



Commonwealth Legal Assistance News

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NEWSLETTER OF THE COMMONWEALTH SECRETARIAT'S CRIMINAL LAW SECTION

AUGUST 2002

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Extradition – Whether extradition barred by prior conviction for similar offence in requested country – Whether surrender to the requesting country violated fundamental human rights - Canadian Charter of Rights and Freedoms, sections 6 and 7; treaty of extradition between the United States and Canada, Article 4; Canadian Extradition Act – (Canada)

The appellant, a Canadian citizen, went on vacation from Canada with his family to Florida in the United States. It was alleged that during the vacation, he had sexually battered his seven year-old daughter.

The facts were that one day during their vacation, the appellant's wife left him and the children in their motor home to go out. When she returned a few hours later, she found the appellant with his penis exposed and his daughter bent over with her face in close proximity to his penis. The daughter later disclosed that there had been other incidents of sexual abuse in Ontario. The appellant's wife reported the incidents to the Florida police. Although a judge in Florida issued a warrant for his arrest, the appellant was not arrested and he returned to Canada.

When they returned to Ontario, a complaint was lodged with the Canadian police. The daughter disclosed that the appellant had subjected her to a variety of different types of sexual touching over several months. The appellant was subsequently charged with sexual assault in Ontario for conduct involving his daughter, he pleaded guilty, and was sentenced to 30 months' imprisonment, in addition to 3½ months spent in pre-sentence custody. In sentencing the appellant the judge made no reference to his Florida conduct.

The United States requested his extradition to face a charge of sexual battery upon a person less than 12 years of age, relating to the incident in Florida. The penalty for the offence is a mandatory sentence of life imprisonment without the possibility of parole. He was committed for extradition, and the Minister of Justice ordered that the appellant be surrendered to the United States, upon his release from prison. He was at the time, serving term for other criminal activity, having already served his sentence for the sexual battery in Ontario.

He appealed against the committal order, and sought judicial review of the Minister's surrender order.

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Produced by the Criminal Law Section of the Commonwealth Secretariat as a service to Member Governments

For further information or copies, please contact: The Editor, Criminal Law Section, Legal & Constitutional Affairs Division (LCAD), Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX, United Kingdom.
Tel: +44 (0)20 7747 6417/6420/6423
Fax: +44 (0)20 7839 3302
E-mail: k.prost@commonwealth.int
v.wright@commonwealth.int

Designed and printed by the Commonwealth Secretariat

At the trial in Canada, although the charge detailed in the information excluded the appellant's Florida conduct, both in terms of the date and location, the factual summary read into the record by Crown counsel to support the conviction included a brief summary of the Florida facts.

At the extradition hearing, the appellant had argued that the extradition request should be stayed because:

- (i) the offence for which his extradition was sought was not an extraditable offence;
- (ii) extradition would violate his rights under ss. 6 and 7 of the Canadian Charter of Rights and freedoms; and
- (iii) the affidavit evidence did not comply with the Extradition Act.

He argued that he had entered his guilty plea in Ontario on the understanding that it would effectively resolve the outstanding charges against him, both in Ontario and in Florida. The extradition judge rejected these contentions. Similar arguments were made in submissions to the Minister prior to the decision on surrender and rejected.

The issues before the appeal court were as follows:

- (1) Did the extradition judge err by concluding that the requesting State had presented a prima facie case?
- (2) Was the appellant's extradition barred by virtue of Article 4(1)(i) of the Treaty, on the basis that the appellant was punished in Ontario for his Florida conduct?
- (3) Would surrender of the appellant to the requesting State violate his rights as guaranteed by sections 6 and 7 of the Charter?
 - (a) As to the first question, the appellant had submitted that there was not a prima facie case against him, because the only evidence adduced at the extradition hearing was the affidavits of his ex-wife and daughter, and these did not support the charge in the Florida information. He argued also that there was no jurisdiction to amend the American charging document, and therefore the extradition judge was forced to apply the facts adduced in the charging document before him in order to determine whether a prima facie case had been presented.
 - (b) As to the second question, the appellant submitted that the extradition judge and Minister of Justice both erred by failing to find that the appellant's extradition was barred by virtue of Article 4(1)(i) of the Treaty on Extradition Between the Government of Canada and the Government of the United States of America (the "Treaty") which provides that:

"Extradition shall not be granted in any of the following circumstances:

- (i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offence for which his extradition is requested."
- (c) On the third question, the appellant submitted that his extradition infringed his rights under section 7 of the Charter, which provides that:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

In particular, he contended that his surrender would be contrary to the principles of fundamental justice, having regard both to the issue of double jeopardy and also the severity of the penalty that he would face in Florida.

Relying on the decisions of the Supreme Court of Canada in *United States of America v. Cobb* (2001), 152 C.C.C. (3d) 270 and *United States of America v. Kwok* (2001), 152 C.C.C. (3d) 225, he submitted that the extradition judge had jurisdiction to deal with the s. 7 Charter issue, insofar as s. 7 may relate to the severity of the sentence.

(d) Finally, the appellant submitted that the Minister of Justice erred by failing to properly consider that surrender would be an unjustified infringement of his rights as guaranteed by s. 6 of the Charter.

➔ **Held:** dismissing the appeal;

1. The type of mistake alleged by the appellant should not be a bar to extradition. The affidavits submitted by the requesting state in support of the extradition request stated that the offence was committed on or about a date which was different from that in the affidavit. This mistake did not cause any prejudice to the appellant. As La Forest J. said in *R. v. Schmidt* (1987), 33 C.C.C. (3d) 193 at 215-216 (S.C.C.):

"The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial, including such matters as giving proper weight to the evidence and adequate consideration of available defences and the dictates of due process generally".

2. As to the question whether the appellant had already been punished in Ontario for the Florida offences, the Court held the following:

(i) *The Extradition Judge's Decision*

The appellant had submitted that the extradition judge would have found that his extradition was barred by operation of the *Treaty*, had he considered the issue. He based this submission on the extradition judge's finding that the Florida conduct was considered as an aggravating factor on sentencing, and that the sentencing was intended to "clear the deck of criminality" with respect to the appellant's conduct involving his daughter. In the Court's view the extradition judge was correct when he expressed the view that his role in the extradition proceeding was a limited one limited to determining whether there is a prima facie case that an alleged extradition crime was committed and, if so, to order the fugitive to be committed for surrender, and that questions of *autrefois acquit* or *res judicata* are matters for the consideration of the executive, subject to ultimate judicial review if those considerations are not properly resolved

The record of the sentencing of the appellant that was before the extradition judge did not support a finding that the sentencing judge took into consideration the appellant's conduct towards his daughter in Florida. In any event, the conclusion of the extradition judge was correct when he did not apply Article 4(1) of the Treaty notwithstanding his finding that the appellant was punished in Ontario for the offence for which his extradition was requested.

(ii) *The Minister's Decision*

As stated by Laskin J.A. in *United States of America v. Whitley* (1994), 94 C.C.C. (3d) 99 at 111 (Ont. C.A.), aff'd, 104 C.C.C. (3d) 447 (S.C.C.), "[t]he comments of the extradition judge are not, of course, binding on the Minister." Nor are the extradition judge's "findings" binding on the appeal court. It should also be noted that the extradition judge did not have the benefit of all of the information that was before the Minister, including the documents submitted by the Crown counsel who appeared before the sentencing judge to the effect that it was not intended that the guilty plea encompass the Florida conduct.

Moreover, there was no information on the record to support the appellant's statement that he understood that a plea of guilty to the Ontario sexual assault charge would "effectively end" all the outstanding charges against him.

There was no error on the part of the Minister in concluding that Article 4(1)(i) of the Treaty did not apply in the circumstances of this case.

3. On the question whether the surrender of the appellant would violate his rights under s. 7 of the Charter, the Court held that the extradition judge was correct in not applying s. 7 in the circumstances of this case. As expressed by Arbour J. in *Cobb*, the extradition judge's jurisdiction to grant Charter remedies is generally limited to the circumscribed issues relevant at the committal stage of the extradition process, including determining whether the hearing is conducted in accordance with the principles of fundamental justice. However, when it comes to considering whether the severity of the potential penalty to be imposed would breach s. 7 of the Charter, that issue is not for the extradition judge to determine but should be left for the Minister's consideration. In the present case, the Minister considered whether the appellant's s.7 rights would be affected and concluded that in the particular circumstances of the case, a decision to surrender J.H.K. would not "shock the conscience of Canadians" such that it would infringe section 7 of the Charter.

The test to be applied in assessing whether surrender of the appellant in the present circumstances would violate s. 7 of the Charter on account of the penalty that the appellant would face in the foreign jurisdiction was set out by McLachlin J. in *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 (S.C.C.). McLachlin J. said at p. 55:

"The test for whether an extradition law or action offends s. 7 of the Charter on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state "sufficiently shocks" the Canadian conscience: *Schmidt*, per La Forest J. at p. 214. The fugitive must establish that he or she faces "a situation that is simply unacceptable": *Allard*, supra, at p. 508. Thus, the reviewing court must consider the offence for which the penalty may be prescribed, as well as the nature of the justice system in the requesting jurisdiction and the safeguards and guarantees it affords the fugitive. Other considerations such as comity and security within Canada may also be relevant to the decision to extradite and if so, on what conditions. At the end of the day, the question is whether the provision or action in question offends the Canadian sense of what is fair, right and just, bearing in mind the nature of the offence and the penalty, the foreign justice system and considerations of comity and security, and according due latitude to the Minister to balance the conflicting considerations".

While decisions of the Minister are subject to judicial review, the courts should only intervene in

exceptional circumstances: *Republic of Argentina v. Mellino* (1987), 33 C.C.C. (3d) 334 (S.C.C.).

Canadian courts had in a number of judgments, upheld decisions of the Minister to surrender fugitives to the United States to face lengthy prison terms: *United States of America v. Whitley*; *United States of America v. Jamieson* (1994), 93 C.C.C. (3d) 265 (Que. C.A.), rev'd, 104 C.C.C. (3d) 575 (S.C.C.).

4. As to whether surrender would violate the appellant's rights under s. 6 of the Charter, Canadian courts have confirmed on numerous occasions that extradition, while a prima facie infringement of the right to remain in Canada guaranteed by s. 6(1) of the Charter, is a reasonable limit that can be justified under s. 1 of the Charter: see *United States of America v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.); *United States of America v. Burns*.

However, a person whose extradition is sought can submit that, in the circumstances of the case, a

surrender order would be an unjustified infringement of s. 6(1) if, for example, prosecution in Canada would be an equally viable option: see *United States of America v. Kwok*, at 256 (S.C.C.).

In *Cotroni*, the Supreme Court upheld the extradition of two fugitives as being a reasonable limit on their rights under s. 6(1) of the Charter even though the fugitives had never been in the requesting state, all of their alleged criminal activities had been carried out in Canada, and both could have been charged with criminal offences in Canada.

The Minister was correct in concluding that prosecution in Canada was not a viable option for conduct that occurred in Florida. The surrender of the appellant in these circumstances represented a reasonable limit on his rights under s. 6(1) of the Charter.

USA v. J.H.K., June 2002 Docket Number C33326; C33327, Court of Appeal for Ontario

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Mutual Assistance in Criminal Matters – whether Requested country under obligation to disclose the contents of request without the consent of the Requesting country - whether Requested Country under obligation to obtain assurances that the requested information would not be transmitted to a third party country with interest in the case – Criminal Justice (International Co-operation) Act 1990, S.4 (2A); Treaty of Co-operation between the UK and Nigeria, Article 9; The Commonwealth Scheme on Mutual Assistance in Criminal Matters (the Harare Scheme); the European Convention on Mutual Assistance in Criminal Matters, Article 2; - (United Kingdom)

A is the son of the late Nigerian dictator, General Sani Abacha. B is his business associate. They were accused by the present government of Nigeria (FGN) of being fraudulently involved in two large transactions involving state money and dishonestly receiving state money in cash. A and B admitted receiving US\$750million in cash, which was paid into Nigerian bank accounts and then laundered through European bank accounts controlled by

them. They paid this money back and contended that they were holding it for "State and security purposes". They faced criminal charges in respect of their receipt of the cash in Nigeria and in Switzerland for money laundering. The FGN and the Swiss authorities requested the United Kingdom authorities' assistance in obtaining evidence in connection with those criminal proceedings, under section 4 of the Criminal Justice (International Co-operation) Act 1990, sub-section (2A).

A and B applied to the High Court in the United Kingdom for judicial review of the decision of the Secretary of State for Home Affairs to transmit the evidence to the Swiss and Nigerian Authorities. In the case of the Swiss request A and B contended that the Secretary of State should only have agreed to transmit the evidence on undertakings which ensured that it could not be used by the FGN who were a civil party to the Swiss criminal proceedings. In the case of the FGN request, the contentions were that there was procedural unfairness because the Secretary of State refused to disclose the request or the FGN's replies to their representations and that the first of the two statutory conditions was not satisfied and/or that in his discretion he should not have acceded to the request. The FGN appeared as an interested party on the application relating to its request.

The FGN Request.

There is a co-operation treaty between the FGN and the UK concerning the investigation and prosecution of crime which prescribes in Article 9 that parties "shall to the extent requested use their best efforts to keep confidential a request and its contents". Also both the treaty and the Commonwealth Scheme on Mutual Assistance in Criminal Matters require the requesting country not to use the information provided by the requested country for other purposes without consent.

One of the transactions for which A and B were being investigated was called the "Ajaokuta" transaction. It involved a company beneficially owned by A and B. It bought a number of bills of exchange guaranteed by the Central Bank of Nigeria which were then sold to the Ministry of Finance of Nigeria, on the instructions of General Abacha, leaving the company with a profit of about DM500m. The FGN alleged that this was a corrupt transaction.

The second transaction, called the "Vaccines" transaction, involved another company incorporated in England and also beneficially owned by A and B. It sold vaccines to the Nigerian family support programme, of which General Abacha's wife was the President, at an alleged profit of US\$80m. Again, the FGN alleged that this was a corrupt transaction.

A and B learnt of the FGN's request to the UK through the press. Their demand for a copy of the request was refused by the Secretary of State because the FGN would not consent. Nevertheless, they tried unsuccessfully to convince the Secretary of State not to accede to the FGN's request.

In the meantime, A and B had been trying in Switzerland to obtain a restriction on the use to which the FGN could put the evidence obtained in the Swiss investigation. Also, in Nigeria, B asked the Federal High Court to restrain the FGN from pursuing criminal and other proceedings against him.

Finally, A and B were provided with a redacted version of the FGN request without prejudice to the Secretary of State's contention that there was no obligation to provide this document

Procedural Unfairness

Counsel for A and B argued that although there was no duty on the Home Secretary to disclose the request, on the facts of this case, fairness demanded disclosure. They argued that there was no confidentiality in the request because its existence had already been reported in the press. Their counsel also argued that Article 8 of the ECHR was

engaged because the implementation of the request would be an interference with their private life which included their business, and correspondence. Counsel argued that although Article 8 did not contain any explicit procedural requirements, the European Court of Human Rights had held in *TP and KM v. the UK* (application no. 289435/95) that the decision-making process involved in measures of interference must be fair such as to afford due respect to the interests safeguarded by Article 8.

The Swiss Request:

The facts are that on 14 August 2000 a Swiss Magistrate submitted a request for mutual assistance to the Secretary of State asking for details of specified deposits of money made at banks in London between 2 April 1996 and 12 January 1998.

A and B argued that the Secretary of State before transmitting the documents to Switzerland, should have sought and obtained an undertaking to prevent their use by the FGN. In exercising his discretion as to whether or not to transmit material to the requesting State the Secretary of State should have weighed all the competing interests for and against transmission so as to act as a safeguard against an abuse of the international mutual assistance process by foreign Governments (*Zadari v. Secretary of State* [2001] EWHCA ADMIN 275 Paragraphs 24- 26 and 29 - 30).

The Secretary of State contended that he had no legal obligation to obtain an undertaking from the FGN, and that in any event there was already in existence an undertaking from the Swiss magistrate that "no document or other information obtained will be used other than in criminal prosecutions in Switzerland arising from investigations set out in the letter of request without the prior consent of the Secretary of State for the Home department". Therefore he was entitled to authorize transmission. A and B argued on the other hand that the Swiss magistrate's undertaking was worthless as it bound only the Swiss and did not affect the FGN's status as a civil party entitled to have access to and take copies of any transmitted material.

➤ Held:

1. As to the issue of procedural fairness, the court assumed, without deciding, that implementation of the FGN request would or might have involved some interference with A and B's rights under Article 8, bearing in mind that such interference may be justified if it was in accordance with law and necessary for the prevention of crime or the protection of rights and freedoms of others. Also, the section 4 process is not a trial. It leads only to the transmission of evidence to the

requesting State where, if it is to be used, one can assume that the criminal defendant will have the opportunity of answering it. Moreover, such requests are made by friendly, foreign countries with whom the UK have treaty or similar obligations of mutual co-operation. The expectation must therefore be that the UK will comply with the request unless there are compelling reasons for not doing so and that it will do so as quickly as possible. Any requirement for procedural fairness must be fashioned with those considerations firmly in mind.

The court rejected the complaint of unfairness. The history of the case indicated that A and B had ample opportunity to make representations to the Secretary of State as to why he should not accede to the FGN request. They did and the Secretary of State considered them in the light of the FGN's response to them. Because the request contained confidential information there was a good reason for not disclosing it to A and B. Besides, A and B knew which transactions the Nigerian authorities were investigating and were able to make a prompt response to put their case. It did not seem that they suffered any real prejudice by not seeing the request or by not seeing the FGN's actual responses to their representations, the substance of which they were given by the Treasury Solicitor. The Secretary of State's duty is not to conduct a criminal trial on paper or to decide disputed questions of foreign law before making his decision. The process which led to his decision was entirely fair.

2. As to the Article 8 argument, in the court's view, the Secretary of State was right to accept the FGN's contention that it had not promised that those who returned stolen money would not be prosecuted and that this was a matter which was already before and should be decided by the Nigerian courts. Also, the abuse of process argument did not afford any ground for challenge of the Secretary of State's decision.

Once the requesting State has identified the offence and certified that it has been committed or that there are reasonable grounds for suspecting that this is so, the statute confines the Secretary of State's role to considering whether the nature of the offence identified involves serious or complex fraud. The Secretary of State does not have to go behind the certificate to satisfy himself of the statutory conditions.

Having considered each of the general points raised by A and B, the Court concluded that the Secretary of State's discretion was correctly exercised. The allegations made raised issues of foreign law or procedure which the Secretary of State could not possibly be expected to resolve. If there was anything in these allegations they should be raised

with and considered by the courts or authorities in the countries concerned. They could not be used as the basis for further delaying the implementation of the Secretary of State's decision which the court considered to be lawful, to provide the co-operation which the requesting State was entitled to receive and the United Kingdom was obliged to provide.

3. As regards the Swiss request, the Court had to decide the following questions:

- (i) Was there a legal obligation for the Secretary of State to obtain an undertaking concerning the use of the transmitted material?
- (ii) Can the December 2000 decision to transmit be justified on the basis of the 3 October undertaking and other matters?

(i) As to the first question, the court decided that neither section 2 of the Criminal Justice Act 1987 nor the 1990 Act requires the Secretary of State to obtain such an undertaking about the use to which the transmitted material can be put before transmission can be authorised. This is in sharp contrast for example with the provisions of the Harare Scheme (which do not apply to the Swiss request) which limit the use to which the transmitted material can be put.

Section 4 (2A) contains two express pre-conditions which have to be met before information can be supplied. If Parliament intended that undertakings about the use of the material requested should be obtained as a pre-condition to transmission, this would have been expressly stated in the legislation.

Thus, there was no legal obligation for the Secretary of State to obtain an undertaking in this case, notwithstanding that the absence or presence of such an undertaking might in appropriate cases be a relevant matter to the exercise of the Secretary of State's discretion.

(ii) As to the second question, even if in the circumstances of this case some form of undertaking had to be sought before transmission could be authorized, the Secretary of State obtained on 3 October an undertaking by which the Swiss Magistrate undertook that no document or other information obtained as a result of the request would be used other than in criminal proceedings arising from the investigation set out in the letter of request without the prior consent of the Secretary of State.

There is nothing unusual in a legal system proceeding on the assumption that documents disclosed in an action will not be misused by a party who receives them and that there will be policing by the courts of the country in which the proceedings are being conducted. In this case the Secretary of State had told A and B's solicitors that

the use of the documents transmitted was a question for Swiss law and that there was no reason to believe that the Swiss authorities would not perform their duties properly.

A and B had also contended that the policing powers of the Swiss Court was of limited, if any, use, especially as it could only be enforced after the collateral use had occurred and might not cover breaches that occur outside Switzerland. But, the weakness of their position was shown by the fact that they would have been content if the FGN had unequivocally undertaken not to use the documents or, if the Court had ordered that any transmission pursuant to the Swiss request would be subject to a condition to that effect. In either of those events, it could only have been the Swiss authorities who could have policed such an order and the applicants were implicitly accepting that they would have been ready, willing and able to let them do so. By parity of reasoning, the undertaking given by the Magistrate would also be effectively policed.

In any event, a court "should not shut its mind entirely to considerations of comity": *R v. Secretary of State for the Home Department* [1988] QB 994 at 1004). The Secretary of State was right to hold that the question of misuse of material by the FGN in the light of the October 3 undertaking was a matter for the Swiss authorities.

The court did not believe that the Secretary of State's decision in relation to the Swiss request could be faulted.

Mohammed Sani Abacha and Abubakar Bagudu v. The Secretary of State for the Home Department and the Federal Republic of Nigeria (Interested Party), [2001] EWHC Admin 787

Application for asylum – what constitutes well-founded fear of persecution – UN Refugee Convention (UK)

B, a Turkish national, applied for asylum in the UK two days after he arrived clandestinely in that country. He based his claim on the allegation that being an Alevi Kurd and a supporter of the PKK, he was persecuted in Turkey and had a well-founded fear that he would be persecuted by the Turkish authorities if he was returned to Turkey. The Secretary of State refused his application and he appealed to the Immigration Adjudicator, who also refused his appeal. The Immigration Appeals Tribunal also refused his further appeal. He then appealed to the Court of Appeal.

In refusing his application, the Immigration Adjudicator found that although B was a

sympathiser of the PKK he was not a member of the group and did not take any active part in the organisation. The Adjudicator refused B's allegation that he had been tortured when arrested for participating in demonstrations. He held that he did not find any particular reason why B should have been singled out for any particular treatment while he was detained with others.

B's principal ground of appeal to the Immigration Tribunal was that the Adjudicator had failed properly to take into account the background evidence which, showed that "suspected low level activity is sufficient to compel the Adjudicator to the conclusion that the appellant has a well-founded fear upon return". In particular, in view of the background evidence, once the Adjudicator had accepted (as he did) that B had been detained by the authorities, it was irrational to reject his evidence that he suffered ill-treatment during his detention.

The Tribunal in considering the submitted background evidence, concluded that the demonstration that B alleged led to his last detention in September 2000, did not in fact take place.

It found that although the leader of the PKK had been tried, convicted and sentenced to death the death sentence had been suspended by order of the European Court of Human Rights and that hostilities against the Turkish government had been suspended by the PKK.

In his appeal to the Court of Appeal, B's Counsel argued that it was not reasonably open to the Tribunal to reject B's evidence of ill treatment, and that the Tribunal had no reasonable basis for overturning the Adjudicator's finding that there had been a pro-PKK demonstration on 15 August 2000, and that the appellant had participated in it.

He also submitted that the findings by both the Adjudicator and Tribunal that B's account of ill treatment was incredible were irrational. They failed to take account of the background evidence, and the reasons they gave for rejecting B's account did not bear scrutiny.

➤ **Held:** dismissing the appeal;

1. Whether a Turkish Kurd was at risk of persecution in Turkey, depended on the facts of each individual case. In making an assessment of those facts, findings as to the past experiences of the appellant are usually of critical importance. If an appellant has been subjected to persecution in the past, this will be cogent evidence that, in the absence of a material change of circumstances, he will be at risk of persecution if he is returned. For

this reason, it was critical in this case for the Adjudicator and Tribunal to have made a decision as to whether B had or had not been tortured during his two periods of detention. If they had accepted his evidence on this point, they were not likely to have dismissed his appeals. It follows that what lies at the heart of the appeal to the Court of Appeal was the challenge to the rejection by the Adjudicator and the Tribunal of B's evidence on this point.

2. B's counsel did not dispute that, taken by itself, the background evidence could not prove that B was likely to have been tortured during his detention. The Court did not accept the submission that the background evidence raised a "presumption" or even a "prima facie case" that B's account of torture during his two periods of detention was true. That evidence was important as part of the background. It had to be considered. It was certainly consistent with the appellant's account. But it did not establish the truth of the evidence. B's credibility lay at the heart of the appeal to the Adjudicator and the Tribunal. The Adjudicator had the benefit of his oral evidence. He did not believe that B had been tortured during his periods of detention, and he gave reasons for not believing B, including that B would have left Turkey earlier if he had a well founded fear of persecution. He claimed to have been tortured in August 1996, and yet continued thereafter to take part in PKK demonstrations albeit at a very low level.

In the judgment of the court, the Adjudicator was entitled to reject the evidence of torture for the reasons that he gave which, in combination, provided a rational basis for rejecting B's account of torture.

3. As regards the complaint against the decision of the Tribunal, the court said that although the Tribunal did not deal with the Adjudicator's findings in relation to the first detention, it explicitly upheld the Adjudicator's finding in relation to the second detention, and there was nothing to indicate that it took a different view as regards the first detention. The tribunal was entitled to uphold the Adjudicator, and to conclude that the background evidence did not shake his findings as to the credibility of B's account.

In fact, the Tribunal took the view that the background evidence reinforced the Adjudicator's overall conclusion that the appellant did not have a well-founded fear that he would face persecution for a Convention reason if he returned to Turkey, because, in view of the ceasefire, the demonstration of 15 August 2000 could not have taken place. If that demonstration did not take place, that further undermined B's credibility, since he had said that he had participated in it. In reaching its decision, the Tribunal endorsed the essential reasoning of the Adjudicator, which was that the appellant was a low-level supporter of the PKK in whom the authorities would have no interest. This conclusion was reinforced by the Tribunal's appreciation of the effect of the ceasefire, and their conclusion that the demonstration did not take place. But there was no reason to suppose that the Tribunal would not have endorsed the view of the Adjudicator even if they had agreed with the Adjudicator about the demonstration of 15 August. It follows that there had been no error of law in the Tribunal's reasoning.

Bulent Avci v. Secretary of State for the Home Department [2002] EWCA Civ 977 (17 July 2002)

