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Heard at Field House
On 10 October 2002

APPEAL NO HX42030-2001
DH (Risk-IMIK-KAA) Iraq CG
[2002] UKIAT 05099

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
5 November 2002
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Before:

Mr G Warr (Chairman)
Mr N Kumar, JP
Mr A Smith

Between

Dilshad Hamagharib

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. The appellant, a citizen of Iraq, appeals the determination of an Adjudicator (Mr N P Dickson) who dismissed his appeal against the decision of the Secretary of State to refuse his application for asylum.

2. Mr B Caswell, of Counsel, instructed by Parker Bird, Solicitors appeared for the appellant. Mr J McGirr appeared for the Secretary of State.

3. The papers were in a poor state of preparedness. Mr McGirr had not got a bundle from the appellant apparently but was able to make do with the material that had been placed before the Adjudicator. A skeleton argument was handed in after the commencements of proceedings. Authorities are referred to in that skeleton without any reference being given and without copies being provided in breach of practice direction number 4, paragraph 8, reported at [2001] Imm.A.R.172. Mr Caswell stated that he did not intend to refer to any authorities. It must be clearly appreciated that the service of skeleton arguments this late in the day is of no assistance to anyone. (In fact copies of authorities reached

us after the hearing, they had been faxed late the previous afternoon). An additional feature of the case is that the grounds of appeal are more or less illegible.

4. The Chairman who granted leave did so on a limited basis. He observed that the Adjudicator had found that the appellant could safely live in an area controlled by the KDP or the PUK but that he did not consider whether internal relocation would be unduly harsh.

5. The appellant was born in 1966. He had joined the Iraq army as a soldier in 1985 and had received serious injuries during chemical bombings in 1988. He had left the army in 1991. During the Kurdish uprising that year he had been arrested by Iraqi security services and taken to Baghdad and detained for 40 days during which he was seriously ill-treated. The Secretary of State in paragraph 11 of the refusal letter noted that the appellant had stated that the reason for his arrest was because he had left his identification card at home and that he did not consider that this isolated incident had anything to do with his current asylum claim.

6. He escaped and joined the Islamic Movement of Iraqi Kurdistan (IMIK). In 2001 he decided to leave IMIK. IMIK attempted to persuade him to change his mind and he was put in prison for 10 days. The appellant was of the view that IMIK would not allow him to leave the party as he knew too many secrets. He escaped from prison with the help of a friendly guard. He went to stay with his father. IMIK visited his father while the appellant was in hiding in the house. He then decided to leave Iraq.

7. The respondent was not represented before the Adjudicator. The appellant gave evidence. The Adjudicator had before him documentary material including a report from a GP, Dr Clowes, and expert reports – the same reports that are relied on before us. The Adjudicator's conclusion is expressed as follows: he refers to IMIK as IMK:

> "18. I am prepared to accept that in the main the appellant is a credible witness although I do consider that he has exaggerated the events since he decided to leave the IMK in 2001. There are a number of discrepancies in the various accounts he gives of events in Iraq until that date. I have however taken into account the report of Dr Clowes of 20 February 2002. He suffered severe injuries during the bombing in 1988 and he has many scars from that event although no scars remaining from the injuries whilst in detention in 1991. The appellant suffered from a poor memory since his detention. He has difficulty remembering simple things such as his telephone number and he does not sleep well. Dr Clowes considers that "memory loss is a common manifestation of depression and post-traumatic stress, following any severe life event which would include being involved in an explosion or being tortured whilst in detention". I

accept Dr Clowes' report and have taken this into account in respect of certain discrepancies in the period up to August 2001. The appellant suffered horrifically from the Iraqi government in 1991 and during the chemical bombings in 1988. He received inhuman treatment while he was in detention. However, in order to consider his claim for asylum he must have regard to the present position in the KAA which is set out in the CIPU (paragraphs 3.7 to 3.22 and 4.5 to 4.9 and pages 30 and 41 which deal with the IMK).

19. In 1995 the appellant worked for the IMK military as a commander of a small group of freedom fighters. In August 2001 he decided to leave the party and I can accept that efforts were made by the IMK for him to stay. ON balance I am prepared to accept that the IMK detained the appellant who then managed to escape with the assistance of the guard. However I consider that if the appellant had been an important prisoner whom the IMK intended to transfer to their main prison near the Iranian border, there would have been more security arrangements. After the appellant said he escaped from prison, he went to his house and was speaking to his wife when IMK guards kicked down the door of his house and again he managed escape over a wall. He was staying at his father's house in New Halabjah when the IMK guards came again and did not search the house while he was hiding inside. I consider that if the appellant was an important prisoner who had escaped from detention and had run away from his own house while they kicked down the door, the IMK would have made efforts to search the house of his father.

20. I am not satisfied that the appellant was in possession of such important secrets that the IMK were not prepared for him to leave. The arrest and capture of seven freedom fighters and their subsequent sale to the Iranian secret agents was probably not too surprising bearing in mind that the IMK receive aid from Iran and other Islamic countries (CIPU page 3 or 41). The sale of bullets and ammunition to the KDP happened some three to four years before the appellant left the IMK. The passage of time would not have made this incident significant. Finally, in his evidence the appellant said that the opposition did not know that the IMK were in possession of a valuable rocket and again I do not consider that this is a significant secret.

21. I accept that the appellant has a well founded fear of persecution in the IMK area of influence and there is a risk of ill treatment if he returned. In order to succeed on the asylum claim, the appellant would have to show that there is nowhere in the KAA of northern Iraq where he can safely live. It seems to me quite clear that he could easily move to a different part of the KAA in which to live which is either under the control of the KDP or the PUK if he feared difficulties in ensuing yet again from the IMK. I do not consider that it is likely that the IMK will continue to pursue him through the KAA in view of my findings. I do not

consider that he is sufficiently important for them to pursue him into another area. The reports from Amnesty International and the Human Rights Watch confirm that since 1991 some 94,000 Kurds and other non-Arabs have been expelled from Kirkuk and other areas in Iraq to KAA. While the CIPU report does state that the IMK has offices in the DKP and the PUK areas of control, the IMK have splintered in 2001 and dissident factions have emerged (CIPU 3.22). While I have taken into account the objective evidence and in particular Dr O'Shea's report, in my view there is no reason why the appellant could not live safely in areas of the KAA not controlled by the IMK.

22. Insofar as the human rights appeal is concerned, I agree with the respondent's conclusion that none of the articles within the ECHR are applicable in this case. For the reasons that I have already set out, there is certainly no evidence that his life will be at risk if returned to the areas of Northern Iraq controlled by the KDP and the PUK and therefore no potential breach of Article 2. There is again no reliable evidence that he would be subjected to torture or inhuman or degrading treatment if returned to these areas and therefore Article 3 is not applicable.

23. Mr Kooner also relied on Article 5. Article 5 provides for the right to liberty and security of person and that no one shall be deprived of his liberty save as in certain circumstances and in accordance with the procedure prescribed by law. In considering such rights the burden of proof is upon the appellant to show that there is a reasonable likelihood for believing there is a risk of exposure of human rights being violated on his return to northern Iraq. For the reasons I have set out, I do not consider that Article 5 is relevant.

24. Accordingly the asylum appeal is dismissed as is the human rights appeal for the reasons set out above."

8. Mr Caswell submitted that it was not entirely clear from the terms in which leave to appeal was granted whether the issue of safe areas was before us or whether it was simply the question of the undue harshness of relocation. He acknowledged the possibility that it was open to us to find in the light of the objective material and the fact that IMIK had ceased to exist that the appellant might not need to relocate at all. He would not have established that he had a fear of persecution.

9. Mr Caswell submitted that it would be unduly harsh for the appellant to relocate, his wife being in Halabjah. The appellant had not lived in the KDP and had only had a brief period of residence in the PUK between 1981 and 1985. He was of limited education and his only attainment was an ability to read. He had limited work experience; as a soldier, builder's mate and labourer. He had limited work prospects. He would have no political support from the PUK or KDP – indeed quite the contrary. He had no family or tribal support and no financial support in the shape of benefits or savings. He had some physical scars and disability and psychological problems. There was general lawlessness

in the KAA as indicated in the expert reports. The appellant's brother had been killed by the PUK.

10. There would not be a safe haven for him in any event. IMIK would pursue him and the Adjudicator had applied the incorrect test in his determination when he had said that he did not consider it likely that IMIK would continue to pursue him. The correct test was whether there was a reasonable degree of likelihood of his being pursued.

11. Although IMIK had ceased to exist, other groups had evolved and it was stated in paragraph 3.26 of the Home Office Country Assessment that tension between the PUK and the Islamist Group remained unsolved.

12. The people who had persecuted the appellant might still be in a position to do so. Although the group had changed its title, the problems remained. His enemies were high profile people. There were no real borders in the KAA and there was no safe haven for the appellant. The appellant had had a significant role and would clearly come to the attention of the fractured parts of IMIK. In all the circumstances it would be unduly harsh for the appellant to relocate and he could not, in any event move at all since there was no safe haven.

13. Mr McGirr submitted that the Adjudicator's findings were sustainable. He had concluded that the appellant had not been an important figure and had given a rational explanation for his conclusion that he was not of continuing interest to IMIK or its successors. While Mr McGirr acknowledged that the passage in the determination dealing with internal flight was not as well set out as it might be, it was clear that he had by implication considered whether it would be unduly harsh for the appellant to move.

14. The appellant was, in the alternative, not in fear at all given the change in circumstances. Paragraph 3.26 of the Country Assessment dealt with IMIK. There was no reason to believe that the appellant had a fear that the splintered parts of IMIK would be looking for him.

15. The appellant had consistently talked about friction between IMIK and the PUK but had not referred to the KDP.

16. The points relied on by Counsel for stating that it would be unduly harsh for the appellant to relocate applied with equal force to his circumstances in the United Kingdom. The Adjudicator had considered the appellant's medical condition and had given a generous interpretation to the evidence. The appellant had a difficulty with his right elbow, poor memory and did not sleep well. The factors taken together did not mean that it would be unduly harsh for the appellant to relocate. There was a functioning medical service in the KAA as appeared from paragraph 4.57 of the Country Assessment. The situation had changed from the time when the O'Shea report had been

compiled in July 2001. The report of S J Laizer was based on her opinions and was unsourced. The CIPU assessment should be preferred. The KAA was not lawless and there was an operating judicial system (paragraph 3.7 of the Assessment) and while there was no evidence before the Tribunal of any parliament in the KAA, paragraph 3.20 of the Assessment referred to the prospect of parliamentary elections. Mr McGirr suggested that social security was available. Paragraph 5.18 of the Assessment referred to human rights organisations. Human rights abuses had reduced since the early 1990s.

17. Mr Caswell submitted that there was no evidence that social security existed in the KAA. There was no evidence about any parliament in the KAA. The O'Shea report at paragraph 14 stated that there was no means of support for Kurds who chose the internal flight option. Even if a parliament existed, the KAA were not in a position to grant nationality. Although the KAA might be beginning to adopt state-like characteristics it had not yet become an entity capable of providing protection.

18. Islamist groups still operated and tensions still existed in the KAA. The appellant remained at risk. IMIK was fragmented and there was no safe haven. The appellant's circumstances in the United Kingdom were not the same as in the KAA. The points he relied on in his skeleton argument for stating that it was unduly harsh for the appellant applied in the KAA in a way that they would not apply in the UK.

19. Mr McGirr, in conclusion, stated that, for the avoidance of doubt, the Secretary of State gave the usual undertaking in respect of returns to the KAA. Mr Caswell commented that that did not mean that the return would be to a safe location.

20. At the conclusion of the submissions we reserved our determination.

21. The appellant's account, which was not tested in cross-examination, was found to be credible in the main by the Adjudicator although he did consider that he had exaggerated certain events. He was prepared to give the appellant the benefit of the doubt concerning a number of discrepancies in his accounts prior to 2001. He bore in mind the opinion of the GP.

22. The Adjudicator was prepared to accept that IMIK was reluctant to lose the appellant as a member of the party and that he was detained but not that he was a detainee of any importance. The Adjudicator did not consider that the appellant had any significant insider information that would cause IMIK to be anxious not to lose track of him.

23. Mr McGirr accepts that paragraph 21 of the Adjudicator's determination is not as clear as it might be. As the Adjudicator accepted that IMIK had fractured in 2001 it is not clear to us why he was prepared to accept that the appellant had a well founded fear of persecution in the IMIK area of

influence since there was no longer such an area. Paragraph 3.26 of the Home Office Country Assessment reads as follows:

> "3.26 The Islamic Movement of Iraqi Kurdistan (IMIK) has, over the year 2001, splintered. Four dissident factions have emerged – "Islamic Group", "Unification" movement and the "Soran Force", and "Jund al-Islam", with the latter founded on 1 September 2001. The Jund al-Islam is a militant group that has vowed destruction of established secular Kurdish political parties in the northern enclave. In turn, it was roundly condemned by the KCP and the KDP, pledging every assistance to the PUK to arrest Jund extremists. The Jund al-Islam, seized control of some villages near the Iranian border and attempted to institute a strictly Islamic theocratic regime. According to press and opposition reporting, the Jund al-Islam attached PUK fighters near Halabjah, killing dozens of persons. Intermittent fighting between the PUK, and the Jund al-Islam, and other Islamic groups continued until late November, when an agreement between those involved and the Iranian Government dissolved the Jund al-Islam and imposed a cease-fire. **[2f]** Jund al-Islam, alongside a number of other Islamist groups, has merged into a new group, Ansar al-Islam, ("Supporters of Islam"). Despite a few negotiation rounds with Iranian mediation, tension between the PUK and the Islamist group remains unsolved. **[2f][26][28b]**"

24. Counsel submits the appellant will face exactly the same problems from the new group as from the old. However, it will be observed that IMIK split into four and that one of the groups, Jund al-Islam was founded on 1 September 2001 – the appellant had left the KAA on 15 August 2001. In late November a ceasefire was imposed and a new group emerged, Ansar al-Islam. It is correct to say that tension remains despite new negotiations but it is by no means established on the evidence, in our view, that the group IMIK whose attentions the appellant was seeking to escape, has any interest in him today. It has ceased to exist. It splintered into four. One of the groups has merged with other groups to form yet another group. There are at least two removes between IMIK and the new group and it would be speculative to assume that the new group has any interest in the appellant. Counsel submits that the appellant was of some profile. The Adjudicator, however, did not consider that to be the position. He was not an important detainee with any information of significance. We consider that conclusion to be properly sustainable on the evidence before the Adjudicator. Counsel submits that his former enemies are still around as individuals notwithstanding that IMIK has ceased to exist. He noted that the report by F J Laizer mentions speculation about the PUK seeking to accommodate Jund al-Islam and forge an agreement to contain the violence that erupted in the autumn of 2001. It is suggested that alliances between the three main powers in northern Iraq threaten to further undermine individual liberties and the opposition forces freedom to organise in northern Iraq. We note the position of the UNHCR on 27

November 2000 that the KDP and PUK were considered to be *de facto* authorities but it could not be presumed without more to provide adequate and effective protection to those residing in their territories. The O'Shea report compiled in July 2001, refers to lawlessness.

25. Paragraph 3.7 of the Country Assessment states that the regions administered by the KDP and PUK each have a system of justice, based on Iraqi legislation with a police force to enforce public order. There are hospitals, schools and universities. Both regions have their own administrations, in which several parties have seats. In September 1998 the KDP and PUK reached an agreement called the "Washington Accord" following talks in the USA. It was planned to hold parliamentary elections the following year though at the hearing the parties were not able to confirm that parliament had been convened. Municipal elections were held in February and May 2000. These elections were reportedly fair according to foreign observers.

26. At paragraph 5.18 of the assessment it is stated that the authorities on the whole cooperate fully with the implementation of aid programmes and that UN representatives deal with the issue of displaced persons and intercede with the KDP and PUK. Although human rights abuses had been committed, the PUK and KDP had enacted laws establishing an independent judiciary. It was agreed by independent observers that the groups had generally observed the laws enacted. Human rights ministries had been established by both the PUK and KDP. These ministries monitored human rights conditions and submitted reports to relevant international bodies. Ways were recommended to end abuses.

27. The northern Iraqi community had developed its own human rights initiatives and a number of local human rights organisations were active in northern Iraq. Local and international observers in northern Iraq had concurred that the human rights situation there had improved markedly in recent years – see paragraph 5.22 of the CIPU assessment.

28. In the light of the material before us, we are not satisfied that the appellant has established that he has a well founded fear of persecution in the KAA. The Adjudicator found that the source of that fear was IMIK. That source no longer exists and we are not satisfied on the material that is before us that the appellant can plausibly base his fear on the reconstituted fragments of what was once IMIK.

29. It is not necessary for us accordingly to go into the question of undue harshness. Had it been necessary to do so, we would have tended to agree with Mr McGirr that even viewed cumulatively the various matters relied on by Mr Caswell would not make it unduly harsh for the appellant to reside in a different area. The difficulties that he has would affect him to a certain degree anywhere and we are not satisfied that he would have insuperable difficulties in getting employment – we bear in mind generally the guidance given in <u>Robinson</u> [1997] Imm.A.R.568.

30. However, for reasons which we have set out above, it is not established that the appellant has a well founded fear of persecution in the KAA. He can properly be returned there without the United Kingdom being in breach of its international obligations. We note the undertaking given by the Secretary of State that the appellant will not be returned via any part of Iraq under the control of Saddam Hussein.

31. The appeal is dismissed.

G Warr
Chairman