Neutral Citation Number: [2007] EWCA Civ 585

Case No: C5/2006/1822

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**
**Mr Turkington (Adjudicator)**

Royal Courts of Justice
Strand, London, WC2A 2LL

15/06/2007

**Before:**

**LORD JUSTICE MUMMERY**
**LORD JUSTICE DYSON**
and
**LORD JUSTICE WALL**

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**Between :**

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| **OB (Iraq)** | **Appellant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Respondent** |

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WordWave International Ltd
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190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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Mr Danny Bazini (instructed by Messrs Lawrence & Co) for the Appellant
**Miss Julie Anderson** (instructed by **Treasury Solicitors**) for the Respondent

Hearing dates: 7 June 2007

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# Judgment

**Lord Justice Dyson:**

1. The appellant is a citizen of Iraq. He was born on 24 January 1974. He is an Arab Sunni Muslim from Tikrit who joined the Ba'ath party while he was still at school. His case was that, as a Sunni from Tikrit and in the light of his activities for the party, he was at risk of being associated with Saddam Hussein and, therefore, persecution by Shi'a Muslims. After the fall of Saddam Hussein, his family had been threatened and his father and brothers killed. He fled Iraq and entered the United Kingdom in March 2004. His claim for asylum was refused in April 2004. He appealed. By a decision promulgated on 30 July 2004, Mr Turkington (adjudicator) allowed his appeal on asylum and human rights grounds. The Secretary of State was granted permission to appeal. The first stage reconsideration (chairman Mr Geraint Jones QC) determined on 20 April 2006 that there were two errors of law in the adjudicator's decision and that the appeals should be heard de novo. On 29 June 2006, at the second stage reconsideration (chairman Mr S J Widdup) the appellant's appeals on both asylum and human rights grounds were dismissed.

2. The appellant now appeals with the permission of Sir Henry Brooke. He appeals against both the first and second stage reconsiderations. Before I come to the grounds of appeal, I need to set out the material parts of the adjudicator's decision and the two reconsideration decisions.

*Adjudicator's decision*

3. The adjudicator summarised the appellant's evidence at para 12 of his determination. The appellant said that he feared persecution by the new regime of Shi'a Muslims and all the people who had suffered at the hands of Saddam Hussein's party. He believed that he would be a target because he was involved with the Ba'ath party through the student organisation of which he had been president when he was at school. He had recruited fellow students to join the party. He had made adverse reports to his "own higher authorities" on up to ten students who refused to join the party. He said that after the fall of Saddam Hussein, he was in danger because militia groups started to kill Ba'ath party members and "specialists" such as the appellant. In April 2003, two men wearing masks had come to his home and demanded that his family leave. He also said that after his brothers had been killed, he was shot at while driving his car. In short, his case was that he was a Ba'ath party member activist who was known on the ground to be such and would be targeted for that reason.

4. The adjudicator then reviewed the objective in-country material. He made extensive reference to the then current CIPU report. At para 13, he referred to the fact that there were more than 2 million members and sympathisers of the Ba'ath party. Most members joined for pragmatic reasons. It was more or less obligatory for advancement in education, the professions etc. At para 14, the adjudicator said:

> "The CIPU report goes on to say at paragraph 6.115 that with Ba'ath Party membership a prerequisite for advancement in many fields in Saddam Hussein's Iraq, ordinary membership did not of itself imply support for the party's policies. Sources told the 2003 UK Danish fact finding mission that Iraqis differentiated between those who joined the party because it was necessary for them to get jobs, and others such as members

> of the security services who committed crimes against them. Only those former Ba'ath members who were known to have abused their position were being targeted for reprisals; these would mostly be former members of the intelligence services, the security services of Fedayeen Saddam, but according to one source, even in those categories only individuals known to have committed abuses would be targeted. This could, however, mean that relatively low ranking Ba'ath Party members could be at risk because they had operated at street level and were therefore known to the victims or their victims' families or associates."

5. At para 15, the adjudicator referred to numerous reports of party members being targeted since the fall of Saddam Hussein, including the security guard at a sewage plant. The victim's brother said: "I think it was because he was in the Ba'ath. He was not a senior member."

6. At para 16, the adjudicator referred to a report by Amnesty International which stated that scores of former Ba'ath party members and security force members were being targeted in revenge attacks, particularly in the Shia dominated districts of Baghdad and in southern Iraq.

7. At para 17, he referred to a report that former Ba'ath party officials were being killed and that the killers were reported to be working from lists looted from security service buildings or "simply killing Ba'athist icons or irksome party officials identified with the Saddam Government." Word of violence spread from house to house, neighbourhood to neighbourhood "fuelled by rumour and suspicion."

8. At para 19, he said that he found the appellant's evidence to be unsatisfactory in a number of respects and that the appellant had sought to exaggerate his story to enhance his claim. Nevertheless, he accepted the appellant's evidence that he was an "enforcer" for the Ba'ath party and that he was president of the student committee when he was 19 years of age.

9. At para 20, he said:

> "Whilst I have reservations about some parts of the Appellant's evidence I find that the Appellant is a Sunni Muslim from Tikrit. I accept the Appellant's evidence that he was a member of the Al-Ba'ath Party. I accept his evidence that he was an enforcer for the Al-Ba'ath Party. I have no reason to doubt that the Appellant during Year 12 of his studies was the President of the student committee. He was 19 years of age at that time. The Appellant claims that his work on behalf of the party would have been well known to those persons with whom he was dealing. The Appellant claimed that he was a lowly member of the party but, nevertheless, his connection was well known to people on the ground. I find the evidence in the CIPU report in the chapter entitled "Reprisals against Ba'ath Party members", at 6.115, that relatively low ranking Ba'ath Party members could be at risk because they had operated at street level and

> were therefore known to their victims or their victims families or associates to be apposite. The Appellant, in this case, operated at a lowly level. He claims to have made reports adverse to the situation of up to ten persons as part of his work. In his capacity as an enforcer, encouraging students to join the party, the Appellant will have become well known. His work was tainted with the persecutory nature of the Ba'ath Party insofar as the Appellant had, on occasions, up to ten occasions, cause to complain to his authorities about the activities of up to ten persons. There is no evidence as to what happened in relation to these people but the general nature of the Appellant's work was such that his connection to the Al-Ba'ath Party was established. Insofar as he was an active member of the Al-Ba'ath Party, albeit working at a lowly but public level, I find that the Appellant will be at risk of reprisals in the event of his being returned to Iraq."

10. At para 21, the adjudicator said that the appellant had been an active member of the Ba'ath organisation and that, having regard to the CIPU report, active members were potentially liable to persecution. The likelihood of persecution was at least greater than a serious possibility. The adjudicator concluded, therefore, that the appellant had a well-founded fear of persecution on the grounds of the perceived political opinion of him as a member of the Ba'ath party. There was a serious possibility that he would be killed by way of reprisal if he returned to Iraq. For that reason, his appeal on human rights grounds succeeded as well.

11. The Secretary of State did not raise the issue of internal relocation and the adjudicator did not mention it.

*The appeal by the Secretary of State*

12. The Secretary of State appealed on a number of grounds. These included: (i) the adjudicator failed to consider, when examining para 6.115 of the CIPU report, that only those low level members of the Ba'ath party involved with the security or intelligence services might be at risk of reprisals; even with his evidence taken at its highest, the appellant did not fit this profile; and (ii) the adjudicator erred in law in failing to consider that, because the appellant's alleged activities took place eleven years earlier, when he was nineteen, and were confined to one area of Iraq, the option of internal relocation was open to him.

*The first reconsideration decision*

13. The critical section of the decision is in paras 4-6:

> "4. At the hearing before us Miss Dassa, on behalf of the appellant, accepted that the Adjudicator had simply not dealt with internal relocation in any way whatsoever. In circumstances where the appellant's case relied upon an alleged risk of reprisals from erstwhile school children or possibly their respective families, it was incumbent upon the Adjudicator to consider the nature and extent of the risk that that might pose

> for the appellant. It was only after consideration had been given to that issue that the availability of internal relocation could be considered on the basis of both the findings of fact made and the appropriate objective evidence. In our judgment it was a plain error of law for the Adjudicator to omit any consideration of the issue of internal relocation.
>
> 5. We are also satisfied that the Adjudicator materially erred in law in failing to give any proper consideration to the nature and extent of the appellant's activities as a school student and to relate them to the objective evidence when considering whether or not such activities would or would not place the appellant at a real risk of persecution and/or inhuman and degrading treatment. We say that because the objective evidence disclosed that it is only those low level members of the Ba'ath Party who have been involved with the security or intelligence services who might be at risk or reprisals. The Adjudicator failed to observe that there was no evidence from the appellant to indicate that any of the people upon whom he may have filed a report to more senior people in the Ba'ath Party, knew that he had done so. Reprisals are taken by those who know that somebody else has done something which they consider deserving of such reprisals. In the absence of such evidence the Adjudicator could not reasonably conclude that the appellant would be at risk of such reprisals if he returned to Iraq generally or to his home area in Baghdad in particular.
>
> 6. The Adjudicator plainly considered the risks faced by former members of the Ba'ath Party generally and referred to aspects of the objective evidence which disclosed that Ba'ath Party members who had been involved in security and/or intelligence matters leading to others being targeted by the authorities, might well face reprisals. He failed to relate that objective evidence to the appellant's subjective circumstances and, in our judgment, that is what led him into error in the result at which he arrived."

14. They determined that the appellant's appeals should be heard de novo.

*The second reconsideration decision*

15. At para 2 of its determination on the second reconsideration, the tribunal correctly described the two material errors of law identified by the tribunal at the reconsideration, viz (i) the failure to deal with internal relocation and (ii) the failure to give proper consideration to the nature and extent of the appellant's activities and to relate them to the objective evidence when considering whether or not those activities would place him at risk on return.

16. The tribunal recorded at para 4 that it was agreed between those representing the parties that there were three issues "namely the appellant's involvement with the

Ba'ath party, his flight from Iraq and internal relocation and how renowned he was as an international sportsman in Iraq."

17. The appellant's case was summarised at paras 7-17. In view of the challenge made by the appellant to the tribunal's second reconsideration decision, it is necessary to consider this part of the decision with some care. At para 8, they recorded that it was the appellant's case that "as a Sunni and a Baathist from Tikrit he was at risk of being associated with Saddam Hussein". As a student "he had been involved in recruiting for the Ba'ath party." He was well known in Iraq because when he was at university, he had played in the national handball team and gained a good deal of publicity in the press.

18. The appellant gave evidence. He confirmed that the contents of his witness statements were true. His supplementary statement gave details of his claim to be a renowned handball player. I shall return to the statements later.

19. At para 12, the tribunal stated that the appellant was asked about his involvement with the party. He stopped his "activities" when he left school in 1993. "He had been recruiting people to join the Ba'ath party". Para 14 records that the appellant was asked about his witness statement in which he had said that he was "most actively involved in recruiting for the Ba'ath party in 1989 when he joined the national team".

20. At para 23-25, the tribunal summarised the submissions made by Miss Dassa on the appellant's behalf. The main submission was that he was at risk "because he is from Tikrit, he is a member of the Ba'ath party and was well known as a sports player. He was at risk of revenge attacks against Ba'athists and would be remembered from his sports career and from the time when he was a recruiter".

21. The tribunal's conclusions were at paras 26-28.

> "26. We make the following findings of fact:
>
> (i) We accept that the Appellant was a member of the Baathist party and that he undertook some limited work for them recruiting others to join the party.
>
> (ii) His activities started at school and continued until he was 19 and then ceased.
>
> (iii) His work for the Baath party did not involve him in any activities which put others at risk.
>
> (iv) At school and at University he was selected to play for the Iraqi national handball team. He attracted publicity. The team was involved in a tournament in Italy and his picture was in the paper on various occasions. He also appeared on TV.
>
> (v) We accept that in 2003 his brothers and his father were murdered in separate incidents and that his car was damaged by gunfire.

13. Although we have made findings of fact in favour of the Appellant on some parts of his evidence we have treated his evidence with some care. The Appellant changed his evidence. Initially he said that his activities on behalf of the Baath party ceased in 1993. He then said that they were reduced and that they only ceased in 1997 after he graduated.

14. We have read the passages cited to us by Mr Tranter from the CIPU and take them into account. In particular we note from paragraph 6.545 that according to a report in the Washington Post in February 2005 the Baath party had a membership of between 1 and 2.5 million. We also note from paragraph 6.549 that some low ranking officials of the Baath party have been killed or attacked and the example is given of a known brutal torturer.

15. We do not consider the Appellant can be properly described as an official of the Baath party. He was, when at school, someone who would recruit for the party. His activities were therefore at a very low level and occurred at least 13 years ago.

16. We are not persuaded that the fact that the Appellant's family is Sunni Arab from Tikrit adds anything to the risk assessment.

17. We accept that the Appellant was a well known sportsman in the early 90s. We accept that his photograph will have appeared in the press. However, we do not find that his fame all those years ago exposes him to additional risk now. We note from the Appellant's witness statement in paragraph 9 that the Appellant did not appear on TV many times because Uday Hussain was more keen on football and this would have attracted more coverage. We also take into account that the photographs we have seen show the Appellant as he was in the early and mid 90s. Since then he has put on weight and his appearance is more mature. He is not likely to be as readily identifiable from his photographs now as he would have been at the time they were taken.

18. We do not overlook the fact that his brothers and his father have been murdered. However, the Appellant himself said that this was random violence and thus he contradicted his earlier evidence that his family was targeted after the fall of the regime. While we accept that his car was damaged by gunfire we do not accept that he was personally targeted.

27. We therefore find that the Appellant does not have a well founded fear of persecution in Baghdad. Thus it is not necessary for us to consider the issue of internal relocation.

> 28. It follows that the Appellant's asylum claim fails. It also follows from our finding that the Appellant is not at risk of persecution that his claim that his human rights will be contravened by his removal to Iraq also fails."

*The grounds of appeal to this court*

22. The appellant appeals against both the first and second reconsideration decisions. In relation to the first decision, Mr Bazini submits that the tribunal were wrong to hold that the decision of the adjudicator contained the two errors of law which they identified. He also submits that, even if there was a material error of law in the adjudicator's decision, the tribunal erred in remitting the case for a hearing de novo: they should have directed a rehearing limited to those aspects of the adjudicator's decision that were affected by the error or errors of law. In relation to the second reconsideration decision, Mr Bazini submits that the tribunal erred in law primarily because their finding that the appellant's activities did not put others at risk was unexplained and perverse.

*Appeal against the first reconsideration decision*

23. The first ground of appeal is that the tribunal were in error in saying that the adjudicator (i) failed to give proper consideration to the appellant's activities and relate them to the objective in-country evidence and (ii) failed to observe that there was no evidence from the appellant to indicate that any of the people on whom he may have filed a report to more senior people in the party knew that he had done so. Mr Bazini submits that the adjudicator's decision was detailed and fully reasoned. The tribunal's criticism in substance is no more than a disagreement with the adjudicator's decision on the facts and does not disclose an error of law. The adjudicator referred to the background material in some detail and made findings that were open to him in the light of that material. Mr Bazini also says that the tribunal were not entitled to hold that reprisals were not reasonably likely unless there was evidence that the persons reported on by the appellant knew about his reporting. This too was no more than a disagreement with the adjudicator on the facts.

24. I would reject these submissions largely for the reasons given by Miss Anderson. It was no part of the appellant's case that the risk of persecution derived merely from the fact that he was a Sunni Muslim or from the fact that he had been a member of the Ba'ath party. As the adjudicator said, there were more than 2 million members and sympathisers of the Ba'ath party. It has never been suggested that all members and sympathisers were at risk of reprisals by Shi'a Muslims. The alleged risk of persecution arose from the appellant's particular activities. It was necessary for the adjudicator to explain by reference to the evidence (including the objective in-country material) how those activities put the appellant at risk of persecution.

25. The evidence reviewed by the adjudicator at paras 14-17 of his determination showed that the persons who were at risk of persecution were those who had done something which had led to the risk of reprisals or revenge attacks. This is clearly evident from para 14: see the references to persons who had "committed crimes" and who had "committed abuses" and to "victims" [of those who had committed crimes or abuses]. There is nothing in para 15 to suggest that the security guard at the sewage plant who was killed had not, or was not thought to have, committed abuses. Para 16 refers to

"revenge attacks" against former party and security force members: this too is at least consistent with reprisals on members who had committed abuses. Similarly with regard to para 17. The reference to Ba'athist icons and irksome party officials is at least consistent with their having been, or having been perceived to be, persons who had committed abuses.

26. Para 20 contains the kernel of the adjudicator's decision. The steps in his reasoning are: (i) para 6.115 of the CIPU report shows that relatively low ranking Ba'ath party members could be at risk because they had operated at street level; (ii) the appellant operated at a low level as an "enforcer"; (iii) in that capacity he will have become well known; and (iv) he was therefore at risk of reprisals. The problem with this reasoning is that neither the CIPU report nor any of the other objective material referred to by the adjudicator demonstrated or even suggested that someone who reported on persons for refusing to join the party (still less someone who reported on no more than 10 persons many years ago) would be regarded as having committed abuses so as to be liable to become targets for reprisal. Nor did the objective material indicate whether it would be likely that the appellant's reporting activities would lead to reprisals many years later, when he had not been a member of the party after he completed his studies and had not engaged in any political activities. Further, there was no evidence that any of the persons reported had been victimised or had suffered in any way. As Miss Anderson points out, since the persons reported were fellow students of the appellant, it seems likely that, if they or their families had suffered as a result of their refusal to join the party, he would have heard about it.

27. In my view, the tribunal were right to hold that the adjudicator had failed to relate the appellant's activities to the objective material when deciding whether they would put him at risk of persecution. The adjudicator acknowledged that there was no evidence as to what happened to the persons who had been reported, but he sought to meet that difficulty by saying that "the general nature of the appellant's work was such that his connection to the Al-Ba'ath Party was established". But a mere connection with the party was not enough to found a well-founded fear or persecution: see para 24 above.

28. The second ground of appeal is that the tribunal were in error in holding that the adjudicator erred in law in not dealing with the internal relocation issue. In view of my decision on the first ground of appeal, it is not necessary to decide this point.

29. The third ground of appeal is that the tribunal were in error in directing a hearing de novo. It has now been established that a reconsideration should:

> "prima facie take place on the basis of the findings of fact and the conclusions of the original tribunal, save and in so far as they have been infected by the identified error or errors of law. If they have not been infected by any error of law, the tribunal should only revisit them if there is new evidence or material which should be received in the interests of justice and which could affect those findings and conclusions or if there are other exceptional circumstances which justify reopening them.": per Latham LJ in *DK(Serbia) v Secretary of State for the Home Department* [2006] EWCA Civ 1747, [2007] 2 All ER 483, para 25.

30. The question whether a correct decision as to the scope of a second stage reconsideration has been made does not raise an issue of jurisdiction. Once a tribunal decides that there should be a second stage reconsideration, it has a discretion as to its proper scope. The remarks by Latham LJ in *DK(Serbia)* are directed as to how that discretion should be exercised. Mr Bazini submits that the tribunal acted unreasonably in remitting the case for a rehearing de novo in this case, since they did not identify any errors in the adjudicator's fact-finding to justify such a course. Thus, for example, the tribunal were in error in making an order that permitted the making of findings at the second stage of the reconsideration as to the appellant's credibility that were different from those made by the adjudicator.

31. I do not agree that the tribunal's decision was unreasonable. If the only error of law found by the tribunal had been the failure to deal with the internal relocation issue, then it would have been unreasonable and a wrong exercise of discretion to require a rehearing de novo. In those circumstances, the rehearing should have been confined to the internal relocation issue.

32. But the error of law that the tribunal found in the adjudicator's reasoning was sufficiently fundamental for it not to be unreasonable to require a complete rehearing. The error went to the heart of the question whether the appellant had shown a well-founded fear of persecution. A different tribunal might have decided that it was reasonable for the reconsideration to take place on a more limited basis. But I do not consider that the decision of this tribunal was not one which they were reasonably entitled to take. I should add that the appellant was not prejudiced by this course. The adjudicator had not found him to be an entirely credible witness and had rejected part of his evidence. The appellant was able to take advantage of the tribunal's order and introduce evidence which had not been before the adjudicator. I would reject this ground of appeal.

*Appeal against the second reconsideration decision*

33. The first and principal ground of appeal is a challenge to the tribunal's finding that the appellant's work for the party did not involve him in any activities which put others at risk. Mr Bazini submits that this finding, unsupported by reasons, is perverse. He says that the appellant reported on others who refused to join the party: there is ample evidence that persons who refused to cooperate with the party were likely to be seriously punished.

34. I would reject this ground of appeal. It is necessary to have in mind the way in which the appellant put his case. Before the adjudicator, he placed some emphasis on the fact that he had reported on up to 10 fellow students who refused to join the party. He placed a short witness statement before the adjudicator in which he said (para 4) that he had to force people to join the party and if there was anyone who did not want to join, he had to produce a report giving reasons. He amplified this in the course of his oral evidence. That is why at para 20 of his determination, the adjudicator said that the appellant was an "enforcer".

35. Before the tribunal, the emphasis of the case changed. The appellant produced a longer witness statement for the second stage reconsideration. At para 3 of this statement, he said that it was "not only because I recruited people to the Ba'ath party but also because I was from the same tribe as Saddam, Tikrit tribe and so, many

people see us as being related to Saddam". At para 11, he said that he was at risk because he was perceived as having been loyal to Saddam. "I also encouraged some [people] to join the party". "I was enthusiastic about recruiting people into the party. I had persuaded many people to join the party as well….I was able to persuade so many people to join this party by lecturing them (pestering if necessary) continuously to persuade in various ways and making various attempts. I only reported those who still refused after a lot of attempts to recruit them voluntarily had failed".

36. At para 12 he said:

> "My main role at that time was to ensure that as many people as possible were recruited from the colleges to join the party. The government placed a lot of emphasis on recruiting young people into party membership and we were the people through whom they achieved this aim. On occasions, we were not successful with recruitment and were expected to report those who persistently refused to join. We did not do this lightly but I would usually visit these sorts of people on several occasions to persuade them to rethink their position highlighting to them the advantage of joining. If however everything failed, we would report them. I was reluctant to report because there were serious consequences for those who refused in this way but it was my duty to report if everything failed and I did so on about 10 occasions….."

37. As I have said, he also produced to the tribunal a supplementary witness statement saying that he was a renowned handball player.

38. Consistently with the content of the main statement that he produced for the tribunal, he gave oral evidence in which the emphasis of his case was that he was at risk because he had recruited for the party on a big scale: see paras 17, 19 and 20 above. Before the tribunal, his case was not that he was at risk because he had reported up to 10 people who had refused to join the party. Rather, it was that he had been a successful and large-scale recruiter who would still be well known because he had been in the national handball team. In his witness statement, he played down his reporting of refuseniks. He reported only as a last resort and he was so successful as a recruiter that he rarely had to report.

39. In these circumstances, it is hardly surprising that the tribunal did not deal with the case as if it was based on a fear of reprisals from those who had been reported. The case was that of a well-known recruiter who would be the subject of reprisals from Shi'a Muslim opponents of the Ba'ath party. Since that was the case that was advanced on the appellant's behalf, I consider that the tribunal were justified in finding that his work did not involve him in any activities which put others at risk.

40. In any event, as Miss Anderson points out, the appellant has not pointed to any evidence as to what action, if any, would follow as a result of no more than 10 reports by a young man while at school in the early to mid-90s.

41. The remaining grounds of appeal were not developed by Mr Bazini in oral argument. The second ground of appeal criticises the statement at para 16 of the tribunal's

determination that the fact that the appellant's family is Sunni Arab from Tikrit adds nothing to the risk assessment. It is said that this statement is perverse. Tikrit is a stronghold for Saddam loyalists. The fact that the appellant is a known Baathist from this area must have some relevance to risk assessment.

42. Miss Anderson points out in her skeleton argument that it was no part of the appellant's case before the AIT on the evidence that being one of many thousands of Sunnis from Tikrit of itself gave rise to a well-founded fear of persecution. In fact, the appellant's connection with Tikrit was tenuous in any event. He had been born there, but had moved away at a young age and was brought up elsewhere. I accept these points. There is no substance in this ground of appeal.

43. The third ground of appeal criticises the finding that the appellant would no longer be readily identifiable as the sportsman who was well-known in his youth. Mr Bazini submits that he will be readily identified by his ID card. Further, bearing in mind the current food shortages, he is likely to lose weight fast so that his appearance will resemble his previous appearance. This is hopeless as an alleged error of law. In any event, this finding did not form an essential part of the tribunal's reasoning. Their main ground for finding that the appellant did not have a well-founded fear of persecution was not that he would no longer be recognised, but that his activities were such that he would not be at risk of persecution even if he was recognised.

44. The final ground of challenge is that para 18 of the tribunal's determination is based on a misunderstanding. I set the paragraph out at para 21 above. It is said by the appellant that the interpreter misunderstood his evidence. He maintains, as he has always maintained, that his brothers were the victims of targeted killing and that his father was targeted because of him and that when he learnt of the death and tried to return home, he was followed and shot at.

45. I accept the submissions made by Miss Anderson as providing a complete answer to this point. If it is being suggested that this misunderstanding has given rise to a fundamental error of fact which can be considered as an error of law, then the appellant has to satisfy the stringent requirements prescribed by this court in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, para 66:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

46. These conditions are not satisfied here. The alleged error of fact is not agreed. It is controversial. There is no indication that the tribunal were alerted at the time the evidence was given that there were any difficulties in interpretation. The appellant has had many opportunities to clarify the point, but it surfaced for the first time in Mr Bazini's skeleton argument. Finally, the appellant has not sought to show that the alleged error of fact played a material part in the reasoning of the tribunal in finding

that he had not made out his claim that he was at risk of persecution for his political activities as a student.

*Conclusion*

47. For the reasons that I have given, I would dismiss this appeal. The challenges to both the first and second reconsideration decisions fail.

**Lord Justice Wall:**

48. I have had the advantage of reading Dyson LJ's judgment in draft. I agree with it, and like him, I would dismiss this appeal. I add a judgment of my own for two reasons. Firstly, I have not found this an altogether easy matter to decide, and in these circumstances I think the appellant entitled to a judgment which explains why I have come to the same conclusion as Dyson LJ. Secondly, and because we are dealing with an appeal from a reconsideration of an adjudicator's decision (and one which, essentially on the facts, reached the opposite conclusion to that reached by the adjudicator) I am anxious to attempt to dispel any perception the appellant may have that he has been unfairly treated by the system.

49. Dyson LJ has set out the facts and cited extensively from each of the three decisions reached in this case. In these circumstances, and for ease of reference, I propose to refer to the two tribunals which reconsidered the adjudicator's decision as, respectively, "the Jones Tribunal" and "the Widdup Tribunal". I also propose to refer to the two errors of law in the adjudicator's reasons identified by the Jones Tribunal as, respectively, "the internal relocation point" and "the reasons point".

50. I further propose to put on one side for the moment the question of whether or not the Jones Tribunal was right in its conclusion that the adjudicator's failure to consider the internal relocation point constituted an error of law. Like Dyson LJ, I take the view that this point only arises if Mr. Bazini, for the appellant, is correct in his submission that the Jones Tribunal itself made an error of law in paragraphs 4 to 6 of its judgment in its assessment of the reasons point. Dyson LJ has set out the relevant passage in the Jones Tribunal's reasoning in paragraph 13 above, and I need not repeat it.

51. Miss Anderson, for the Secretary of State was, I think, minded to accept that if the only error in the adjudicator's decision was his failure to consider the internal relocation point, the Jones Tribunal's decision to order a hearing de novo could not be supported. That would certainly be my view, but the point is academic if the Jones Tribunal was right both to identify the reasons point as an error of law, and to order a re-hearing; and if the Widdup Tribunal was (a) fair; and (b) reached a conclusion which was properly open to it.

52. In my judgment, therefore, the two first and critical questions are; (1) was the Jones Tribunal right to identify the reasons point as an error of law by the adjudicator? (2) and if so, was it entitled to order a reconsideration de novo?

53. Mr Bazini took us carefully through the adjudicator's decision. Dyson LJ has set out his submissions in relation to it in paragraph 25 above. Mr Bazini's essential, and straightforward submission, as I understood it, was that the adjudicator had made sufficient findings of fact to support his conclusion; that there was sufficient material

upon which he could properly reach that conclusion and that, accordingly, there was no error of law in his decision on the reasons point.

54. I have to say that I was initially attracted by this submission, not least because Miss Anderson was minded to accept that in one sentence in paragraph 5 of its reasons for identifying an error of law in the adjudicator's decision on the reasons point, the Jones Tribunal had stated, erroneously, that " …..the objective evidence disclosed that it is only those low level members of the Ba'ath party who have been involved with the security or intelligence services who might be at risk of reprisals". As the extracts from the objective evidence set out by Dyson LJ demonstrate, and as Miss Anderson properly accepted, this is, clearly, an over-statement.

55. On further reflection and re-reading, however, and having carefully reconsidered the arguments addressed to us on both side, I have come to the conclusion that the Jones Tribunal was entitled to find, as it did, that the adjudicator had made an error of law in the terms stated by Dyson LJ at (ii) in paragraph 15 of his judgment. My reasoning is essentially the same as that expressed by Dyson LJ in paragraphs 24 to 27 of his judgment, but I will nonetheless summarise my view.

56. In order to establish, even on the low standard of proof required, that he had a well founded fear of persecution for a Convention reason, the appellant had to show, and the adjudicator had to find, a causal relationship between the appellant's activities and the objective evidence such as to demonstrate that the appellant would be at real risk of persecution were he to return to Iraq.

57. The principal plank of the appellant's case before the adjudicator, as I understand it, was that he had not just been a recruiter for the Ba'ath party, but that he had been, in the adjudicator's phrase "an enforcer". In these circumstances, it seems to me, the Jones Tribunal was entitled to make the point that the adjudicator had failed to relate the objective evidence to the appellant's particular circumstances, and that there was simply no evidence that the type of activities in which the appellant had engaged (reporting those who would not join the Ba'ath party) had resulted in the people he had reported being targeted by the regime. It was thus an error of law for the adjudicator to find, as he did, that the appellant's connection with the Ba'ath party was itself sufficient to invoke a well founded fear of persecution. As will be clear from the appellant's subsequent evidence, to which I refer below, and the manner in which his case was conducted before the Widdup Tribunal, it is, in my judgment, clear that the Jones Tribunal was, in the event, plainly right in its assessment that there was no acceptable evidence that the appellant's activities as an enforcer either had had or would have the consequences which the appellant expressed.

58. I will return to this point when I have considered the next question, namely whether or not it was properly open to the Jones Tribunal to order a reconsideration de novo. This point also initially troubled me in the light of Sedley LJ's dictum in Mukarkar v Home Secretary [2006] EWCA Civ 1045, [2006] INLR 486 at paragraphs 43 and 44, with which I find myself in complete agreement: -

> "43. I would add this on the procedural aspect of the case. Had the tribunal been right in its critique of the first determination in relation to Rule 317, it should have included in its order a direction that the immigration judge who was to continue the

> reconsideration should do so on the basis that the facts found by Mr Ince were to stand save insofar as the issue to be reconsidered required their significance to be re-evaluated.
>
> 44. The reason why it is important to be rigorous about this is that reopening a concluded decision by definition deprives a party of a favourable judgment and renders uncertain something which was certain. If a discrete element of the first determination is faulty, it is that alone which needs to be reconsidered. It seems to me wrong in principle for an entire edifice of reasoning to be dismantled if the defect in it can be remedied by limited intervention, and correspondingly right in principle for the AIT to be cautious and explicit about what it remits for redetermination."

59. On analysis, however, I respectfully agree with Dyson LJ that what we are concerned with here is not with a point of jurisdiction, but of discretion. On the facts of this case, the error of law which I have identified as the reasons point goes to the root of the appellant's case. Furthermore, this is not a case in which the adjudicator's decision depended upon his assessment of the appellant's credibility, and a finding that his credibility was not impeached. To the contrary, the adjudicator had found in terms that the appellant's evidence had been "unsatisfactory in a number of its elements" and that he had "sought to exaggerate his story in order to enhance his claim for asylum status" (paragraph 19 of the adjudicator's decision).

60. In these circumstances, it does not seem to me that this court can properly describe an exercise of discretion by a specialist tribunal to order a reconsideration de novo as either unfair to the appellant or an exercise of discretion outwith the area in which reasonable disagreement is possible, and thus plainly wrong.

61. I would, I think, take a different view if I thought either that the decision to order a reconsideration de novo was unfair to the appellant (as, for example, it would have been had the detected error law related exclusively to the internal relocation point) or that the Widdup Tribunal hearing was itself in any way unfair to the appellant. However, neither, in my judgment, is the case here. On the factual point, as I have already stated, the error identified by the Jones Tribunal went to the heart of the appellant's case, and in such circumstances, the order for a reconsideration de novo cannot be said to be a wrongful exercise of judicial discretion. And as to the reconsideration itself, the hearing was plainly fair: in particular, the appellant had the opportunity (which he took) to re-marshal and re-present his case in the manner which he and his legal advisers thought most persuasive.

62. In these circumstances, I have reached the clear conclusion that the direction for a reconsideration de novo does not on the facts of this case offend against Sedley LJ's dictum, and cannot properly be described as unfair. The error detected was not what Sedley LJ identifies as a "discrete element" in the adjudicator's decision. It was a fundamental point which went to the heart of the appellant's case. Furthermore, it did not depend upon an issue in which the appellant's credibility had been engaged and tested and found to be intact.

63. In my judgment, therefore, the appellant's attack on the reasoning and conclusion of the Jones Tribunal on the reasons point fails.

64. The third point which troubled me was that fact that the Widdup Tribunal does not appear to have addressed the particular issue which had formed the basis of the adjudicator's reasoning – namely the fact that the appellant had been an "enforcer" for the Ba'ath party. The error of law on the part of the adjudicator had been – at least in part – his failure to observe that (as the Jones Tribunal put it in paragraph 5 of its reasons) "….. there was no evidence from the appellant to indicate that any of the people upon whom he may have filed a report to more senior people in the Ba'ath party knew that he had done so".

65. In these circumstances, one might have expected this aspect of the case to have formed the focus of the reconsideration. However, it plainly did not. Not only were the three issues set out by Dyson LJ in paragraph 16 of his judgment agreed, the Widdup Tribunal's finding at paragraph 26(iii) of its reasons makes no reference to it. It states simply and starkly "His work for the Ba'ath party did not involve him in any activities which put others at risk".

66. My initial reaction to paragraph 26(iii) of the Widdup Tribunal's reasons was the it had failed to address a critical issue and that it was, as a consequence and at the lowest, arguable that the Widdup Tribunal had itself committed an error of law sufficient to vitiate its conclusion. On further reflection, however, I have come to the conclusion that such a reaction was erroneous. I have reached that conclusion for the following reasons.

67. Firstly, there is a great danger, which always needs to be resisted, to see a case in purely appellate terms, and to take insufficient notice of how the case was presented and argued in the court below.

68. I have already pointed out that the order for a reconsideration de novo gave the appellant the opportunity to present his case to the Widdup Tribunal in a way which would rectify the deficiencies in the evidence detected by the Jones Tribunal. The appellant plainly exercised that opportunity. As Dyson LJ has pointed out, he prepared a further, lengthy statement. It is instructive, in my judgment, to compare what the appellant was saying in his statements prepared prior to the hearing before the adjudicator, and what he says in the statement prepared for the Widdup Tribunal. In the former, the appellant's case was put in the following way in paragraphs (4) (5): -

> "(4) During Year 12, I became the president of the Student Committee. My main job was to encourage other fellow students to join and to attend meetings of Al-Ba'ath party or its organisation such as Youth, Student or Women organisation. There were times that I had to force students to join Al-Ba'ath party if they refused I had to prepare a report
>
> (5) This party ordered me to enforce people to attend the A'-Ba'ath Militia as Al-Quds Army and other Army Organisations. I was obliged to enforce people to join, and this is the main reason I have faced persecution (my emphasis)."

69. There is no doubt at all, in my judgment, that the emphasis of the appellant's case before the Widdup Tribunal was quite different. As Dyson LJ accurately points out in paragraphs 35 to 37 of his judgment, the main thrust of the appellant's case in his supplementary statement is that he was from the same tribe and city as Saddam Hussein, and that he was active as a recruiter for the Ba'ath party.

70. On the evidential lacuna identified by the Jones Tribunal, the appellant says in paragraph 15 of his statement for the Widdup Tribunal: -

> "I am also claiming asylum based on actual and imputed political opinion, ethnicity and membership of a social group. Those people whom I reported for refusing to join the Ba'Ath party must have been punished in one way or another. I do not know the extent of the punishments they faced. However, it is well known that those who were seen as opposing Saddam were punished quite severely. If my reports resulted in anything like this, and it might have done, then those people if still alive or members of their families and their tribes will remain after me until they kill me. I am therefore at risk of revenge killing by those persons who will want to kill me because they believe that I was at least indirectly responsible for the death of members of their family, or their torture. Tribal laws in Iraq mean that the members of the family of any person who has been killed as a result of the actions of Saddam Hussein and his government will feel an obligation to kill someone from the family of any of the persons that they hold responsible for these acts. In my case, my sports career and political profile at the relevant time means that I would be recognised as such a person even now in Baghdad. (my emphasis)"

71. It is in my judgment apparent from this passage that the edifice which the appellant sought to construct in relation to his "enforcer" activities is based on very flimsy foundations. The appellant did not know the extent of the punishments those whom he reported had faced. Other critical phrases are "must have been punished in one way or another"; "If my reports resulted in anything like this, and it might have done"; and "then those people, if still alive".

72. In my judgment, the passage I have cited from paragraph 5 of the appellant's supplemental statement confirms the accuracy of the Jones Tribunal's assessment that there was indeed "no evidence from the appellant to indicate that any of the people upon whom he may have filed a report …. knew that he had done so". In these circumstances, it is hardly surprising that the appellant's case before the Widdup Tribunal took on a different dimension.

73. Against this background, I do not think it can be said either that the Widdup Tribunal was unfair to the appellant, or that it was not entitled, on the material placed before it, to reach the conclusion which it did reach The absence of any cogent evidence from the appellant about the relevance of his role as an enforcer both required and enabled the Widdup Tribunal to decide the application in the manner in which the case was presented to it, and in my judgment is was entitled on that evidence to reach the

conclusion that the appellant had not demonstrated a reasonable fear of persecution if returned to Iraq.

74. In these circumstances, the relocation issue does not arise, and whilst Miss Anderson devoted the bulk of her written submissions to it, it would seem to me – as it does to Dyson LJ - wholly inappropriate for this court to give additional obiter guidance on a point which does not arise for decision.

75. For the reasons given by Dyson LJ, and also for the reasons set out above in so far as they supplement those given by Dyson LJ, I too would dismiss this appeal.

**Lord Justice Mummery:**

76. I agree with Lord Justice Dyson.