OUTER HOUSE, COURT OF SESSION

[2008] CSOH 83

OPINION OF LORD BRODIE

in the petition

A. A.

Petitioner;

for

Judicial Review of the Decision of the Secretary of State for the Home Department dated 24 April 2007

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Petitioner: Winter, Solicitor Advocate; McGill & Co, Edinburgh
Respondent: Carmichael, Advocate; Solicitor to the Advocate General

21 May 2008

[1] The petitioner was born on 1 January 1982. He is a citizen of Iraq. He describes himself as an Iraqi Kurd (someone of Kurdish rather than Arab ethnicity). The respondent is the Advocate General for Scotland as representing the Secretary of State for the Home Department. The petitioner seeks judicial review of a decision of the Secretary of State intimated by letter dated 24 April 2007 refusing the petitioner's application for Indefinite Leave to Remain made on 25 August 2006.

[2] The petitioner entered the United Kingdom, illegally on 17 February 2001. He claimed asylum on the same day. In support of his application he provided the Secretary of State with information about what he claimed to be his circumstances.

Briefly, these were as follows. Both his parents were born in Kirkuk (the petitioner avers that he too was born in Kirkuk). He and his family were living in Kirkuk at the time of the Kurdish uprising subsequent to the defeat of the government of Saddam Hussein in the first Gulf war in 1991. Together with other Kurdish families, the petitioner's family was deported to Ranya in Kurdistan. It would appear that the petitioner continued to live in Ranya until the time he left Iraq for the United Kingdom. In May 2000 (when the petitioner was 18) he started a video hire business with a friend. According to the petitioner he received two letters from the Islamic Movement ordering him to terminate this business. The petitioner and his business partner ignored these letters. On 10 January 2001 the petitioner's business partner disappeared. Two days later he was found dead. The petitioner knew that the Islamic Movement was responsible for the death of his partner. Shortly thereafter the petitioner left Iraq, in order, as he would have it, to escape persecution by the Islamic Movement. The petitioner's asylum claim was refused by the Secretary of State on 29 March 2001. The petitioner appealed this refusal. On 27 January 2003 the Immigration Judge refused the appeal. The Immigration Judge was not satisfied that the petitioner had shown that he had a well-founded fear of being persecuted in Iraq for a Refugee Convention reason or that his human rights would be breached on return to Iraq. The petitioner's application for permission to appeal to the Asylum and Immigration Tribunal was refused on 11 April 2003.

[3] Notwithstanding the failure of the petitioner's claim for asylum, the Secretary of State did not take steps to remove him from the United Kingdom. By letter dated 25August 2006, the solicitors acting on behalf of the petitioner made an application for Indefinite Leave to Remain to the Secretary of State on behalf of the petitioner. The application was acknowledged but no correspondence followed thereon and,

accordingly, the petitioner's solicitors wrote further, on 1 December 2006 confirming that they continued to act on behalf of the petitioner who was seeking Indefinite Leave to Remain in the United Kingdom "arising out of the judgment in the English Court of Appeal case of *Bakhtear Rashid"*.

[4] The Secretary of State has a discretion to grant foreign nationals leave to remain in the United Kingdom. Leave may be indefinite in the sense of leave for an indefinite period, subject to cancellation or revocation. The discretion is exercised on behalf of the Secretary of State by his officers (otherwise "case workers"). These officers are guided in their decision-making by policies adopted by the Secretary of State. The case of *Bakhtear Rashid* (*R.* (*on the application of Bakhtear Rashid)* v *Secretary of State* [2005] EWCA Civ 744) arose out of the discovery that there had been inconsistent and therefore unlawful application of a policy adopted by the Secretary of State not to rely on the possibility of internal flight as between that part of Iraq controlled by the government lead by Saddam Hussein ("Government Controlled Iraq") and the area to the north subject to international protection known as the Kurdish Autonomous Zone. (Ranya, where the petitioner lived from 1991 until 2001 is in the Kurdish Autonomous Zone). Following the decision of the Court of Appeal in *Bakhtear Rashid* and *R (on the application of A, H and AH)* v *Secretary of State* [2006] EWHC 526, the Secretary of State adopted a policy in respect of Iraqi citizens who had made asylum claims, which was expressed in Iraq Policy Bulletin 2/2006, issued on 1 August 2006. It was to this Policy that those acting for the petitioner referred in the letter of 1 December 2006 and it was this Policy that was relied on by the petitioner in challenging the decision of the Secretary of State in this petition.

[5] A copy of the Policy was produced as 6/8 of the petition process. After setting out the background, at section 4, the Policy identifies various sets of circumstances where an applicant will, in terms of the Policy, be granted Indefinite Leave to Remain. One set of circumstances appears at section 4.5. For an individual claimant to satisfy the section 4.5 criteria he must:

> "I. have been from the Government Controlled Area of Iraq (GCI) and [have been] refused [asylum] by the Secretary of State between April 1991 and 20 February 2003 (where the practice was to grant four years' ELR to claimants from GCI), and
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> II. have not been granted four years' ELR".

[6] As it finally came to be articulated on his behalf by Mr Winter, the petitioner's complaint was that the Secretary of State had failed properly to apply the Policy in coming to the decision notified by letter of 24 April 2007. Although that letter makes reference to the Policy, it proceeds on the basis that the petitioner is to be regarded as being "from" the former Kurdish Autonomous Zone (otherwise the "KAZ"). The submission made on behalf of the petitioner was that in terms of the Policy he was to be regarded as having been "from" the Government Controlled Area of Iraq (otherwise the "GCI"). The petition suggests that this is the nature of a failure to have regard to a material factor. That is not how I see the petitioner's complaint, as it came to be articulated. Rather, the error of the Secretary of State, if there was an error, would appear to have been a failure properly to interpret his own policy or, alternatively, a failure to apply his policy to the facts of the case.

[7] The point come to be a very short one and that is whether the Secretary of State acted unlawfully in regarding the petitioner, who had been born in Kirkuk in the GCI but who had lived in Ranya in the KAZ from 1991 (when he was 9 years old)

until 2001 when he left Iraq and who had established a business in Ranya in 2000, was "from" the KAZ rather than being "from" the GCI.

[8] The letter of 24 April 2007 gives only a very limited insight into the thought processes of the relevant decision maker when it comes to the question of where the petitioner should be regarded as being "from". It may be that it simply did not occur to the decision maker, on the facts available, that the petitioner could be from anywhere other than that part of Iraq where he had spent the last ten years of his residence in that country and where he was sufficiently established to allow him to set up a business. That, in my opinion, does not matter. I took Mr Winter to agree that the petition would fall to be dismissed if the meaning of the word "from" which had been adopted by the relevant decision-maker was one which was, in the opinion of the Court, reasonably possible.

[9] Miss Carmichael, on behalf of the respondent, invited me to refuse the petition. She agreed with Mr Winter that it raised a narrow point of interpretation of the Policy issued on 1 August 2006. She accepted that the Secretary of State must be taken to have known at the relevant time the fact that the petitioner was born in Kirkuk, the issue for the decision-maker being whether the petitioner fell into any of the categories set out in the Policy. She confirmed the history of the Policy as set out in section 3 of Iraq Policy Bulletin 2/2006. This had been what Miss Carmichael described as a shameful chapter during which some officers of the Secretary of State had not been applying the then current policy in relation to Exceptional Leave to Remain in respect of people from Iraq. The aim of Iraq Policy Bulletin 2/2006 was to set out in simple language the fall-out from the legal decisions referred to in the text. It attempted to set out in easily understandable language who should be given Leave to Remain. Miss Carmichael accepted that the terms of the Policy were relatively

"hard edged". It set out fairly firm criteria for eligibility. Nevertheless, the Policy fell to be interpreted in a way that was different from statute. A policy required to be construed having regard to its language, its context and its purpose. The Secretary of State was entitled to interpret his own policy and, accordingly, if his interpretation was challenged, was only subject to judicial review on *Wednesbury* grounds. That said, Miss Carmichael accepted that there was a divergence of view expressed in the authorities, as she demonstrated by taking me through the following cases: *R* v *SSID ex p Engin Ozminnos* [1994] Imm AR 287, *Gangadeen* v *SSHD* [1998] Imm AR 106, *R(Nadarajah)* v *SSHD* [2003] Imm AR 373, *R (Gashi)* v *SSHD* [2003] EWHC 1198 (Admin), *in re McFarland* [2004] 1 WLR 1289, R v *SSHD ex p Urmaza* [1996] COD 479, *R (Springhall)* v *London Borough of Richmond upon Thames* [2006] EWCA Civ 19, *First Secretary of State and another* v *Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520. The view that it was a matter for the Secretary of State to construe his own policy was particularly associated with his judgment of Auld J, as he then was, in *Ozminnos*, as approved by the Court of Appeal in *Gangadeen*. The alternative view is associated with the judgment of Sedley J, as he then was, in *Urmaza*. There Sedley J argues that it is not open to the Secretary of State to give a policy document other than its plain and ordinary meaning. Accordingly, the Secretary of State will be open to review where in the opinion of the Court he has failed to do that. Miss Carmichael commended the approach adopted in *Ozminnos*, although she immediately recognised that in a case where the court took the view that the policy document had one, and only one, plain meaning, it would, by implication be deciding that any other meaning could not reasonably be adopted. Although, she had thought it proper to draw the Court's attention to the relevant authorities and the two strands of opinion within these authorities, she accepted that they may be of limited assistance

when the point came to be as narrow as the possible meanings to be given to the word "from". She declined to offer any definition of the expression "from GCI" where it appeared in section 4.5 of the Policy. It was an expression which was highly dependent on its context. She accepted that, depending on circumstances, it might be appropriate to regard someone as "from" GCI notwithstanding the fact that his most recent period of residence in Iraq was in the KAZ.

[10] The point I have to determine is, as parties were agreed, a very short one. One way of stating it is whether the Secretary of State was necessarily wrong in determining, on the uncontroversial facts, that the petitioner was "from" the KAZ and therefore not "from" GCI. I am grateful to Miss Carmichael for her careful exposition of what appeared to be the relevant authorities in relation to the interpretation of their policy documents. I do not, however, find it necessary to associate myself with either of the strands of opinion in the authorities which were identified by Miss Carmichael. It appears to me that the question as to where any individual is "from" is likely to admit of more than one answer, as can be illustrated by reference to the extensive law on domicile and residence. Leaving aside the history and purpose of the Policy, it appears to me that the petitioner could be regarded as being from GCI in that he was born in Kirkuk of parents who were also both born in Kirkuk. He lived there until the age of nine and only left because his family was deported. On the other hand, I consider that he could also be described as being from the KAZ because he had been living there for ten years, at the date he left Iraq, he and his family had settled there and he had established a business there. When regard is had to the history and purpose of the Policy, it would appear to me only reasonable to regard the petitioner as being from the KAZ. However, the question for me is whether the Secretary of State made a decision which was open to him as a rational decision maker. In my opinion that

question can only be answered in the affirmative. Mr Winter accepted that if it was reasonably possible to regard the petitioner as being from the KAZ and therefore not from GCI, the petition would fall to be dismissed. I shall therefore dismiss the petition.

[11] Miss Carmichael on behalf of the respondent moved for expenses. Mr Winter did not resist that motion but moved for modification of the petitioner's liability in expenses as a legally aided person. He explained that the petitioner was dependant on state benefits. In the circumstances I shall modify the petitioner's liability in expenses to nil.