EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Carloway
Lord Hardie
Lord Philip

[2009] CSIH 83
XA46/06

OPINION OF THE COURT

delivered by LORD HARDIE

in Application for leave to appeal

by

D.B.N.B.K (A.P.)

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

_____

Act: Caskie; McGill & Co

Alt: Lindsay; Solicitor to the Advocate General

14 October 2009

Background

[1] This case has a long history. The applicant, a citizen of Iraq, arrived in the United Kingdom with her sister DK when they claimed asylum. On 30 July 2004 their claims were refused and a decision was later taken to refuse the applicant and her sister leave

to enter the United Kingdom. The applicant and her sister separately exercised their statutory right of appeal against removal on asylum and human rights grounds. It appears from the decision of the Immigration Judge in the applicant's case that the applicant's sister's appeal before an adjudicator in 2004 was unsuccessful but the sister sought reconsideration of that decision. The Immigration Judge in the applicant's case observed that it was difficult to see why the claims of the applicant and her sister were not conjoined as each of them relied on her religious persuasion in support of her claim to need surrogate protection. It appears from the response to him by the solicitor for the applicant that this was a conscious decision "in order that a negative credibility finding on one should not go against the other." (paragraph 38)

[2] The applicant's case called on 6 October 2004 before an adjudicator who dismissed the appeal without consideration of the merits when there was no appearance by or on behalf of the applicant. The Tribunal subsequently held that the adjudicator had made a material error of law and the case was sent for reconsideration before a differently constituted Tribunal. On 5 December 2005 the Immigration Judge heard from the applicant followed by submissions from the applicant's solicitor and from the respondent's presenting officer. On 6 January 2006 the Immigration Judge dismissed the applicant's appeal.

[3] The applicant sought leave from the Asylum and Immigration Tribunal to appeal to the Court of Session but that was refused on 20 February 2006 for the following reasons:

> "The application was not made in the prescribed form and was therefore not a valid application [Rule 34(2)(a) of the 2005 Procedure Rules].
>
> It was also lodged outside the permitted period and I have no power to extend time.

> If I am found to be wrong on the above matters, I would not have granted the application as the grounds do not raise a properly arguable issue of law. Appellants' affiliation to Christian faith is not disputed by the Judge. What he has not accepted, and correctly so, on the evidence before him, that her commitment to and her activities for the Church are such as to cause her a real risk on return to Iraq. How much weight is given to an item of evidence is not a matter of law. On the issue of membership of a particular social group, it is not the membership that determines status as a refugee. It is the causal link to persecution that does. That link is missing in this case."

Thereafter the applicant lodged the present application.

[4] Pending the determination of this application both the applicant and her sister applied to the respondent for reconsideration of each of their cases. The respondent refused the application for reconsideration by the applicant's sister and refused to reconsider the applicant's case pending the hearing of the present application. Thereafter both the applicant and her sister sought Judicial Review of these decisions. Initially both sisters presented a single petition which was refused first orders. Thereafter separate petitions on behalf of each of the applicant and her sister were lodged seeking to review the decision that affected the particular individual. On 24 April 2009 in the course of a First Hearing in these petitions counsel for the respondent withdrew the letters issued to each sister and advised the court that each of them would in due course be issued with a substantive decision. Both the applicant and her sister have had the benefit of Legal Aid throughout the various proceedings in their claims for asylum.

Decision of the Immigration Judge

[5] The Immigration Judge did not find the applicant to be a credible and reliable witness. He was constrained to accept that the applicant was a Christian because that had been conceded on behalf of the respondent. However when he considered the applicant's commitment, and that of her family, to her religion he concluded that the applicant left him "with the impression that religion did not play any significant role in her life or that of her family." (paragraph 19) He also concluded that there was no evidence that the applicant and her family "were persecuted or discriminated against up to the fall of the Saddam Hussein regime on account of their religious persuasion." (paragraph 20) At paragraph 25 he commented:

> "I do not accept that the appellant underwent the experiences of ill-treatment which she has described. I do not then accept that it is reasonably likely that when the appellant decided to leave Iraq in March 2003 her decision was in any way influenced by her religious persuasion as a Christian or by attempts to coerce her into membership of the Ba'ath Party. I find it more reasonably likely that she and her sister decided to leave Baghdad as war loomed over that city. She cannot be criticised for that but such a decision does not make her a refugee in terms of the 1951 Convention."

Thereafter the Immigration Judge considered whether the applicant would be at risk if she returned to Iraq. He concluded that she could not safely be returned to Baghdad as a Christian at the date of the hearing before him (paragraph 30). Thereafter he considered the question of internal flight. Although that issue had not been raised in the letter of refusal, an argument in support of internal flight was advanced on behalf of the respondent in submissions. The applicant's solicitor replied. The Immigration Judge rejected the submission that the applicant could safely and reasonably relocate

within southern Iraq but on the basis of reports from various government agencies he concluded that she could safely relocate to the Governorates of northern Iraq. In doing so, he observed:

> "The Governments of northern Iraq have made arrangements for Christians to be received into a specific area. There is no information that that area is being targeted because of its inhabitants or that those who have moved there are at risk of harm. I see no reason why, standing such arrangements, the appellant with her sister could not safely relocate there."

Submissions on behalf of the applicant

[6] Counsel for the applicant criticised the conclusion of the Immigration Judge that the applicant could relocate to the Governorates of northern Iraq and submitted that in reaching that conclusion the Immigration Judge had erred in law. In particular the Immigration Judge failed to take account of difficulties that the applicant would experience in lawfully residing in the northern Governorates. Moreover it was clear from the decision of the Immigration Judge that he had failed to take account of the UNHCR Guidelines dated October 2005 relating to the eligibility of Iraqi asylum seekers (hereinafter referred to as "the Guidelines"). It is a prerequisite of the availability of internal relocation that the applicant can lawfully reside and make a reasonable life for herself in the area of relocation. Counsel also submitted that in these circumstances the applicant should have been accepted as a refugee in January 2006 and for that reason he invited the court to allow the appeal and to determine the applicant's application for asylum in her favour. Alternatively he invited the court to remit the case for reconsideration on the question of internal flight.

[7] As for the procedural issue relating to the alleged lateness of the application to the Asylum and Immigration Tribunal for leave to appeal to the Court of Session, counsel

disputed that the application had been late. It had not been possible to recover the documentation from storage because the matter had only arisen in the course of the hearing before this court. Even if the application had been late, it was appropriate for the court to dispense with the failure to comply with the time limits. In any event the respondents should have taken a plea to the competence of the present application if the respondent wished to rely upon the procedural irregularity.

Submissions on behalf of the respondent

[8] As far as the alleged procedural irregularity was concerned, counsel for the respondent was unable to advise the court what was before the Tribunal when it considered the application for leave to appeal to the Court of Session. Nor could he confirm whether there had been substantive compliance with the procedural rules. However he submitted that if the application had not been lodged timeously with the Tribunal, it was incompetent for the Tribunal to extend the time limit.

[9] As for the merits of the application, counsel for the respondent submitted that the court should refuse the application because there had been no material error of law in the decision complained of. His alternative submission was that if there had been an error of law the case should be remitted back for reconsideration on the question of internal relocation. In particular he submitted that it would not be appropriate for the court to determine the application for asylum as matters were not sufficiently clear to enable the court to reach its own view on the merits.

[10] The principal submission on behalf of the respondent was that the Immigration Judge had reached a conclusion that was reasonably open to him in light of the evidence before him. It was important to recognise that different decision makers could reach a different view of the same facts. However the possibility of a different view did not elevate it to an error of law. The Immigration Judge had considered the

Country of Origin Information Report which recognised that many Christians had relocated to safer areas in the Kurdish Governorates. The Guidelines, upon which the applicant relied, acknowledged that it was not an exhaustive report and the Immigration Judge's observation to that effect did not amount to an error of law.

Decision

[11] Before considering the merits of this application there are two procedural issues which should be addressed. The first is whether the application to the Asylum and Immigration Tribunal for leave to appeal to the Court of Session was competently made and, if not, what effect that has upon the present application. The procedure is contained within the Asylum and Immigration Tribunal (Procedure) Rules 2005 *[S12005/230]* (hereinafter referred to as "the Rules"). Part 3 Section 3 of the Rules deals with applications for permission to appeal to the appropriate appellate court. The relevant rules are as follows:

> "**Applying for permission to appeal**
>
> 34(1) An application to the Tribunal under this Section must be made by filing with the Tribunal an application notice for permission to appeal.
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> (2) The application notice for permission to appeal must -
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> (a) be in the appropriate prescribed form;
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> (b) state the grounds of appeal; and
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> (c) be signed by the applicant or his representative, and dated.
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> (3) If the application notice is signed by the applicant's representative, the representative must certify in the application notice that he has completed the application notice in accordance with the applicant's instructions.

(4) As soon as practicable after an application notice for permission to appeal is filed, the Tribunal must notify the other party to the appeal to the Tribunal that it has been filed.

Time limit for application

35(1) In (*sic*) application notice for permission to appeal must be filed in accordance with Rule 34 -

(a) if the applicant is in detention under the Immigration Acts when he is served with the Tribunal's determination, not later than 5 days after he is served with that determination;

(b) in any other case, not later than 10 days after he is served with the Tribunal's determination.

(2) The Tribunal may not extend the time limits in paragraph (1)."

As noted above, the Senior Immigration Judge who considered the application for leave to appeal to the Court of Session recorded in the reasons for refusal that the application was not in the prescribed form and was therefore not a valid application. In that regard he relied upon Rule 34(2)(a). Moreover he recorded that the application was lodged outside the permitted period and he had no power to extend the time. If either or both of these observations is correct the Senior Immigration Judge ought to have raised his concerns in that regard with the applicant's solicitors. Having done so, if it remained his position that the application was not a valid application by virtue of Rule 34(2)(a) or was outside the timescale specified in Rule 35, he should have rejected as incompetent the application and refused to entertain it on its merits. As the Senior Immigration Judge correctly observes, Rule 35(2) specifically excludes the Tribunal's power to extend the time limit specified in Rule 35(1). Moreover the requirements of Rule 34(2) are mandatory concerning the form and contents of the

application notice for permission to appeal. Having regard to the first two reasons given by the Senior Immigration Judge in his decision dated 20 February 2006 it is difficult to understand why parties did not consider the question of the competence of the application for leave to appeal to this court in advance of the hearing. It is unsatisfactory that neither party was able to advise the court unequivocally whether there had been compliance with Rules 34 and 35. In the absence of such information and without the benefit of detailed submissions we are unable to reach any concluded view about the competence of this application. In the circumstances the application will be treated as competently before us, although practitioners in asylum cases and the respondent should be conscious of the need to comply with the Rules and be aware of the risk of applications being dismissed as incompetent where the Rules are not complied with.

[12] The other observation about procedure in this case is that it appears, from the history of this case and that of the applicant's sister, that a conscious decision was taken by their advisers to separate their appeals in case an adverse finding of credibility of the applicant or her sister affected the application of the other. There is provision in the Rules for the Tribunal hearing two or more appeals together. Rule 20 is in the following terms:

> "Where two or more appeals are pending at the same time, the Tribunal may direct them to be heard together if it appears that -
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> (a) some common question of law or fact arises in each of them;
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> (b) they relate to decisions or action taken in respect of persons who are members of the same family; or
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> (c) for some other reason it is desirable for the appeals to be heard together."

In the present case it is clear that the appeals by the applicant and her sister satisfied Rule 20(a) and (b). It is unfortunate that the Tribunal did not exercise its power to direct the appeals to be heard together, thereby avoiding unnecessary public expense as both the applicant and her sister were in receipt of Legal Aid. Although Rule 20 confers a power upon the Tribunal to direct appeals to be heard together, there is no equivalent obligation imposed upon an appellant or his professional representatives. There is, nevertheless, an obligation on solicitors whose clients have the benefit of Legal Aid to have due regard to economy. In these circumstances where, as here, members of the same family arrive in the United Kingdom together, the representatives of such claimants should notify the Tribunal of their related outstanding appeals and request that they be heard together. Moreover it is a matter of concern in this case that the applicant has incurred further unnecessary public expense by pursuing a petition for Judicial Review of the respondents' refusal to reconsider her claim for asylum at a time when the determination of the present application was pending.

[13] As for the merits of the application, the passages quoted above (para 5) from the decision of the Immigration Judge clearly illustrate that he rejected her claims that she left Iraq because of fear of persecution as a Christian or because of attempts to coerce her into membership of the Ba'ath Party. Rather he concluded that the applicant and her sister decided to leave Baghdad because of the imminence of war and that she was not a refugee in terms of the 1951 Convention. It was not disputed on behalf of the applicant that the Immigration Judge was entitled to make these findings and the narrow issue for our consideration was whether he had erred in law in concluding that the applicant could relocate to the Northern Governorates of Iraq.

[14] The solicitor for the applicant relied upon the significant change in relation to Christians that had taken place in Iraq after 2004 and the Immigration Judge accepted that was a proper approach. The Immigration Judge considered the Country of Origin Information Report dated October 2005 and noted increased tensions between Christians and Muslims. He observed:

> "There is growing evidence of intimidation of Christians whether lay or cleric. Christians are being seen as supporters of the Coalition. Many Christian families have left their homes for safer areas within Iraq or have gone to neighbouring countries largely out of fear of reprisals at the hands of the Islamic extremists. On any view these facts support the contention that the situation for returning Christians to what I may call freed Iraq is one of serious risk. That risk would certainly exist for the appellant in Baghdad in which she has lived all of her life. While then she would not have a well-founded fear of persecution for a Convention reason in Baghdad she could not safely be returned there as a Christian now." (para 30)

The Immigration Judge noted that an argument in support of internal flight was advanced on behalf of the respondent in submissions although it had not been raised in the letter of refusal of asylum. The Immigration Judge rejected a submission on behalf of the respondent that the applicant could safely and reasonably relocate within southern Iraq but concluded that relocation to the Governorates of northern Iraq was and remained a viable, valid and reasonable option for her.

[15] In considering whether the Immigration Judge erred in law it is important to bear in mind the test to be applied in cases where relocation is being considered. In *Januzi* v *Secretary of State for the Home Department* [2006] 2 AC 426 Lord Bingham of Cornhill expressed it in the following way:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so." (paragraph 21)

In the same case Lord Hope of Craighead expressed it thus:

> "The question where the issue of internal relocation is raised can, then, be defined quite simply....it is whether it would be unduly harsh to expect a claimant who has been persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there." (para 47)

In *AH and Others (Sudan)* v *Secretary of State for the Home Department* [2008] 1AC 678 Lord Bingham of Cornhill referred to his definition of the appropriate test in *Januzi* and observed:

> "It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the inquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the

> difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is." (para 5)

At paragraph 13 Lord Bingham of Cornhill further observed:

> "As already indicated (para 5 above) the test propounded by the House in *Januzi* was one of great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought."

Thus in determining whether it would be unduly harsh or unreasonable to expect the applicant to relocate, the Immigration Judge should not leave out of consideration any material other than the conditions in the United Kingdom. In particular, as Lord Hope of Craighead observed, it is relevant to consider whether the applicant can reach the less hostile part of the country without undue hardship or undue difficulty. In the present case at Annex VII the Guidelines discuss the question of internal relocation within the Iraqi context. Paragraphs 18 to 26 consider the question of whether relocation is practically, safely and legally accessible to an individual. Travel by road is extremely dangerous and the three northern Governorates are not easily accessible. There are check points and strict security measures which result in the rejection of persons not originating from the respective Governorate. Anyone allowed to enter requires to apply for a residence permit in order to legalise his/her stay and in all three Governorates applicants must have a Kurdish sponsor residing in the respective Governorate in order to be granted a residence permit. In considering the Guidelines the Immigration Judge referred to the Country of Origin Information Report and

observed that the entries in that report were sourced and relatively recent. He also noted that the Kurdistan regional governments were prepared to instigate and implement a scheme to facilitate the acceptance of Christians from southern Iraq and he attached importance to that. Thereafter he observed:

> "I was not referred to any part of the Guidelines which deals with that adminicle of evidence. The absence of such material from the Guidelines (issued in October 2005) is important. It is also clear that many of the Christians who lived in Basra and Baghdad originated from the Northern Governates (*sic*) in any event."

It appears that the Immigration Judge may have dismissed the difficulties recounted in the Guidelines for persons seeking to relocate in the Northern Governorates. His justification for not relying upon the Guidelines is unconvincing in the context of a report which does not purport to be exhaustive. Having rejected the Guidelines the Immigration Judge has failed to consider whether the applicant had a sponsor in the Northern Governorates or had any relatives or other connections there. Nor did he address the question of how the applicant would reach there in safety. In that regard there was a dispute between counsel for the appellant and counsel for the respondent as to the method of transport which would be available to the applicant from Baghdad to the Northern Governorates. The Immigration Judge had no evidence that the scheme involving the acceptance of Christians into the Northern Governorates applied to the applicant or was even still in existence. In all the circumstances we have concluded that the Immigration Judge may have erred in law and for that reason we shall allow the application for leave to appeal. Having done so we shall allow the appeal and remit the case to the Tribunal for reconsideration. In view of the fact that counsel for the applicant acknowledged that the situation in Iraq changed quickly and

having regard to the passage of time since the decision of the Immigration Judge the matters for reconsideration should include the question whether the applicant can now return to Baghdad and, if not, whether she could relocate to any other part of Iraq including southern Iraq as well as the northern Governorates.