Case No: C4/2008/0340

Neutral Citation Number: [2008] EWCA Civ 1054
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(SIR MICHAEL HARRISON)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 10th September 2008

Before:

LORD JUSTICE SEDLEY

- -

Between:

The QUEEN on the Application of DR (IRAQ)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr I Lewis (instructed by Messrs Dare Emmanuel Solicitors) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED

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Judgment

(As Approved by the Court)

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Lord Justice Sedley:

1. This is a renewed application, made with his usual skill by Mr Lewis, following refusal by Carnwath LJ of permission to appeal. The proposed appeal was against Sir Michael Harrison's refusal to grant permission for judicial review of the Home Secretary's refusal to accept what is said to be a fresh claim by the applicant for humanitarian protection. While awaiting removal, following an unsuccessful asylum claim which had been based upon his father's political profile in Iraq, the applicant became involved upon (at least) the margins of a murder conspiracy among the community of Iraqi Kurds in this country. Three men have been convicted; two have fled to Iraq, but, of those two, one has now been arrested and is awaiting extradition back to this country. The applicant himself was charged with conspiracy to pervert the course of justice following an exculpatory statement which he gave, but retracted, thereby implicating the others. He himself was acquitted and now fears reprisal from, or on behalf of, not only the two fugitives but, logically, the three convicted men. The particular fear upon which he relies in these proceedings, however, is the fear, if he is returned to Iraqi Kurdistan, of reprisal on behalf of the two who have fled there.

2. The Secretary of State has rejected this claim as being outwith rule 353. Rule 353 provides:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
> (i) had not already been considered; and
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection [I omit the rest of the paragraph]."

3. Now on its face this is manifestly, in literal terms, a fresh claim. It has nothing whatever to do with the previous one, but to this requirement the rule adds that it must itself have a realistic prospect of success. Mr Lewis is right to say that that means success not with the Home Secretary who, *ex hypothesi*, has taken an adverse view, but with an independent immigration judge. The judgment as to whether this is so, as Buxton LJ explained in WM (DRC) v SSHD [2006] EWCA Civ 1495, is a judgment confided initially to the Secretary of State. It has been assumed, and said more than once, that this means that it can only be upset on Wednesbury grounds. For myself, I think that remains a very wide open question. Rule 353 makes the Secretary of

State judge in her own cause, and for that reason alone ought arguably to attract much closer judicial vigilance that the Wednesbury test traditionally involves. It also requires of the Secretary of State a judgment which a court is constitutionally better placed to make than is the executive. So I propose to take it as at least arguable that the supervisory court, whether the Administrative Court or (now) the Court of Appeal, is not confined to a bare irrationality test but is more nearly required to ask itself whether the Home Secretary has got it right.

4. Sir Michael Harrison considered that, one infelicitous adjective apart, the Home Secretary had got it right. He could see no answer to the in country evidence which indicates that Iraqi Kurdistan is a tolerably well-governed state within a state, capable of affording police protection to individuals needing it, with exceptions, such as tribal disputes, which, in the Home Secretary's view, did not apply here. What Mr Lewis says, however, is that the murder in question was -- as indeed it was -- a vicious, planned and highly publicised so-called "honour killing" of a young woman in this country and that the applicant will be regarded as having violated cultural or tribal custom by reneging on the conspirators rather than supporting them. That may be true as far as it goes, but in my judgment, for reasons I will come to, it does not go far enough.

5. The Home Secretary's decision letter of 4 January 2008 is long and full. In the course of it (see paragraph 17) the Home Office rejects the possibility of the applicant being targeted "specifically and persistently". This, Mr Lewis submits, is no part of the correct test of the risk of persecution. The word "specifically", when associated with targeting, is, however, mere tautology. The word "persistently" is, I agree, not a necessary ingredient; but I take the same view as the two other judges I have mentioned that it plays no pivotal role in the decision letter. You can subtract it and the thrust and reasoning of the letter will be the same. The upshot of the letter is found at paragraph 22.

> "Whilst we acknowledge that the current security situation in Iraq is far from ideal, we believe that your client will be able to turn to the authorities in the KRG for protection. Indeed, as stated above, it is deemed that there is a sufficiency of protection in the KRG and the general security environment there is much better than in the rest of Iraq, as detailed in paragraph 2.12 of the OGN on Iraq of February 2007 and the case law of SM and Others [2005] UKIAT 00111 supports these facts -- reference paragraphs 19 and 20."

6. None of this is directly dissented from by Mr Lewis, nor does he pursue a critique of the alternative that the letter sets out of internal flight, because that is a fall-back position from one which in my judgment is, in any event, secure. It is secure not in the barren Wednesbury sense that, however debateable, you cannot actually call it irrational, but in the sense that on close scrutiny it makes perfectly good sense. Of course the applicant, given his involvement on the

fringes of this murder, may be at risk of reprisal; but he will be at that risk whether in Iraq or here, for it was in the community here that it occurred. In neither country is he guaranteed safety, as I accept, but in both countries he can seek and expect such protection as a state can reasonably be expected to provide.

7. Since he would on his own case be no safer here than there, the case for humanitarian protection falls down, in my view, at that point. It is not reasonably possible in those circumstances that an immigration judge would find the applicant to be at real risk in Iraq of harm from which he would be meaningfully protected if he were allowed to remain in this country. For that reason it seems to me that any grant of permission to appeal would represent a dead end for this applicant. One has some sympathy for him in the situation on which he has found himself, but it is not a situation which the law of humanitarian protection is going to be able to alleviate for him.

Order: Application refused