

H-MH/11-V2

Heard at Field House

On 23 August 2004

FK (Iraq - medical conditions
for children) Iraq CG [2004]
UKIAT 00310

IMMIGRATION APPEAL TRIBUNAL

25/11/2004

Date Determination notified:

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Before:

Mr. D.K. Allen - Vice President
Mr. A.R. Mackey - Vice President
Mrs. M.E. McGregor

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Appellant: Ms. L. Elliot, Solicitor,
Halliday Reeves Solicitors, Gateshead.

For the Respondent: Mr. M. Blundell, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant, a national of Iraq, appeals with permission against the Determination of an Adjudicator, Mrs. Nicola Bircher, promulgated 29 December 2003,

wherein she dismissed an appeal against the decision of the respondent who had issued removal directions and refused asylum and human rights claims.

2. Permission was granted on one ground only. That ground was that the Adjudicator had failed to have regard, when considering the issue of returnability, to the position of the appellant's children. The youngest of the appellant's children, two boys, were born in the UK on 25 February 2002 (the other child, a girl, was born in Iraq in 1998). The appellant's solicitors provided us with a bundle consisting of relevant objective information and two medical reports. Both of these had not been before the Adjudicator for reasons explained. First was a report from Dr. E.G.A. Thorniley-Walker, General Practitioner, this report related to one of the twin boys of the appellant, Muhammed (M). It stated:

"This 2 year old boy has been registered with our practice since 5 February 2003. He has recently been referred to a consultant paediatrician in South Tyneside Hospital regarding possible fits. These may be simply associated with fevers but a consultant opinion is being sought to exclude any other significant reasons for these episodes.

He has no other significant past medical history and is not currently on any medication."

3. The second, and clearly more relevant, report is from Dr. Stephen M. Cronin, Consultant Paediatrician, South Tyneside Health Care (NHS Trust) and is dated 6 August 2004. A copy of that report was also made available to the respondent.
4. This report states that the consultant had seen M on two occasions (27 July 2004 and 5 August 2004) and had heard his history and that of his parents. The report relates that on five occasions over the last six to eight months M had experienced a short-lived seizure. There were no triggering events. Details of the effects of the seizure are set out. The consultant states that in addition to this issue it is of serious concern that M is not linking words together. He has used fairly simple single words only. He has only been walking since he was 18 months old. Both M and his brother have the same developmental delay, which the consultant considers is a real concern, although the brother has not exhibited seizure episodes. Descriptions of the seizure episodes are then described and the consultant states:

"They sound epileptic, i.e. related to electrical discharge in the brain but could also be Salaam Attacks, otherwise known as Infantile Spasms, which can have a very poor prognosis particularly in terms of development. The latter often occur in

the first year or so of life but can occur up to 6 years of age and because of the long-term consequences require careful investigation and treatment where appropriate."

5. The consultant has arranged for an electroencephalogram to be performed. He also arranged, because of the history, to raise this issue with a Dr. Ramesh a Consultant in Paediatric Neurology in Newcastle. Dr. Ramesh, like the consultant, felt that these seizures were important and he was awaiting the result of the EEG test. He mentioned an unusual familial condition that can occur in children of Kurdish origin and feels that further investigation in terms of further EEG's and possibly an MRI scan is appropriate. The consultant reports that at this stage it has not been possible to set up the investigations but it will be done over the next few weeks.
6. The consultant then goes on to set out the implications for M, from this particular problem, and states that they may simply respond to treatment, in which case, he needs appropriate investigation and initiation of the appropriate therapy if the episodes continue. Alternatively they may be the portend of a worsening picture and clearly, in this case, different types of assessment and intervention may become essential. Finally, he noted that, these episodes may actually be a one-off period, which will not continue. He considered this seemed unlikely at the moment but was possible. He then noted:

"Paediatric neurology is a difficult area and although considerable expertise has evolved, there nevertheless are things we aren't necessarily able to explain easily."

7. He goes on to state that he will require early placement in nursery, speech therapy and possibly every assistance with his hearing. He states that follow-up over the next six months to a year may well require life-long interventions of one type or another although at this early stage could not be more precise.

Background

8. The appellant arrived in this country in September 2000 and, it appears, his wife and daughter arrived in 2001. As stated their twins have been born in this country. The appellant fled to this country from Iraq because he claimed, after reaching the rank of Captain in the former Iraqi army under Saddam Hussein, he had become involved in an escape from detention and had considered that he had to flee the country. The Adjudicator however did not find the appellant to be credible, apart from accepting he had been a soldier who had obtained the rank of Captain. The Adjudicator did not find it credible that the appellant was able to travel in an army vehicle to the Kurdish

Autonomous Zone without any challenge. He also did not find the appellant's wife, who gave evidence, to be credible and she had provided contradictory evidence in some respects, to that of her husband. The Adjudicator went on then to find that she did not consider the appellant to be at risk on return and that there was not a real risk he would suffer a breach of his protected rights under Article 3 of the ECHR. She did not specifically consider the risks to the appellant and his wife or to the children, or to the consequences on the appellant from problems his children may incur on return to Iraq. It was for this reason that permission was granted. The Adjudicator however did go on to note a strong recommendation that "the appellant and his family be granted leave to remain in the UK". She states:

"The appellant and his wife are articulate, intelligent people who have resided in the UK in excess of three years. They have a very young family and have made efforts to become integrated in the community. The appellant spoke good English and has gained excellent passes on college courses. The appellant pursued the issue of the 'one off exercise to allow families who have been here for at least three years to stay' with his own MP. The appellant and his family would at the very least be eligible for consideration under this scheme."

9. The appeal however was dismissed on both asylum and human rights grounds.

The Appellant's Submissions

10. Ms. Elliot submitted to us that the sole issue in this case was whether there would be a breach of Article 3 of the ECHR should the appellant and his children be returned. She informed us that the respondent had advised that an application under the "special exercise" may be considered by the respondent but no result of that was known. She submitted to us that at this time, the report from the consultant paediatrician showed that a full diagnosis was not yet available and that therefore the specialist has not set out what the proposed treatment should be, or indeed could be, for M. In this situation the appellant was not just a single man returning to Iraq and the inter-related problems for the family had to be considered. She then referred us to a considerable amount of objective information contained in the bundle. These consisted of:

An "Integrated Regional Information Network News" article "Iraq - Briefing Paper on Health" 18/05/2004. This report included the following statements:

"By 2003, almost a third of the children in southern and central Iraq were malnourished. Low birth weight is a particular problem as are diarrhoea and acute respiratory infections. An established 1 in 8 children dies before his or her 5th birthday, according to World Health Organisation (WHO). The three biggest child killers in Iraq are acute respiratory infection, diarrhoeal diseases and measles. Almost half of the country's 24.5 million people are children, and their future depends on a massive and rapid improvement in the country's health and infrastructure.

In a recent report by the NGO, Medial Aid for the Third World, the medical infrastructure was deemed outdated with patients not able to receive optimal treatment. 'Everything is lacking, including medicines for acute as well as chronic ailments', the report said."

11. The same report goes on to state:

"According to the WHO statistics, the infant mortality rate in Iraq is 108 per thousand live births, the under 5 mortality rate is 28 per thousand and maternal mortality is 294 per 100,000. This data is very telling when compared to neighbouring countries such as Syria."

12. The next report we were referred to was the UNHCR "Report of the High Commissioner: The present Situation of Human Rights in Iraq (Advance unedited version)" 04/06/2004. In particular we were referred to paragraphs 88, 89, 94, 131, 133-136. At paragraph 89 there is reference to UNICEF and international NGOs, since August 2003, due to the security situation, finding it impossible to sustain appropriate monitoring of the rights of the child in Iraq. At paragraph 90 it is stated that child malnutrition drastically increased in the early 90s mainly due to the imposition of economic sanctions. In paragraph 91 there is reference from UNICEF that, due to violence that affects many parts of the country, school attendance has dropped to less than 50 percent and access to quality healthcare and services has become increasingly a challenge to many children and their parents.

13. At paragraph 94 it states:

"Vulnerable groups of children, including children living in poverty, children living in institutions, street children, working children, children belonging to minority groups and children with disabilities, are at risk of any form of neglect, abuse and exploitation. Access to quality education and health services is increasingly under stress due to the poor functioning of public services and the security situation. There has

apparently been a dramatic increase in the number of street children as parents cannot support their children anymore."

14. At paragraph 131 in the part of the report relating to Health, it states that the health system has deteriorated dramatically and that the standard and provision of curative and preventive health care remained well below public health norms and there was an increasing risk of disease outbreaks. Health structures were noted to have been affected by looting and chaos which followed the conflict and the levels of distribution available of human resources for health remained inadequate.
15. Under the next section "Food, Water and Sanitation" there is reference to malnutrition and one assessment suggesting that seven out of ten children suffered from various degrees of diarrhoea, primarily as a result of contaminated drinking water. Poor food hygiene also contributed to children's ill-health as power cut disabled refrigeration and cooking gas became scarce. It was also noted (paragraph 136) that sewage treatment facilities were often non-operational due to the breakdown of fuel supply lines, lack of maintenance and looting and that one serious consequence of poor water and sanitation conditions was an increase in diarrhoeal and water-borne diseases.
16. We were then referred to the Joint British-Danish Fact-Finding Mission to Damascus, Amman and Geneva on conditions in Iraq (1-12 July and 23 July 2003). In particular we were asked to note paragraph 5 relating to returns to Iraq. Paragraph 5.1 reports that the UNHCR considered there was a volatile and rapidly evolving situation (which became the subject of the report referred to earlier in this Decision) and for this reason new eligibility guidelines for Iraqi asylum seekers were prevented. This report also suggested according to the UNHCR returns should not be rushed and a humanitarian approach should be taken. Paragraph 5.18 refers to returns to the Baghdad area and notes that refugees face increasing housing problems in the post-Saddam era.
17. We were next referred to an Immigration Advisory Service report "Ministerial response to letter on forced returns to Iraq and Somalia" - 12/07/2004. This sets out a letter from the Minister of Immigration, Mr. Des Browne which includes the comment:

"In respect of Iraq, I agree with you and the UNHCR that voluntary returns are preferable to enforced returns, but I nevertheless believe that enforced returns are justifiable to the more stable areas of the country. You refer to the FCO Travel Advice on travel to Iraq. This advice is for British nationals. There is a difference between the risk a British citizen would face in travelling to Iraq and those of an Iraqi

returning to their home country. There is clearly a difficult position in those parts of Iraq most affected by insurgencies; however, I do not accept that this is the case in all areas --- We will take forward enforced returns on a case-by-case basis and will only return to particular areas assessed as sufficiently stable, where we are satisfied that the individual concerned will not be at risk."

18. Ms. Elliot submitted that the objective country information therefore suggested that a system was not in place to assist a family, such as this appellant's, and in particular medical and humanitarian aid for the children were simply unavailable. Beyond this children were at risk of malnutrition, disease and diarrhoeal or water-borne diseases. In this situation this family was very vulnerable and in particular the child M, whose condition had not yet been diagnosed, would be major concern to his parents. In this situation any return to Baghdad or elsewhere in Iraq would constitute a breach of Article 3 of the ECHR in that the family would suffer inhuman and degrading treatment either directly or, in the case of the parents, having to observe the breakdown in the health of their children. Accordingly we should allow the appeal.

The Respondent's Submissions

19. Mr. Blundell submitted that the background situation was not disputed and the situation in Iraq was certainly not ideal although improvements were being made. Against this had to be set his submission that children of a very young age were adjustable and given that these children would be returning with their family their position would be better than that of street children or others in special categories noted in the objective information. He submitted that it appeared the appellant and his wife were in good health and able to support their family by way of employment and child care. Beyond this they would be able to access what medical facilities were available.
20. Having considered the medical report of the consultant paediatrician he considered that it was still necessary for us to find that the very high threshold required to meet Article 3, ECHR would not be met in this case. He referred us to the leading Determination of the Court of Appeal in **N [2004] INLR 10**. He agreed that, while the very high threshold required for there to be a breach of Article 3 was variable and would be more relaxed in the case of a child, this was a situation where there was no diagnosis before us to show that it would be unsafe for this child to be returned to Iraq at this time. The medical report indeed stated that there may be in fact no problem for this child and accordingly, following the guidance given in **N**, there was clearly difficulty for us to conclude that returning the appellant and his

family to Iraq at this time would constitute a breach of the Article 3 obligations of this country. We must consider the likely impact of a return. Given the uncertainty and lack of diagnosis that was simply something we could not do to the level required and accordingly we should dismiss the appeal.

21. In reply Ms. Elliot submitted to us that a suggestion that the appellants could return to Iraq and pay for medical care was not a sustainable one given that the objective country information did not show that such care was even available but, in the alternative, appeared to indicate that due to looting and chaos medical facilities may simply be unavailable. She also agreed however that due to the lack of diagnosis it was not possible for us to know at this time what actually was needed for their care.
22. She submitted that in this situation the need for ongoing checks on M such as scans showed that this was not likely to be received in Iraq and therefore it was unsafe for M to be returned.
23. We reserved our Determination.

The Issue

24. We found the sole before us to be whether the return of the appellant, accompanied by his wife and young family, would constitute a breach of Article 3 of the ECHR on the basis of the findings of the Adjudicator, the new medical evidence provided and our own assessment of the objective information.

Decision

25. At the outset we note that it is relevant to consider the general situation in Iraq and we have done this by consideration of the objective information placed before us. As was conceded by Mr. Blundell the situation is not an ideal one from the prospective of child health or development. However we are satisfied, particularly noting the guidelines set out in **N** that the very high (extreme) threshold set out by Lord Justice Laws will only be reached in specific situations and does not apply as a generality. We have also noted the helpful guidance on Article 3 and Article 8 ECHR assessments in **Ullah [2004] UKHL 26** and **Razgar [2004] UKHL 27**.
26. It is thus necessary for us to go on and consider the individual circumstances of this family and in particular the medical issues for M and to a lesser extent his twin brother. We have carefully noted also the helpful and balanced report of Dr. Cronin and agree that we are placed in a situation where there is a lack of diagnosis at this time, which is understandable due to the age of the child and

short time period over which the fitting episodes have occurred. It does however place us in the situation where we find we are in agreement with the submission of Mr. Blundell that it is possible that M's situation may be found to be of a serious nature or may not be a problem at all. We must make our decision on the basis of the evidence before us. We consider that noting the relevant jurisprudence, there are not substantive reasons for concluding that M, or his parents or siblings would be at a real risk of suffering inhuman or degrading treatment as the likely impact of their return at this time. For these reasons therefore the Article 3 ECHR claim cannot succeed and the appeal must be dismissed.

27. We do however find this a very troubling case because of the undiagnosed situation for M and the uncertainty, particularly relating to future medical treatment for children, in Iraq. We agree with Mr. Blundell that at the moment there does appear to be a gradually improving situation. Whether that will continue into the future, we know not. We have noted that the Home Office have undertaken to consider a concession under the "special exercise". Clearly the appellant should take all steps to access that concession if it is available. Beyond this we take into account the additional medical evidence that we had before us, which was not before the Adjudicator. We would also add our recommendations to that of the Adjudicator that this is a case where exceptional consideration could be given to the appellant and this family, at least during the time when investigations are carried out as to the diagnosis of the child M.
28. The appeal however is dismissed.

MR. A.R. MACKEY
VICE PRESIDENT