Case No: QBCOF/2000/0635/C

Neutral Citation Number: [2001] EWCA Civ 328
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
Maurice Kay J.

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 2nd March 2001

B e f o r e :

LORD JUSTICE PETER GIBSON
LORD JUSTICE CHADWICK
and
LORD JUSTICE KEENE

- - - - - - - - - - - - - - - - - -

R

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Appellant

Ex Parte

SENKOY — Respondent

- - - - - - - - - - - - - - - - - -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - -

Mr. Mark Bishop (instructed by the Treasury Solicitor of London for the Appellant)
Mr. Mark Henderson (instructed by Messrs Howe and Co. of Wood Green for the Respondent)

- - - - - - - - - - - - - - - - - -

Judgment

LORD JUSTICE PETER GIBSON:

1. This is an appeal by the Secretary of State from the order of Maurice Kay J. on 18 February 2000 quashing the refusal of the Secretary of State to treat an unsuccessful asylum seeker's further representations as a fresh claim for asylum. The appeal is brought with the leave of Schiemann L.J.

2. The facts are these. Ali Senkoy is a 29-year-old Turkish Kurd from south-east Turkey. He arrived in the United Kingdom on 8 May 1993 with no passport or documents, having travelled from Turkey via the Philippines. He promptly applied for asylum, but that was refused by the Secretary of State in April 1994. He appealed, but on 10 January 1997 the Special Adjudicator, although finding that Mr. Senkoy had assisted the outlawed Kurdish organisation, the PKK, and had been detained and tortured, including having his toes broken, by the Turkish authorities, dismissed his appeal. Mr. Senkoy sought leave to appeal to the Immigration Appeal Tribunal, but that was refused. Mr. Senkoy applied for judicial review of that refusal. Forbes J. quashed the refusal. Mr. Senkoy then appealed to the Tribunal from the Adjudicator's decision. But by a determination notified to Mr. Senkoy on 29 April 1998 the Tribunal dismissed the appeal.

3. In that determination the Tribunal said that with the agreement of the parties it dealt with the case on the basis that the Adjudicator had found Mr. Senkoy to be credible. On that basis the Tribunal dealt with only two issues. One was whether there was a reasonable likelihood of persecution upon Mr. Senkoy being returned to Turkey. The other was whether it was reasonable for Mr. Senkoy to relocate from the Kurdish area in Turkey where he had lived to Istanbul. On the first issue it was Mr. Senkoy's case that he would face persecution as a returned Kurdish asylum-seeker. The Tribunal referred to a number of documents placed before it, in some of which there was evidence that returned asylum-seekers would be interrogated and mistreated. But one document, which the Tribunal gave the Secretary of State leave to adduce although produced only on the day of the hearing, appears to have been of particular significance to the Tribunal. This was the Migrant News Sheet for November 1997. It contained a translated extract from a German newspaper, the Suddeutsche Zeitung, stating that Kurds who were returned to Turkey were not automatically imprisoned and added that this was the view not only of the German authorities but also of the Turkish Human Rights Federation, the IHD. The extract continued: "However, upon arrival, (IHD affirmed), repatriated Turks are interrogated by the police upon the grounds of having violated the law on the misuse of passport during which they are badly insulted, threatened and humiliated."

4. The Tribunal gave its assessment of the risk to Mr. Senkoy on his return to Turkey in these terms:

> "In looking at the documentary evidence we have arrived at the conclusion that he would be interrogated on arrival, and he would quite likely be "badly insulted, threatened and humiliated". Uncomfortable that this would be, we accept [the Secretary of State's] submission to us that this does not amount to persecution. The documents which we have referred to in this determination paint a similar picture: namely an intense and thoroughly unpleasant interview or series of interviews at the airport. This may result in incarceration for a few hours or a few days. However, for a person such as the appellant, it is our view that there is no serious possibility that he would be persecuted on his arrival. It is likely that he would be released and allowed to go on his way."

5. On the second issue the Tribunal contended that it would not be unduly harsh for Mr. Senkoy to relocate to Istanbul. I need say nothing more on this issue as it has not featured in this appeal.

6. Mr. Senkoy sought permission from the Tribunal to appeal to this court, but that was refused on 3 July 1998, and no further application for permission was made to this court. Directions were given for Mr. Senkoy to be removed from the United Kingdom on 19 August 1998. But, just two days before, his solicitors sent a letter to the Secretary of State, enclosing nine documents. The solicitors asked the Secretary of State to consider the documents as a fresh claim to asylum. The solicitors also referred to s. 21 Immigration Act 1971, giving the Secretary of State, in a case where an appeal from him has been before an Adjudicator or Tribunal, the power to refer to an Adjudicator or Tribunal any matter relating to the case which was not before the Adjudicator or Tribunal so as to obtain the opinion of that Adjudicator or Tribunal on that matter. The solicitors suggested that the Secretary of State might wish to make such reference.

7. The nine documents included a number which predated the Tribunal's determination. But of particular significance was a report dated 19 June 1998 of Kieran O'Rourke, a solicitor in the firm acting for Mr. Senkoy. Mr. O'Rourke had visited Turkey in May 1998 and recorded what he had been told on 28 May 1998 by the IHD's Vice-President, Osman Baydemir, who is a lawyer. Mr. Baydemir said that the Turkish police would be suspicious of any person arriving in Turkey without a valid passport, that such a person would be interrogated and detained and that other checks would be made about him. He further said that every Kurd in the situation of a failed asylum seeker was at particular risk of serious ill-treatment by the airport police. Under the heading "The Risk of Torture by the Airport Police" Mr. O'Rourke reported as follows:

> "20 I asked how would a person, held by the airport police, be treated during questioning and interrogation. Under Turkish law, everyone accused of a political or criminal offence is innocent until the crime is proved. However, in the IHD's experience the practical reality is very different. The State security forces behave as though all detainees have committed an offence, even though no crime has actually been committed. The IHD state that there is always a high possibility that a person will be tortured in police custody. Torture is not limited to cases where the police are dealing with people they suspect of political involvement. However, some ethnic groups may be at especially greater risk, and it is the view of IHD that being Kurdish increases the risk of torture at the hands of the police in such situations.
>
> 21 It is the IHD's view that everyone detained by the Turkish police can normally expect to be beaten while in custody and this applies equally to returnees who are detained on arrival at the airport."

8. Mr. Baydemir on 28 July 1998 confirmed his complete agreement with the contents of Mr. O'Rourke's report. That confirmation was also sent to the Secretary of State.

9. On 4 September 1998 the Secretary of State gave his response to the letter of 17 August 1998. First, he said that he disregarded the material in several of the documents as having been available to Mr. Senkoy at the time of the Tribunal hearing. He concluded with regard to the further points that the claim advanced was not sufficiently different from the earlier claim to admit of a realistic prospect that the conditions of the Immigration Rules under which asylum would be granted would be satisfied "because the information is of a general nature and not specifically related to your claim". The Secretary of State accordingly decided not to treat the further representations as a fresh asylum claim. Second, he went on to deal with the suggestion of a reference under s. 21. He said that he remained of the view that Mr. Senkoy did not qualify for leave to remain in the United Kingdom as a refugee and repeated that Mr. Senkoy had not produced any new evidence which related to him specifically. He further said that he did not believe that Mr. Senkoy's case would benefit from further consideration by the Adjudicator or Tribunal under s. 21 and did not propose to make a reference. Third, the Secretary of State said that having reconsidered the

asylum claim, he was not prepared to reverse his decision which had been upheld by the Adjudicator and the Tribunal.

10. Mr. Senkoy then sought leave to apply for judicial review of two of the three decisions made by the Secretary of State on 4 September 1998, viz. (1) not to treat the representations made by the letter of 17 August 1998 from Mr. Senkoy's solicitors as a fresh claim for asylum, and (2) not to make a reference under s. 21. He did not seek to challenge the decision to maintain the refusal of the asylum claim. Turner J. granted leave on 16 December 1998. By a witness statement dated 11 June 1999 Christine Ruffles set out the approach of the Secretary of State to the assertion by Mr. Senkoy of a fresh claim for asylum. She said (in para. 18):

> "The Secretary of State observes that none of the documents named the Applicant or dealt specifically with his case; rather, they all dealt with the general situation for persons in the Applicant's position. The Immigration Appeal Tribunal had already seen a large amount of material which alleged the occurrence of mistreatment of asylum seekers and others similar to the events alleged in these documents to have occurred. Although the further evidence added to the evidence which was already available of instances in which the Turkish authorities have taken an adverse interest in persons who have been returned to Turkey, it did not alter the nature or character of the Applicant's claim. It remained the same claim as that advanced to the Immigration Appeal Tribunal, albeit with some elaboration or addition in the form of the further evidence."

11. The hearing of the substantive application for judicial review did not take place till February 2000, when Maurice Kay J. allowed the application. The judge reviewed the law and then turned to its application in the present case. He accepted that a great deal of the material submitted on 17 August 1998 was general in nature and repeated aspects of the objective material before the Tribunal. But he continued:

> "However, there is one aspect of this case which troubles me. The reason why the Tribunal felt able to conclude that upon return the Applicant would suffer no more than from being "badly insulted, threatened and humiliated" was because of the reliance it placed on the Migrant News Sheet for November 1997. I have referred to the circumstances in which it came into the case. The ultimate finding on assessment of risk on arrival is clearly based upon it, indeed it quotes those very words. The fact that they seem to have the imprimatur of the Turkish Human Rights Federation (IHD) must have been rather persuasive. The essence of the contribution of Mr. O'Rourke to the new material is that the reliance on that document was misplaced. Far from considering that the risks upon arrival are limited to being "badly insulted, threatened and humiliated", the view of the IHD and Mr. Baydemir as reported by Mr. O'Rourke is that there is a significant risk of torture, especially in the case of a Kurdish failed asylum seeker and, by implication, one who has been involved with, if not a member of, the PKK."

12. The judge concluded that the new claim was sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim. He said:

> "There may not be a change in the nature of the persecution said to be feared, but that is not a necessary requirement. It seems to me that there is a realistic prospect that a favourable view could be taken of the Applicant's claim if, instead of, or even as well as, the Migrant News Sheet for November 1997, a different tribunal were considering Mr. O'Rourke's report .... In my judgment, the decision of the Secretary of State not to treat the Applicant as making a fresh asylum application in the light of the material submitted after his appeal

had been dismissed by the Immigration Appeal Tribunal, failed to take into account the relationship between the Migrant News Sheet for November 1997 and the report of Mr. O'Rourke. The decision of the Secretary of State was thus unreasonable in the Wednesbury sense."

13. The judge then turned to s. 21 and said that the terms of the letter of the Secretary of State led the judge to the conclusion that the Secretary of State failed to appreciate the relationship between the November 1997 Migrant News Sheet and Mr. O'Rourke's report and so failed to appreciate that the Tribunal may have acted upon a misapprehension in relation to a matter which became one of perceptible importance in the determination of the Secretary of State. The judge said that it would have been appropriate for the Secretary of State to reconsider the material in the light of what the judge said about it and to have considered whether or not that was an issue on which he should obtain the opinion of the Tribunal upon a s. 21 reference. It the judge had not decided that this was a fresh claim, that would, he said, have been the appropriate course.

14. Before I consider the submissions made by counsel to us, I will set out the legal framework against which they fall to be considered.

15. The overriding obligation to which the United Kingdom has committed itself by being party to the Geneva Convention is not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Art. 33). That obligation continues so long as a refugee (defined by reference to a well-founded fear of being persecuted for a reason specified in the Convention) is in the United Kingdom. If a claim for asylum is made by a person, that is to say a claim that it would be contrary to the United Kingdom's obligations for him to be removed from or required to leave the United Kingdom, that person cannot be removed from or required to leave the United Kingdom pending a decision on his claim, and, even if his asylum claim is refused, so long as an appeal is being pursued.

16. That there can be more than one claim for asylum was recognised by this court in R. v Home Secretary, Ex p. Onibiyo [1996] QB 768. At pp. 781-2 Sir Thomas Bingham M.R. (with whom Roch and Swinton Thomas L.JJ. agreed) said:

> "It would in my judgment undermine the beneficial object of the Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligations of the United Kingdom or depriving a person of the right to make a fresh "claim for asylum" ....
>
> Any other construction would in my view be offensive to common sense. However rarely they may arise in practice, it is not hard to imagine cases in which the material "claim for asylum" might be made on unsubstantiated, or even bogus, grounds, and be rightly rejected but in which circumstances would arise or come to light showing a clear and serious threat of a kind recognised by the Convention to the life or freedom of the formerly unsuccessful applicant. A scheme of legal protection which could not accommodate that possibility would in my view be seriously defective."

17. At the time when Onibiyo was decided, the only provision of the Immigration Rules governing fresh claims for asylum was rule 346 which then provided:

> "When an asylum applicant has previously been refused asylum in the United Kingdom and can demonstrate no relevant and substantial change in his circumstances since that date, his application will be refused."

18. In considering what constitutes a fresh claim the Master of the Rolls in Onibiyo agreed first with the propositions accepted by counsel, viz. there had to be a significant change from the claim as previously presented, such as might reasonably lead an Adjudicator to take a different view, and that if the first claim depended on new evidence, it had to satisfy tests analogous to Ladd v Marshall [1954] 1 WLR 1489, of previous unavailability, significance and credibility. Second, he agreed with the views expressed by Stuart-Smith L.J. (with whom Rose L.J. and Sir John Balcombe agreed) in R. v Secretary of State for the Home Department, Ex p. Manvinder Singh (unreported) 8 December 1995 (CAT No. 1618 of 1995). Those views were that it was necessary to analyse what are the essential ingredients of a claim to asylum and see whether any of the ingredients have changed, that a useful analogy was a cause of action to establish which certain ingredients must be proved, that if the essential ingredients were changed a different cause of action was being asserted, that the essential ingredients of a claim for asylum were (1) that the applicant has a well-founded fear of persecution, (2) that he has that fear in relation to the country from whence he came, (3) that the source of the persecution is the authorities of that state or persons whose actions are tolerated by the authorities or the authorities do not offer effective protection, and (4) that the persecution is for a Convention reason, and that only if one or more of the essential ingredients differed from the earlier claim could it be said to be a fresh claim.

19. Sir Thomas Bingham also expressed himself content with a statement by Carnwath J. in the Manvinder Singh case at first instance ([1996] Imm AR 41) that a change in the character of the application was required, provided that it was not taken to mean that there must necessarily be a change in the nature of the persecution said to be feared. He continued at pp. 783-4:

> "The acid test must always be whether, comparing the new claim with the earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

20. Rule 346 has been amended to give effect to the guidance given in Onibiyo. This now provides:

> "Where an asylum applicant has previously been refused asylum during his stay .... the Secretary of State will determine whether any further representations should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in paragraph 334 will be satisfied. In considering whether to treat the representations as a fresh claim, the Secretary of State will disregard any material which:
>
> (i) is not significant; or
>
> (ii) is not credible; or
>
> (iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined."

R. 334 sets out the conditions for the grant of asylum.

21. There is no right of appeal from the determination of the Secretary of State, but it can be challenged by way of judicial review on Wednesbury principles (Cakabay v Secretary of State for the Home Department (No. 2) [1999] Imm AR 176).

22. There are three reported decisions since Onibiyo in which the essential elements of a fresh claim for asylum have been considered. The first was R. v Secretary of State for the Home Department, ex p. Ravichandran (No. 2) [1996] Imm AR 418. In that case Dyson J. considered a Wednesbury

challenge to the decision of the Secretary of State that no fresh claim for asylum had been made by two Sri Lankan Tamils. The Secretary of State applied the test formulated by Stuart-Smith L.J. in Manvinder Singh of whether there had been a change in the essential ingredients of a case. Dyson J. said that the formulation had now to be interpreted in the light of the explanation given by Sir Thomas Bingham MR. in Onibiyo that there need not be a change in the nature of the persecution to be feared. Dyson J. continued (at p. 431):

> "Thus, a later claim may be a fresh claim if it is to be supported by convincing fresh evidence of the same persecution said to be feared as was alleged in support of the earlier claim."

23. The second was Secretary of State for the Home Department v Boybeyi [1997] Imm AR 491. That too was a case in which the refusal of the Secretary of State to treat a claim based on new evidence as a fresh claim for asylum was challenged by way of judicial review on Wednesbury grounds. Sedley J. at first instance had accepted the applicant's submission that the Secretary of State had to determine a series of questions, viz. "Does the claim relate to substantially the same circumstances as before? If so, is there nevertheless fresh evidence in support of it? If there is, is the evidence credible on the face of it and is there any good reason why it was not advanced previously?" On the appeal, apart from disapproving the requirement that it was "on the face of it" that the evidence should be credible, Nourse L.J. (with whom Evans and Ward L.JJ. agreed) expressed himself as in broad agreement with Sedley J.'s views. After citing "the acid test" from Onibiyo, Nourse L.J. said this (at p. 495):

> "Those observations must be read in the context of everything which the Master of the Rolls said under the sub-heading "*A fresh claim*" at pp 380-381, including his acceptance of the proposition that, if the fresh claim depends on new evidence, then it has to satisfy tests, analogous to those in *Ladd v Marshall* [1954] 1 WLR 1489, of previous unavailability, significance and credibility. It follows that it is implicit in the concept of "a realistic prospect that a favourable view could be taken of the new claim" that the prospect may be manifested by evidence which satisfied the second and third of the *Ladd v Marshall* tests, namely that it would probably have an important influence on the result of the case, though it need not be decisive, and that it must be apparently credible, though it need not be incontrovertible. (It has not been suggested that the first of the *Ladd v Marshall* tests is not satisfied in this case.)"

24. Nourse L.J. then considered the applicant's claim for asylum based on new evidence. It is evident that the applicant feared persecution through being arrested for an offence committed in 1992 through being a member of and participating in the activities of an illegal organisation, and the evidence on the original claim was an arrest warrant found to be a forgery. The new evidence was a copy of a later warrant issued after the applicant's arrival in the United Kingdom, the authenticity of which warrant was supported by a report. Nourse L.J. expressed the view that the evidence satisfied the Ladd v Marshall tests. He said that the question whether the new claim was a fresh claim for asylum should be kept distinct from the question whether it ought to be acceded to or rejected. At p. 497 he said:

> "It is also important to emphasise that the requirement embodied in the acid test is that there should be a realistic prospect that a favourable view could be taken of the new claim. That sort of test is very familiar to all of us. It is not a very high test."

On the facts he found that the Secretary of State could not reasonably have determined that there was no such prospect.

25. The third case was Nassir v Secretary of State for the Home Department [1999] Imm AR 250. However, this was a renewed application for leave to move for judicial review, and judgments given on such applications are not binding and should not normally be cited (cf. Clark v University of Lincolnshire [2000] 3 All ER 752 at p. 762). Nevertheless it is of interest to note that Lord Woolf M.R. (with whom Morritt and Tuckey L.JJ. agreed) said (at p. 255) that if the Secretary of State was considering whether or not there was a fresh claim for asylum on the basis of the applicant's personal credibility the Secretary of State would be required to consider the new material and apply the Onibiyo approach.

26. There are two possible ways in which "the acid test" and the amended r. 346 can be interpreted. One is that the new claim must be different from the earlier claim in a way that goes beyond the mere provision of additional evidence in support of the same essential ingredient of the asylum claim. That was certainly the way this court in Manvinder Singh viewed a claim based on further evidence, Stuart-Smith L.J. saying:

> "The source of the fear is still the same, namely, the extremists. The further material is simply additional evidence as to why the extremists may wish to persecute him."

The other is that further evidence may be relied on as amounting to the making of a new claim if, being significant, credible and not previously available, it gives rise to a realistic prospect that the application for asylum would succeed. The approach adopted in Ravichandran (No. 2) and Boybeyi, both decisions being taken in the light of Onibiyo, support the latter view.

27. Mr. Bishop for the Secretary of State contends for that first way. He submits that the mere submission of significant new evidence not previously available is not enough to make a new claim a fresh claim for asylum. He says that the essential ingredients and character of Mr. Senkoy's claim have not changed, and he argues that it cannot be right that the mere production of further evidence in support of a point already made will start the asylum procedures, including the right of appeal, afresh. He criticises the judge for deciding for himself that there was now a realistic prospect of a favourable view being taken of Mr. Senkoy's claim, rather than asking himself whether the assessment of the Secretary of State in exercising his broad discretion in this case was Wednesbury unreasonable.

28. Mr. Henderson for Mr. Senkoy argues for the second way. He submits that it is a novel proposition that in addition to there being a realistic prospect that a favourable view could be taken of the new claim it must be shown that there is a change to the character of the claim. He supported the way that Maurice Kay J. had decided the case.

29. In determining whether the decision of the Secretary of State is impugnable on Wednesbury grounds, I remind myself that those grounds include not only that the decision is unreasonable in the sense of being perverse but also that the decision-taker has misdirected himself in law or taken into account an irrelevant consideration or failed to take account of a relevant consideration.

30. I start with the decision letter itself as there the Secretary of State has explained why he decided that there was no new claim. In the letter of 4 September 1998 the Secretary of State, having set out the requirements of r. 346, stated his approach as being "thus to compare the later claim with the earlier claim and to form a view as to whether it is sufficiently different from the earlier claim that a special adjudicator might reasonably take a favourable view of the later claim, despite rejection of the earlier one." Mr. Henderson not surprisingly accepts that formulation as correct. The Adjudicator's task is not to make the comparison between the later claim and the earlier claim but simply to see whether on the evidence a claim for asylum is made out.

31. But when the Secretary of State expresses his conclusion advanced to Mr. Senkoy the only reason given as to whether the later claim is not sufficiently different from the earlier claim to admit of a realistic prospect that the asylum conditions are satisfied is that the new information is of a general nature and not specifically related to Mr. Senkoy. That point is repeated in Ms. Ruffles' witness statement. I have difficulty with that as a reason for there being no new claim. The new evidence, which on its face is significant, credible and not previously available, is that there is a real risk that a Kurdish asylum-seeker, who is returned to Turkey, will be tortured. Mr. Senkoy is a Kurd, indeed he is a Kurd who has already been detained and tortured for his association with the PKK, so that it cannot be doubted that the new information applies to him even if it is not confined to him. As a self-standing reason for the decision of the Secretary of State, it seems to me to be unsustainable.

32. But the matter does not stop there. Although the Secretary of State has guided himself by the test of what an Adjudicator might reasonably decide on the new evidence, the Secretary of State, as the judge observed, does not appear to have taken note of the fact that the evidence on the risk to returned Kurds of torture, which the Tribunal plainly thought of significance (viz. the evidence of what was said to be the view of the IHD of the extent of the risk), was undermined by the new evidence in Mr. O'Rourke's report of what the IHD actually stated was the then current risk. Whilst the judge may not have expressed himself entirely happily in putting forward what on the face of it was his own assessment of a realistic prospect of a favourable view being taken of Mr. Senkoy's claim, the essence of the judge's criticism of the Secretary of State's decision was that a material consideration, viz. the link between the new evidence, which would appear to set out the then current risk, and the evidence significant to the Tribunal's conclusion, was apparently overlooked by him. That point is the stronger because of the Tribunal's admission of the Migrant News Sheet for November 1997 as evidence on the very day of the hearing, which allowed no opportunity for its contents to be challenged or countered by other evidence.

33. In my judgment therefore the judge's conclusion that the Secretary of State's decision should be quashed should be upheld. This will enable the Secretary of State to reconsider the matter in the light of the judge's and this court's judgments. I own to be the happier to reach this conclusion because of what we were told by Mr. Henderson (by reference to evidence in another case) that in any event the Migrant News Sheet for November 1997 gave an incomplete account of what had appeared in the Suddeutsche Zeitung. In the full version the IHD referred to returnees on arrival in Turkey being "physically ill-treated, often because of minor violations of passport laws."

34. That leaves the important question to which I have referred in para. 25 and on which, having heard full argument, I think it right to express my views briefly, even if obiter. Although the Master of the Rolls in Onibiyo expressed himself as accepting Stuart-Smith L.J.'s formulation of the essential ingredients of a new claim, he made an important qualification by saying that it was not a necessary requirement that there should be a change in the nature of the persecution to be feared. If that ingredient need not change and one looks at the other essential ingredients, the scope for a new claim becomes very limited indeed, if further evidence in support of an existing ingredient can never amount to a new claim. For example, the applicant is hardly likely to change the ingredient of fear in relation to the country from whence he came. I prefer the approach taken in Ravichandran (No. 2) and Boybeyi, which took into account what was said in Onibiyo. It also seems to me to accord better with the United Kingdom's obligations under the Convention. When clear and cogent evidence of the same fear of the same persecution for the same Convention reason, let us say of the possibility of the execution of an applicant on return, becomes available which was previously not available, can it really be right to treat that as not amounting to a new claim for asylum? I recognise the administrative inconvenience of new evidence in support of an

existing ingredient being capable of giving rise to a new claim, but that is tempered by the considerable safeguards of the Ladd v Marshall conditions incorporated into r. 346. Further, it remains for the Secretary of State alone to determine whether or not the new evidence gives rise to a new claim on the test set out in r. 346. Provided that he guides himself correctly in accordance with the law, his decision cannot be impugned.

35. My conclusion on the fresh claim point renders it unnecessary for me to say anything on the s. 21 point. In any event s. 21 was repealed by the Immigration and Asylum Act 1999 with effect on 2 October 2000. I prefer to say nothing on the point.

36. I would dismiss this appeal.

LORD JUSTICE CHADWICK:

37. The 1951 Convention relating to the Status of Refugees (the Geneva Convention), to which the United Kingdom is party, requires, at article 33, that:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of the territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

38. The Asylum and Immigration Appeals Act 1993, as its long title makes clear, was enacted to make provision (amongst other things) in relation to persons who claim asylum in the United Kingdom. In that context a "claim for asylum" means a claim by a person that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom. Section 6 of the 1993 Act provides that, during the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom. The Act provides for a person claiming asylum to have a right of appeal to a special adjudicator against a refusal of leave to enter the United Kingdom, against a decision varying (or refusing to vary) any limited leave to enter and remain in the United Kingdom, or against a decision of the Secretary of State to make (or to refuse to revoke) a deportation order – see section 8 of the 1993 Act.

39. An appeal to a special adjudicator under section 8 of the 1993 Act was (until the repeal of Part II of the Immigration Act 1971 by the Immigration and Asylum Act 1999) an appeal to which certain of the provisions in Part II of the 1971 Act, as amended by the Asylum and Immigration Act 1996, had effect – see paragraph 4 in schedule 2 to the 1993 Act. In particular, a party who was dissatisfied with the determination of the special adjudicator might appeal, as of right, to the Immigration Appeal Tribunal – see section 20 of the 1971 Act and paragraph 4(2)(c) in schedule 2 to the 1993 Act. There was a further appeal to this Court, with leave, on a question of law – see section 9 of the 1993 Act. The protection against removal from the United Kingdom, afforded by section 6 of the 1993 Act, continued during the period for which an appeal was pending – see Part II in schedule 2 to the 1971 Act as applied by paragraph 9 in schedule 2 to the 1993 Act. The provisions in Part II of the 1971 Act – so far as relevant to appeals – are now re-enacted in the 1999 Act.

40. The 1971 Act provides for the Secretary of State to lay before Parliament, from time to time, statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of the Act. The relevant rules for the purposes of this appeal - the Immigration Rules (HC 395) - were laid before Parliament on 23 May 1994. Part 11 of those Rules contains provisions relating to asylum applicants.

41. Paragraph 346 of the Immigration Rules, in the form in which it appears following amendment by Cmnd. 3365, is in these terms:

> "Where an asylum applicant has previously been refused asylum during his stay in the United Kingdom, the Secretary of State will determine whether any further representations should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in paragraph 334 will be satisfied. In considering whether to treat the representations as a fresh claim, the Secretary of State will disregard any material which:
>
> (i) is not significant; or
> (ii) is not credible; or
> (iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined."

42. It is pertinent to have the provisions of paragraph 334 of the Immigration Rules in mind:

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that :
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and
> (ii) he is a refugee, as defined by the Convention and the Protocol; and
> (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

In that context, the Protocol means the Protocol to the Convention; and "refugee" has the meaning given to that expression by the Protocol, that is to say (so far as material in the present context), any person who:

> ". . . owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is

unable or, owing to such fear, is unwilling to avail himself of the protection of that country; . . ."

43. The importance of the determination whether further representations, made after an earlier asylum claim has been refused and appeals against that refusal have been exhausted, are to be treated as a fresh claim for asylum was explained by Lord Justice Schiemann in *Cakabay v Secretary of State for the Home Department* [1999] Imm AR 176, at pages 180-181:

"The [1993 Act] makes no express provision as to what is to be done in the case of repeated claims for asylum by the same person. The second claim may be identical to the first ("a repetitious claim") or may be different ("a fresh claim"). It is common ground that a fresh claim attracts all the substantive and procedural consequences of an initial claim whereas a repetitious claim does not.

In the case of a repetitious claim no more is required to be done: the first decision has ensured that the United Kingdom has complied with its obligations under the Convention. Section 6 of the 1993 Act creates no inhibition on the claimant's removal: the Secretary of State has on the occasion of his decision on the first claim decided the repetitious claim. So far as the decision on the claimant's repetitious application for leave to enter is concerned the claimant will be told that leave has already been refused and that there is no need for any new decision.

In the case of a fresh claim the claimant is protected by section 6 and the Secretary of State must make a decision on his fresh claim. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the immigration officer will grant limited leave to enter (immigration rule 330). By contrast, if the Secretary of State decides not to grant asylum, the immigration officer will (immigration rule 331) resume his examination to determine whether or not to grant the application for leave to enter and then determine it. Assuming no factual change in relation to non-asylum matters, the immigration officer will refuse it and the applicant will then have his rights of appeal and will be protected during the appellate process.

The difficulty lies in the cases where the claimant asserts that he has made a fresh claim whereas the Secretary of State categorises it as repetitious."

44. It was held by this Court in *Cakabay* that there was no right of appeal under the provisions of Part II of the 1971 Act, as applied by the 1993 Act, against the decision of the Secretary of State under rule 346 ("the categorisation question") that further representations did not constitute a fresh claim; and that if a determination on the categorisation question was challenged on an application for judicial review, the decision would be reviewed on *Wednesbury* grounds. The court would not be concerned with the precedent facts.

45. In the present case the Secretary of State determined the categorisation question against the claimant, Ali Senkoy. He did so for reasons set out in a decision letter dated 4 September 1998 signed on his behalf by an officer of the Asylum Directorate. The substance of that letter, in relation to the categorisation question, is contained in three short paragraphs:

> "The Secretary of State has now considered in accordance with paragraph 346 the information and enclosures provided in your letter of 17 August. He notes that several of the articles enclosed were available to your client at the time of his hearing before the Tribunal. He has accordingly disregarded this material in reaching his decision.
>
> The Secretary of State has concluded with regard to the further points raised that the claim is not sufficiently different from the earlier claim to admit of a realistic prospect that the conditions set out in paragraph 334 will be satisfied *because the information is of a general nature and not specifically related to your client*.
>
> Accordingly the Secretary of State has decided not to treat your representations as a fresh application for asylum." [emphasis added]

46. The only reason for the decision that the claimant's further representations, based on the information and enclosures provided in the letter of 17 August 1998, do not amount to a fresh claim is that set out in the words which I have emphasised. After disregarding material to which the Secretary of State, acting under rule 346, is not bound to have regard, the reason is that there is no realistic prospect that the conditions set out in rule 334 will be satisfied because the information to which he is bound to have regard is of a general nature only. That is confirmed in a witness statement signed on 11 June 1999 by Christine Ruffles, a civil servant in the Integrated Casework Directorate of the Home Office Immigration and Nationality Directorate, which was put before the judge. At paragraph 18 she said this:

> "The Secretary of State observes that none of the [new] documents named the Applicant or dealt specifically with his case; rather they all deal with the general situation for persons in the Applicant's position. The Immigration Appeal Tribunal had already seen a large amount of material which alleged the occurrence of mistreatment of asylum seekers and others similar to the events alleged in these documents to have occurred. . . ."

47. The judge's task, on an application for judicial review of the Secretary of State's determination of the categorisation question under rule 346, was to review that determination on *Wednesbury* principles. It was not for the judge to decide the categorisation question for himself - see *Cakabay* to which I have already referred. There is, I think, some force in the criticism that the judge lost sight of this distinction when he said, in a passage at paragraph 29 of his judgment:

> "I readily accept that a great deal of that [new] material which was put forward after the determination by the Immigration Appeal Tribunal is general in nature and repeats aspects of the objective material which was before the tribunal. However, there is one aspect of this case which troubles me. The reason why the Tribunal felt able to

> conclude that upon return the Applicant would suffer no more than from being "badly insulted, threatened and humiliated" was because of the reliance it placed on the Migrant News Sheet for November 1997. I have referred to circumstances in which it comes into the case. The ultimate finding on assessment of risk on arrival is clearly based upon it, indeed it quotes those very words. The fact that they seem to have the imprimatur of the Turkish Human Rights Federation (IHD) must have been rather persuasive. The essence of the contribution of Mr O'Rourke to the new material is that the reliance on that document was misplaced. Far from considering that the risks upon arrival were limited to being "badly insulted, threatened or humiliated", the view of the IHD and Mr Baydemir as reported by Mr O'Rourke is that there is a significant risk of torture, especially in the case of a Kurdish failed asylum seeker and, by implication, one who has been involved with, if not a member of, the PKK. *I have come to the conclusion that, when one applies the words of Sir Thomas Bingham MR in Onibiyo and those of Nourse LJ in Boybeyi to the facts of the present case, the contention that there is material here which passes the acid test is correct.* There may not be a change in the nature of the persecution said to be feared, but that is not a necessary requirement. *It seems to me that there is a realistic prospect that a favourable view could be taken of the Applicant's claim if, instead of, or even as well as, the Migrant News Sheet for November 1997, a different tribunal were considering Mr O'Rourke's report."* [emphasis added].

48. In the sentences which I have emphasised the judge may, I think, be said to have trespassed into the decision making territory which is the preserve of the Secretary of State. He seems to be deciding, himself, as a matter of precedent fact, the question whether or not it was arguable – or, as it is put in rule 346, whether or not there is a realistic prospect – that the new material would lead to the conclusion that the claimant was a person whose life or freedom would be threatened on account of his race, political opinion or membership of a particular social group if he were required to return to Turkey.

49. But the judge was on firmer ground when he said, in the next sentences of the same paragraph of his judgment, that:

> "In my judgment, the decision of the Secretary of State not to treat the Applicant as making a fresh asylum application in the light of the material submitted after his appeal had been dismissed by the Immigration Appeal Tribunal, failed to take into account the relationship between the Migrant News Sheet for November 1997 and the report of Mr O'Rourke. The decision of the Secretary of State was thus unreasonable in the Wednesbury sense."

50. I agree with that conclusion. As the judge recognised, the significance of the new material contained in Mr O'Rourke's report was that it called into question the Tribunal's conclusion that, uncomfortable though it would be to be interrogated on arrival – and to be "badly insulted, threatened and humiliated" - the claimant did not

face persecution. As the Tribunal put it, in the section of its determination and reasons headed "Assessment of risk on arrival":

> "The documents which we have referred to in this determination paint a similar picture: namely an intense and thoroughly unpleasant interview or series of interviews at the airport. This may result in incarceration for a few hours or a few days. However for a person such as the appellant, it is our view that there is no serious possibility that he would be persecuted on his arrival. It is likely that he would be released and allowed to go on his way."

51. To dismiss from consideration evidence which, as Lord Justice Peter Gibson has observed is, on its face, significant, credible and not previously available and which, if accepted, would go a long way to support the conclusion that there is a real risk that a Kurdish asylum-seeker who is returned to Turkey will be tortured on the grounds that "the information is of a general nature and not specifically related to your client" is – to my mind – irrational. Evidence as to the treatment on arrival of returning asylum seekers is bound to be general in nature. That was the nature of the evidence upon which the Tribunal relied in reaching the conclusion which it did. It would be remarkable if evidence as to the treatment on arrival of returning asylum-seekers related "specifically" to the claimant – for the obvious reason that the claimant is most unlikely, himself, to have been a returning asylum seeker. The question is whether the evidence relates to the treatment of those with whom the claimant shares sufficiently significant common characteristics that it can be said with any confidence that the treatment which they have received is a fair indication of the treatment which he is likely to receive if he is required to return.

52. I would dismiss this appeal on the ground that the reason given by the Secretary of State in his decision letter of 4 September 1998 must be regarded as irrational.

53. I find nothing in the witness statement of Ms Ruffles which persuades me that it would be wrong to dismiss this appeal. But it is necessary to refer to the two final sentences of paragraph 18 of that statement. Ms Ruffles states that:

> "Although the further evidence added to the evidence which was already available of instances in which the Turkish authorities have taken an adverse interest in persons whom have been returned to Turkey, it did not alter the nature of the Applicant's claim. It remained the same claim as that advanced to the Immigration Appeal Tribunal, albeit with some elaboration or addition in the form of further evidence."

54. She identifies, there, what seems to me to be a different ground from that relied upon in the decision letter of 4 September 1998. The ground, I think, is that further evidence bearing on the risk of persecution on arrival in Turkey cannot, of itself, amount to a fresh claim. That is because the risk of persecution on the claimant's arrival in Turkey was always an essential element in his asylum claim. That may or may not be a ground upon which the Secretary of State could have relied when he made his determination in September 1998. But the decision letter contains no hint that he did rely upon that ground; and Ms Ruffles does not say so.

55. I recognise, however, that the Secretary of State's task, in cases where he does give proper weight to all relevant material, is not made easy by what, as it seems to me, is a possible inconsistency in the guidance which has been given in decisions of this Court. The point is identified in the sentence in the passage which I have cited from the judgment below:

> "There may not be a change in the nature of the persecution said to be feared, but that is not a necessary requirement."

The sentence is taken from the judgment of Sir Thomas Bingham, Master of the Rolls, in *Regina v Secretary of State for the Home Department, Ex parte Onibiyo* [1996] QB 768, at page 783H. After setting out a passage from the judgment of Lord Justice Stuart-Smith in *Regina v Secretary of State for the Home Department, Ex parte Manvinder Singh* (8 December 1995, unreported) – with which he expressed agreement – the Master of the Rolls went on, at pages 783H-784A, to say this:

> "There is a danger in any from of words, which can too easily be regarded as a binding formula. In the *Manvinder Singh* case [1996] Imm AR 41 Carnwath J held that a change in the character of the application was required. I am content with that statement, provided it is not taken to mean that there must necessarily be a change in the nature of the persecution said to be feared. The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a real prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

It is reasonably clear that rule 346, in the amended form introduced by Cmnd. 3365, is derived from that statement of principle.

56. The problem, as Lord Justice Peter Gibson has pointed out, is that there are two possible ways in which the "acid test" and the amended rule 346 can be interpreted. The one is that the further representations must go beyond the mere provision of additional evidence in support of the same essential ingredient of the earlier asylum claim; the other is that the further representations need not amount to more than additional evidence (being significant, credible and not previously available) in relation to an ingredient of the earlier claim which is essentially unchanged. It is enough that the new evidence gives rise to a realistic prospect that, in the light of that evidence, a claim which has previously been rejected might now succeed. As Lord Justice Peter Gibson has observed, there are decisions which tend to support each of those two approaches. It will, I think, be necessary for the courts to give an authoritative answer to the question: which approach should prevail?

57. Lord Justice Peter Gibson has indicated a preference for the second approach. I am not at all sure that I share that preference. But I am satisfied that this is not the appropriate opportunity to set out the reasons which lead me towards a different view. First, in the circumstances that I, like Lord Justice Peter Gibson, would decide this appeal on the ground that (whichever be the correct approach) the reason which the Secretary of State has given in his decision letter cannot be sustained. Secondly, if an authoritative answer to the question is required, it is

unlikely to be found in observations made *obiter* upon which all members of the Court are not in agreement.

LORD JUSTICE KEENE:

58. I agree that this appeal should be dismissed for the reasons given by Peter Gibson and Chadwick L.JJ. I would only add a few words on the difficult topic of the test which has to be met for representations by an applicant for asylum to be treated as a fresh claim. The relevant authorities and rival contentions of the parties have already been set out fully in the judgment of Peter Gibson L.J.

59. If what is required to be established is, as submitted on behalf of the Secretary of State, a change in the character of the asylum claim, there immediately arises a problem of defining such a change, bearing in mind the statement of Sir Thomas Bingham, MR, in *Onibiyo* that a change in the nature of the persecution is not required for a fresh claim. Moreover, on such a test, it is difficult to see where in practice a fresh claim could ever arise, save where there has been a change in the circumstances in the applicant's own country since the first claim was made. In any other circumstances, if he puts forward a claim asserting a different basis for the claim, he will be met with the inevitable reply: why was this basis for the claim not advanced before? The result then would be that his credibility would be greatly damaged. It follows that, on this approach, the circumstances in which a fresh claim could be advanced would be very narrowly confined indeed.

60. Fresh evidence, credible and previously unobtainable, may go to overcome doubts about an applicant's credibility which had led to the dismissal of his original claim. But since such evidence would relate back to the account of events which the applicant had already given about his subjective fear and about what had happened to him, it is most unlikely that such evidence would on the Secretary of State's test be regarded as giving rise to a fresh asylum claim. Yet that is the very situation where consideration by an adjudicator who hears oral evidence from an appellant is most necessary. Because of these deficiencies, there is a real risk that the test now propounded by the Secretary of State would put the United Kingdom in breach of its obligations under the Convention. For this reason, had this issue arisen for decision, I would have been inclined to prefer the approach as set out in *Boybeyi* and *ex parte Ravichandran* (No 2). Given, however, the basis upon which I agree this appeal should be determined, I propose to say no more about this particular issue.

ORDER: Appeal dismissed with costs, subject to a detailed assessment.

(Order does not form part of approved Judgment)