ASYLUM AND IMMIGRATION TRIBUNAL

HM (Policy concessions not Convention recognition) Iraq [2006] UKAIT 00092

THE IMMIGRATION ACTS

Heard at: Bradford

Date of Hearing: 21 April 2006
Promulgated on: 12 December 2006

Before:

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Roberts
Immigration Judge Dickson

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr D Seddon, instructed by Refugee Legal Centre
For the Respondent: Ms R Petterson, Home Office Presenting Officer

A claim that the appellant is (or was) entitled to be recognised as a refugee under the Convention has to be distinguished from a claim that the appellant is (or was) entitled under some policy to be treated in the United Kingdom as a refugee. An appellant cannot select elements from those two distinct arguments and combine them into a hybrid claim.

DETERMINATION AND REASONS

1. This was the reconsideration, in pursuance of an order made by Ouseley J, of the appellant's appeal against the decision of the respondent on 4 August 2005 to give removal directions against him as an overstayer.

2. The appellant is a citizen of Iraq. He was born on 20 May 1986. He is a Kurd. He lived in a town close to Kirkuk, in the government controlled area, just outside the Kurdish Autonomous Zone (KAZ). When he was aged about 16 he began a relationship with a girl whom he met in secret. The relationship continued for about a year until 25 January 2003, when a neighbour saw them leaving a house together and contacted the appellant's girlfriends' mother. Her husband, the girl's

father, was a member of Saddam Hussein's intelligence and security forces and had considerable power in the area. Because it was clear that he would not approve of the relationship, the appellant feared for his life. He therefore left his home, travelling across the KAZ and through Turkey, and eventually came to the United Kingdom, arriving on 17 February 2003. He applied for asylum the same day. After consideration of his case, the Secretary of State decided on 12 March 2003 to refuse him asylum. Two reasons are given for that decision in the letter of that date. The first is that "your claim is not based on a fear of persecution in Iraq because of race, religion, nationality, membership of a particular social group or political opinion", the second is that "the Secretary of State finds it not unreasonable to expect you to go to a part of Iraq that you would be safe". The second reason is the subject of some elaboration in the letter refusing asylum; in particular, the Secretary of State notes that the appellant had travelled through KAZ on his way to Turkey, apparently without any problems. On 13 March 2003 the Secretary of State issued formal notices refusing to grant asylum but granting exceptional leave to remain in the United Kingdom until 19 May 2004, the day before the appellant's eighteenth birthday. The reason for the grant is stated simply that "it has been decided that it would be right because of the particular circumstances of your case".

3. The appellant appealed under s69(3) of the 1999 Act. In his Notice of Appeal he advanced human rights grounds, which were the subject of separate consideration by the Secretary of State, recorded in a supplementary refusal letter dated 30 September. The Secretary of State rejected the claim based on the European Convention on Human Rights and pointed out that Saddam Hussein's regime no longer posed a threat to anybody as it had been removed from power by armed action in March and April 2003.

4. The appellant's appeal was heard by an Adjudicator on 7 January 2004. The appellant was professionally represented. Before the Adjudicator it was conceded on the appellant's behalf that he had no entitlement under the Refugee Convention because the ill-treatment he feared would not be for reasons of any of the five motives mentioned in Article 1A(2) of that Convention. The appeal proceeded therefore to deal with human rights matters only. The Adjudicator dismissed the appeal. There was no further challenge to that determination.

5. There was also no further grant of leave to the appellant, whose leave accordingly expired on 19 May 2004. On 15 October 2004, with the assistance of solicitors (according to his subsequent statement at interview) the appellant applied for further leave to remain, solely on human rights grounds. He was interviewed on 7 March 2005. He stated that he still feared his former girlfriend's father. We say "former girlfriend" because he now based his claim partly on a relationship with a new girlfriend, who he had met at a nightclub, and who he knew only as "Christine". On 4 August 2005 the Secretary of State refused his application and decided to remove the appellant. The Secretary of State took the view that the matters now mentioned by the claimant were not significantly different from those

raised in his original asylum claim. Further, it was said that if there were any difficulties for the appellant, he could live in an appropriate part of the KAZ. So far as the new relationship was concerned, it had been begun at a time when the appellant had no leave and his situation in the United Kingdom was unstable. There would therefore, in the Secretary of State's view, no disruption to the relationship if the appellant now had to leave. Given that the appellant was an overstayer who was not being granted leave, he was liable to removal under s10 of the 1999 Act.

6. The appellant appealed against that decision. His appeal was heard by an Immigration Judge on 9 September 2005. The appellant was unrepresented. It is, however, clear from the Immigration Judge's determination that he gave the appellant every possible opportunity to say anything he wanted to say in support of his case. The Immigration Judge took the view that the appellant had failed to establish that, if he were returned to Iraq, he would be at risk of ill-treatment that he could not reasonably be expected to avoid by moving to a safe part of the country. So far as his life in the United Kingdom was concerned, the appellant now had another girlfriend, called Alison. She was certainly aware of his immigration status, and the Immigration Judge found no truly exceptional reason for departing from the Immigration Rules in the appellant's case. He accordingly dismissed the appeal.

7. There was then an application for reconsideration. The application was made on a ground which had not previously been raised. It was that in 2003 the Secretary of State had not treated the appellant in accordance with his policy relating to claimants from Iraq. The terms of that policy had only become apparent in the course of litigation in the case of Rashid v SSHD [2005] EWCA Civ 744. The Grounds of Challenge are set out in the application for reconsideration as follows:

> "*Jurisdiction*
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> 8. The IJ's jurisdiction on appeal extended to a consideration of whether the decision appealed against was not in accordance with the law (s84(1)(e)). Such a jurisdiction extends to consideration of whether or not the Secretary of State's decision was vitiated by errors of public law: DS Abdi v SSHD [1996] Imm AR 148 Court of Appeal. A failure to follow policy (all other things being equal) is plainly a public law error.
>
> *Rashid*
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> 9. At the time of the initial decision on the claimant's case, the policy articulated in Rashid was in play. At such time, no removals of Kurds were being effected to government controlled Iraq. In recognition of the well-founded fear of persecution for relevant reasons faced by Kurdish returnees. In those premises, the Secretary of State erred in failing to grant the Claimant refugee status at a time when he took a policy decision to grant the Claimant exceptional leave to remain until he reached majority.

10. In these premises the IJ erred in failing to allow the appeal pursuant to his not in accordance with the law jurisdiction."

8. The Tribunal made no order for reconsideration, but on renewal an order was made by Ouseley J for reasons he gave as follows:

> "There is nothing wrong with the conclusion that the claimant is not entitled to asylum or that there would be no breach of Article 3 in returning him. He did not raise the point which he now raises under the Robinson principle. He arrived in the UK 17.2.03 and was refused asylum on 12.3.03 on the grounds that he could relocate safely to KAZ. He did not appeal against that decision. The Govt policy not to take that point was changed on 21.3.03. He received ELR as a minor and an extension was refused on 4.8.05. It was that decision which was the subject of the appeal. The Abdi line permits a failure to consider a policy to be an error of law although it is not for the AIT to enforce the policy. The AIT cannot deal with abuse or misuse of power as if it were a JR Court. The Rashid decision was not simply a failure to apply a policy but involved an abuse of power because of the extended duration over which the policy had been applicable to Rashid but had not been applied. The facts are entirely different here in terms of timescale and applying Rashid, an abuse case would be very hard to mount. Yet absent that the only aspect which could be said no to be in accordance with law would be the failure on 12.3.03 to address the policy; this was some two years before the appeal decision. A JR Court might regard there as having been delay in raising the point which could be circumvented were the AIT to broaden its jurisdiction to cover JR matters. However I am satisfied that there is sufficient in the point to make it arguable that it could have an effect upon the outcome. It is a matter which could usefully be dealt with at a senior level upon reconsideration."

9. The extent of the policies operated by the Secretary of State at relevant times is now reasonably clear, as a result of a witness statement by a Home Office official, Mr A P Saunders, prepared for use in Judicial Review proceedings before Collins J, R, H and AH v SSHD [2006] EWHC 526 Admin. The policies in question appear to have been as follows.

    1. Before the military action against Iraq in March 2003, Iraqi asylum seekers from South and Central Iraq were normally (perhaps always) granted exceptional leave to remain if they did not establish a claim under the Refugee Convention, because of a number of factors including the severe penalties imposed by Saddam Hussein on those who left Iraq illegally. Iraqi asylum seekers from the KAZ who did not establish that they were entitled under the Refugee Convention were normally (perhaps always) granted exceptional leave to remain because of poor humanitarian conditions in the KAZ, or the lack of a practical route for return, or both. (Paragraphs 24 and 26 of Mr Saunders' witness statement).
    2. Following the establishment of the KAZ there was some suggestion that the KAZ might provide an internal relocation alternative for asylum seekers from Southern and Central Iraq. But IND Policy, possibly from the very beginning, and certainly for some years before removals to Iraq temporarily ceased on 20

March 2003, was that the possibility of internal relocation to Northern Iraq would not be advanced in the case of a person from South or Central Iraq, and therefore that asylum would not be refused on the basis of that possibility. (Paragraphs 28 to 34, 48, 61 to 62, 65 and 68 of Mr Saunders' statement). Difficulties have arisen because that policy was, apparently erroneously, not applied consistently.

3. The period of exceptional leave to remain granted to those who were found not to be refugees was, at first, four years. On 20 February 2003 the period was reduced to six months "in view of the uncertain situation surrounding Iraq, in particular the prospect of imminent military action". (Paragraph 64 of Mr Saunders' statement).
4. Independently of any policy specific to Iraq, an unaccompanied minor who claimed asylum but failed to establish entitlement under the Refugee Convention was granted exceptional leave to remain for a period expiring on the day before his eighteenth birthday.

10. At the hearing before us, Mr Seddon made extensive submissions on jurisdiction, at our request. He based the rest of his submissions on his exceptionally helpful skeleton argument, which we may summarise as follows.

    1. By advancing an argument based on the possibility of internal relocation in 2003, the Secretary of State had failed to follow his own policy.
    2. The Secretary of State was wrong in his conclusion that the appellant was not entitled to refugee status for lack of a Convention reason for the feared persecution.
    3. Therefore, the Secretary of State should have recognised the appellant as a refugee, by reaching the right answer on Convention reason and by ignoring any question of internal relocation. His failure to recognise the appellant as a refugee in 2003 amounted to "conspicuous unfairness". The decision to remove him in 2005 was therefore not in accordance with the law, because it could be made only in the context of an unfair refusal of refugee status in 2003.
    4. Strictly in the alternative to 3, if the Secretary of State was entitled to refuse to recognise the appellant as a refugee in 2003, he ought to at least to have granted him exceptional leave to remain on the same basis as he would have granted it to any other Iraqi asylum claimant. The grant, being after 20 February 2003, would have been of six months leave, which would, in Mr Seddon's submission, be "on a 'risk' basis i.e. not simply on the grounds of age". The failure to grant such leave means that the appellant has been treated unfairly and he is entitled to be replaced in the position he should probably have been in. That means that he should be treated as having been granted exceptional leave to remain on a "risk" basis, and should now be permitted to make an application to extend that leave, as though the leave had been granted and the application had been in time. In this case too the 2005 decision to remove was a decision which was not in accordance with the law

because the appellant's lack of leave again results from a faulty decision in 2003.

11. In her submissions Ms Petterson reminded us that our task in a reconsideration is primarily to determine whether the Immigration Judge materially erred in law in his conclusions. He was dealing with an appeal on asylum and human rights grounds. He dealt with the arguments put to him and it had not been shown that he made any error in his conclusions on those arguments. So far as the points made by Mr Seddon were concerned, the references in the 2002 refusal to the possibility of internal relocation were erroneous, but refugee status was also refused upon the basis of a lack of a Convention reason, and it could not accordingly be said that the claimant should have been regarded as a refugee. His case had been dealt with promptly and he had been granted more than six months exceptional leave to remain. It was difficult to see any unfairness. In reply, Mr Seddon repeated his submission that the Secretary of State's 2003 conclusion on Convention reason was simply wrong. He said that he accepted that had he been granted exceptional leave to remain as an Iraqi asylum seeker (rather than an Iraqi minor asylum seeker) it would have been leave for only six months, but submitted that if the leave had been granted on a "protection" basis rather than on a "minority" basis, the appellant might have been treated more favourably when he sought to renew it. He now ought to be treated as though he had been granted exceptional leave to remain on a "protection" basis.

12. There is no doubt that the Secretary of State erred in raising the possibility of internal relocation against in the appellant in his 2003 decision. It is, however, important to appreciate precisely why it is said that he erred. It is not because internal relocation had somehow ceased to be part of refugee law. It is merely because the Secretary of State had a policy of not raising the issue. As is apparent from Mr Saunders' witness statement, even the UNHCR appears to have wavered as to whether the KAZ constituted a possible relocation alternative for asylum seekers from Central and Southern Iraq. The decision not to raise the issue was taken on a purely pragmatic basis. The consequence of that must be that individuals who in fact had a reasonable and safe relocation alternative within Northern Iraq were, in the United Kingdom, treated as though they were refugees under the Refugee Convention. And that treatment was not on the basis of entitlement under the Refugee Convention, but as a result of the Secretary of State's pragmatic decision. In the same way that a policy sometimes operates to grant benefits outside the Immigration Rules, this was a policy that operated (in some, unidentified cases, but as a matter of principle) outside the Refugee Convention.

13. It is in that context that Mr Seddon's submission about the Convention reason for the harm threatened to the appellant needs to be evaluated. In his skeleton argument, and before us, Mr Seddon treated this issue as though it were a matter of refugee law. That is to say, he attempted to show that in the circumstances in which the appellant found himself, and on the basis of authority, the threatened persecution would be for one of the reasons specified in the Refugee Convention.

The problem is that that process does not enable the appellant to demonstrate that in 2003 he should have been recognised as a refugee. In order to determine whether someone is a refugee, one has to ask the simple composite question posed by the Refugee Convention. One cannot do it by ignoring questions of internal relocation. The ignoring of questions of internal relocation is a feature of the Secretary of State's policy, not of the Refugee Convention itself. If we are to determine whether the appellant was in truth, in international law, a refugee, we have to take both factors into account. The appellant has never shown that the arguments on internal relocation raised in the 2003 Refusal Letter were without merit as a matter of international law, and we think it is unlikely in the extreme that he could succeed in doing so. What he does say is that the arguments should not have been made, not because they were not relevant to his refugee status, but because the Secretary of State had a policy of not raising those arguments. The appellant fails to show that in 2003 he was a refugee, because he seeks to do so by reference to only one of the reasons raised against him. The appellant cannot show that he was a refugee by excluding considerations going to internal relocation. What he might be able to show is that if the Secretary of State had applied his policy correctly he might (or would) have treated the appellant as a refugee, whether he was one or not. That is to say, he might have applied his policy outside the Refugee Convention in such a way as to call the appellant a refugee. But when we are considering the exercise of the Secretary of State's policy, we are concerned with his decision-making process, not primarily with whether the decision was correct. Whether or not reasons could now be found for asserting that the Secretary of State was incorrect in holding that there was no Convention reason, nothing that has been advanced at any stage in this appeal demonstrates that the Secretary of State erred in his procedure for making the decision. That the issue is very far from clear is demonstrated by the fact that the lack of Convention reason was conceded by the appellant in the 2003 appeal, when he was legally represented. Whether there was a Convention reason in the present case is, in truth, a matter of some difficulty. In the operation of his policy the Secretary of State decided that the appellant's claim to be a refugee failed for that reason. Whether he was as a matter of international law right or wrong on that basis, his decision-making process and his conclusion are not shown to have been in any way unfair, and the conclusion was accepted by the appellant in the 2003 appeal.

14. The appellant cannot make his case by selecting one element from arguments based on the policy and another element from arguments based on the Convention. So far as the Convention is concerned, he has not established that he was a refugee in 2003, because for those purposes he cannot exclude considerations of internal relocation. So far as the policy is concerned, he has not established unfairness in refusing to recognise him as a refugee, because he cannot do that without showing that it was unfair (rather than arguably wrong) for the Secretary of State to decide that there was no Convention reason for the threatened ill-treatment.

15. For those reasons we reject Mr Seddon's submission that the appellant should have been recognised as a refugee in 2003 and his submission that it was in some way

improper for the Secretary of State not to recognise the appellant as a refugee in 2003.

16. The question then is whether the appellant was entitled to exceptional leave to remain that was in some way different in nature from that which he was granted. So far as the period of leave is concerned, he cannot complain: he received rather over a year's leave instead of merely six months. Mr Seddon's submission is that his leave should have been granted not on the basis of his minority but on the basis of the need to provide protection against difficulties that he would suffer if returned to Iraq. We have the very gravest of difficulties with that submission. First, it is very far from clear the difference between various qualities of leave in early 2003 is anything other than a construct of Mr Seddon's. In April 2003 a distinction between humanitarian protection and discretionary leave was introduced; but no such distinction appears to have existed when this appellant was granted exceptional leave to remain. Secondly, the period of six months granted to Iraqi asylum seekers after 20 February 2003 was as short as six months specifically because it was clearly not envisaged at that time that it would be necessary to make grants of leave on a general "protection" basis to failed Iraqi asylum seekers for very much longer. Thirdly, we do not understand that the leave granted to the appellant was not on a "protection" basis. It is true that any unaccompanied minor would have received the same, that the reasons behind the development of a policy of that sort are rather unlikely to exclude any perceived need for protection on return. Fourthly, because there was in March 2003 no distinction between exceptional leave in various categories, the grant to the appellant would have been exactly the same if it had been on the basis that Mr Seddon submits it should have been. That is to say, it would have been a period expiring on the day before the appellant's eighteenth birthday, consisting of a period of six months because the appellant was a failed Iraqi asylum seeker, followed by a period at the expiry of which he would still be a minor. We cannot see that there is anything in the material before us showing that that was not exactly what the appellant got. The position is that, instead of six months leave he received fourteen months.

17. For these reasons we reject Mr Seddon's submission that the appellant had something less than the Secretary of State's policies and practice entitled him to.

18. In any event, Mr Seddon's submission was that the appellant should now be put into the position that he would have been if he had been treated properly, granted the notional leave that he should have been granted in 2003, and allowed to make what would be an in-time application for its extension. Mr Seddon's submission was that that would be to grant the appellant a remedy equivalent to that granted to AH in R (A, H and AH) v SSHD. That, with respect, is not right. In that case A and H should have been recognised as refugees, whether in international law they were entitled to be so recognised or not: their claims failed solely because the Secretary of State had, contrary to his policy, taken an internal relocation point against them. They were, in Collins J's view, now entitled to ILR, not because they

are now refugees, but because they should have been recognised as refugees from the beginning. AH's case was different. He could not properly claim to have been entitled to be recognised as a refugee. In his case the problem was that the determination of his case had taken an unaccountably long time, despite a declared practice of the Secretary of State of determining such claims quickly. Because of the delay, his claim was determined just after 20 February 2003. He therefore was not granted the four years exceptional leave to remain which he would have been granted in accordance with the practice or policy, if his claim had been determined before 20 February 2003. Instead, he was granted six months exceptional leave to remain. Collins J's conclusion in his case was that he should have been granted four years exceptional leave to remain in July 2001. That would by now have expired, and so the Judge ordered that he be treated as having applied for an extension in time if he did so within a reasonable time of the judgment which had, for the first time, established his right to the four years.

19. In the present case, there was no unacceptable delay. The appellant arrived in the United Kingdom only three days before the change of policy on 20 February 2003. It cannot properly be suggested that his claim ought finally to have been determined within those three days. Unlike AH, who was entitled to four years but received only six months leave, the appellant was entitled to six months but received fourteen. We have not been shown any policy which would have entitled the appellant to a period of leave which he has not been given. We can see no basis on which it can be said that the appellant should be granted a period of six months leave in addition to the fourteen months which he has had.

20. For these reasons we also reject Mr Seddon's submissions as to the way in which the appellant should now be treated.

21. There is a further point, which in a sense is a preliminary issue, but which it has been convenient to leave until the end of this judgment. The arguments raised by Mr Seddon were not raised before the Adjudicator in 2003 or before the Immigration Judge in 2005. The order for reconsideration appears to have been sought and made on the basis that those arguments were obvious in the Robinson v SSHD [1996] EWCA Civ 706 sense: that is to say, that there are matters which the Tribunal ought to take into account, whether or not specifically raised by the parties. We have been content to consider them, given in particular the terms of the order for reconsideration. We do, however, have very considerable doubts whether the arguments before us can be said to be within the Robinson doctrine. In Robinson itself, considerations were said to be confined to "obvious points of Convention law", meaning in that context the Refugee Convention. There can be no objection to extension to points relating to the Human Rights Convention. "Obvious" has the refined meaning that the point is one which has a good prospect of success (even if the point itself is not immediately apparent). The reason for the doctrine in litigation which is essentially *inter partes*, is the need to ensure that a failure to argue the point does not put the United Kingdom in breach of its international obligations. Following the decision of the Court of Appeal in A (Iraq)

v SSHD [2005] EWCA Civ 1438, it is now also clear that the Secretary of State is entitled to rely on the Robinson doctrine. The arguments put in the present case are, however, as we have explained, not arguments on Convention law. They are arguments based on the Secretary of State's application of a policy outside the Refugee Convention. For that reason we have considerable doubt whether it was in truth open to the appellant to rely on them at this late stage. As we have indicated, however, even if he is entitled to rely on them, they do not enable him to win his appeal.

22. We reject the arguments put by the appellant on reconsideration. It follows that the Secretary of State was entitled to treat the appellant as an overstayer in 2005. The Immigration Judge did not err in law in dealing on the merits with an appeal against a decision to remove the appellant as an overstayer. He had in mind the arguments that the appellant had adduced at various stages, and had also in mind the appellant's concession at the previous hearing. We are not persuaded that he erred in law in dismissing the appeal on asylum and human rights grounds for the reasons he gave. We accordingly order that his determination stand.

C M G OCKELTON
DEPUTY PRESIDENT
Date: