Case No: C/2000/3478

Neutral Citation Number: [2001] EWCA Civ 650
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MR. JUSTICE KEENE

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 9th May 2001

B e f o r e :

LORD JUSTICE SCHIEMANN
LORD JUSTICE ROBERT WALKER
and
LORD JUSTICE TUCKEY

- -

Tadeusz ROSZKOWSKI	**Appellant**
- and -	
A SPECIAL ADJUDICATOR	**Respondent**

- -

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

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Andrew NICOL Q.C. and Elizabeth DUBICKA (instructed by Fisher Meredith for the Appellant)
Andrew HUNTER (instructed by Treasury Solicitor for the Respondent)

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Judgment

As Approved by the Court

LORD JUSTICE SCHIEMANN : This is the judgment of the Court.

The procedural background

1. Mr Roszkowski, a Polish Roma, came to this country from Poland with his family and immediately sought asylum. This was refused by the Secretary of State for the Home Department who also certified his asylum claim under paragraph 5 of Schedule 2 of the Asylum and Immigration Appeals Act 1993 (as amended).

2. Mr Roszkowski appealed to the Special Adjudicator who held that she had no reason to doubt Roszkowski's evidence of what had happened to him and his family in Poland. She however did not consider this amounted to persecution and therefore dismissed his appeal. She agreed that the case was appropriate for certification.

3. Thereupon Mr. Roszkowski applied for a judicial review of both of those decisions of the Special Adjudicator. Keene J. dismissed those applications but gave permission to appeal because he regarded them as raising serious issues as to the meaning of torture in the certification legislation.

The certification procedure

4. The statutory provisions governing the certificate were added to the 1993 Act by the Asylum and Immigration Act 1996, s.1, which introduced a new para 5 to Sch 2 of the 1993 Act. That paragraph is headed "special appeal procedures for claims without foundation".

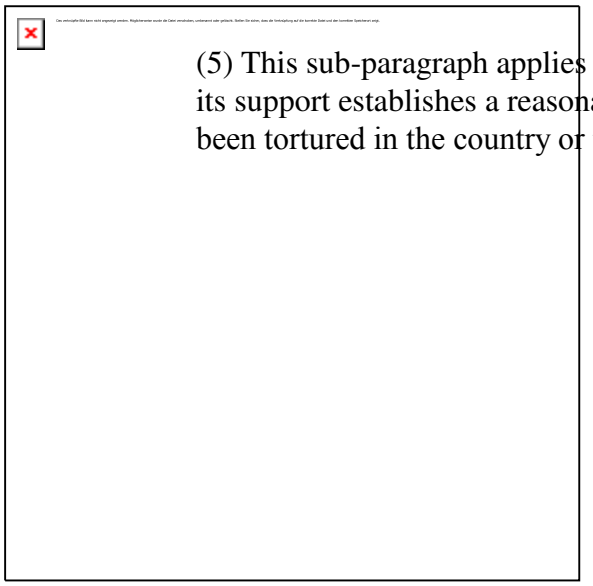
5. The new provision, insofar as relevant for present purposes, reads as follows:

> "5(1) This paragraph applies to an appeal by a person on any of the grounds mentioned in subsections (1) to (4) of section 8 of this Act if the Secretary of State has certified that, in his opinion, the person's claim on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or be required to leave, the United Kingdom is one to which:
>
> (a) sub-paragraph (2),(3) or (4) below applies; and
>
> (b) sub-paragraph (5) below does not apply.
>
> (2) This sub-paragraph applies to a claim if the country or territory to which the appellant is to be sent is designated in an order made by the Secretary of State by statutory instrument as a country or territory in which it appears to him that there is in general no serious risk of persecution."

6. There is no dispute that that sub-paragraph (2) applies to the present case, because Poland is a designated country.

7. Sub-paragraph (3) applies broadly speaking to cases where the appellant failed to produce a valid passport without reasonable explanation.

> (4) This subparagraph applies to a claim if –
>
> (a) it does not show a fear of persecution by reason of the appellant's race, religion, nationality, membership of a particular social group, or political opinion;
>
> (b) it shows a fear of such persecution, but the fear is manifestly unfounded or the circumstances which gave rise to the fear no longer subsist
>
> (c) …
>
> (d) it is manifestly fraudulent …
>
> (e) it is frivolous or vexatious



> (5) This sub-paragraph applies to a claim if the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country or territory to which he is to be sent."
>
> (7) If on an appeal to which this paragraph applies the Special Adjudicator agrees that the decision is one to which-
>
> (a) subparagraph (2),(3) or (4) above applies; and
>
> (b) subparagraph (5) does not apply,

> section 20(1) of [the Immigration Act 1971] shall not confer on the appellant any right of appeal to the Immigration Appeals Tribunal."

8. For present purposes the significant effect of an agreement by the Special Adjudicator with the certificate is that the appellant is deprived of his right to appeal to the Immigration Appeal Tribunal. That right is itself qualified by the need to obtain leave to appeal but nothing turns on that. The effect of this deprivation is that the only course open to an appellant is to apply for Judicial Review.

What caused Mr. Roszkowski to leave Poland

9. The Special Adjudicator accepted Mr. Roszkowski's evidence. One of the issues in the case is whether what was described by him was severe enough to amount to persecution or torture. It is therefore useful to set that evidence out. It comes from Mr. Roszkowski's asylum interview, the written statement which he put before the Special Adjudicator and the answers he gave in cross-examination.

10. In his *asylum interview*, in answer to the question:

> **"**What particular event caused you to leave your own country?"

Mr. Roszkowski answered:

> "5 or 6 times they attacked my accommodation, demand money, sometimes they beat me, mostly they came late in the evening because during the day police were patrolling around. In the end they were threatening they would burn us down and police advised us to run away elsewhere. It's some Mafia Russian harassing gypsies."

11. In his *statement* which was before the Special Adjudicator Mr. Roszkowski gave evidence on the following lines:

> "Slawno [where he lived] is a small town and everybody knew we were a gypsy family. Gradually my problems became worse and worse and I would have problems when I went into shops. Other customers would shout at me and tell me to get out, that I was not allowed in the shop. The shop-keepers used to laugh when this happened.
>
> My children suffered the most.... when they were at school they had lots of problems from the other children. Whenever something bad happened at the school, the teachers blamed my children just because they were gypsies. One of my sons ... was involved in fights at school when the other children were calling him names and harassing him. His nose was broken 3 times between the ages of 13 - 16.
>
> I also suffer badly from my nerves..... I was so bad in Poland that I went to see the Doctor and he gave me some herbal tranquillisers.... I have asthma which gets very bad when I am under stress. I use an inhaler and I take tablets.... We lived in a first floor flat in Slawno.... I was often away from home travelling with my band. My sons were also in the band and so we would travel together. Our flat was

attached on 5 or 6 occasions but I was only present twice. The other times it was attacked my wife and daughter were the only ones there as I was travelling.

The first time the flat was attacked was about 2 - 3 years before we left Poland. It happened about 4 - 5 p.m. I heard knocking on the door and when I tried to answer there were about 8 - 9 people there. They pushed their way into my flat. I tried to defend my family and I was hit on the jaw and I collapsed onto the floor. They were Poles and Russians, they were shouting "get out of here, we don't need blacks in this country. Hitler did not manage to burn you, we will do this now." They then started to vandalise the flat smashing glasses and plates. They continued to shout at us "get back to your country, or else we will be back."

I reported this to the police and I made a statement describing the events. I do not think they ever managed to catch any of these people. The next time we were attacked it was late at night and I was present at the house. There were about 6 - 7 people, some of them were the same as the last time. They .... pushed into the house. They pushed me again and my wife tried to defend me, she asked why they were attacking us. They replied they had warned us to leave but we were still there and one of them hit my wife in the chest. They started shouting the same kind of things as they had done the last time....

On all the other occasions that we were attacked, I was not at home. My wife was there with my young daughter [aged 8]. She told me that the attacks happened late at night and she would hear a knock on the door. She was frightened that they would knock the door down and so she opened the door. She did not tell me much about these attacks as she knew I would worry. She told me that some of the people who came were the same, but she could see new faces as well. They always pushed into the house and shouted the same kind of things, threatening us. She was very frightened.

I reported these attacks on us to the police. They took my statement but nothing was done and the attacks continued.

The last attack took place several days before we left Poland. I was away with the band and my wife and daughter were in the house. It was the same as usual, except they warned us that this was the last warning, next time they would harm us. When I got back, my wife told me she was terrified because I was always away and she did not know what would happen next time. We did not feel safe in the house and we went to a church for help, we knew the priest very well. We stayed in the church for several days. We realised it was not safe to stay in Poland.... We had heard that other families had escaped to England and we thought it would be safer there. The church paid for our plane tickets".

12. The account given by the Special Adjudicator of the *cross-examination* of Mr. Roszkowski indicates that he repeated what was in his statement but added that:

> "[The family] were generally attacked because they were gypsies and did not have their own country. The most general comments were always that they should get out, that their homes would be burnt and that they should get out of the country. He did not know specifically why the people attacked his home. He had reported it to the police but as normal they wrote down a report and that was it. There was no witness to the attack on his family, the family were alone. Although he could not identify his attackers he thought the police should have searched for them."

The Secretary of State for the Home Department's refusal letter

13. The letter conveying the Secretary of State for the Home Department's refusal of asylum deals first with the claim for asylum and then with the certificate. After making references to the attempt of the new Polish Government to follow up perpetrators of attacks of the kind complained of by Mr. Roszkowski, it continues

> "The Secretary of State considers that the Convention does not impose an absolute obligation upon the authorities of the country concerned to provide total protection to its citizens. Its obligation cannot be higher than a duty to take all reasonable steps having regard to its means and resources and to the circumstances in the country at the time. *Consequently* (my emphasis) the Secretary of State has concluded that you do not qualify as a refugee under the Convention."

14. It then indicates that he did not consider that Mr. Roszkowski would be of interest to the authorities and that he considered that there were reasons for doubting the credibility of Mr. Roszkowski's account of what led him to leave Poland. In relation to the certificate it merely says that "your application is one to which paragraph 5(5) does not apply because you have adduced no evidence relating to torture"

The Special Adjudicator's determination and reasons

15. The determination starts by shortly setting out the history of the proceedings and what happened at the hearing. The Special Adjudicator indicates that Mr. Roszkowski accepted what he had said in the statement and then describes the cross examination in the way we have set out above. She then records the submissions by each side. The submissions on behalf of the Secretary of State are recorded as follows:

> "Mr. Bentley said that he relied on the refusal letter. He submitted that even if I were to believe the appellant's evidence he did not come within the Convention. The gypsies in Poland faced discrimination and hostility from others in the population but that was not within the Convention. He asked me to find that local thugs were not agents of persecution, he submitted that the Polish authorities had taken reasonable steps. The appellant said that he had been attacked but he did not know who had done so and had not seen them since. It was difficult to see what the police could have done. The Convention only expected that there should be reasonable protection in place and Mr Bentley submitted that there was. He asked me to uphold the certificate and dismiss the appeal."

16. The appellant put before the Special Adjudicator a careful written skeleton argument dealing with persecution. It starts with the following:

> "It is submitted that not only does the appellant have a genuine well founded fear of persecution but that the treatment of Roma in Poland creates a reasonable degree of likelihood that all Polish Roma have a well founded fear of persecution at the present time."

17. It then deals at length with the effectiveness of the protection provided by organs of the Polish state and submits that it is inadequate. It does not as such address the question of certification. However, in her determination the Special Adjudicator records the following submission on behalf of the appellant;

> "Regarding the certificate she submitted that the appellant was from Poland and asked me to find that the beatings and attack on the family constituted torture. He had suffered psychological trauma and fear for himself and his young family. Ms Warren asked me to find that that constituted torture and overturn the certificate."

18. The Special Adjudicator in her conclusions and reasons deals first with the certificate. This is in accord with the general practice at a time when rule 11(2) of the Asylum Appeals (Procedure) Rules 1996 required her, if she agreed that the Secretary of State was right to certify the claim, to pronounce her decision at the conclusion of the hearing. She stated in her notice of determination:

> "In considering the question of torture I have obtained guidance from the definition in Article 1 of the U.N. Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment 1984 and also from the Criminal Justice Act 1988 section 134 (1). I am satisfied, having considered those definitions and having considered the evidence put forward by the appellant, that there was nothing in his account that amounted to torture and that the decision of the respondent that sub-paragraph 5 did not apply, was correct. I therefore upheld the Secretary of State's certificate."

19. She then deals with the substantive case. She starts with various legal propositions including the following:

> "The meaning to be attached to the word "persecution" was defined in R v Immigration Appeal Tribunal ex parte Jonah [1985] Imm A R 7 as "to pursue with malignancy or injurious action especially to oppress for holding a heretical opinion or belief. In Ravichandran and Rajendrakumar v Secretary of State for the Home Department [1996] Imm AR 97 it was said that "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. … Persecution may be inflicted on an individual by a group of persons within a country who do not constitute the official authorities. However, it has been established that the risk of such treatment by such a group will not be sufficient to amount to a risk of persecution warranting the grant of refugee status under the Convention unless

> either the authorities knowingly tolerate that treatment or they are unable or unwilling to offer effective protection against the treatment."

20. After some more legal propositions she continues:-

> "Having had the benefit of seeing and the appellant give evidence I had no reason to doubt this evidence of various acts of what would amount discrimination and harassment but not to persecution as defined above. Even considering all the acts cumulatively I did not consider that they would amount to persecution as defined above. I have regard to the cases and background documentation produced before me. From those reports I am satisfied that there is sufficiency of protection in Poland and did not consider that the unidentified attackers could be considered to be agents of persecution. As [the Home Office Presenting Officer] has pointed out, it was difficult to see what else the police could do other than take a report of the details which they had done. The appellant did not take his complaints further, he did not know that the Ombudsman scheme could assist him. There is racial intolerance in Poland but it [is] clear that the Government is taking steps to deal with the incidents and that structures are in place to allow for redress. I am also aware that Poland is a serious applicant to join the European Union and in that respect would not want to jeopardise its reputation.
>
> In the circumstances ... I was not satisfied that the appellant had made out his claim and accordingly I dismiss the appeal."

The decision that the appellant was not a refugee

21. It was submitted on behalf of the Secretary of State that on a proper construction of the Special Adjudicator's decision this includes a finding that as a matter of fact what had happened to Mr. Roszkowski was not of sufficient severity to be properly characterised as persecution. We reject that submission. The Secretary of State's decision letter indicates that his approach was that the appellant was prevented from being characterised as a refugee because the level of protection by the Polish police was such as not to call for surrogate protection of the appellant by the international community. The submissions before the Special Adjudicator were all directed to this question of the adequacy of protection as is the bulk of the Special Adjudicator's reasoning.

22. Although the Special Adjudicator came to her decision prior to the speeches in the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 W.L.R.379, her formulation of her legal approach in relation to this question is in line with that case and the contrary was not submitted. She had before her a considerable amount of evidence of a general nature in relation to the measures taken by the Polish state as regards the protection of gypsies from the appalling behaviour to which they are often exposed and as to what had or had not been done in relation to the attacks of which the appellant complained. However, it was submitted on behalf of the appellant that her determination did not demonstrate that she had sufficiently engaged with the evidence before her in relation to the sufficiency of police protection. It was submitted that her conclusion in that regard was perverse or that in any event her reasoning was inadequate.

23. Like the judge we have come to the conclusion that on the material before her it was open to her to come to the conclusion that there was a sufficiency of protection. Such a decision, while perhaps not inevitable, was not surprising given the material before her. As to the adequacy of the reasoning the principles are not in dispute between the parties and are well known – see *R v Criminal Injuries Compensation Board, ex parte Cook* [1996] 1 W.L.R.1037. What is required varies from case to case. A relevant factor is whether the decision is on its face a surprising one calling out for a carefully reasoned explanation. In the circumstances of the present case, like the judge, we consider that what she did by way of expressing her reasoning was legally adequate.

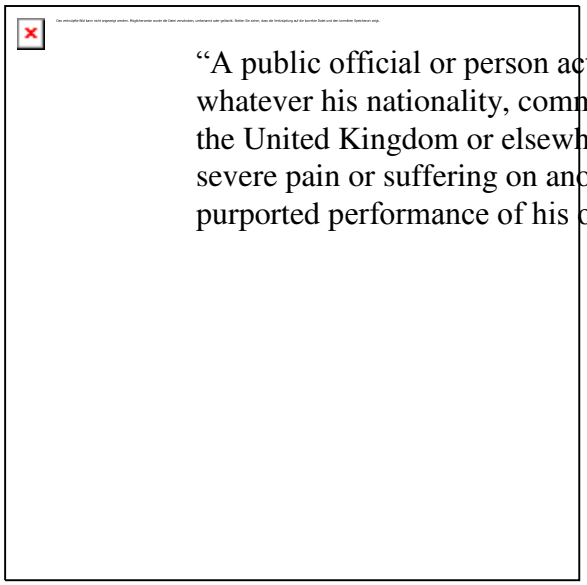
24. Thus it becomes critical to decide whether the determination of the Special Adjudicator that the evidence adduced in support of the claim for political asylum did not establish a reasonable likelihood that the appellant had been tortured in Poland should be quashed. To this we now turn.

On a proper construction of the Special Adjudicator's decision did this include a finding that as a matter of fact what had happened to Mr. Roszkowski was not of sufficient severity to be properly characterised as torture?

25. In order to construe the decision in relation to torture properly it is necessary to have in mind the two provisions to which the Special Adjudicator made reference. The UN Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment 1984, Art 1(1) provides:

> "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity."

26. The Criminal Justice Act 1988, s.134, created a new offence of torture in English law, largely in fulfilment of the 1984 Convention. Section 134(1) reads as follows:



> "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

27. It was submitted on behalf of the appellant that the reference by the Special Adjudicator to these two provisions indicates a possibility that the Special Adjudicator came to the conclusion that a reasonable likelihood of relevant torture had not been shown *because* it had not been suggested, still less demonstrated, that a public official had intentionally inflicted severe pain or suffering.

28. We accept that if one regards only the relevant paragraph of the determination it does indicate that possibility. However, we do not accept that it is legitimate to approach that paragraph out of context in that way. It had not been suggested by the appellant that there had been intentional infliction on him of pain by a public official. Nor had it been submitted on behalf of the Secretary of State that a reasonable likelihood of such an intentional infliction of pain by a public official needed to be shown before an applicant could claim that he had been tortured within the meaning of paragraph 5(5). If the Special Adjudicator had formed the view that this was a prerequisite she would surely have stated this expressly either at the hearing or at the very latest in her reasons. We do not accept that there is a possibility that this was the Special Adjudicator's reasoning.

29. In the alternative it was submitted on behalf of the appellant that the reference by the Special Adjudicator to these two provisions indicates a possibility that the Special Adjudicator came to the conclusion that a reasonable likelihood of relevant torture had not been shown because it had not been demonstrated, that there was an insufficiency of protection by the Polish state against the intentional infliction of severe pain or suffering. we do not accept that there is a possibility that this was the Special Adjudicator's reasoning.

30. Taking the relevant paragraph of the determination on its own there is nothing to suggest that sufficiency of protection was an issue in relation to the question of certification, as opposed to the question of refugee status. The sentence "I am satisfied, having considered those definitions and having considered the evidence put forward *by the appellant* [our emphasis], that there was nothing *in his account* [our emphasis] that *amounted to* [our emphasis] torture and that the decision of the respondent that subparagraph 5 did not apply was correct." points away from, rather than towards, a consideration of the protection issue in this context.

31. The Convention refers to "severe pain or suffering, whether physical or mental". In our judgment the Special Adjudicator referred to the Convention and the Act in order to indicate that she accepted the submission of the appellant that psychological trauma could constitute torture but that the suffering must be severe. Nothing further is to be deduced from this reference.

32. Taking the paragraph in the wider context of the Secretary of State's decision letter and the recorded submissions there is no reason to suppose that anyone at any stage had considered that sufficiency of protection was an issue in relation to torture, as opposed to refugee status.

33. We therefore conclude, as a matter of construction of the Special Adjudicator's reasons, that the sole reason that she had for coming to the conclusion that the evidence did not establish a reasonable likelihood that the appellant had been tortured in Poland was that severe pain or suffering was required before treatment could be described as torture and that what had happened to him did not amount to severe pain or suffering.

Was the conclusion reached by the Special Adjudicator that Mr. Roszkowski had not been tortured perverse?

34. Mr. Nicol submitted that on the materials before her the only conclusion legally open to the Special Adjudicator was a finding that Mr. Roszkowski had been tortured.

35. The mental stress to which he had been exposed was clearly considerable. The Special Adjudicator was right to consider whether it amounted to severe mental pain and suffering. Parliament has placed on the Special adjudicator, not on the Court, the difficult task of evaluating the severity of what has happened. It was for her to reach a conclusion on this after she had considered all the evidence, in particular Mr. Roszkowski's own account. The conclusion which she reached was legally open to her and can not be characterised as perverse.

Other submissions

36. That renders it unnecessary to consider a number of other matters which were debated in front of us.

37. One was predicated on the assumption that there was a possibility that the Special Adjudicator had made some form of public participation or acquiescence a prerequisite of any finding of torture. It was submitted on behalf of the appellant that this was an error of law. For reasons which we have given we reject the premise.

38. For his part, Mr Hunter on behalf of the Secretary of State submitted that it would have been perverse on the facts as found by the Special Adjudicator to have come to any conclusion other than that what had been suffered by Mr. Roszkowski did not amount to torture and therefore there was no advantage in remitting even if there had been an error of law in the Special Adjudicator's approach. We incline to disagree for two reasons. First, we doubt whether, if the Special Adjudicator had come to the conclusion on the facts as found by her that what Mr. Roszkowski had suffered had amounted to torture and this conclusion had been upheld by the Immigration Appeal Tribunal this court would have reversed that decision. Second, in a case of this kind, where there is a possibility that on remission further evidence will be put before a

Special Adjudicator, it seems harsh to deprive an appellant who has demonstrated a legal error in the handling of his case of the chance to have it properly considered on all the evidence which he now wishes to adduce. However, it is unnecessary to express a concluded opinion.

39. We record that we heard a number of interesting submissions in relation to the difficult question whether the torture referred to in paragraph 5(5) must be torture by organs of the state or agents of the state or, if by non-state agents, be torture against which the state refuses or is unable to provide a sufficiency of protection. The judge, *obiter*, opined that this was so. As we have indicated we do not find it necessary to come to a conclusion on what we regard as a nicely balanced question.

The new evidence

40. There was placed before us some material which had not been before the Special Adjudicator. If true it showed that his wife had been more maltreated in the family house than Mr. Roszkowski knew at the time. Had he known it then the psychological pain to which he must have been exposed by what he did know would have been even greater and might thus have led to the pain being of an appropriate degree of severity to qualify in the eyes of the Special Adjudicator as torture. As a kindness, the wife kept it from him. The judge said as to this

> "It is submitted that, if this matter were to go back to the Special Adjudicator, there is fresh evidence now available from the Applicant's wife which could well mean that the same decision would not be reached on the certificate. That evidence relates to his wife's sufferings during the final attack. It is evidence which is currently under consideration by the Respondent in connection with the separate claim for asylum which has been made by the Applicant's wife and which has not yet been determined. On the face of it, it is a powerful and moving account of his wife's suffering, and it is clearly of relevance to his wife's claim. However it does not help advance the Applicant's claim that he experienced torture in the past in Poland. He was unaware of what his wife had experienced on that occasion until August 1999, nearly 3 years after he had arrived in this country. There is no fresh evidence that, while in Poland, he had suffered torture, even in the shape of psychological torment, because of his wife's experience. I would in any event, therefore, not quash the decision as to the certificate."

We see no escape from the logic of the judge's reasoning and Mr Nicol could suggest none.

41. The reference to the wife's claim caused us to inquire what had happened there. Clearly if her claim to asylum succeeds, or she obtains indefinite leave to remain, then her husband's claim to remain here will be substantially stronger. Even though we gave him 24 hours to obtain instructions Mr Hunter was unable to find out why it was that the Secretary of State had not been able to reach a decision on her claim in the past two years. Unexplained, that delay is astonishing – particularly in the context of the link with the present case which is currently winding its way through the legal system. Mr Hunter was able to undertake that the Secretary of State would decide the case and issue a reasoned decision within 6 weeks.

42. But, unsatisfactory and moving as all this is, it provides no reason for allowing this appeal.

Conclusion

43. This appeal is dismissed

ORDER: Appeal dismissed; detailed assessment of claimant's costs

(Order does not form part of Approved Judgment)