Neutral Citation Number: [2006] EWCA Civ 682

Case No: C4/2002/2000

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL
Hx/44402/2001
[2002] UKIAT 03608

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2006

Before :

LORD JUSTICE BROOKE
Vice-President, Court of Appeal (Civil Division)
LORD JUSTICE SEDLEY
and
LORD JUSTICE HUGHES

- -

Between :

DK	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
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Ms F Webber (instructed by **S J Solicitors**) for the **Appellant**
Ms S Broadfoot (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date : 10th May, 2006

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Judgment

Lord Justice Brooke:

1. This is an appeal by DK from a determination of the Immigration Appeal Tribunal ("IAT") on 9th August 2002 whereby they dismissed his appeal from the determination of an adjudicator dated 21st January 2002. The adjudicator had in turn dismissed his appeal from the decision of the Secretary of State dated 23rd May 2001 to refuse his claim for asylum. The delay in processing his appeal to this court was due to the unsettled conditions in Iraq during the period since the IAT's determination.

2. The findings of the adjudicator ran along these lines. DK is an Iraqi Kurd. He arrived in this country on 24th April 1999 at the age of 18 and claimed asylum on arrival. His fear of persecution arises from a blood feud which went back over 20 years. A family called Rash had been instrumental in implementing a plan, devised by Saddam Hussein's regime, to remove Iraqi Kurds from their villages and place them in a camp. The project went ahead in spite of the protests which DK's father made to Gaphora Rash, and A and his family moved under sufferance to the camp.

3. DK's father received the support of the Peshmergas in his quarrel with Rash, and in 1981-2 Rash was killed, alongside his cousins. It appeared that the Peshmergas were responsible, but the idea got about that DK's father was also in some way responsible for the killing. DK said that this was not true, and that his father did not ask the Peshmergas to kill Rash.

4. In 1990 DK's father was killed by the Iraqi security forces. DK believed that he was killed on the grounds that he had been responsible in some way for the death of Rash, who had been an agent of the Iraqi Government. The following year Rash's family tried to avenge Rash's death by attempting to kill both DK and his paternal uncle, who ran a grocery shop, but they did not pursue their plans once they realised that DK and his uncle had obtained the protection of the Kurdish Democratic Party ("KDP"). The other main political party in the Kurdish Autonomous Area ("KAA"), the Patriotic Union of Kurdistan ("PUK"), for their part supported Rash's family. DK was not himself a member of the KDP, of which one of his maternal uncles was a senior member.

5. In 1993-4 the family was forced to close the grocery shop and move to Shaqlawa. This was an area which remained under KDP control where DK felt relatively safe. His paternal uncle was killed, however, in 1994 in a fight between the PUK and the KDP.

6. DK continued to feel safe in a KDP area, but on 5th December 1998 he was shot at from a taxi. He could see the person who shot at him. It was a member of the Rash family. DK believed that this was an attempt to kill him or kidnap him. The incident was reported immediately to the police, who were given a description of the attacker and of the car in which he had been travelling. The police notified the checkpoints on the way to Suleimaniya (a town under PUK control), but the car was not spotted. The police could not provide DK with 24-hour protection, and as a result DK went into hiding and in due course left the country.

7. In his oral evidence DK told the adjudicator that his fear was of the Rash family. He felt that a truce could not be organised with this family because he was unable to see

them in order to negotiate it. If he had any means of effecting a reconciliation he would take advantage of it, but he did not know where they were currently living.

8. The adjudicator found DK's evidence reasonably consistent and reliable. He accepted that he feared the Rash family, although he was not satisfied that that family was indirectly responsible for DK's father's death at the hands of the Iraqi authorities. It appeared to the adjudicator that DK could be safe within KDP-dominated areas, and that the personal animosity directed towards his family by certain members of the Rash family did not really engage the Convention. If there were any repetition of criminal acts on the part of the Rash family DK ought to turn immediately to the authorities for appropriate protection. The local police had apparently tried to catch the perpetrator on the last occasion.

9. The adjudicator rejected the Refugee Convention claim on the basis that the Rash family were not agents of persecution. They were really no more and no less than a particular family that felt ill-disposed towards DK's family. It was the adjudicator's overall assessment that it was safe for DK to return to the KAA part of Iraq. He therefore also dismissed DK's appeal on human rights grounds, too.

10. The IAT granted permission to appeal on the grounds that there were arguable issues as to whether the KDP were capable of providing DK with adequate and effective protection from the Rash family, who were not considered by the adjudicator to be agents of persecution. At that time the IAT had jurisdiction to entertain appeals on both law and fact.

11. At the hearing before the IAT oral evidence was given by Dr Maria O'Shea, of the School of Oriental and African Studies in London, who had a particular research interest in the countries of the northern Middle East and the region's stateless minorities, particularly the Kurds. She had prepared a written report on this case in July 2001. We were told that it was placed before the adjudicator, but he does not refer to it in his determination.

12. The first part of this report described the situation within the KAA, and the way in which it was divided into the two areas over which the KDP and the PUK exercised control. In paras 8-10 of this part of her report she said:

> "8. I am of the opinion that the Kurdish parties are not able to administer the regions under their control in the manner that the Home Office seem to imagine.
>
> Lawlessness is a serious problem, especially outside the cities, and the parties often fear losing an element of their support base, be that tribal or otherwise. In a society that is still largely defined by tribal, family and latterly political, support networks, someone from an unimportant family is unlikely to be assured acceptable standards of legal or physical protection. For example, the Kurdish administration has been unable to protect women who have claimed to be at risk from 'honour' killings, indicating that Kurdish civil society is very fragile.

> 9. Administrative control of the KAA is disordered. To talk of 'the authorities' implies a homogeneity and degree of control that does not exist. The political landscape, as well as administrative control shifts constantly in the KAA, over time and from city to city and region to region. The disordered nature of the administration cannot be emphasised enough. There is no real law and order, vigilante attacks are common, and the so-called authorities are both impotent and unwilling to intervene unnecessarily.
>
> 10. Revenge killings are frequent in Iraq as a whole and appear to be on the increase in the KAA, reflecting the fragility of civil society, political and economic instability and possibly the political parties' exploitation of tribal values in order to guarantee their support bases. The administrations have been accused of collusion in such activities. I find it difficult to see how a targeted adult male could avoid an enemy's retaliation anywhere in the KAA, unless he were kept in protective custody, in which case his family would then be likely targets, as is considered normal in the culture of revenge attacks."

13. In the second part of her report Dr O'Shea discussed the particular features of DK's case, and in this respect she found herself largely in agreement with DK's maternal uncle, who had made a short statement commenting on the Secretary of State's refusal letter. He said:

> "... I would like to say that it is clear the Secretary of State does not understand how society works in northern Iraq. Whilst it is true that Mr Rash was killed nearly 20 years ago, and [DK's] father was not killed until 1990 in retaliation, the reason for this is that Mr Rash's sons were very young at the time of their father's killing, and waited to avenge their father's death until they were older. There is a very strong tradition of avenging family killings in Iraqi Kurdistan. The fact that [DK] was shot at in 1998 as part of the continuing attempt to avenge their father's death does not surprise me at all. Such long-lived feuds are relatively common in Iraqi Kurdistan. The only way to bring an end to such feuds is via a truce. However, these truces are negotiated by senior family members or community leaders. In [DK's] case this would not be possible as his father and paternal uncle have been killed, and his four maternal uncles, including myself, live in the UK. Furthermore there is a more complicated political dimension to this case, as [DK] is a supporter of the KDP and the Rash family are supporters of the PUK. It is very unlikely that the PUK or KDP would support any truce between the two sides, as this would not be in their interests."

14. After describing how the KDP had not been able to provide protection even for the KDP Governor of Erbil, who was killed in broad daylight despite having two cars of bodyguards with him, the uncle continued:

> "Another example I can give is that of other members of my family. In 1987 my cousin ... was killed by the Iraqi security forces. He was a KDP commander. After his death a KDP unit made up of fighters and family members killed the two mercenaries who were directly responsible for his death. Until now the family of the two mercenaries have been trying to avenge their deaths, and only a few months ago my cousin's family fled Iraqi Kurdistan because of this. They have now come to the UK, and have been granted indefinite leave to remain as refugees. This also demonstrates how the KDP are unable to provide safety, even to active members of the KDP and their families."

15. Dr O'Shea said that this description of Iraqi Kurdish society, with its examples of revenge killings in feuds that could last for generations, was accurate. The comment on the absence of male family elders to negotiate a truce was also significant, as was the explanation of the time lag. It was a familiar theme from Kurdish oral literature that Kurdish children could be brought up with the knowledge that once they were adults they would be expected to take revenge for their father's death. A book by a Turkish-Kurdish author describes how an adolescent boy killed his mother for a breach of family honour that occurred before he was born.

16. In her oral evidence to the IAT Dr O'Shea said that she had heard several accounts of events in which people were attacked by the PUK in a KDP-controlled area. She said there was a distinct breakdown of law and order in the KAA, and the borders between the regions were permeable. Police officers would not pursue suspects into either region. There was a policy of not officially deporting people to either region, and there was no formal extradition treaty between the KDP and PUK.

17. She went on to say that among the Kurds there was a segmentary structure in place which says that "the enemy of my brother is my enemy". A family could be a small unit, but it could unite together at an increasingly high level if one of their own was insulted. Tribal revenge could go on for years. The feud might end by mediation, but there was currently a decline in young people's respect for mediators. In cross-examination she said that there was a general lawlessness which made it difficult for the authorities to protect anyone.

18. The IAT said, without giving any reasons, that they did not find that Dr O'Shea's evidence greatly assisted DK. They were influenced by a judgment of an administrative court in Lower Saxony (which neither party was able to show to us) which appears to have found that in the event of a family member being killed by an adult perpetrator, the killing of another family member of equal value was incurred. Although they found that there was no causative link between the Rash family and the killing of DK's father in February 1990, they nevertheless said that if there was indeed a blood feud, the killing of DK's father brought that feud to an end.

19. In his statement DK had said (at para 5) of the period between his father's death and the move to Shaqlawa:

> "We noted that Rash family members regularly visited the vicinity where the shop was located. On many occasions they approached us, either in the shop or at our home. They threatened us saying they were going to take revenge for the person who killed Rash. They said my father was responsible for Rash's death and because I was his eldest son, revenge would be taken out on me."

20. The IAT observed that in the Lower Saxony decision victims and perpetrators were mostly sought out beforehand, with the result that word generally got out in families about who was next in turn and who must effect the revenge. Because, they said, there was no evidence that this had happened in the present case, they could only conclude that there was no blood feud. If there was one, it no longer existed. Dr O'Shea had told them that DK's absence from the area meant that it was possible that other male members of the family could be attacked. The IAT commented that DK had a younger brother and there was no evidence that this brother had been targeted in any way by the Rash family: "this must surely indicate that there is no blood feud". DK was 18 years old and we were told that his brother was 12 years old when DK left Iraq in 1999.

21. The IAT held that the feud between the two families did not have as its root cause a political opinion because they did not consider that DK's father's protest about the camps was rooted in any political opinion. They also held that the authorities in the KAA region were able and willing to offer DK a sufficiency of protection.

22. Their reasons for reaching this conclusion were that DK and his uncle had been safe in 1990-93 while Suleimaniya was under the control of the KDP, and that DK according to his own evidence felt safe after he had moved to Shaqwala. Of the incident in December 1998 the IAT said:

> "This Adjudicator did not make any finding on this evidence. Looking at the evidence ourselves, we doubt that it ever happened. By his own evidence, the Rash family had not carried out their plan to kill him knowing that he was supported by the KDP and this was when he was residing in Suleimania. In December 1998, he was residing in Shaqwala, yet another area controlled by the KDP. We would therefore question why the Rash family would now attempt to kill him when he was residing in yet another area controlled by the KDP."

23. They went on to say that even if the incident had happened, the evidence showed that the police had taken active steps to catch the malefactor. DK had only decided to leave Iraq when the police told him they could not offer him 24-hour protection and the KDP had told him that it was not practical for them to provide him with protection in his kind of situation.

24. The IAT concluded that the police provided the appellant with a sufficiency of protection within their capability. In *Horvath v Home Secretary* [2001] 1 AC 489 the

House of Lords said that no one could be guaranteed absolute protection, and this, they believed, was what the appellant was expecting.

25. For all these reasons they dismissed his appeal.

26. On the further appeal to this court it was common ground that the two issues we had to determine were whether the IAT erred in their approach to the issue of protection in fact, and whether they erred in law on their approach to the evidence, in particular in relation to the alleged shooting incident in 1998 and the existence of the blood feud. It was agreed that it did not matter for the purposes of this appeal whether the appellant succeeded on Refugee Convention or ECHR Article 3 grounds, although both these possibilities would remain live if we were to return the case to the Asylum and Immigration Tribunal ("AIT") for reconsideration.

27. In my judgment the IAT's approach to the facts in this case was very unsatisfactory, and the matter must be remitted for reconsideration. My reasons are these:

i) Dr O'Shea gave clear, coherent evidence on material issues. The IAT did not suggest that they did not accept her evidence. They merely said that they did not find that it greatly assisted the appellant without explaining why. The reason for this conclusion is not at all clear;

ii) After finding that the Rash family had nothing to do with the death of DK's father, it was not open to the IAT to find that this killing (of a member of DK's family of equal value to Gaphora Rash) brought the blood feud to an end;

iii) Although in the nature of things DK could not know who had been selected from within the Rash family to execute revenge, he said in his statement that he had been told in 1991-3 that revenge would be taken out on him because he was his father's eldest son, and the IAT overlooked this evidence;

iv) It is evident from paras 31-33 of the adjudicator's determination that the adjudicator accepted DK's evidence that he could identify the member of the Rash family who shot at him from the taxi. In those circumstances it was not open to the IAT, who did not hear DK give evidence, to doubt whether this incident had happened;

v) It was not in issue whether, as the IAT found, the KDP police provided DK with a sufficiency of protection within their capability. What was in issue was not their willingness to do their best but whether the KDP were capable of providing him with adequate protection (as opposed to protection on a 24-hour basis, which cannot be reasonably required: see Lord Hope's speech in *Horvath* at p 500 G). In *Noune v SSHD* [2001] INLR 526 this court said at para 28(3) that it was not necessary for an applicant to show that a state's protective machinery had totally collapsed before he could successfully claim refugee status. In this context careful consideration should have been given both to Dr O'Shea's evidence and to the evidence in a UNHCR letter dated 27th November 2000 which stated that although the KDP and the PUK were considered as *de facto* authorities they could not be presumed, without more, to provide adequate and effective protection to those residing in their territories.

28. For all these reasons this appeal must be allowed. The matter must be remitted to the AIT for reconsideration on the basis that the adjudicator's findings of fact in relation to DK's story must stand, and the Refugee Convention appeal and the human rights appeal must be reconsidered on the basis of up to date evidence about the situation in the Kurdish part of Iraq.

Lord Justice Sedley:

29. I agree.

Lord Justice Hughes:

30. I also agree.