Case No: C/2002/0193

Neutral Citation Number: [2002] EWCA Civ 750
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 24th May 2002

Before :

LORD JUSTICE WARD
LORD JUSTICE KEENE
and
SIR MARTIN NOURSE

- -

Between :

Mr Azad Gardi — **Appellant**

- and -

Secretary of State for the Home Department — **Respondent**

- -

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

- -

Mr N Blake Q.C. and Mr R Husain (instructed by **Gill and Company, London WC1X 8PQ**) for the appellant
Mr R Tam (instructed by **Treasury Solicitor, London SW1H 9JS**) for the respondent

- -

Judgment
As Approved by the Court

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Lord Justice Keene:

Introduction:

1. This appeal from the Immigration Appeal Tribunal ("IAT") raises a novel point about the meaning of "refugee" in Article 1 of the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol. That is not the only issue, for complaint is also made by the appellant about the procedure adopted by the IAT in dealing with this case, but it will be convenient to deal with the main issue about the Convention before turning to the procedural point. Permission to appeal to this court was granted by the IAT itself.

The Facts:

2. The appellant, Mr Azad Gardi, is a national of Iraq. He is ethnically a Kurd. He claims to have arrived in the United Kingdom on 8 August 2000 hidden in a lorry. He had no valid travel documents and was an illegal entrant. He claimed asylum by post, but his claim was refused by the respondent on 7 January 2001.

3. By a notice dated 12 January 2001 Mr Gardi was informed that directions had been given for his removal as an illegal entrant. The notice stated:

> "Directions have now been given for your removal from the United Kingdom by scheduled airline to Iraq, at a time and date to be notified."

4. He appealed to a Special Adjudicator under section 69(5) of the Immigration and Asylum Act 1999 ("the 1999 Act") on the basis that his removal in pursuance of the directions would be contrary to the 1951 Convention. His appeal was heard on 12 April 2001 and decided by a determination promulgated on 27 April 2001.

5. Mr Gardi had lived in the northern part of Iraq within the Kurdish Autonomous Region ("KAR"), also referred to as the Kurdish Autonomous Zone ("KAS") and the Kurdish Autonomous Area ("KAA"), an area which borders upon Iran, Turkey and to a limited extent Syria. That region had been granted considerable devolved powers of internal self-government by a statute of 1975, but violent conflict between the Iraq government and the Kurds continued. Since the 1991 Gulf War, the KAR has benefited from the Western-imposed "no-fly zone". The evidence showed that the KAR was not a single unified area but rather one where different parts were controlled by the Kurdistan Democratic Party ("KDP"), the Patriotic Union of Kurdistan ("PUK") and to a lesser extent the Islamic Movement for Iraq Kurdistan ("IMIK"). The KDP and the PUK had fought one another from 1994 until a cease-fire in 1998, but relations between them remained strained.

6. Mr Gardi put forward two bases for claiming that he had a well-founded fear of persecution for a Convention reason, so as to bring himself within the scope of that Convention. The first was that he had avoided taking part in military service with the Iraqi government, because he did not want to fight his own people. That meant that he would now be shot by the Iraqi authorities if caught. Secondly, he claimed that he was at risk from the KDP because he was a supporter of the PUK. He had been a telephone operator for the PUK and had been detained for three years by the KDP, during which time he had been tortured.

7. The Special Adjudicator in her determination did not accept that the appellant's claims were credible. It is unnecessary for present purposes to go into detail about her reasoning. She concluded that he did not have a fear of persecution "in his own home area ... no question of internal flight arises". Para. 8.2.

8. However, she then turned her attention to the removal directions themselves. It had been submitted on behalf of the appellant that those directions would nonetheless put him at risk of persecution because there was no method of direct travel to the KAR, the appellant's home area in Iraq. The only scheduled flights to Iraq were to Baghdad, which was of course controlled by the Iraq authorities. The Special Adjudicator had before her a report approved by the then Home Office Minister, Barbara Roche, on 26 March 2001, which reads as follows:

> "ENFORCED RETURNS TO NORTHERN IRAQ
>
> The government recognises that there may be certain people from northern Iraq who are in need of international protection under the terms of the 1951 United Nations Convention relating to the Status of Refugees. However, there are also some asylum seekers from that region who, after careful consideration of their application, do not appear to meet the criteria set out in the Convention. The Office of the United Nations High Commissioner is on record as saying that it would not object to the return to northern Iraq of asylum seekers from that area who have been found through fair and objective procedures not to be in need of international protection.
>
> To that end, the Government is in the process of exploring the options for returning Iraqi citizens of Kurdish origin to the northern part of Iraq, and these arrangements will be used to return such Iraqi nationals who do not qualify for leave to enter or remain in the United Kingdom."

9. On this basis it was submitted on behalf of the Home Secretary to the Special Adjudicator that an unsuccessful Kurdish asylum-seeker would not be sent back through Baghdad but would be returned under the supervision of British officials to ensure that the asylum-seeker reached northern Iraq safely. The Special Adjudicator, however, was not persuaded by this. She noted that the appellant had been active in the PUK. He was also subject to a new law penalising those who left Iraq illegally. There were frequent police checks in Iraq on major roads. She concluded:

> "I find that if the appellant is returned to Iraq by Baghdad there is a real risk that the appellant would be subject to this new law. The appellant's Kurdish background would then make the probable prison term unduly harsh at this time. It is possible that return to Kurdistan may be safe for persons such as the appellant in the future, but at present I find that there is a real risk of significant harm amounting to persecution to this appellant if he is returned to Iraq at present by Baghdad." (para. 8.7).

Consequently she allowed the appeal.

The IAT's Decision:

10. The Secretary of State for the Home Department appealed from that decision to the IAT, which listed the appeal along with 9 others, all involving asylum claims by ethnic Kurds who had come from the KAR. It treated Mr Gardi's appeal as the test case for determining the effect of the inability to return such an asylum-seeker to the KAR at present, when there was currently no means of getting such a person to the KAR save by scheduled flight to Baghdad. In that context it noted that there was no challenge to the Adjudicator's finding that there was a well-founded fear of persecution in parts of Iraq under Saddam Hussain's control.

11. Citing the House of Lords' decision in *Adan –v- Secretary of State for the Home Department* [1999] AC 293, the IAT, presided over by Collins J., emphasised that a person could only be a refugee if he was outside the country of his nationality owing to a well-founded fear of persecution for a Convention reason. If he was not, it was unnecessary for him to be provided with surrogate protection. Then the IAT dealt with the situation where there was a well-founded fear of persecution in part of a person's country but not in another part. It noted that no question of internal flight arose in this case, since there was no fear of persecution in Mr Gardi's home area. It was critical of the way in which the removal directions had been drafted in the present case, referring only to Iraq rather than to the KAR, but it was prepared to regard the assertion by the Secretary of State's representative that Mr Gardi would not be returned by way of Baghdad as binding on the Secretary of State. In those circumstances, it concluded that Mr Gardi was not a refugee since he had failed to establish any real risk of persecution.

The submissions:

12. On behalf of the appellant, Mr Blake Q.C., accepts that, to be a refugee under the Convention definition, a person must satisfy both limbs of Article 1A(2). He must show that owing to a well-founded fear of persecution for a Convention reason he is outside the country of his nationality; secondly he must show that he is unable or, owing to such fear, he is unwilling to avail himself of the protection of that country. On the first limb, it is emphasised that one need not show that one left that country

because of such fear: it is enough that there is currently a well-founded fear of persecution. It is contended that the appellant has such a current fear. Two arguments are in essence put forward in support of that contention: first, Mr Blake submits that the court must look at the whole of the country in question in order to determine whether there is a well-founded fear of persecution, at least where the state is the persecutor or one of the persecutors. The question is not to be decided by considering whether such a fear exists in relation to the asylum-seeker's home area. It will suffice if there is such a well-founded fear from the state authorities in some parts of the country.

13. Secondly, the appellant contends that he has a well-founded fear of persecution because he cannot return to the KAR except by way of Baghdad, where as the Adjudicator found he would be at risk of persecution from the Iraqi authorities. It follows that he is "outside the country of his nationality" owing to such a fear. In this connection, reliance is placed on the IAT's decision in *Dyli* [2000] INLR 372 where at para. 36 the IAT said that if he (the asylum-seeker):

> "has no well-founded fear of persecution in his own area but as a matter of fact is to be returned elsewhere, the only question is whether he is at risk of persecution in his own country on the way to his home area."

In the present circumstances Mr Gardi could not be returned to the KAR except by passing through areas where he would be at risk. Mr Blake accepts, however, that mere inability to get back safely to a "safe" home area is not sufficient to satisfy the first limb of the definition of a refugee.

14. The main emphasis of the submissions on behalf of the appellant is on the second limb of Article 1A(2). It is argued that he is and will be a refugee until he can obtain access to effective protection by a stable state-like authority. Two points are made under this heading. First, it is contended that the KAR does not qualify as a state-like authority, so that even if the appellant could return to it it would not be able to provide protection in the sense contemplated by the Convention. Mr Blake has referred us to a paper by Professor Hathaway and Michelle Foster on "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination", where the authors emphasise that the protective obligations in the Convention are specifically addressed to "states" (see, for example, Articles 3 to 8), and say:

> "The very structure of the Convention requires that the protection will be provided not by some legally unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions." (page 46).

15. It may be that in Kosovo such a state-like body existed, as was held in *Vallaj* [2001] INLR 455, but there UNMIK had been established under United Nations resolution and the Federal Republic of Yugoslavia had in effect ceded control to it. The

situation in the KAR is not comparable, since there is no internationally recognised body in control, and Iraq has not ceded its protective function to any of the KAR authorities. Protection is a general duty of a state which it owes to its citizens, including those abroad, and the appellant does not enjoy the benefit of such protection.

16. Secondly, such protection has to be accessible at the present time, as is demonstrated by the decision of the Federal Court of Australia in *Al-Amidi -v- Minister for Immigration and Multicultural Affairs* [2000] FCA 1081, (2000) 177 ALR 506. That proposition is borne out by Hathaway and Foster when dealing with the issue of internal flight or an Internal Protection Alternative (IPA):

> "Since IPA analysis is concerned with the possibility of a *present* source of alternative internal protection, the first question is whether the asylum-seeker can in fact gain access." (page 27)

The appellant is in no position currently to gain access to the KAR, even if it were able to provide him with the necessary protection.

17. Mr Tam on behalf of the respondent explains that the Ministerial statement of March 2001, quoted earlier in this judgment, was made because there seemed to be some "glimmer of hope" that removals to the KAR may be able to start at some future date. The options by which access to the KAR may be safely achieved for Kurds from Iraq are being explored. In the meantime, he puts before us a written undertaking on behalf of the respondent, which is given in respect of this appellant as well as others. It reads as follows:

> "UNDERTAKING BY THE SECRETARY OF STATE
>
> Consistent with the statement approved by the then Minister of State, the Secretary of State confirms that he will not seek to enforce the removal of any failed Iraqi asylum seeker to the Kurdish Autonomous Zone (KAZ) of northern Iraq unless satisfied that he is able to do so without breaching obligations under the Refugee Convention and the Human Rights Act 1998. The Secretary of State will be mindful of these obligations in considering not only conditions in the KAZ itself but also the route of return to the KAZ.
>
> For the avoidance of any doubt the Secretary of State also confirms that he will not for the time being enforce return of any failed Iraqi asylum seeker either to or via territory controlled by the Iraqi government.
>
> Subject to the above, it is the Secretary of State's intention to effect removal as soon as it is practicable to do so."

It seems that this undertaking has been drawn up in the light of criticisms made by the IAT of the way in which the respondent's position had been outlined to it and to the Special Adjudicator.

18. Mr Tam's submission is twofold. First, the appellant does not have a well-founded fear of persecution. He has come to this country from an area found by the Adjudicator to be in effect safe, that is, the KAR, an autonomous area within a fractured state. Removal to the KAR would not expose him to a risk of persecution, and consequently he is not a refugee. He does not need surrogate protection from the international community. Reliance in this respect is placed on the Court of Appeal's decision in *Canaj* [2001] INLR 342. Since the respondent does not intend to remove Mr Gardi to or via any part of Iraq controlled by the government of Saddam Hussein, there can be no well-founded fear of persecution because of risks en route to the KAR. The mere inability to remove the appellant to the KAR at present does not make him a refugee.

19. Secondly, it is contended that the second limb of the Convention definition is not established by the appellant, since protection in practice can be provided within the KAR. The fact that the KAR has no international personality should not be decisive on the protection issue. The reality is what matters. Mr Tam draws attention to the decision of the Federal Court of Australia in *Tjhe Kwet Koe –v- Minister for Immigration and Ethnic Affairs* [1997] 912 FCA as showing that protection need not be something provided by the state.

Discussion on the Convention Issue:

20. Article 1A(2) of the Convention provides, insofar as relevant for present purposes, as follows:

> "For the purposes of the present Convention, the term "refugee" shall apply to any person who ... owing to 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 ..."

21. In the case of *Adan* (ante), the House of Lords had to consider the meaning of that definition. Lord Lloyd of Berwick, with whom the other members of the House agreed, noted that under that provision a national who was outside his country

> "must satisfy two separate tests: what may, for short, be called "the fear test" and the "protection test.""

22. As I have indicated earlier, there is no dispute in the present appeal that, to be a refugee under the Convention, a person must satisfy both those tests. Of course, the two have an inter-relationship. The well-founded fear is also referred to in Article

1A(2) in connection with the unwillingness of the claimant to avail himself of the protection of his country. Moreover it would generally be unusual for a person to have no well-founded fear of persecution in his country where the source, or at least one source, of persecution is the national government, which could not then be seen as providing protection from persecution. Nonetheless, both the "fear" and the "protection" tests have to be met in any individual case, and it is to be observed that Hathaway and Foster, cited earlier, treat these as separate matters when dealing with internal flight as an alternative: see pages 13 and 39.

23. The KAR clearly does present an unusual situation, where the authority of the Iraqi state has very largely been excluded for a considerable period of time. In any event, this appeal has to be approached, at least on this issue, on the basis of the Special Adjudicator's finding that the appellant does not have a well-founded fear of persecution in the KAR, his home area. At the same time, it is common ground that there is such a well-founded fear, were he to be returned to parts of Iraq under the control of the Iraqi government.

24. I accept that one is concerned under the first limb of Article 1A(2) with whether or not a well-founded fear *currently* exists, irrespective of whether the asylum-seeker fled his country because of such a fear or at a time when he had such a fear. Although the House of Lords in *Adan* were concerned with whether a historic fear would suffice and their conclusion was that a current fear is a necessary condition for refugee status, all the reasoning in the speech of Lord Lloyd of Berwick is consistent with a current well-founded fear being a sufficient condition as well. In addition, that accords with the UNHCR Handbook, para. 94. To that extent I accept Mr Blake's submissions on this first limb.

25. But I do not find it possible to accept his argument that, on the Adjudicator's findings of fact, the appellant does have a well-founded fear of persecution for a Convention reason. The contention that one must look at his country as a whole and that it suffices if in some parts of it he would be at risk, namely those areas under the control of the Iraqi government, is inconsistent with the decision of this court in *Canaj*. There the appellant Canaj was an Albanian from Kosovo, who came to this country in September 1999 after UNMIK and KFOR had taken over control in Kosovo. It was argued that elsewhere in the Federal Republic of Yugoslavia he would have a well-founded fear of persecution, that being his country of nationality, and that therefore the case should be seen as one involving the internal protection alternative, even though he was to be returned to Kosovo. The concept of a 'home area' was criticised on behalf of the appellant.

26. The leading judgment of this court was given by Simon Brown L.J. He pointed out that the UNHCR Handbook postulated that the fear of persecution was in the claimant's part of the country (para.30) and that it would be remarkable:

> "were it necessary to ask in every case: is there a part of the claimant's home country in which he would be unsafe? ... If it is plain that the claimant can safely be returned to his own home area and so is not being required to uproot himself and

> move to a different area, there is simply no reason to temper the strict interpretation of Art 1A(2) 'is unable to avail himself of the protection of that country' ... Why ever should it be 'unduly harsh' to expect a claimant to return to live in his own home area once it is accepted that it is safe for him to do so?" (para 32).

27. While that was a decision dealing with the concept of alternative protection, the reasoning is quite incompatible with the argument now advanced by Mr Blake. Moreover, the court there quoted, apparently with approval, a passage from the IAT's decision in *Dyli*, para. 34:

> "The question of internal flight only arises when a claimant has a well-founded fear of persecution in his own home area. If he has no such fear there, the possibility of his movement elsewhere simply does not arise. He is not a refugee."

28. Of course "home area" must not be interpreted too narrowly. A person may be accustomed to moving about beyond his own village or town as part of his day-to-day life and, were that to give rise to a well-founded fear of persecution, that would suffice for Convention purposes. But that is not the situation with which the Adjudicator was dealing in the present case. Subject to that qualification, I accept the passage from *Dyli* as an accurate summary of the position.

29. This accords with the underlying purpose of the Convention, that of providing surrogate protection to those in need of it. I cannot see why the international community should be expected to provide surrogate protection to someone who is found to have no well-founded fear of persecution in his own home area. Of course, that assumes that he can be safely returned to that area, a matter which I shall turn to when dealing with the second way in which the appellant's case on the "fear test" is put. But this first argument appears to me to be ill-founded.

30. That is borne out by a consideration of the established legal principles about internal flight or internal protection areas. For this purpose it is sufficient to refer to the leading authority of *R –v- Secretary of State for the Home Department, ex parte Robinson* [1998] Q.B. 929. There this court said at page 939:

> "if the home state can afford what has variously been described as a 'safe haven', 'relocation', 'internal protection', or 'an internal flight alternative' where the claimant would not have a well-founded fear of persecution for a Convention reason, then international protection is not necessary. But it must be reasonable for him to go and stay in that safe haven."

31. If a person is not a refugee because there is a safe part of his country to which he could reasonably be expected to relocate, it would be very remarkable if a person were to acquire the status of a refugee when the safe area is one where he originally lived.

I conclude that, so as long as he is not put at risk in the process of getting to his safe home area, he is not a refugee.

32. That takes one to Mr Blake's other argument about the appellant's well-founded fear of persecution, namely the absence at present of a way of obtaining access to the KAR other than via Baghdad. It is of course right that the removal directions in this case specify Iraq as the place to which removal would take place, albeit that they do not specify a date or time. Moreover, section 69(1) of the 1999 Act gives a right of appeal on the ground that removal:

> "in pursuance of the directions would be contrary to the Convention."

33. It seems to me that the removal of the appellant under present circumstances to the KAR *via Baghdad* or any other part of Iraq under the control of that state's central government would be contrary to the Convention. It would be contrary to the internationally – recognised principle of "non-refoulement", which is reflected in Article 33 of the Convention, and to Article 3 of the European Convention on Human Rights.

34. However, the removal directions have to be read in the light of the undertaking given on behalf of the respondent. Despite Mr Blake's criticisms of some of the wording of the undertaking, it is sufficiently clear that the Secretary of State does not propose to remove Mr Gardi or others in his position to the KAR via Baghdad or any other part of Iraq controlled by its government, unless and until a Convention – compliant method of so doing can be achieved or a means is found of achieving access to the KAR which avoids Iraqi-controlled territory altogether. While it might be argued that in theory the appellant in the present situation is "outside the country of his nationality" "owing to a well-founded fear of being persecuted", the reality is that he is outside simply because a safe method of return to the KAR is not at present available in practice. He will not be returned to the KAR until such a method is available. In the light of the respondent's undertaking, the appellant cannot have a fear that he will be returned to a part of Iraq where he will be persecuted.

35. I cannot see that a person who has a safe home territory, to which he currently cannot obtain access, is to be described as having a well-founded fear of persecution, any more than would someone who comes from a "safe" land-locked state to which he currently cannot obtain access because of its hostile neighbours where he would be persecuted. He cannot currently be returned but he is not a refugee. The decision in *Al-Amidi*, relied on by the appellant, is not of relevance here, because in that case it was accepted that the applicant was justified in fleeing Northern Iraq (para. 19) and was outside Iraq because of a well-founded fear of persecution (para. 16). The decision concerned the availability of protection, rather than whether or not he had such a fear.

36. If it is right that the appellant does not have such a well-founded fear, it means that he fails to pass the "fear test". In that event, it matters not whether he passes the

"protection test", and I propose therefore to deal only shortly with the submissions on that aspect.

37. The reference in Article 1A(2) is to an asylum seeker being unable or unwilling to avail himself "of the protection of that country", a reference to the earlier phrase "the country of his nationality". That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognised internationally. That indeed was a point made in the *Tjhi Kwet Koe* case at page 11. The KAR does not meet that criterion. I see force also in the point made by Hathaway and Foster in their paper at page 46, that protection can only be provided by an entity capable of being held responsible under international law. The decision in *Vallaj* is not inconsistent with that proposition, since the UNMIK regime in Kosovo had the authority of the United Nations plus the consent of the Federal Republic of Yugoslavia. Yet no-one suggests that the KAR or any part of it is such an entity under international law.

Conclusion on the Convention Issue:

38. Had it been necessary to decide it, I would have been inclined to find in favour of the appellant on the "protection test". However, that is the second stage of any assessment of a claim by a person to be a refugee. The first stage requires him to meet the "fear test", and for the reasons set out I can only conclude that that test is not met. The IAT was right to conclude that the appellant is not a person who has a well-founded fear of persecution for a Convention reason.

The Procedural Issue:

39. This too can be taken shortly. The appeal to the IAT was brought by the Secretary of State, but a respondent's notice was lodged on behalf of Mr Gardi, seeking to uphold the Special Adjudicator's decision on other grounds. Those grounds were in essence that her findings on credibility were illogical and unsafe. A certain amount of background material seems to have been submitted in connection with those grounds.

40. There is evidence before us that the IAT decided to deal with the issue of law arising in this appeal and the 9 other appeals on the Convention definition of a refugee as a preliminary point, on the assumption that the appellant did not have a well-founded fear of persecution in the KAR. We have seen notes made on 9 October 2001, the first day of the hearing, by the appellant's solicitor recording that the IAT indicated that it did not propose to go into the facts of the individual cases but to decide the legal principles. The solicitor, Bruce Burson, has made a witness statement in which he confirms this and adds that the IAT indicated that the facts would be determined at a later stage by a different tribunal.

41. That this was the approach adopted would seem to be confirmed by a letter dated 31 October 2001 from the President of the IAT, Collins J., saying that an expert's report submitted on behalf of the appellant:

> "really does not touch on the preliminary issues which we are deciding."

Mr Tam on behalf of the Secretary of State does not seek to dispute the appellant's account of what happened before the IAT.

42. Yet at the end of the determination by the IAT following the hearing of the 9 – 10 October 2001 the appeal by the Secretary of State was simply allowed. Mr Blake submits that his client was deprived of the opportunity to argue the matters raised in the respondent's notice. There were submissions to be made on those matters, but there was no hearing on them, and in addition the evidence submitted on these aspects was never considered or dealt with by the IAT. In those circumstances the IAT was in error in dismissing the appeal.

43. Mr Tam seeks to uphold the IAT's decision on the basis that the findings and conclusions of the Special Adjudicator were clearly right. There is therefore no justification for sending this matter back to the IAT.

44. I am satisfied that there was here a significant procedural error which deprived the appellant of the opportunity to present his case in full. It is right that there can sometimes be circumstances where it is obvious that, despite a procedural error, the conclusion arrived at was inevitable and it would not be appropriate to remit the matter to the tribunal below. This, however, is not such a case. The Special Adjudicator's conclusion on the appellant's credibility involved, as so often in these cases, a process of setting his account against the backcloth of information about the situation in his country and in particular in this case the KAR. The appellant's advisers put in fresh evidence to the IAT on the background of the situation in the KAR, and one cannot accept that the evidence against Mr Gardi was so overwhelming that the outcome on these further issues was inevitable. Particularly in asylum cases, where a tribunal has to give "the most anxious scrutiny" to a decision refusing asylum (see *R –v- Home Secretary, ex parte Bugdaycay* [1987] AC 514, per Lord Bridge), it would only be in an extreme case that such a procedural error could be treated as of no practical effect. This case does not come into that category.

Overall Conclusion:

45. I would, therefore, dismiss this appeal insofar as it relates to the meaning of "refugee" under the 1951 Convention, but allow it on and only on the procedural issue. In those circumstances I would remit this case to the IAT for there to be a hearing on the factual issue relating to whether or not the appellant has a well-founded fear of persecution in the KAR.

Sir Martin Nourse

46. I agree.

Lord Justice Ward

47. I also agree.

Order: appeal allowed to extent that it be remitted to the tribunal for determination of the issues whether and to what extent the appellant would be at risk, in the Kurdish Autonomous Area of Iraq, of persecution for a reason enumerated in the Refugee Convention or of treatment prohibited by the European Convention on Human Rights; no order as to costs save detailed assessment of the appellant's public funding costs.

(Order does not form part of the approved judgment)