Case No: C5/2007/0043

Neutral Citation Number: [2007] EWCA Civ 852
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: HX/0911/2004]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 5th July 2007

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LAWS
and
MR JUSTICE BLACKBURNE

- -

Between:

MH (Iraq)

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr A Durance (instructed by Greater Manchester Immigration Aid Unit) appeared on behalf of the **Appellant**.

Mr A Payne (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

- -

Judgment

Lord Justice Laws:

1. This is an appeal against the determination of a Senior Immigration Judge ("the SIJ"), promulgated on 6 October 2006, by which he dismissed the appellant's application for reconsideration of his asylum appeal. Permission to appeal to this court was granted on the papers by Sir Henry Brooke on 16 February 2007.

2. The appellant is a 34 year-old Sunni Muslim national of Iraq. He arrived in the United Kingdom clandestinely on 18 September 2002 and thereafter claimed asylum. That was refused by the Secretary of State on 29 April 2004. The appellant appealed to an adjudicator, who dismissed his appeal on 3 August 2004. On 11 December 2004 the appellant obtained leave to mount a further appeal to the Immigration Appeal Tribunal. By the time the matter came to be dealt with substantively, the current statutory appellate regime was in place so that the case fell to be determined by the Asylum and Immigration Tribunal ("the AIT"). On 9 March 2006 the AIT determined that the adjudicator's decision was flawed by errors of law and ordered a reconsideration. Thereafter, the scope of the reconsideration was set out by the AIT and I must return to that. The final stage of the reconsideration was constituted by a hearing of 30 August 2006, leading to the determination promulgated on 4 October 2006 which, as I have said, is now under appeal.

3. The adjudicator in 2004 found (paragraph 20) that the appellant was a truthful witness. Here is a summary of the facts he described as they were accepted by the adjudicator. From 1993-2002 the appellant worked in the Iraqi army; this was, of course, during the dictatorship of Saddam Hussein. He became a sergeant's assistant, transferring military prisoners to courts and camps. He was involved in the arrest of 200-300 persons, including two spies on separate occasions in 1998. He was known in the south of Iraq to be tough in his job and had been involved in beatings and torture. He claimed to have been forced into such activity or just to be obeying orders. He was to claim also that his family had told him that persons who had previously been his victims were looking for him. He was a Ba'ath party member.

4. The original genesis of his asylum claim arose, on the case he put forward, from an incident on 3 August 2002 when, after an argument with colleagues about Saddam Hussein, he threw a bucket of water at a picture of the dictator. Omitting the detail, he then fled Iraq, fearing reprisals, and made his way to the United Kingdom arriving, as I have said, on 18 September 2002.

5. His case by the time the appeal reached the adjudicator was, ironically perhaps, that he feared reprisals for what he had done in the service of Saddam's regime. He claimed that he would not be safe anywhere in Iraq. The adjudicator considered but dismissed the possibility that the appellant might, by virtue of his participation in acts of torture, be disentitled to the protection of the Refugee Convention having regard to the provision of Article 1F. This issue was however raised again on the reconsideration.

6. It was submitted to the adjudicator for the Secretary of State that the appellant would not be in danger throughout Iraq and that an internal flight alternative was available. His family lived in Basra and he had been active in Basra in particular and certainly in the south of the country. The submission was that he would be safe further north, in particular in Baghdad.

7. The adjudicator's conclusions on the evidence are expressed in two paragraphs as follows:

> "22. However, my task is to assess whether the Appellant's subjective fear is objectively well founded. If what he says is true, and judging by the objective evidence there is a reasonable likelihood that is, then it would not be safe for him to return to Southern Iraq since it is reasonably likely that he would be the subject of revenge attacks. As things stand today in Iraq I do not think that the authorities in Basra would be able to provide a sufficiency of protection for him due to the overall difficult security situation. Consequently, I conclude that it is reasonably likely that if the Appellant returned to his home area he would have a well founded fear of persecution in the form of reprisal attacks against him. In the current situation I do not believe that the authorities would be in a position to protect him, let alone provide sufficient protection.
>
> "23. However, the Appellant does have an internal flight alternative. Mrs Prince was unable to refer me to any objective evidence which suggests that significant number of Iraqis from the South have gravitated towards Baghdad. From my perusal of the objective evidence such is not an identifiable trend. The Appellant would be returned to Baghdad and, indeed, can go to a more Northern city in an Arab area. I have not been advised of any health difficulties and consequently he appears to be a fit and healthy young man. Accordingly, I do not think that it would be unreasonably harsh to expect him to go and live in another part of Iraq away from his home area. If he did this I do not think it reasonably likely that he would be tracked down by those who are apparently seeking revenge against him."

8. The errors of law which the AIT identified in this decision by the adjudicator consisted of a failure to set out or apply the objective evidence relevant to the question of internal flight and the failure, also, to explain why it would not be unduly harsh or unreasonable for the appellant to have to return to parts of Iraq away from the south. The AIT's direction as to the scope of the reconsideration was in these terms:

> "The appeal will therefore proceed on the basis of the Adjudicator's finding at paragraph 22 of his determination, that the appellant has a well founded fear in his home area because of his activities on behalf of Saddam's regime. The issues to be considered will be whether those activities come within the ambit of Article 1F of the Refugee Convention and whether they render it unsafe for him to relocate to a different part of Iraq."

9. The appellant gave further live evidence before the SIJ on the reconsideration. He had also prepared a witness statement to which Mr Durance, on his behalf, made some reference this morning. The SIJ (paragraph 45) declined to accept on the facts that the appellant was barred from the protection of the Refugee Convention by force of Article 1F. He gave detailed reasons but this issue does not figure in the appeal and so it is unnecessary to say any more about it.

10. The SIJ turned to the question of internal relocation. He described some of the further evidence given by the appellant. He referred (for example in paragraph 12) to the appellant's evidence that he had transferred prisoners to almost all parts of Iraq and he set out other details. The SIJ also recounted in very considerable detail the in-country or objective material relied on by the appellant, including a report by Dr Seddon of the University of East Anglia.

11. The SIJ's conclusions are expressed in paragraphs 57-59 inclusive as follows.

> "57. The people who suffered direct harm at the hands of the appellant would appear on the evidence to be people who were in the south where the appellant is not to be returned and where it is common ground that he will be at risk. Otherwise he claims to be at risk from people who as prisoners he transported to various parts of Iraq including Baghdad and on account of his name being on lists. I have not had any evidence put before me as to the nature of such lists or the likelihood that persons such as the appellant would have their name on any list. In effect, I am invited to surmise that from the fact that he would have signed and receipted various documents in connection with the transport of prisoners that his name would remain to be found now although he left the country in 2002.
>
> "58. I do not consider that the appellant faces a real risk of being identified for any of these reasons. It is not doubt possible that a person who was ill-treated in the south might encounter him in Baghdad or in a more specifically Sunni area in the centre of Iraq. It is possible that a person whom he transported as a prisoner would identify him in the same way. In this regard, however, it is perhaps relevant to note there is no indication that he ever ill-

treated any of the prisoners indeed he was involved in their journeys being broken up to enable them to have food and drink. Nevertheless I accept there might be some degree of hostility towards him on account of having been involved in their transport. The degree of likelihood in that regard, however, does not to my mind equate to a real risk. It is a matter of chance and possibility falling short of a real risk. Although I have found that he was involved in the commission of serious offences in the south, he was involved at a low level as a conscripted volunteer for a number of years at the base where he carried out his activities. As I say, I have been shown no evidence to indicate that such a person's name would be found on any lists now. No doubt it is the case as quoted to me from the country report that there is targeting by Islamist militias who dominate the ISF and also on the part of other or the same Shi'ite Muslim assassins towards members of the former regime. But I do not consider that the likelihood of the appellant being identified in any of the ways I have considered as being such a person is such as to cross the threshold of needing to show a real risk or degree of likelihood in that regard. In the context of the internal relocation test set out in *Januzi* I do not consider that it would be unduly harsh to expect the appellant to relocate to Baghdad or elsewhere in central Iraq where there are clearly Sunni enclaves. Although his tribe is from the south, it is of clear relevance that he belongs to the dominant religious group in the Sunni areas of Iraq. No doubt there would be gossip or questions about him as set out in Dr Seddon's report. Iraq is a tribal country and tribal groups are historically unwelcoming to others. But that does not, to my mind, equate to the kind of factors set out in paragraph 20 in *Januzi*. There is no indication that the appellant as a person not belonging to any of the tribes in the Sunni parts of Iraq would be placed ipso facto in conditions of severe hardship or unable to sustain a relatively normal life at the minimum subsistence level only. The evidence does not indicate that he would face economic destitution or existence below at least an adequate level of subsistence. He is, as has been pointed out, a young man of thirty four who is in good health. His family is a wealthy one, and although the evidence is unclear as to their present whereabouts, it is the evidence that they have not experienced any reprisals on account of his past activities and it can reasonably be surmised as a minor aspect of the overall assessment of undue harshness that they might be in a position to be reunited with him and to provide him with assistance accordingly.

> "59. In coming to these conclusions I do not seek to minimise the extreme difficulties faced by people in Iraq generally at the moment. But to my mind (and bearing in mind that there is no contention in this case that conditions there generally are such as to breach the Article 3 threshold for a returnee) I do not consider that the appellant's position would be materially different from that of any other Iraqi save to the extent that there is a slight risk, as I have described, of him being identified by a person with whom he has come into contact as a consequence of his past activities. There is no indication that he would need any particular documentation in order to make his way from Baghdad to a predominantly Sunni area. The evidence does not show that he would need any kind of passport or formal documentation, although there are risks in travel between population centres as mentioned in paragraph 6.378 of the Country Report and the restrictions on freedom of movement mentioned, for example, at paragraph 6.75, again I do not consider that these are matters such as to make the appellant's relocation unduly harsh. Mr Durance properly accepted that essentially the same arguments fall to be made in the context of Article 3 as in the context of undue harshness, and accordingly in concluding that the appellant's claim does not succeed under the Refugee Convention I conclude, for essentially the same reasons, that his claim does not succeed under Article 3 either."

12. Although, with respect, Mr Durance's skeleton argument is discursive, the grounds are succinct. It is said first that the SIJ's conclusion that the appellant would not be at risk of persecution if returned to Baghdad is contradicted by the objective evidence. Secondly, the evidence of the existence of a hit list, taken with the evidence of the appellant's past activities, tends to demonstrate that the appellant has a well-founded fear of persecution. Thirdly, the SIJ misapplied the standard of proof, in particular in holding, as Mr Durance would have it, that to succeed the appellant must produce positive evidence that his name was on a list. Fourthly and last, it is irrational to suppose or infer that the appellant could only succeed if he produced evidence from persons who had drawn up a hit list.

13. However, the major theme in this appeal as presented by Mr Durance in his oral submissions this morning is essentially to be found in the first ground and it is to the effect that the SIJ arrived at a perverse or irrational result, bearing in mind the in-country evidence. Mr Durance says, in effect, that the SIJ was bound to find that he faced a real risk of persecution throughout Iraq, certainly in Baghdad, because the objective material when applied to his case -- or his characteristics, as it was put -- dictated that result.

14. The objective material in question is discussed at some length by the SIJ, as I have already said. It is cited at length in Mr Durance's skeleton argument but

helpfully Mr Durance's take on it, if I may put it that way, is very crisply summarised in paragraph 1 of the grounds of appeal as follows:

> "The objective evidence before the SIJ demonstrates on the lower standard of proof that:
>
> (i) Former Ba'ath party members are *systematically* targeted irrespective of their level of association;
>
> (ii) Such targeting emanates from *inter alia* the ISF forces;
>
> (iii) The ISF forces have inherited the previous Ministry of Interior departments (for whom the Claimant had worked between 1990 and 2002)
>
> (iv) There are hit lists which have been drawn up of former Ba'ath party members, in particular those members who were security personnel;
>
> (v) Principal targets are Sunni members who committed abuses;
>
> (vi) Low-ranking members are targeted;
>
> (vii) The Claimant would have to present himself to the Ministry of the Interior (ISF) for documentation, thus alerting the very group identified with acts of assassination with his details."

15. Mr Durance has referred to the chapter and verse which he says supports these propositions. I will not read out the text; part of it comes from Dr Seddon and part of it comes from the country report produced and prepared on behalf of the Home Office, but there is a multitude of different materials. The SIJ, as I have said, referred extensively to the in-country evidence, no doubt having in mind the basis on which the AIT had found the earlier adjudicator to have perpetrated legal errors.

16. In my judgment this irrationality challenge is unfounded. The evidence shows that former Ba'ath party officials claimed to be systematically targeted (see paragraph 51 of the SIJ's determination); in fact a Dutch country report of December 2004 suggested that former Ba'ath party members are at less risk of being the targets of violence than those believed to be cooperating with the interim government or the MSN. As regards hit lists, the suggestion that assassins are said to be working their way through a hit list of Saddam's former security and intelligence and personnel appears to come only from a newspaper article in February 2005. It is right that that is referred to in the Home Office report, but that cannot give the material any greater or lesser force than the newspaper article itself possesses. Moreover, Dr Seddon, who

was the appellant's expert, reports the view that Iraqi were only targeting those who had committed crimes against them (paragraph 50 of the SIJ's determination) and the only individuals at risk would be those known to have committed abuses. He says the appellant would be at less risk in Baghdad, where the majority are Sunni.

17. I acknowledge at once that these short references are themselves selective. The truth is, as often happens, the in-country evidence does not speak with an entirely single voice, and certainly does not provide an entirely unequivocal picture of the risk of future events in Iraq. It is clear that there are problems, perhaps of varying degrees, all over the country but the evidence that we have been invited to consider does not, in my judgment, contradict the SIJ's view that the appellant might be safely returned to Baghdad in such a way as to condemn that view as irrational or perverse. The reasons given in paragraph 58 of the determination, which I have set out, are not a bizarre departure from the evidence: quite the contrary, they track pieces of the evidence closely.

18. It is, in my view, of the first importance to have in mind that the case was one of internal flight. The appellant's case as regards his being returned to the south had been accepted. The SIJ was concerned to decide the risk of the appellant being identified in the north and ill-treated thereafter. He gives reasons for his conclusion that the risk of either of those events happening was not sufficient to satisfy the test that he was required to apply. I will come specifically to the nature of that test, the standard of proof, in a moment. It is to be noted that the SIJ specifically deals (paragraph 59) with any difficulties as regards the immigration process. It is also clear (paragraph 48 of the SIJ's determination) that the appellant's own case did not depend on what he had done in Basra, but rather on the fact of his having transported prisoners.

19. In the result, it seems to me that the SIJ arrived at a considered judgment on this question of internal flight which was within the scope of rational decisions open to him.

20. The second ground of appeal concentrates specifically on the issue about hit lists, and I will briefly deal with that separately. The background is the paucity of any evidence relating to such lists. As I have said, it is only to be found in the newspaper article. The newspaper is called *Knight Ridder*. The SIJ considered this evidence and considered also the appellant's evidence that he feared persecution because his name would be on such a list. Dr Seddon makes no reference whatever to hit lists. The SIJ concluded that there was no evidence about the nature of such lists or the likelihood that persons such as the appellant would figure on them (see in particular paragraph 57).

21. Subject to the appellant's more general argument about the standard of proof there is, in my view, nothing in the criticisms that are levelled at this reasoning. This disposes also of the suggestion in the third ground that the SIJ has imposed some unjustified rule that the appellant had to show positive evidence that his name was on a list. The SIJ has imposed no such rule, either expressly or impliedly. His observations at paragraph 7 are in the nature of a

general comment about the vague quality, the un-particularised quality of such material as there was about hit lists. That observation says nothing as to any particular view of the standard of proof; it is merely an observation made by the SIJ in the course of his reasoning. The fourth ground of appeal adds nothing to this.

22. In the context of all these grounds, Mr Durance has submitted that the SIJ has applied too high a standard of proof, and I will make some general observations about this. Though Mr Durance's skeleton argument is replete with learning from Australia, the United States, the European Court of Human Rights and this jurisdiction, in my judgment with respect to him the law is perfectly clear. The authorities disclose two principles. One, the burden is on the asylum seeker to make his case: see for example Aziz v Secretary of State [2003] EWCA Civ 118. Two, the burden is discharged, however, certainly in relation to future events, by showing that there is a real as opposed to a fanciful risk that they will happen. That has often been characterised as a lower burden of proof. This has effectively been the law ever since their Lordships house decided Sivakumaran [1998] IAR: see also Kacaj [2002] Immigration Appeal Reports. I understood Mr Durance to accept that these two propositions effectively represent the law relating to burden and standard of proof.

23. In my judgment there is nothing from first to last in the SIJ's decision to show that he has departed from this standard. For convenience, I will set out again this very short passage from paragraph 58 where the SIJ is dealing with the risk that the appellant might be identified in Baghdad:

> "No doubt it is the case as quoted to me from the country report that there is targeting by Islamist militias who dominate the ISF and also on the part of other or the same Shi'ite Muslim assassins towards members of a former regime. But I do not consider that the likelihood of the appellant being identified in any of the ways I have considered as being such a person is such as to cross the threshold of needing to show a real risk or degree of likelihood in that regard."

It is plain that the SIJ has applied the right test there expressly and indeed in his determination.

24. For all these reasons, I have concluded for my part that the SIJ's determination is not flawed by any legal error and in those circumstances I would dismiss the appeal.

Lord Justice Mummery:

25. I agree.

Mr Justice Blackburne:

26. I also agree.

Order: Appeal dismissed. The cost order against the Appellant is not to be enforced without leave of the Court, and there be a detailed assessment of the Appellant publicly funded costs under the Community Legal Services Order.