Saber v. The Secretary of State for the Home Department [2003] ScotCS 360 (13 November 2003)

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

Lord Justice Clerk

Lord Osborne

Lord Johnston

OPINION OF THE COURT

delivered by THE LORD JUSTICE CL

in

APPEAL TO THE COURT OF SESS

against

A decision of the Immigration Appeal Tribu
14 June 2002 and communicated to the Appe
June 2002

by

RIZJAR FAKE AHMED SABER (A

against

THE SECRETARY OF STATE FOR THI
DEPARTMENT

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Act: Bovey QC, Collins; Drummond Miller WS

Alt: Carmichael; Solicitor to the Advocate General

13 November 2003

Introduction

[1] This is an appeal against a decision of the Immigration Appeal Tribunal on a claim by the appellant for asylum. The respondent is the Secretary of State for the Home Department.

[2] The appellant is a Kurdish citizen of Iraq. Until 4 July 2000, when he fled from Iraq, he lived in Koya in the Kurdish Autonomous Region (KAR) in Northern Iraq. He entered the United Kingdom illegally later in July 2000 and claimed asylum. On 13 February 2001 the respondent refused his claim. By notice dated 22 February 2001, the respondent issued directions for the removal of the appellant to Iraq by scheduled airline at a time and date to be notified.

[3] The appellant appealed to an adjudicator. By decision dated 29 July 2001 the adjudicator allowed the appeal. The respondent appealed against that decision. By decision dated 14 June 2002 the Immigration Appeal Tribunal allowed the respondent's appeal. That is the decision now appealed against.

[4] After this appeal was lodged, the respondent amended his case to raise the new argument that, as a result of the military action in Iraq by the US-led coalition forces, the regime from which the appellant claimed to fear persecution was no longer in power, and therefore that the appeal raised issues of academic interest only. At the outset of the hearing counsel for the respondent told us that, on instructions, she would not pursue that point. That lent an air of unreality to the discussion. It required us to decide the case on the basis of the facts as they existed before the invasion of Iraq and in particular to consider the central question of the appellant's fear of persecution in a context that is now historical only.

The claim for asylum

[5] The appellant claims that he is a refugee whose removal from the United Kingdom would constitute a breach by the United Kingdom of its obligations under the Geneva Convention Relating to the Status of Refugees (1951) (the Refugee Convention) and under articles 3 and 5 of the European Convention on Human Rights (1950) (the ECHR).

> "Article 1A of the Refugee Convention provides *inter alia* as follows:
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> For the purposes of the present Convention, the term 'refugee' shall apply to any person who ...
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> (2) ... 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 ... "

The ministerial statement and undertaking

[6] On 26 March 2001, the then Home Office Minister, Mrs. Barbara Roche, made the following statement:

> "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."

[7] That statement was followed by a written undertaking given by the respondent in the following terms:

> "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"
> (cf. *Gardi v Secretary of State for the Home Department*, [2002] 1 WLR 2755, at p. 2762).

The proceedings before the adjudicator

The evidence

[8] The adjudicator had before him the appellant's statement of evidence form; his interview record; the respondent's refusal letter; the Iraq Country Assessment prepared by the Home Office Country Information and Policy Unit (the CIPU assessment) (April 2001), and the Immigration and Nationality Department assessment of Iraq (3 July 2001), which was in substance the same. The CIPU assessment was the basic source document. It set out *inter alia* detailed information about the volatile state of affairs in the KAR, and in particular about the activities of the rival political groups, the PUK and the PDK, and the areas over which they exercised control. The adjudicator did not have the terms of the ministerial statement that we have quoted. The adjudicator also heard the oral evidence of the appellant who, as he records, was thoroughly cross-examined (Decision, para. 9).

The adjudicator's conclusions on the appellant's credibility

[9] The adjudicator found the appellant to be "generally a credible witness" (para. 11). Although there were some discrepancies between the appellant's statement of evidence, his asylum interview and his oral evidence, he held that those "were all of a very minor nature and did not affect the core credibility of the appellant's story" (para. 15). He did not believe the appellant's claim that he had been beaten and tortured by the PDK (para. 12). He regarded the appellant's exaggeration of his suffering at the hands of the PDK as "perhaps an understandable embellishment" in his wish to indicate the risk to him in the KAR (para. 15).

The adjudicator's findings in fact

[10] The adjudicator found that the appellant joined the PUK in 1994. While at University in Arbil in the KAR, he was involved in promoting and recruiting for the PUK and was widely known to be so involved. The PDK gained control of Arbil in August 1996. Shortly after that, the appellant was arrested by the PDK, detained for

25 days and questioned. The appellant was released on the intervention of a lecturer at the University and continued his studies for the next two years. During that time he maintained his links with the PUK.

[11] The appellant left Arbil in December 1998 for Koya, which was in a PUK-controlled area. He began to smuggle machine and car parts, and later medicines, to Sulaymaniya from Kirkuk at the request of PUK members. He was assisted in these activities by a friend called Farhad Aziz. In April 2000, while they were smuggling medicine, Farhad was arrested by the Iraqi authorities. The appellant escaped. Farhad's family blamed the appellant for having involved Farhad in the work. They threatened to take revenge on him if Farhad did not return safely. The appellant fled because he feared both Farhad's family and the Iraqi secret agents who were working with impunity within the KAR. He feared that the Iraqi authorities would have extracted information about the appellant from Farhad.

The adjudicator's decision

The Refugee Convention

[12] The adjudicator considered that the "basic crux" of the appeal was that the appellant was by then almost certainly known to the Iraqi State as a political opponent who had been engaged in smuggling into the KAR for the PUK. He considered that the appellant's return to Iraq would mean his return to Baghdad. It was unnecessary for him to consider the issue of internal flight in the KAR since at that time there was no such option. Even if the appellant somehow returned to the KAR, it followed from the appellant's evidence, which he believed, and which the objective evidence did not contradict, that since Iraqi secret agents were moving with virtual impunity in the KAR, the appellant would be at a real risk of capture or death at their hands (para 17). The adjudicator concluded that return to Baghdad, or even to the KAR, would mean a real risk of imprisonment, torture, inhuman and degrading treatment or punishment, and that treatment could be causally linked to the appellant's PUK political affiliations. He therefore allowed the appeal under the Refugee Convention (para. 18).

The ECHR

[13] In considering the potential for the appellant to be imprisoned on his return and to be subjected to torture, inhuman and degrading treatment or punishment, the adjudicator relied upon the CIPU assessment and on matters within judicial knowledge. He held that it was within his judicial knowledge that the United Kingdom did not return failed asylum seekers to Iraq and that at the time of the hearing there was no means of returning the appellant directly to the KAR, with the result that return to Iraq meant return to Baghdad (para. 19).

[14] The adjudicator concluded that the appellant would, upon return to Baghdad without any papers to show that he had left Iraq legitimately, almost certainly be detained. The adjudicator described prison conditions in Iraq, as disclosed in the CIPU assessment, as appalling. He referred in particular to the nature and extent of the torture of detainees in certain Iraqi prisons. On the basis of this "objective evidence," as he described it, he found that if the

appellant should be returned to Iraq, there would be a real risk that his article 3 rights would be violated. He said that the same argument applied to the case under article 5, which he considered to have extra-territorial effect (para. 21). He therefore allowed the appeal under the ECHR (paras. 21-22).

The decision of the tribunal

[15] The tribunal first considered the adjudicator's conclusion that the return of the appellant to Iraq would mean his return to Baghdad. It referred to the ministerial statement and the relative undertaking, and to its decision in *Gardi* (01/TH/02997) that an adjudicator should accept such an undertaking. It concluded that the adjudicator had erred in holding that he need not consider the issue of internal flight to the KAR or the question whether there was a risk of persecution there. It remarked that it would be a strange state of affairs if the United Kingdom's obligations under the Refugee Convention were engaged by assessing a claim in relation to a place where the claimant had no intention of going and where the respondent had no intention of sending him.

[16] The tribunal held that the issue was whether or not the claimant had a well-founded fear of persecution for a Convention reason in the KAR. The appellant's case raised two forms of that risk: the risk of capture or death at the hands of agents of the Iraqi authorities within the KAR and the risk of violence and persecution at the hands of Farhad's family.

[17] In relation to the first risk, the tribunal's conclusions were as follows:

> "14. The adjudicator had before him the Iraq Country Assessment April
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> > 2001: This confirms that the KDP and PUK have control of their own areas which both have a system of justice based on Iraqi legislation with police to enforce public order. Both regions have their own government in which several parties have seats. The Tribunal accepts that this is an accurate assessment of the situation. The contents of this report are the source for the Secretary of State's comments in paragraph 8 of the reasons for refusal letter stating that both the PUK and KDP enjoy almost complete freedom of action in their own territories. The Tribunal also note that the asserted fear from Iraqi agents in the KAA does not appear in the claimant's statement in support of his claim for asylum, nor was it considered by the Secretary of State in his reasons for refusal letter. In any event, in the view of the Tribunal there is no adequate evidential basis for a finding that Iraqi secret agents move with impunity within the KAA. If this were the case, and it were known, it would be very surprising if there were no objective evidence to support the contention. In fact, the background evidence goes the other way. It confirms that within their areas the PDK and the PUK have almost complete freedom of action.
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> 15. Even if there is a risk from Iraqi agents operating within the KAA, the

> issue arises of whether the claimant is able to look to the PUK authorities for protection. As the claimant has been a member of the PUK and on his own account has been working on its behalf by bringing medical supplies in to the KAA area, the Tribunal are satisfied that there is no reason at all why the PUK would not provide him with protection and indeed every reason why it should."

[18] The tribunal then held that the adjudicator had had no proper basis for his findings on the risk from Farhad's family. We need not go into its reasons since the appeal on that point has not been pursued.

[19] The tribunal held that the ECHR appeal too should be assessed in relation to a return to the KAR rather than to Baghdad. It again rejected the adjudicator's decision in relation to the risk from Farhad's family. It considered that no issue arose under article 3; or under article 5, since there was no evidence that the appellant was likely to face unlawful detention in the KAR (para. 18).

[20] The tribunal therefore allowed the appeal against both grounds of the adjudicator's determination.

Submissions for the appellant

[21] Counsel for the appellant submitted that it was only in exceptional circumstances that the tribunal should disturb findings in fact of an adjudicator that were based on oral evidence and on questions of credibility (*Ibrahim* v *Secretary of State for the Home Department* [1998] INLR 511, at p. 514D (IAT); *Secretary of State for the Home Department* v *Chiver* [1997] INLR 212, at p. 219G-H (IAT); *Horvath* v *Secretary of State for the Home Department* [1999] INLR 7, at paras. [9] to [12] (IAT)). The adjudicator had held, upon the oral evidence of the appellant, with whose overall credibility he was satisfied, that Iraqi agents were operating with impunity in the KAR. In paragraph 14 (*supra*) the tribunal had erred in substituting findings of fact based on paragraph 4.9 of the CIPU assessment. There was an adequate evidential basis for the adjudicator's finding about the presence of the Iraqi agents. It came from the appellant. The background evidence did not go the other way. The tribunal had no proper basis for disturbing the adjudicator's finding that the appellant had a real fear of persecution.

[22] The tribunal had also erred in holding that if there was a risk of persecution, the appellant could look to the PUK for protection. It was inherent in the idea that Iraqi agents were operating with impunity in the KAR that there was no real possibility of the appellant's being protected by the PUK. The tribunal had also erred in impliedly holding (para. 15) that the possibility of protection by the PUK met the requirements of article 1A(2) of the Refugee Convention. In terms of that provision, the country of the appellant's nationality was Iraq. Iraq could not protect him from persecution because Iraq was the persecutor. In *Gardi* v *Secretary of State for the Home Department* (*supra*) the Court of Appeal had held on similar facts that the KAR did not qualify as a "country" for the purposes of article 1A(2) (at para [37]; cf Hathaway and Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination* there referred to, and now published in *Refugee Protection in International Law*, Feller *et al* (eds) (2003) p. 357, at pp. 409-411). The situation in the KAR was not comparable with the situation in Kosovo that was considered in *R*. v. *Special*

Adjudicator ex p. Vallaj ([2001] INLR 455). Although the conclusion of the Court of Appeal in the *Gardi* case was *obiter*, the reasoning was correct and was adopted on behalf of the appellant. Neither the KAR nor the PUK was capable of providing the appellant with the protection necessary for the purposes of article 1A(2).

[23] The court should allow the appeal, quash the decision of the tribunal and restore the decision of the adjudicator (Macdonald, *Immigration Law and Practice in the United Kingdom*, 5th ed., para. 18.194). It would be unfair to the appellant if there had to be a re-litigation of the whole issue (*Drrias* v *Secretary of State for the Home Department* [1997] Imm. AR 346). The adjudicator's determination in this case was made more than two years ago. In *Mohammed Arif* v *Secretary of State for the Home Department*([1999] INLR 327) the Court of Appeal had restored the decision of the special adjudicator in similar circumstances (at pp. 331-332). *Singh* v *Secretary of State for the Home Department* (1999 SC 357), where the case was remitted to the tribunal for a further hearing, was distinguishable. That was a "reasons" case, in which the tribunal had heard evidence (at p. 363G-H).

Submissions for the respondent

[24] Counsel for the respondent submitted that the tribunal was entitled to disturb the adjudicator's findings in fact because it was in as good a position as the adjudicator to assess the evidence about the state of affairs in Iraq (cf. *Balendran v Secretary of State for the Home Department*, [1998] Imm AR 162, Jowitt J at pp. 167-168). The adjudicator's conclusion about the operations of Iraqi agents within the KAR depended on the unsupported assertion of the appellant. The adjudicator should have tested it against the documentary material, particularly since in the many previous cases on asylum claims by Kurds, the point had not been mentioned. The tribunal had applied its own expertise on the point. It was right to reject the appellant's evidence since he had not mentioned the point in his statement of evidence form and since there was no independent evidence to support it.

[25] The court should not take an over-formal approach to the definition of the appellant's country of nationality for the purposes of article 1A(2). In an exceptional case, the court could hold that its protection could be secured by an entity other than a "country" (*R v Special Adjudicator, ex p. Vallaj*, *supra*, at paras. 21, 24, 29-31; *Thje Kwet Koe v Minister for Immigration and Ethnic Affairs*, [1997] FCA 912). The KAR could be considered to be a "country" for the narrow purposes of article 1A(2). It had a degree of autonomy, identifiable borders and an identifiable community within it.

[26] If the court were to allow the appeal, it should return the case to the tribunal for a hearing *de novo*. If the court were to re-instate the decision of the adjudicator, it would re-instate a decision that was admittedly flawed in respect of his erroneous belief that return to Iraq would mean return to Baghdad. The tribunal could look afresh at the question of the KAR, and the respondent would have the opportunity to lead evidence about the new state of affairs in Iraq.

Decision

[27] There are three questions in this appeal: (1) whether the tribunal was right to substitute its own findings for those of the adjudicator; (2) whether the tribunal was right to hold that the appellant would receive appropriate protection if he were to returned to the KAR; and (3) if we should sustain the appeal, what should be the appropriate disposal.

Findings in fact

[28] In our opinion, the tribunal erred in substituting its own findings for those of the adjudicator. We do not accept the argument for the appellant that an adjudicator's acceptance of an appellant's own word on a material question of fact precludes the tribunal from reaching any other conclusion on the question. An adjudicator is certainly entitled to accept the uncorroborated evidence of a claimant on any material point; but the circumstances may show that his assessment of the evidence is flawed. If, for example, an adjudicator were to accept evidence from an appellant that was expressly contradicted by all sources of independent information, such as CIPU assessments, the tribunal might well disturb the adjudicator's finding. The tribunal has its own expertise in these matters. In such a case, it would be open to it to hold that the decision was perverse. The question will depend on the circumstances in every case.

[29] In this case, the appellant's assertion that Iraqi agents were operating with impunity within the KAR was crucial to his claim. That assertion, so far as counsel are aware, had never been made in any reported Kurdish asylum case. It was not explicitly supported by the CIPU assessment.

[30] If the assessment had explicitly contradicted the appellant's assertion, the tribunal might well have been justified in holding that it was not proved. The adjudicator's overall judgment on the appellant's credibility seems lenient to us in the light of his having disbelieved the appellant's evidence of beatings and torture at the hands of the PDK; but we have come to the view that paragraph 3.11 of the CIPU assessment, which reported that in 1996 Iraqi and Iranian intelligence units were active in the KAR, gave some justification for the conclusion that those operations were likely to be continuing at the time of the hearing. Moreover, we consider that the tribunal erred in its conclusion that the background evidence went the other way (para. 14). The background evidence did not support the appellant's evidence; but it was not inconsistent with it.

[31] We have therefore come to the view that the tribunal's reasoning on this point was erroneous and that its decision cannot stand.

The protection argument

[32] To succeed under article 1A(2) the appellant has to establish that he has a well-founded fear of persecution and that he is unable by reason of such fear to avail himself of the protection of the country of his nationality (*Gardi v Secretary of State for the Home Department*, *supra*). The idea of a "country" can be widely interpreted for the purpose of article 1A(2) (cf. *R v Special Adjudicator, ex p. Vallaj*, *supra*); but we reject the submission for the respondent that the tribunal was entitled to conclude that the KAR could be treated as a country for that purpose. In *R v Special Adjudicator*, *ex p. Vallaj* (*supra*), the duty of protection of the Federal Republic of Yugoslavia was being exercised in relation to Kosovo by an international peacekeeping agency. It was held that the phrase "protection of that country" could comprehend protection given by such an agency. In *Thje Kwet Koe v Minister for Immigration and Ethnic Affairs* (*supra*), a similar conclusion was reached by the Australian Federal Court when it held that the former United Kingdom colony of Hong Kong was a "country" for the purposes of the same provision. In our opinion, the information available to the tribunal (CIPU assessment, *supra*, at paras. 3.7-3.21; 4.5-4.9) came nowhere near to supporting that idea in this case. The evidence about the sources of authority in the

KAR points against that conclusion. Notwithstanding that its decision was later declared to be invalid for jurisdictional reasons, we agree with, and adopt, the conclusion on this point expressed *obiter* by the Court of Appeal in *Gardi v Secretary of State for the Home Department* (*supra*, at para. 37; cf. *Gardi v Secretary of State for the Home Department (No 2)*, [2002] 1 WLR 3282).

[33] In any event, we do not accept that the tribunal decided the appeal on the basis that the KAR could be considered as the source of the appellant's protection. Paragraph 15 of its decision shows that the tribunal considered that the protection would come from the PUK, which controlled only a section of the KAR, and even then in circumstances of unrest. Moreover, there was no evidence before the tribunal as to the willingness of the PUK to protect the appellant. We conclude therefore that the tribunal erred on this point too.

Disposal

[34] We shall therefore allow the appeal. It is in our discretion whether to restore the decision of the adjudicator (*eg Drrias v Secretary of State for the Home Department*, *supra*; *Mohammed Arif v Secretary of State for the Home Department*, *supra*, at pp. 331-332); or to make a finding that the appellant has refugee status (*eg R v Immigration Appeal Tribunal*, *ex p. Shah*, [1999] 2 AC 629); or to remit the case for a further hearing (*Singh v Secretary of State for the Home Department*, *supra*). It is a material consideration that it would bear hard on the appellant if he had to re-litigate this case more than two years after he claimed asylum (cf. *Drrias v Secretary of State for the Home Department*, *supra*, Thorpe LJ at pp. 353-354); but in our view it would be wrong merely to re-instate the decision of the adjudicator. His decision was based to a material degree on his understanding that the removal of the appellant would mean his removal to Baghdad. That view was at variance with the ministerial statement of 26 March 2001, of which the adjudicator seems to have been unaware, and it can no longer be maintained in consequence of the ministerial undertaking. Moreover, to re-instate the decision would be to allow the asylum appeal on a basis of fact that has been materially affected by subsequent events in Iraq. It is preferable that the appeal should be determined on up to date facts. In contrast with *Singh v Secretary of State for the Home Department* (*supra*), the tribunal in this case did not hear evidence. In our opinion, the appropriate course is to return the case for a hearing *de novo* by a new adjudicator.