Neutral Citation Number: [2022] EWCA Civ 300

Case Nos: CA-2021-000602 and CA-2021-1232

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MOSTYN J
CO/957/2021 and CO/954/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
and
LORD JUSTICE LEWIS

- -

Between:

GOKHAN YILMAZ	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
YUSUF ARMAN	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

Manjit Gill QC and **Priya Solanki** (instructed by **Duncan Lewis**) for **Mr Yilmaz**
Ramby de Mello (instructed by **Thompsons & Co Solicitors**) for **Mr Arman**
Steven Kovats QC and Jack Holborn (instructed by **the Treasury Solicitor)** for the **Defendant**

Hearing date: 23 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILLI. The date and time of hand-down is deemed to be 10:30am on 10 March 2022

Lord Burnett of Maldon CJ:

1. This is the judgment of the court to which we have all contributed.

2. On 13 May 2021 Mostyn J refused permission to both the claimants before us to apply for judicial review in connection with claims which arise out of the certification of their human rights claims by the Secretary of State under section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). On 30 September 2021 Popplewell LJ gave permission to apply for judicial review in both cases and directed that they be retained in the Court of Appeal.

3. The claimants, Mr Yilmaz and Mr Arman, are both Turkish nationals who were deported to Turkey in 2017 as a result of criminal convictions: Mr Yilmaz was deported on 9 March and Mr Arman on 10 June. Both had made human rights claims arising out of the deportation decision and accordingly enjoyed a right of appeal to the First-tier Tribunal ("the FTT") under section 82 of the 2002 Act. The consequence of the certificate under section 94B was that any appeal against the refusal of the human rights claim had to be brought from outside the United Kingdom. Both claimants had brought earlier judicial review claims challenging the certification and/or removal but had been unsuccessful. Permission to apply for judicial review had, in both cases, been refused and not renewed.

4. Each filed appeals with the FTT following their deportation but nearly five years later those appeals have still not been heard. The reasons are complicated, but such a delay does not reflect well on the system. Part at least of the problem appears to have been that the Home Office only appreciated after the decision of the Supreme Court in *R (Kiarie and Byndloss) v. Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380 that it needed, at least in some cases, to ensure that those deported pursuant to section 94B had access to video-link facilities which would enable them to participate in their appeals from abroad; and it took over a year before such facilities were made available even provisionally at the British Embassy in Ankara.

5. Mr Yilmaz issued his proceedings on 30 September 2020 and Mr Arman on 26 June 2020. The two claims are not identically drafted and both seek various forms of relief, but the primary purpose in each case was to bring about the claimant's return to the United Kingdom in order to be able to pursue an in-country appeal. Both were brought in the Upper Tribunal but subsequently transferred to the High Court. In each case, permission to apply for judicial review was refused on the papers. The renewed applications for permission were heard together.

6. A principal ground in both claims was that it was not possible for a fair hearing to be conducted by video-link. Mostyn J rejected that contention. However, about two months after the hearing the Secretary of State, pursuant to her duty of candour, disclosed to the claimants that on 21 March 2021 the Turkish Ministry of Justice had informed British Embassy staff in Ankara that all evidence to be obtained via a video-link from Turkey to a United Kingdom court or immigration tribunal had to be obtained through official Turkish legal channels and not via a link at the Embassy; and that this had been notified to Home Office staff on 31 March, by an e-mail which explicitly made the point that this "would prevent the use of video-links for our immigration out-of-country appeals". This information was set out in a witness

statement dated 8 July 2021 from Robert Peck, the Head of Appeals, Litigation and Admin Review in the Asylum and Protection Directorate at the Home Office, but his evidence raised further questions.

7. Mostyn J's conclusion that a fair appeal could be conducted by video-link from Turkey would have been different if the true position had been disclosed to him, as it should have been. Acknowledging that, the Secretary of State revoked the section 94B certificates in both cases on 27 July 2021. Mr Yilmaz was returned to the United Kingdom on 8 September 2021 and can pursue his appeal here. Mr Arman's solicitors and family have lost touch with him recently. It has not been possible to arrange his return; but the Secretary of State is willing to facilitate it as soon as he can be found, and he too will be able to pursue his appeal here.

8. These developments changed the complexion of the cases. The principal purpose of the proceedings (to enable the claimants to pursue their immigration appeals in-country) had been achieved.

9. However, both claimants wished to pursue their appeals against the refusal of permission to apply for judicial review. In granting permission to apply for judicial review, Popplewell LJ was concerned by the breach of the duty of candour and the possible issues to which it gave rise. Among the directions he made was that the Secretary of State "file and serve any further evidence upon which she wishes to rely or which she is under a duty to disclose within 6 weeks". A witness statement was supplied, but it was clear that further disclosure was required. There were serious delays in supplying that disclosure. We need not give the details, but it is sufficient to say that although extensions of time were sought even the revised deadlines were not met, without any explanation or further application, and further witness statements and documents were filed at various dates up to 4 February. In a case which has exposed a serious breach of the Secretary of State's duty of candour and the wholesale failure to comply with directions of this court is more than unfortunate.

10. Mr Yilmaz's advisers believe that the Secretary of State's late disclosure has revealed further serious breaches of duty on her part going back as far as 2017. They say that it has now become clear that she had an inadequate policy about how to ascertain whether a foreign state objected to the giving of video-link evidence from its territory in immigration appeals by its nationals who had been deported from the United Kingdom. This complaint was developed in some detail in the skeleton argument filed on behalf of Mr Yilmaz on 9 February. Of course, the points raised had not been pleaded in his judicial review grounds.

11. The result of this complicated and extremely unfortunate history is that when the matter came before this Court for hearing on 23 February there was considerable confusion as to what issues remained live in the proceedings and which it was necessary or appropriate for us to decide. After hearing extensive submissions on that question from Mr Manjit Gill QC for Mr Yilmaz, Mr Ramby de Mello for Mr Arman and Mr Steven Kovats QC for the Secretary of State, we adjourned the hearing and said that we would give our decision in due course.

12. In summary, our decision is as follows. We consider that those parts of each claim seeking public law remedies, essentially declarations, are now academic and should be dismissed for that reason. There are also claims for damages which are not

academic and, in the particular circumstances of this case, it is right to allow them to be pursued in the present proceedings. We are not in a position to decide any aspect of those claims at this stage. They are not fully particularised will be remitted to the High Court for determination. Both claimants will need permission to amend their damages claims, which were understandably not the focus of the original grounds. Any such applications should be made within 42 days of this judgment being handed down, and a case management hearing should be fixed in the High Court to determine that and other issues.

13. We give further details of our reasoning below, but we should first emphasise the gravity of the failure to disclose, prior to the hearing before Mostyn J, what the Home Office had been told about the attitude of the Turkish Government to the giving of evidence by video-link from the Embassy. Mr Peck explained that the failure had occurred because the responsible official within the Home Office wanted to await a more formal statement of the Turkish Government's position, and the outcome of further possible attempts to persuade it to modify it. He did not think it necessary to inform the Government Legal Department until that had occurred. But Mr Peck acknowledged that that approach was quite wrong and offered an unreserved apology to the court and the claimants, which was repeated before us by Mr Kovats. He explained what steps were being taken to prevent anything similar happening again. We accept the sincerity of that apology, but it is particularly regrettable that the original non-disclosure has been followed by the delays in giving the necessary further disclosure referred to above. Mr Kovats explained that the responsible staff had underestimated the extent of the task required, but he acknowledged that that was no excuse for the breach of court orders. He was right to do so. If a party finds it impossible to comply with an order they must forthwith apply to the Court for an extension, with a full explanation of why it is necessary. We hope lessons have been learnt from this sorry episode.

YILMAZ

14. We note that this appeal was listed before us as "*GY (Turkey)*". We enquired whether there was any legitimate basis for anonymisation. Mr Gill explained that the evidence contained some information about the health of Mr Yilmaz's daughter, who is a minor. There is no need for any reference to that evidence before us, and we do not believe that the claim should remain anonymised in this Court.

15. We start by identifying the nature of Mr Yilmaz's claim as pleaded. Section 3 of the claim form identifies the decision to be judicially reviewed as:

> "1) the Respondent's continuing exclusion of the Applicant from the UK and the continuing failure to return Applicant to the UK to prepare and present his appeal before the FTT;
>
> 2) the Respondent's continuing reliance on, and maintenance of, the said 94B decision of 28 October 2015 and the deportation of 9 March 2017 for the purpose of continuing to exclude the Applicant from the UK."

The date of the decision challenged is given as "17 June 2020 and on-going". That is the date of the response to the claimant's pre-action protocol letter, in which it was

stated (among other things) that the Secretary of State did not propose to return Mr Yilmaz to the United Kingdom.

16. The details of the remedies sought were given as follows:

> "1) A declaration that D's continuing reliance on and maintenance of the unlawful s94B certificate of 28 Oct 2015 and of C's unlawful pre-appeal deportation of 9 March 2017, and D's continuing exclusion of C from the UK and D's continuing refusal/failure to return C to the UK to prepare for and attend his substantive deportation appeal hearing, are all unlawful and in breach of EU law and Art 8 ECHR and D's policies on the deportation of Turkish nationals;
>
> 2) A declaration that D has unlawfully violated C's substantive rights under EU law and has failed to provide proper safeguards including the right to contest the deportation in an in country appeal under EU law which has a suspensory effect (on deportation), and a right to present his appeal in person and/or a right to return to the UK to do so;
>
> 3) An injunction that D must return C to the UK, to continue to prepare for and to attend his substantive appeal against deportation in person;
>
> 4) A declaration that D's position (which has been adopted by the FTT) that there should be no separate preliminary hearing in the FTT in advance of the full appeal of all questions relating to the legality and effectiveness of an country appeal, is unlawful;
>
> 5) Damages, including aggravated and exemplary damages
>
> 6) An expedited hearing and abridgement of time;
>
> 7) Such other or alternative relief as may be appropriate."

17. Grounds for judicial review were included with the claim. They identified the challenges as (a) the continued exclusion of Mr Yilmaz, (b) the continuing failure to return him to prepare for and be present at his appeal, (c) the continuing reliance on, and maintenance of, the certification under section 94B of the 2002 Act and the deportation of 9 March 2017, all for the purposes of continuing to exclude him. They repeated the relief sought. Three grounds of claim were identified, which can be summarised as follows:

(1) Requiring Mr Yilmaz to appeal from abroad was contrary to his rights under the 1963 Association Agreement between the European Economic Community and Turkey ("the Ankara Agreement").

(2) The continued refusal to return Mr Yilmaz to the United Kingdom to prepare for and appear in person at his appeal was contrary to article 8 of the European

Convention on Human Rights for reasons which included (a) the delay in setting up a system for hearing appeals from Turkey; (b) difficulties in the preparation of the appeal, in particular in relation to the preparation of an expert report from a social worker; and (c) deficiencies in the procedure for hearing evidence over video-link from the British Embassy in Ankara.

(3) An appeal via video-link would be contrary to the Government's obligations under the General Data Protection Regulation.

18. We are satisfied that the only live pleaded claim in Mr Yilmaz's case is the claim for damages. The claims for declarations and injunctive relief are academic. The section 94B certificate has been revoked. Mr Yilmaz has returned to the United Kingdom and is able to pursue an in-country appeal against the refusal of his human rights claim. A court will not generally deal with academic issues in claims for judicial review although they retain a discretion to do so in exceptional circumstances. We do not consider that there is a good reason for this Court to deal with the public law issues that arise.

19. As we have said, Mr Gill in his skeleton argument raised issues arising from the Secretary of State's late disclosure about her policy about, or approach to, obtaining permission from foreign countries to allow evidence to be given via video link in out-of-country appeals. But that too ultimately goes to the question, which is no longer live, whether Mr Yilmaz should be allowed to pursue an in-country appeal. We recognise that this could possibly be an issue in other cases, but we do not believe that that is a sufficient reason for it to be pursued by way as a public law claim in this case. There are also other obstacles to our dealing with the issue. It would require an amendment to the grounds of claim: it is not acceptable for substantive claims to be made by way of skeleton argument – see *R (AB) v Chief Constable of Hampshire* [2019] EWHC 3461 (Admin) at para. 113, and now para. 11 of the Practice Direction 54A – Judicial Review. In view of its very late emergence the issue was not in a state to be tried and would require an adjournment in any event.

20. For those reasons we dismiss the claim for the relief claimed at paras. 1- 4 and 7 of Mr Yilmaz's claim form. The relief sought at para. 6 is no longer relevant and is refused.

21. We turn to the claim for damages. This was not of course the focus of the original claim and it is exiguously pleaded. The legal basis upon which damages (including aggravated and exemplary damages) are sought is not identified, nor are there any particulars of the heads of loss or of the facts which are said to have caused that loss. That is not necessarily a matter of criticism since if the primary claim had had to proceed, and a finding had been made that Mr Yilmaz had been unlawfully excluded, the normal practice would have been to remit any claim to be heard on another occasion, and possibly in a different forum. Nevertheless, it seems plausible that Mr Yilmaz may have a viable claim for damages arising out of, to put it compendiously, his deportation and/or his subsequent exclusion. Mr Gill recognises that the claim for damages is liable to be affected by the outcome of his appeal to the FTT.

22. Mr Kovats submitted that the appropriate way for Mr Yilmaz to advance his claim for damages would be to bring fresh proceedings in the High Court once the appeal proceedings in the FTT are concluded. He said that the Secretary of State would

undertake not to take any limitation point if such proceedings were promptly commenced at that stage. In other circumstances that might well be the appropriate course. But Mr Gill was opposed to it. Given the unusual history of this case we do not think that it would be right to make Mr Yilmaz start fresh proceedings, not least, though not only, because of the difficulties and delays that would be involved in his having to make a fresh application for legal aid. In our view the damages claim should be determined as an issue within the present judicial review proceedings: that may be unusual, but Mr Kovats accepted that there was no formal procedural obstacle. We see no reason, however, why it should be retained in this Court, and we will remit the claim to the High Court.

23. The first step in progressing that claim will be for it to be properly pleaded. We direct that Mr Yilmaz file and serve on the Secretary of State within 42 days amended grounds of claim re-pleading his claim as a private law claim for damages. That will mean identifying the acts which are said to have caused him loss, the basis on which those acts are said to have been unlawful and the legal and factual basis of the claims to loss flowing from those wrongs. We note that Mr Gill made it clear that Mr Yilmaz now wishes to make a claim for false imprisonment arising out of his detention on two occasions before his deportation.

24. The unlawfulness relied on will no doubt consist of some or all of the same matters which were relied on in the original grounds in support of the public law claim, together perhaps with the new matters arising from the Secretary of State's disclosure; but their relevance will be as the basis of a damages claim, and they will require determination only so far as necessary for that purpose.

25. The application for permission to amend should be dealt with by the High Court at a case management hearing to be held following the service of the amendment application. One issue which the Court will wish to consider once the application to amend is disposed of is whether the proceedings should be stayed pending the outcome of the FTT appeal.

26. One particular issue arises about amendment. We have no doubt that on the claim form as it stands the claim for damages is limited to events occurring on or after 17 June 2020: see para. 15 above. Mr Gill said that that had not been the intention, and that that could be discerned from the terms of the pleaded grounds. Be that as it may, we see no purpose in requiring Mr Yilmaz to bring distinct proceedings as regards the period prior to that date: all the issues, and appropriate periods of time, relating to damages should be considered in the same proceedings. Accordingly, permission to amend should not be refused on the basis only that the cause of action accrued prior to 17 June 2020. That renders immaterial a point taken by Mr Kovats that the Secretary of State took no separate public law decision on 17 June 2020 in any event.

27. As long ago as 19 November 2015 Mr Yilmaz applied for permission to seek judicial review of the issue of the section 94B certificate, but permission was refused. That cannot be an obstacle to his private law claim for damages, even if there was some overlap in the issues raised: see *R v Secretary of State for the Environment, ex p. Hackney LBC* [1984] 1 WLR 92. It was no part of Mr Kovats' submissions that the pursuit of a claim for damages would in the circumstances of this case be an abuse.

ARMAN

28. There is a preliminary point in Mr Arman's case too. As already noted, he has for some time been out of contact with his solicitors and his family, who have expressed concerns about his wellbeing. It is of course to be hoped that he will be found soon, but in the meantime Lewis LJ on 10 February 2022 made an order joining his brother Ahmet Arman as a claimant.

29. Again, we start with the claim form. The decisions challenged in section 3 are: (1) the decision of the Secretary of State to remove him on 10 June 2017; (2) the continued failure to return him to the United Kingdom; (3) the failure to apply EU law; and (4) the certification of his human rights claim under section 94B of the 2002 Act. The relief sought was:

> "1) A declaration that the Defendant had failed to apply EU law principles to the Claimant's deportation as a foreign criminal and that the deportation and the section 94B certification are unlawful;
>
> 2) A declaration that the Defendant, in breach of EU law, failed to provide the Claimant with procedural safeguards due to him under EU law including a right to challenge the deportation on EU law grounds and to present his defence on appeal in person;
>
> 3) A declaration that the removal of the Claimant from the UK and the failure to return the Claimant to the UK are unlawful and breached EU law;
>
> 4) An extension of time, if necessary to challenge the section 94B certificate. The failure to apply Decision 1/80 to the deportation and removal of the Claimant from the UK and the failure to implement EU law properly in implementing the deportation/removal of the Claimant amounts to an exceptional reason why the Court should grant an extension of time. The issues which arise in this case are test points which the Court is requested to determine as it affects many Turkish nationals who are deported from the UK. There will be no prejudice to good administration if an extension of time is granted.
>
> 5) Expedition with an order for the abridgement of time for the service of the [Acknowledgement of Service];
>
> 6) Disclosure of Home Office policies on Article 14;
>
> 7) Damages: an order that the claim for damages to be deferred and if necessary to be transferred to the QBD.
>
> 8) Costs
>
> 9) Any other relief including a reference to the [Court of Justice of the European Union] if appropriate."

The references to "EU law" and to Decision 1/80 are to the Ankara Agreement.

30. An application to amend to include a claim for damages during the time when Mr Arman was in immigration detention was refused by the Upper Tribunal prior to the claim being transferred to the High Court.

31. The grounds relied primarily on the alleged breach of Mr Arman's rights under the Ankara Agreement but also alleged that it was contrary to article 8 of the ECHR for him to have to pursue his appeal from outside the United Kingdom because he suffers from learning difficulties and/or because of the delay in hearing the appeal.

32. In his oral submissions Mr de Mello made it clear that he too wished now to rely on the facts emerging from the Secretary of State's disclosure. He also raised concerns about whether the FTT would be prepared to address his argument that Mr Arman had rights derived from the Ankara Agreement which imposed a different, and stricter test that must be satisfied before he could be deported.

33. In our view it is appropriate to deal with Mr Arman's claim in the same way as Mr Yilmaz's and for substantially the same reasons. Accordingly, the claim for public law remedies under heads 1-3 and 10 of his grounds should be dismissed. The applications under heads 4-6 and 9 are no longer relevant and those are refused. The claim for damages under head 7, which likewise now requires pleading in full, will be remitted to the High Court with a direction that an amended pleading be filed and served within 42 days. If Mr Arman intends to seek damages for his pre-deportation detention, he will have to persuade the High Court that his claim can be entertained since such an application has already been made once and refused: see para. 30 above.

34. Subject to any direction to the contrary, there should be a single case management hearing covering both cases, without prejudice to whether they should continue to be linked thereafter.

35. We note Mr de Mello's concerns about what approach the FTT may take to his argument about the Ankara Agreement, but that is not a matter for this court.

36. We should note that Mr Arman too brought previous judicial review proceedings, in his case in April 2018 seeking permission to challenge the original deportation decision, and that permission was refused, both on the basis that the claim was substantially out of time and on the basis that he had an alternative remedy in the shape of his appeal to the FTT. That cannot be a bar to his pursuing his private law claim for damages.

OTHER MATTERS

37. There are three other matters with which we should deal.

38. First, it will be apparent from what we have said already that it is very desirable that both claimants' appeals to the FTT should be heard as soon as possible. We are conscious of the pressure of work in the Immigration and Asylum Chamber but we would hope that a way could be found to achieve this – subject, of course, to the difficulties which will arise if it continues to be impossible to trace Mr Arman.

39. Secondly, in his judgment refusing permission to appeal in these cases (which he gave permission to be reported) Mostyn J made observations to the effect that the *obiter* views expressed by Lord Wilson in *Kiarie* at paras 70 – 73 about the obstacles to a fair hearing by video-link in cases of this character had now been overtaken by the experience of the courts in hearing evidence online during the pandemic. Those observations summarised the evidence deployed by an intervenor in the Supreme Court, Bail for Immigration Detainees, and undoubtedly read as from another age given the advances in technology in the intervening years. Mostyn J's comments are broadly in line with my own at paras. 197-199 in *R (FB (Afghanistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, [2021] 2 WLR 839. It must, however, be for the First-tier Tribunal and the Upper Tribunal, with their specialist expertise, to consider, and where appropriate give guidance on, what fairness requires in the context of evidence given by remote means in out-of-country appeals of different sorts. The issue was recently considered by the Upper Tribunal in *Agbabiaka (evidence from abroad, Nare guidance) Nigeria* [2021] UKUT 286 (IAC) including the question of consent of foreign governments to evidence being given from their territory. Mr Gill's skeleton argument was critical of one aspect of the guidance, but we heard no submissions on the point and say nothing about it. The First-tier Tribunal has itself given recent guidance. The use of remote technology in legal proceedings, including hearing evidence by phone or computer link, became ubiquitous in all jurisdictions during the Covid pandemic. Many reservations about its use have been dispelled but there remains a central issue about fairness and the interests of justice that is best considered on a jurisdiction by jurisdiction basis with an eye to the different types of case and participation under consideration.

40. Thirdly, we were informed by Mr Gill that the Upper Tribunal has recently decided an appeal from the First tier Tribunal – *QR v Secretary of State for the Home Department* – raising issues about the Secretary of State's policy about obtaining the consent of foreign governments to evidence being given from their territory, and that an Appellant's Notice was very recently filed with this Court. At one point in the argument it was suggested that the application for permission to appeal (and appeal if granted) should be linked with these cases. In view of our decision that does not arise. The application for permission to appeal in *QR* will be determined in the ordinary course.