long on the appellant's back between his shoulders. These were the result of this attack.

In about 1976 he moved to Istanbul as a result of the persecution, but appears to have returned to Gurun from time to time. He worked as a painter and decorator. In February 1993 a PKK placard appeared on the building site at which he was working and the appellant was arrested as he was recorded as a PKK sympathiser; he was detained in Gayrettepe police station, which is the headquarters of the political police. He was detained for one week during which time he was subjected to falaka, beatings and made to lie in iced water. He was released without charge.

In June 1993 the appellant was again arrested and detained for a week by the political police. He was again subjected to the same ill-treatment as on the previous occasions. Thereafter, three or four of the policemen then broke a window on the third floor of the building, pushed the appellant through it cutting him and causing him to bleed profusely. He was then hung upside down outside the window; the police told him they were going to kill him and pass it off as suicide. He lost consciousness but recovered later that day. Again, after a week's detention, he was released without charge. Following his release he remained in hiding until arrangements,

including bribing immigration officials, could be made for him to leave the country. He made his claim for asylum immediately on arrival in the UK.

The Tribunal accepted the appellant's account as true, though, as I have said, they do not set out any part of this account which clearly in my view amounts to persecution. The Tribunal commented that torture was widespread and systematic in Turkey. In addition, the Tribunal had before them a report by Mr Oberdiek and two reports of Amnesty International. The Tribunal then proceeded to consider whether the appellant had a well-founded fear of persecution if he was returned to Turkey. The decision has the merit of brevity, and it is convenient to set it out in full so that the criticisms of Mr Nicol QC, who appeared for the appellant, can be understood:

'The fear of return

The question however which is required to be answered is whether his fear of return is well-founded. The appellant is now in his forties and is a painter and decorator who has lived for many years between 1978 and 1993 in Istanbul. He clearly has friends in that city, and family in his home village.

We have read Mr Oberdiek's report (p 278) very carefully indeed. From this report we can assume that it is likely that when this appellant is returned to Istanbul airport he will be subjected to an identity check in the General Information Centre. It would seem that most returnees are released after 24 to 48 hours. A check is made with the political police and the army, but in this case we do not think that there is a risk he would be handed over because the appellant is not facing any outstanding charges at all and he has already served in the army.

Mr Oberdiek says:

"If the police find neither any motive to justify a penal procedure, nor any infraction of the obligation to present themselves for military service, these people are released after one or 2 days (it is better if they can give an address in Istanbul."

Mr Oberdiek goes on to say that if there is any sign of hostile behaviour of belonging to the Kurdish people it is to be expected that the police will act more brutally. We accept from what we have read in this and the other reports that a person such as the appellant is likely to face insults, and quite possibly worse. We believe, however, on the appropriate test, that it is reasonably likely that he will be released after one or 2 days and allowed to return either to Istanbul or to his home village.

Is this persecution?

The final issue which we must decide, therefore, is whether the risk of what we describe above amounts to persecution within the context of the Geneva Convention.

Mr Symes did not go as far as to state that all Alevi Kurds who are returned to Turkey would face persecution, and we do not believe that the evidence goes anywhere near such a proposition. The DIRB (p.274) suggest that if a Kurdish Alevi is not wanted by the police, or is not suspected of being involved in anti-Government activities, he or she would only be subjected to routine questioning by customs officials on return to Turkey. We have read Mr Imset's report and of course his report, together with the report from Mr Oberdiek, go a little further. Nevertheless, they would not in our view go as far either as to adopt a blanket protection for all Alevi Kurds.

We have read all the documentary evidence in this case, and placed the appellant into that background, on the following basis:

(1) that he was involved in very low-level activity as a young man on the behalf of the PKK;

(2) that he served in the army in the late 1970s;

(3) that he lived during the 1980s in Istanbul without any difficulty at all;

(4) that he was arrested twice in 1993 but that he was released without charge;

(5) that he has friends in Istanbul and family in his home village;

(6) that he is skilled as a painter and decorator.

Although we can give no guarantee of what may await him on his return, it is our opinion that he would be interrogated by the police at the airport, and after a short period, released. He may be insulted by the police; and he may be beaten by them. Obviously we do not know.

But we do not consider that this amounts to persecution. The word must be given its ordinary meaning (Kagema v Secretary of State for the Home Department [1997] Imm AR 137). As in Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 (the possibility of ill-treatment when rounded up does not amount to persecution), it is our opinion that the type of unacceptable behaviour which could be adopted by the customs or the police at Istanbul airport when this appellant is returned, does not in our view amount to persecution. And having been allowed to go from the airport, it is our view that this appellant could live in Istanbul without being persecuted and could return to his home village without being persecuted.'

The appellant's submissions

On behalf of the appellant Mr Nicol made the following submissions:

(1) The Tribunal appear to have misunderstood the decision in Ravichandran [1996] Imm AR 97 or alternatively their reference to this case is so obscure that the Tribunal have failed to give proper reasons or explanation as to what conclusion they drew from it (the Ravichandran point).

(2) If the tribunal had properly approached the questions of beatings which they anticipated the appellant might be subjected to on his return to Turkey, they should have held that this constituted persecution.

(3) The Tribunal's view that the appellant did not have a well-founded fear of persecution was flawed because:

(i) They failed to have proper regard to the appellant's experiences in Turkey before he left the country, which amounted to torture and persecution. Alternatively, they failed to explain why such experience should not have given rise to a well-founded fear of persecution if he were returned.

(ii) The Tribunal applied the wrong burden of proof.

(iii) The Tribunal misunderstood the Ravichandran point or failed to explain it adequately.

The 'Ravichandran' point

In that case three Tamils had left the area of Sri Lanka controlled by the Tamil Tigers and gone to live in Colombo. It was asserted that in Colombo they had a well-founded fear of persecution because they were young male Tamils and were therefore subject to security round-ups of such people which occurred when the security forces were faced with Tamil terrorist activity in the city. When rounded up they were subjected to ill-treatment which amounted to persecution. The adjudicators and the Tribunal had rejected the proposition that young male Tamils as a class and for that reason alone all had a well-founded fear of persecution. The Tribunal had concluded that in Colombo ill-treatment of those rounded up had significantly declined and was not endorsed by the government. The Court of Appeal held that in cases of political asylum it was necessary to look to the future and the appellate authorities were not restricted to the facts at the date of the decision. Accordingly, the Tribunal were entitled to take into account that there had been considerable improvement in the treatment of young Tamils when rounded up in

security checks. It is important to see how the Tribunal expressed its view on this. What they said is set out at 104 of the report:

'Our conclusion is that those Tamils who are rounded up in security checks and operations in and around Colombo are now not likely to be subject to such ill-treatment as to give rise to a well-founded fear of persecution. The excesses of the past have become too well known for the authorities to ignore international pressures, and we find no evidence to suggest that there is other than a strong likelihood that circumstances will continue to improve.'

The court held that the Tribunal were entitled to come to the conclusion that such ill-treatment as the appellants might be subjected to did not amount to persecution. The second limb of the case concerned the question of whether the mere rounding up of young Tamils and their detention of itself amounted to persecution.

Mr Nicol submits that the somewhat cryptic reference to the Ravichandran case suggests that the Tribunal thought that the result of that case was that even if there was a real risk that the appellant would be subjected to ill-treatment on his return to Turkey, that could not amount to persecution. If they did so understand the case, then I agree with Mr Nicol they were in error.

That was not the effect of Ravichandran; on the contrary, everything depended on the degree of ill-treatment. As Simon Brown LJ pointed out at 104:

'The Tribunal rightly recognised that, even if the detentions did not amount to persecution, oppressive and violent treatment of those under investigation could well do so.'

And at 110 he said:

'... the appellate authorities here have not regarded ill-treatment as "perfectly legitimate" but rather as "excesses of the past" against which there is now greater protection. In essence the appellate authorities' conclusion is that there is now no significant risk of such ill-treatment in Colombo.'

The reference to such ill-treatment must be a reference to ill-treatment that amounts to persecution. This is a question of fact and since the Tribunal was entitled to have regard to the lately improved position, they were entitled to reach the conclusion that such ill-treatment as the appellants in that case might expect on arrest did not amount to persecution.

It is unfortunate that the Tribunal in the present case expressed the effect of Ravichandran so laconically. I suspect that the Tribunal intended to find that though the appellant was at risk of some ill-treatment while in detention on his return to Turkey, this would not be of such a serious nature as to amount to persecution. If so, this would be a similar conclusion to that reached by the Tribunal in Ravichandran. But if that is so, then the Tribunal should in my view have expressed their reasons more clearly. In the passage immediately before this, they had concluded that during the period of detention on his arrival, 'he may be insulted by the police; and he may be beaten by them. Obviously we do not know'.

I am left in doubt as to the degree and severity of such beating as the Tribunal envisaged. If it was anything like that which he had previously experienced, I find it difficult to see that it did not amount to persecution.

Did the Tribunal properly approach the question of beatings? Mr Nicol submits that on a proper application of the Convention definition it was not open to the Tribunal, in the light of its finding that the appellant may be beaten by the police when detained on arrival, to find that this did not amount to persecution. Mr Nicol relies on the analysis of Professor Hathaway, a well-known authority in this field, whose work has been cited with approval not only in Ravichandran, but also in Adan and Others v Secretary of State for the Home Department [1997] INLR 1, [1997] 1 WLR 1107, per Hutchison LJ at 20-21 and 1126-1127 respectively and also by Lord Lloyd of Berwick in Adan v Secretary of State for the Home Department [1999] 1 AC 293, 307, sub nom R v Secretary of State for the Home Department ex parte Adan [1998] INLR 325, 332. It is

convenient to cite the passage quoted in Simon Brown LJ's judgment in Ravichandran and his comment on it at 107:

''In sum, persecution is most appropriately defined as the sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or a failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources."

The "first category" there referred to those rights from which no derogation can ever be permitted, even in terms of compelling national emergency, rights such as freedom from the arbitrary deprivation of life, and protection against torture or cruel, inhuman or degrading punishment or treatment. Clearly it would include protection against ill-treatment of the sort suffered by some Sri Lankan detainees in the past.'

The second category referred to by Professor Hathaway includes arbitrary arrest and detention.

As I understand his submission Mr Nicol contends that any beating amounts to cruel, inhuman or degrading punishment or treatment and is therefore persecution. But this would tend to convert what is a question of fact into what is a question of law. The correct approach is as Simon Brown LJ said at 109:

'In my judgment, the issue is whether a person or group of people have a well-founded fear [ie a real risk - see R v Secretary of State for the Home Department ex parte Sivakumaran [1988] AC 958] of being persecuted for [Convention] reasons" - and similarly the Art 33(1) and r 180B(c) issue whether such a person's "freedom would be threatened" for a Convention reason - raises a single composite question. It is, as it seems to me, unhelpful and potentially misleading to try to reach separate conclusions as to whether certain conduct amounts to persecution, and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought into account. I know of no authority inconsistent with such an approach and, to my mind, it clearly accords both with para 51 of the UNHCR Handbook and with the spirit of the Convention.'

So also in Kagema v Secretary of State for the Home Department [1997] Imm AR 137. This court held that persecution was an ordinary word in the English language and whether conduct amounts to persecution was a question of fact. Aldous LJ at 140 said:

'Mr Ashford-Thom, who appeared for the Secretary of State, submitted that the word "persecution" was an ordinary English word and it was for the special adjudicator to decide whether the facts as found amounted to persecution for a Convention reason. The fact that a court might, or would have, come to a different conclusion did not mean that the special adjudicator had erred in law. That only arose if this court concluded that the special adjudicator's conclusion was unreasonable, in the sense that it was a decision that no reasonable adjudicator could come to.

That I believe to be correct.'

He then cited Brutus v Cozens [1973] AC 854 in support of that proposition.

Professor Hathaway's analysis is helpful in showing that what conduct may amount to persecution is a question of degree. At one end of the scale there may be arbitrary deprivation of life, torture and cruel, inhuman and degrading punishment or treatment. In such a case the conduct may be so extreme that one instance is sufficient. But less serious conduct may not amount to persecution unless it is persistent. Staughton LJ in Ravichandran at 114 said:

'Persecution must at least be persistent and serious ill-treatment without just cause by the state, or from which the state can provide protection but chooses not to do so.'

It would I think be open to a Tribunal to find that a single beating, unless it was particularly vicious or injurious, does not amount to persecution. But if there is a real risk of repetition the position would be different. I do not think therefore that the Tribunal's finding, that the appellant may be beaten on his return, entitles the appellant to claim that that of itself amounts to persecution and the Tribunal must have misdirected themselves.

Tribunal's failure to have regard to previous persecution

Mr Nicol submits that the treatment which the appellant received in the months before he escaped from Turkey was life-threatening and of a particularly horrifying kind. This is very relevant to the question whether the appellant has a well-founded fear of persecution on his return, yet the Tribunal do not advert to this aspect of the case at all. In MacDonald's Immigration Law and Practice (Butterworth's, 4th edn), para 12.18, the editors state:

'Past persecution substantially supports the well-foundedness of the fear in the absence of a significant change of circumstances.'

In his book The Law of Refugee Status, at p 88, Professor Hathaway states:

'Where evidence of past maltreatment exists, however, it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home. Unless there has been a major change of circumstances within that country that makes prospective persecution unlikely, past experience under a particular regime should be considered probative of future risk

In sum, evidence of individualised past persecution is generally a sufficient, though not a mandatory means of establishing prospective risk.'

Although the House of Lords in Adan's case held that historic fear was not sufficient and an applicant for asylum had to show a current well-founded fear, Lord Lloyd of Berwick said at [1999] 1 AC 293, 308C, [1998] INLR 325,333E:

'This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear.'

This seems to me no more than common sense. Because the Tribunal do not refer in terms to his experiences before leaving Turkey, it is difficult to know how they would deal with the matter. There does not appear to be any evidence of a significant change in Turkey. Indeed the Amnesty reports and Mr Oberdiek's report suggest the contrary in the case of persons suspected rightly or wrongly of having links with the PKK or with a history of detention in recent years.

In my judgment, if it is the opinion of the Tribunal that there has been such a significant change that the appellant is no longer at risk, it is incumbent upon them to explain why this is so. In the absence of such explanation and reasoning, it seems to me there may be a real risk that someone who, because of his suspected association with the PICK, was subjected to such appalling treatment before he fled the country, will suffer more than transient ill-treatment on arrival at the airport and in the day or so thereafter that he is detained. Accordingly, I have come to the conclusion that the Tribunal's conclusion cannot be sustained.

That being so, it is unnecessary for me to deal with Mr Nicol's further submissions save very briefly.

Burden of proof

The Tribunal dealt with the question of the burden of proof in three places. In the second paragraph of the passage quoted the Tribunal state:

'We do not think that there is a risk that he would be handed over because the appellant is not facing outstanding charges at all and he has already served in the army.'

No objection can be taken to that passage. But at the end of the next full paragraph they say:

'We believe, however, on the appropriate test, that it is reasonably likely that he will be released after one or 2 days and allowed to return either to Istanbul or to his home village.'

On the face of it that is an incorrect statement of the burden of proof. The proper question is whether, applying the lower standard of proof appropriate in asylum cases, there is a real risk that he will not be released. On the other hand, in the last two paragraphs of their decision the Tribunal appear to put the burden of proof correctly.

It is an unsatisfactory feature of the decision. But had this point stood alone and the decision was otherwise sustainable, I would be inclined to the view that overall the Tribunal correctly applied the burden of proof. As it is it adds to my concern that the decision cannot be upheld.

Mr Nicol submitted that the Ravichandran point further assisted him on the main submission. I have dealt with the submission earlier. Once again the lack of reasoning and explanation as to what the Tribunal really had in mind supports my conclusion that the decision cannot stand.

I would therefore allow the appeal. We will hear argument as to the relief which ought to be granted.

LAWS LJ:

I agree.

JONATHAN PARKER J:

I also agree.

Appeal allowed with costs.