Claim No.CO/118/2001, CO/2405/2001

Neutral Citation Number: [2002] EWHC 1597 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London WC2A 2LL

Monday 29 July 2002

Before:

MR. JUSTICE CRANE

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BETWEEN:

THE QUEEN on the application of **Claimants**
MAJID RASHID HWEZ
and
NORI KHADIR

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Transcript of the Handed Down Judgment of
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Mr.Nicholas Blake QC and Mr.Mark Henderson appeared for the Claimants.
Miss Monica Carss-Frisk QC and Mr.Robin Tam appeared for the Defendant.

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Judgment
As Approved by the Court

Introduction

1. Each of these Claimants complains of a failure or refusal by the Defendant to grant him exceptional leave to enter the United Kingdom.

2. Both Claimants are Iraqi nationals of Kurdish ethnic origin who come from the northern part of Iraq known as the Kurdish Autonomous Area ("KAA"). The KAA is sometimes known as the Kurdish Autonomous Zone or the Kurdish Autonomous Region. It borders on Turkey, Syria and Iran. Since the 1991 Gulf War, as a result of the Western-imposed "no-fly zone", the writ of the Iraqi Government headed by Saddam Hussein does not run in the KAA. The KAA is not a single unified area. Different parts are run by different parties, of whom the principal ones are the Patriotic Union of Kurdistan ("PUK") and the Kurdistan Democratic Party ("KDP").

3. It was decided by the Court of Appeal in *Gardi v. Secretary of State for the Home Department* [2002] EWCA Civ 750 that a person who has a safe home territory, such as the KAA, where he does not have a well-founded fear of persecution, is not a refugee.

4. However, it is common ground that these Claimants, just as the Claimant in *Gardi*, cannot safely be returned to the part of Iraq under the control of the Iraqi government. They therefore cannot be returned via the only scheduled flights to Iraq, which are to Baghdad. There are no scheduled flights to the KAA itself. And there is thus at present no route by which they can be removed to the KAA. They claim in these circumstances that they should have been granted exceptional leave to enter. Other issues are no longer pursued.

History

5. The two Claimants' histories have parallels, but are not identical.

6. Mr.Hwez arrived in the United Kingdom on 30 September 2000 and applied for asylum. He was granted temporary admission. On 17 January 2001 the Defendant refused his claim to asylum, taking into account that inhabitants of the KAA were generally safe from the Iraqi government. That view reflected a change in practice or policy set out in a letter dated 19 October 2000 from the Immigration and Nationality Directorate to the Refugee Legal Centre. A notice dated 31 January 2001 was served on Mr.Hwez , refusing leave to enter and saying

> "I have given/propose to give directions for your removal by a scheduled service at a time and date to be notified to (country/territory) IRAQ".

7. Mr.Hwez appealed. The letter of 19 October had recorded that in practice the removal of failed asylum seekers to Northern Iraq has in the past been "hampered by a lack of commercial flights to that country". In fact such removal was impossible. By letters dated 8 February, 6 March and 25 May 2001 Mr.Hwez's solicitors pressed the Defendant for details of the proposed practical arrangements for his removal.

Regrettably, they received no replies. However, in March 2001 the then Home Office Minister of State had made a statement to the effect that some asylum seekers from northern Iraq could be returned to that part of Iraq and

> "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 as do not qualify for leave to enter or remain in the United Kingdom".

8. The Defendant refused to agree to Mr.Hwez's appeal being listed simply for a pre-hearing review "in view of the undertaking of the Minister of State", although it is not clear that the statement actually amounted to an undertaking. The Claimant sought judicial review and permission was granted on 14 June 2001 by Scott Baker J., who ordered that the case be listed at the same time as *R. (on the application of the Secretary of State for the Home Department v. IAT (No.19)* [2002] INLR 116. On 19 December 2001 the Divisional Court gave judgement in that case and adjourned Mr.Hwez's case for further consideration.

9. During the Divisional Court hearing the question of the grant of exceptional leave to enter had been canvassed. The skeleton argument of Counsel appearing for the Defendant read:

> "The Secretary of State accepts that to refuse to grant exceptional leave to enter may be unreasonable if there is no reasonable prospect whatsoever of removing a person from this country".

10. It may well be that orally Counsel's concession was somewhat more widely worded, but I see little profit in examining the differences. Miss Carss-Frisk QC on behalf of the Defendant stands by the considered acceptance as set out.

11. In view of what Counsel had said, Mr.Hwez's solicitors wrote to the Defendant on 28 November, pressing for the grant of exceptional leave to enter. By letter dated 8 February 2002 the Defendant said that it was not appropriate to grant it at that stage. The letter continued

> "It remains our intention, subject to the outcome of his appeal, to remove him to northern Iraq. As you are aware, we have been exploring a number of options for returning Iraqi Kurds to northern Iraq through various neighbouring countries. … Whilst it is the case that matters are taking longer to conclude than we would ideally like, progress is being made and our work continues. However, these negotiations are sensitive and to reveal more of their details would risk jeopardising their outcome.
>
> "You state that granting Mr.Hwez exceptional leave for 12 months at this stage, presumably on the grounds of non returnability, would have no adverse consequences for the Home Office because the leave could be "cancelled" at any later point when circumstances changed. That is not the case. None of the limited circumstances set out in Paragraph 323 of HC 395 under which curtailment of limited leave is permitted would apply to his case and there would be no power to enforce removal before the expiry of the 12 month period.

> "In fact, there is every reason to believe that removal would not be possible for considerably longer. …"

12. The letter dealt with suggested parallels with Somalia and Sierra Leone. It asserted that if exceptional leave to enter was granted it could not be cancelled because none of the limited circumstances in rule 323 of the Immigration Rules would apply. It pointed out that Mr.Hwez would acquire further rights of appeal. It denied that the NASS support regime was unduly harsh. It noted that Mr.Hwez had an outstanding appeal.

13. I pause to record that on 14 June 2001 Grigson J. had prohibited the Special Adjudicator from proceeding with the appeal until the application for permission for judicial review had been determined. In fact Scott Baker J. does not appear to have continued that prohibition when he granted permission. However, both Counsel before me assumed that the prohibition had continued, but had come to an end when the Divisional Court adjourned Mr.Hwez's case. Neither could say why the appeal has not been listed. It is clear that neither Mr.Hwez nor the Defendant have pressed for a listing. It may well be that those responsible for listing have been under the impression that it was not to be listed until the outcome of the judicial review is known.

14. I turn to Mr.Khadir. He arrived in the United Kingdom on 27 November 2000, claimed asylum and was granted temporary admission. On 29 January 2001 his claim to asylum was refused. A notice dated 5 February was served on him, saying that

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

15. Mr.Khadir appealed. His appeal was dismissed by the Adjudicator on 9 August 2001.

16. On 7 November Mr.Khadir was informed that he no longer qualified for support under the Immigration and Asylum Act 1999, section 95 and that he must now leave the United Kingdom. On 23 November Mr.Khadir's solicitors wrote to the Defendant, pressing for the grant of exceptional leave to enter in the light of what had been said by Counsel in the *No.19* hearing. On 14 December Mr.Khadir's Claim Form was issued. The Defendant's Acknowledgement of Service contended that application was premature. On 10 January 2002 Andrew Smith J. ordered the Defendant to determine whether to provide support for Mr.Khadir under section 4 of the 1999 Act ("hard cases support"). Such support was granted on 12 January. In a short letter dated 3 May 2002 the Defendant refused exceptional leave to enter. The Claim Form was later amended and on 7 May Richards J. granted permission and ordered the listing of Mr.Khadir's case with that of Mr.Hwez.

The statutory framework

17. The general principles of entry control are found in the Immigration Act 1971, section 1(2):

> "Those not having [the right of abode] … may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; …".

18. By section 3 (as amended):

> "(1) Except as otherwise provided by or under this Act, where a person is not a British subject -
>
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
>
> (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;
>
> (c) if he is given limited leave to enter or remain in the United Kingdom, it may be subject to all or any of the following conditions, namely -
>
> (i) a condition restricting his employment or occupation in the United Kingdom;
>
> (ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds; and
>
> (iii) a condition requiring him to register with the police.
>
> "(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any period for which leave is to be given and the conditions to be attached in different circumstances; … .
>
> "(3) In the case of a limited leave to enter or remain in the United Kingdom, -
>
> (a) a person's leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions …;"

19. By section 4(2) (as amended)

> "The provisions of Schedule 2 to this Act shall have effect with respect to-
>
> …
>
> (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
>
> (d) the detention of persons pending examination or pending removal from the United Kingdom;
>
> and for other purposes supplementary to the foregoing provisions of this Act".

20. Several paragraphs of Schedule 2 (as amended) are important. Paragraph 2(1) reads:

> "An immigration officer may examine any persons who have arrived in the United Kingdom by ship or aircraft … for the purpose of determining -
>
> …
>
> (c) whether, if he may not [enter the United Kingdom without leave] -
>
> …
>
> (ii) he should be given leave and for what period or on what conditions (if any), or
>
> (iii) he should be refused leave".

21. Paragraph 6(1) requires that if a person examined under paragraph 2 is either refused leave or given limited leave to enter, notice must be given to him of that not later than 24 hours after the conclusion of the examination (or any further examination).

22. Paragraph 8 reads:

> "(1) Where a person arriving in the United Kingdom is refused leave to enter, an immigration officer may, subject to sub-paragraph (2) below -
>
> …
>
> (c) give … [the owners or agents of the ship or aircraft in which he arrives] directions requiring them to make arrangements for his removal from the United Kingdom in any ship or aircraft specified or indicated in the direction to a country or territory so specified being either -
>
> (i) a country of which he is a national or citizen; or
>
> …
>
> (iv) a country or territory to which there is reason to believe that he will be admitted.
>
> "(2) No directions shall be given under this paragraph in respect of anyone after the expiration of two months beginning with the date on which he was refused leave to enter the United Kingdom except that directions may be given under sub-paragraph (1) …(c) after

the end of that period if the immigration officer has within that period given written notice to the owners or agents in question of his intention to give directions to them in respect of that person".

And paragraph 9(1) reads:

"Where an illegal entrant is not given leave to enter or remain in the United Kingdom, an immigration officer may give such directions in respect of him as in a case within paragraph 8 are authorised by paragraph 8(1)".

23. Paragraphs 10, 16 and 21 are particularly important. By paragraph 10(1)

"Where it appears to the Secretary of State either -

(a) that directions might be given in respect of a person under paragraph 8 or 9 above, but that it is not practicable for them to be given or that, if given, they would be ineffective; …

then the Secretary of State may give to the owners or agents of any ship or aircraft any such directions in respect of that person as are authorised by paragraph 8(1)(c)".

By paragraph 16(2)

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 …, that person may be detained under the authority of an immigration officer pending -

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions".

And by paragraph 21

"(1) A person liable to detention or detained under paragraph 16 above may … be temporarily admitted to the United Kingdom without being detained …; but this shall not prejudice any later exercise of the power to detain him.

"(2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his employment or occupation and as to reporting to the police or an immigration officer as may be notified to him in writing by an immigration officer".

24. The Immigration and Asylum Act 1999, section 66 provides for an appeal to an adjudicator if directions for removal are given on the ground that a person is an illegal immigrant. Section 69 provides for such an appeal on asylum grounds in certain circumstances to a person who is refused leave to enter the United Kingdom or if directions are given for his removal.

The Claimants' first argument

25. The first argument relied on by Mr.Blake QC on behalf of the Claimants is based on Schedule 2 of the 1971 Act.

26. It is common ground that the Claimants should not be returned to Baghdad. The only acceptable route, if it existed, would be to the KAA. However, at no material time has it been possible to remove them to the KAA, because no transport links exist. In addition the KAA has no international identity and cannot issue travel documents. Mr.Blake QC concedes that removal directions to the owners or agents of an aircraft are not required by paragraph 8(1)(c) to specify a particular flight, if they indicate a route. However, no valid removal directions have been possible. The Secretary of State, if he is to give directions under paragraph 10(1) must give directions that comply with paragraph 8(1)(c). This he cannot do.

27. He then turns to paragraph 16(2), the power to detain. He submits that since no directions can be given under any of paragraphs 8 to 10, there is no power to detain. In any event, the detention could not be "pending … a decision whether or not to give such directions", since it is known that no directions can be given. It follows that since that person is not "liable to detention", he cannot under paragraph 21 be temporarily admitted, since the power to do so depends on the existence of a power to detain. And temporary admission cannot be used as a form on prolonged indeterminate status.

28. Mr.Blake QC also submits that the power to detain disappears, with similar consequences, if it is for any reason no longer lawful to exercise that power. He relies on *R .v. Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704. In that case Woolf J., as he then was, was concerned with the power to detain pending deportation under paragraph 2 of Schedule 3 of the 1971 Act. Woolf J. said (at 706c):

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that is it subject to limitations. … as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> "In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time".

29. The question what was a reasonable time in another case involving detention under Schedule 3 was considered by the Court of Appeal in *R. (on the application of I) v. Secretary of State for the Home Department* [2002] EWCA Civ 888. At paragraph 23 Simon Brown LJ emphasised the clear distinction to be drawn between a mere hope and a reasonable prospect of removal.

30. Assistance is also to be derived from *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97. The Privy Council had to consider a Hong Kong Ordinance which authorises the director of a detention centre to detain a person "after a decision to refuse him such permission [to remain in Hong Kong], pending his removal from Hong Kong". At 113d they said

> "The issue therefore in the present case is whether the determination of the facts relevant to the question whether the applicants were being detained "pending removal" goes to the jurisdiction of the director to detain or to the exercise of the discretion to detain. In their Lordships' view the facts are prima facie jurisdictional. If removal is not pending, within the meaning of section 13 the Defendant, the director has no power at all".

31. I accept that in the present circumstances, because there is no practicable route for removal to the KAA, the Secretary of State is not able to give valid directions to the owners or any ship or aircraft under paragraph 10(1) of Schedule 2. Incidentally, the notice to each of these Claimants, saying that removal directions have been given, cannot strictly be accurate, since there are no owners or agents to whom they could be given. However, any invalidity of those notices is not crucial and Mr.Khadir has in fact exercised his right of appeal in reliance on the notice.

32. What is crucial is the meaning of paragraph 16(2). The words "If there are reasonable grounds for suspecting that" are agreed not to be relevant in the present cases, since there is no doubt about identity or the history of the cases. Do the words "in respect of whom directions may be given" mean that it must be practicable to give such directions at the time a decision to detain is made? Or do they merely mean that the possibility of giving directions in relation to that person must exist, in the sense that he falls into the category of those to whom paragraphs 8 to 10 apply? I prefer the latter interpretation. It must be remembered that the basic premise of any removal directions is that a person has been refused leave to enter: see paragraph 8(1). Paragraph 10 deals with a situation in which it is not practicable to give directions to the owners of the agents of the ship or aircraft in which the person arrived. In my view the scheme of paragraph 16 is that there is first a consideration whether the person falls into the necessary category. If so, he may be detained (or alternatively temporarily admitted under paragraph 21). There is then a decision whether or not to give directions, which is not necessarily the same as actually giving directions. Then, if the decision is to give directions and directions are given, removal takes place.

33. The Defendant has purported to issue notices saying that directions have been given. I have expressed the view that the purported directions were not valid. However, it is lawful to issue substitute removal directions: *R. v. Immigration Officer, ex parte Shah* [1982] 1 WLR 544. It is accepted on both sides that the invalidity of the purported

directions is not crucial in this case. The reality is that a decision has been taken to give directions, but valid directions have yet to be issued. And although the power to issue valid directions must be given under paragraph 8(2) within 2 months, it appears to me that the power of the Secretary of State under paragraph 10(1) is not so limited.

34. However, the question then arises: how long can detention (or temporary admission) continue? Paragraph 16(2)(a) permits detention "pending" a decision whether or not to give such directions and thereafter "pending" removal in pursuance of such directions.

35. Although Woolf J. in *Hardial Singh* at one point used words indicating that once a reasonable time had elapsed, it would be wrong to exercise the power to detain, earlier he had said that the power to detain was limited to a reasonable period. However, in *Tan Te Lam* the Privy Council clearly stated that if the event in question was no longer "pending" there was no power to detain.

36. I hold therefore that a person may be detained under paragraph 16(2) if he is in the category of persons to whom paragraphs 8 to 10 can apply, whether or not it is or will be practicable to give directions. However, the power to detain lasts only while one of the two events set out in paragraph 16(2)(a) or (b) is "pending". If such an event is not "pending", he is not liable to detention. And he would then not be "liable to detention" under paragraph 21(1). Temporary admission should therefore not arise. This interpretation is consistent with the concept of "temporary" admission, a concept not consistent with something permanent or even indefinite, although I do not accept Mr.Blake QC's submission that admission cannot be temporary unless its end can be seen on the horizon.

37. I have borne in mind that paragraph 21(1) preserves a later exercise of the power to detain, after temporary admission. However, while that is apt in a situation in which a person has been temporarily admitted as an alternative to detention, it is not apt in a situation in which the power has ceased to exist.

38. I am not deciding that temporary admission is not permissible in all circumstances in which it would be a wrong exercise of discretion to detain a person. I am holding that temporary admission is not available when the power to detain no longer exists.

39. I shall return to the question whether either of the relevant events is still "pending" in these cases. I shall also consider the consequences if they are not.

The Claimants' second and third arguments

40. The second and third arguments put forward by Mr.Blake QC can be considered together. These involve a consideration of the nature of exceptional leave to enter.

41. He submits that there cannot be a rational exercise of the discretion to refuse exceptional leave to enter, if the person cannot be removed. He points to the very restricted benefits regime of those temporarily admitted. He points to published

policy. His primary submission is that exceptional leave to enter should have been granted, in the particular circumstances, as soon as asylum was refused in each case, because removal was impossible. Alternatively it should have been granted at some time later or at least at the time of the specific refusals. He submits that exceptional leave to enter could have been granted for only twelve or even six months, that it could have been revoked if the situation changed or simply not renewed. His third argument is that even if in principle exceptional leave to enter could have been refused, the decisions in this case were irrational and unlawful, in that no rational reasons were given for the decisions.

42. In his skeleton argument Mr.Blake QC reminded the court of the need to respect the human rights of the Claimants while they remain within the jurisdiction. In the event, however, he has not relied on human rights grounds in this hearing.

43. However, I bear in mind the very real differences between the support granted to those with leave to enter (which includes income support), NASS support (which includes a cash element) and hard cases support granted to those granted temporary admission. The latter involves no cash element and is, by definition, suitable in a situation that is temporary. These differences must have a considerable impact on the lives of those concerned, particularly over a lengthy period.

44. Section 3(1) envisages leave to enter either for a limited or for an indefinite period. Neither the Act nor the Immigration Rules refer to exceptional leave to enter. Exceptional leave to enter is granted as a matter of policy to certain people who are not refugees but who are in need of protection or for other compassionate or practical reasons. It is granted as a matter of discretion.

45. The policy relating to Somalia provides an example. The *Operational Guidance: Somalia* dated September 2001 states:

> "A period of one year's [exceptional leave to remain] (not four years) should normally be granted to Somalis who are not granted asylum and who do not come from Somaliland or Puntland. This is in recognition of the current practical difficulty in effecting returns to areas other than Somaliland and Puntland rather than on any particular human rights grounds".

46. The Defendant's letter of 8 February 2002 argued that the overriding reasons why exceptional leave was granted to failed asylum seekers from Somalia were based on humanitarian grounds rather than the practicability of effecting removal. The letter does not accurately reflect the policy.

47. Mr.Blake QC points to the Immigration Directorates' Instructions ("IDI") dated December 2000

> "Exceptional leave to enter or remain in this context is that given to people who have sought asylum in this country, who have not been granted

refugee status, but who have been allowed to remain outside the normal provisions of the Immigration Rules. …
Exceptional leave may be granted on the basis of:
…
* likely difficulty in enforcing departure from the United Kingdom".

48. I have been referred by Mr.Blake QC to *R. v. Secretary of State for the Home Department, ex parte Mersin* [2000] INLR 511, in which Elias J. held that where a person has established a right, or something akin to a right, to a status or a benefit, it is incumbent on the relevant authority to grant the status or benefit without unreasonable delay. He was dealing with a Claimant who had established his refugee status. The present Claimants have not established a right of the same kind, although I accept that delay in any decision may be a factor in considering its lawfulness.

49. I do not accept that it was obligatory to grant exceptional leave to enter to the Claimants on refusal of their asylum applications.

50. Miss Carss-Frisk QC accepts the concession in the *No.19* case that to refuse to grant exceptional leave to enter may be unreasonable "if there is no reasonable prospect whatsoever of removing a person from this country". She does not disagree that "a reasonable prospect" contains an implication that the prospect cannot be one that is indefinitely postponed. She contends first that there has been and still is such a prospect of removal. Next she stresses that the grant of exceptional leave to enter is something exceptional and discretionary. She disputes that exceptional leave to enter, if granted, could have been revoked. She contends that the Claimants could return to the KAA voluntarily.

51. She does not rely before me on the arguments relating to loss of control that were rejected by Elias J. in *R. v. Secretary of State for the Home Department, ex parte Quaquah (No.2)* on 1 September 2000. In other words she does not rely on the further appeal rights that might accrue to the Claimants if exceptional leave to enter were granted. She reserves the right to rely on those arguments in any appeal from my decision.

52. It is not easy to assess the prospects of removal. I have already quoted the letter of 8 February 2002, in which it was said that a number of options were being explored and progress was being made. In the letter of 3 May 2002, it was said that the Secretary of State was still investigating a safe route.

53. Miss Carss-Frisk QC applied at the beginning of the hearing on 15 July to introduce further evidence on the prospects of removal and on the possibility of voluntary return to the KAA. I shall consider the latter separately. The new evidence had only just been served on the Claimants' counsel. I accept that it was decided only on 12 July to seek to introduce further evidence. I also accept that there must be great sensitivity in the negotiations with other countries about a route for return. However, in my view it would have been unfair in the circumstances to permit the evidence to be introduced so late; the decision could have been taken earlier. In any event, on the prospects of removal, the new evidence added little to the previous assertion that progress was being made.

54. I have no reason to doubt that progress is being made. However, I have no evidence about when, if ever, arrangements for removal will be possible. It may well be that the Secretary of State is simply unable to forecast when, or even whether, such removal will be possible. If that is the situation today, *a fortiori* it was the situation at all material times previously. In the letter of 8 February this year it was stated that there was every reason to believe that removal would not be possible for "considerably longer" than 12 months from then. I must also bear in mind that removals to the KAA were impracticable for years before the change of practice or policy in October 2000 and that by then the Secretary of State had already been investigating routes for removal. I shall return to this issue.

55. The grant of exceptional leave to enter is indeed discretionary. However, it is not in dispute that a time comes when, in circumstances such as the present, exceptional leave to enter requires at least consideration. Counsel argues that the grounds for curtailing leave to enter must be found in rule 323 of the Immigration Rules (or in 322(2) to (5) which are referred to). I agree with her that rule 323(ii) does not apply, because the Claimant would not have "ceased to meet the requirements of the Rules under which his leave to enter or remain was granted", since he would not have been granted leave to enter under the Rules. However, the very fact that leave would not have been granted under the Rules, but outside the Rules, leads me to the view that exceptional leave to enter could be curtailed or revoked for reasons outside the Rules. Thus, if exceptional leave to enter is granted on the specific basis that removal is impossible to the KAA, it could be curtailed or revoked if such removal became possible. In any event, if exceptional leave to enter were granted for a short period, on a similar basis, it would be justifiable to refuse to renew it if removal became possible. For these reasons I do not accept that these arguments provide a basis for refusing exceptional leave to enter.

56. I turn to the possibility of voluntary return to the KAA. There is conflicting evidence about the ease with which this can be effected. Counsel sought to introduce further evidence on this topic also, which, if permitted, would have led to an application on behalf of the Claimants to introduce further evidence. I refused this part of the Defendant's application for two main reasons. First, I do not accept that this evidence is sensitive. It could have been put forward much earlier. The proposed further evidence included, for example, evidence about scheduled flights to an airport in Iran, which must be in the public domain. Secondly, and more important, the Defendant even in the letters of refusal did not rely on the possibility of voluntary return as a ground for refusing exceptional leave to enter.

57. I am prepared to accept that people do travel to the KAA. I am also prepared to accept in principle that the possibility of voluntary return may be taken into account in appropriate cases. I do not accept that the inability of the KAA to provide diplomatic protection or travel documents is conclusive against voluntary return, although those will be relevant factors. However, such travel is not straightforward. It would be necessary to take into account the individual circumstances of the particular person, his or her ability to travel, the cost and whether assistance with the cost was available in appropriate cases. In fact the letter of 19 October 2000 went some way towards that:

> "… A few Iraqis have departed voluntarily, travelling via Jordan and some, with the assistance of IOM [International Organisation for Migration], have returned via Turkey. If any Iraqi failed asylum seeker were to reach the removal stage the Immigration Service will investigate any viable option".

58. Since voluntary return has not been relied on in relation to these Claimants and hence no individual consideration has been given to it in their cases, it cannot be relied upon to justify these refusals of exceptional leave to enter. That will not prevent its being taken into account in a reasoned decision in the future.

Conclusions

59. The issues can be refined as follows: First, did a time come when in either case temporary admission was no longer lawful, in the sense that (a) the power to detain continued "pending his removal" and (b) his admission was still properly described as "temporary"? Secondly, even if temporary admission has continued to be lawful, did a time come when it was unreasonable to decline to grant exceptional leave to enter in all the circumstances? Thirdly, was the decision to decline in itself unlawful?

60. I consider Mr.Khadir's case first, since he has no outstanding appeal. I do not find it easy to decide the first issue on the facts, in view of the paucity of evidence about the prospects of removal becoming possible. However, I conclude that at least by February 2002, when the view was expressed in the case of Mr.Hwez that there was every reason to believe that removal would not be possible for considerably longer than 12 months, removal was not still "pending". Detention would no longer have been lawful and hence temporary admission was no longer lawful. Even if I am wrong about that, at least by February 2002 his application, made in November, for exceptional leave to enter should in any event have received proper consideration. Very careful consideration should have been given to granting exceptional leave to enter at least for a short period. No decision was in fact given until 3 May 2002, in a letter containing wholly inadequate reasoning.

61. In Mr.Khadir's case, subject to discussion with counsel about the form of the order, I shall quash the decision of 3 May 2002. I shall order the Defendant to give consideration forthwith to the grant of exceptional leave to enter, for some period, in accordance with the contents of this judgement.

62. In Mr.Hwez's case there is an outstanding appeal. The Secretary of State cannot remove him until it is disposed of. Although the decision letter of 8 February 2002 is open to criticism in its reasoning, the decision to refuse leave to enter cannot be characterised as unlawful. Decisions on the provisions of paragraphs 10 and 16 of Schedule 2 have necessarily been suspended, although they would require consideration if the appeal were to be dismissed. The appeal should now be heard without delay. Subject to discussion with counsel, I propose to make no order in the case of Mr.Hwez.

63. However, I note that paragraph 21(2) permits restrictions as to employment or occupation on a person temporarily admitted. This matter has not been argued, but it may be that consideration should be given to permitting Mr.Hwez to work, in view of the lapse of time. As I have said, it may be that those listing appeals have assumed that his appeal has remained stayed. Certainly neither party has sought to press on with the appeal.