

Appeal Number : **HX56242-2001**
DG (Due Process-KAA) Iraq CG [2002] UKIAT 06874
IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 21 November 2002
Dictated : 3 December 2002

Determination Promulgated
.....27.02.20003.....

Before:

Miss K Eshun - Chairman
Mrs A J F Cross De Chavannes
Mrs M Padfield JP

between

Dana Aziz Ghader

Appellant

and

The Secretary of State for the Home Department

Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Mr Mohammad of Musa A Patel & Co Solicitors.
For the Respondent: Mr A Sheikh, Home Office Presenting Officer.

1. The appellant, a citizen of Iraq, appeals with leave of the Tribunal against the determination of an Adjudicator (Mr J P N Hallam) dismissing his appeal against the decision of the respondent made on 17 March 2001 to refuse him leave to enter and asylum.
2. The appellant's claim to asylum is that his father had been involved with the PUK in the 1980s. In April 1988 the Iraqi authorities arrested the appellant, his mother, two brothers and a sister. The appellant at that stage was 12 and he was detained from April 1988 until August 1988 when he was released as a result of an Amnesty being declared. He was ill-treated during his detention. After their release from detention, the family moved to Iran and stayed there until 9 December 1999 at which time the

Iranian government put pressure on the appellant and his family to return to Northern Iraq.

3. The appellant began to trade between Northern Iraq and Iran in Medicine, Tea and Soap and he continued this until November 2000. His trading involved him travelling to Iran three or four times a month. He had to bribe the customs in both Iran and Iraq and he was apparently warned many times not to travel to Iran and back from Kurdistan. Notwithstanding these warnings, the appellant continued with his trading until November 2000 when he returned to Kurdistan with his trading partner and he found the local police had come to arrest him in Kurdistan because they had been tipped off about his return. He managed to escape by the back door but his partner was arrested and his brother was shot at and wounded. The appellant was shot at but still managed to escape. He went to his uncle's house and on 20 December he left Iraq with the assistance of an agent and arrived in the United Kingdom via France on 22 January 2001 where upon he claimed asylum.
4. The appellant indicated that he was trading illegally but that he was suspected by the PUK of spying on behalf of the Iranian Intelligence and there was also an accusation that he was involved with the PKK. He was warned by the PUK on a number of occasions but he ignored these warnings and continued with his trading because he knew that he was not involved in assisting the Iranian Intelligence and was not involved either with the PKK. He claimed that there was a warrant for his arrest and he was fearful of returning to the Kurdish Autonomous Area because he feared persecution by the PUK.
5. So far as the appellant's illegal trading was concerned, the Adjudicator found that the appellant was fearful of prosecution rather than persecution. The appellant had indicated that he had paid customs on both sides of the border in order that he was not arrested for his illegal trading conduct which was in contravention of the Customs Act.
6. The Adjudicator found also that there was no indication that the appellant had been involved with either the Iranian Intelligence or the PKK and there was no evidence to show that the PUK had any grounds for fearing that he was involved with either organisation.
7. In view of the fact that the appellant did not give any indication as to the reason for the warrant for his arrest being issued, it was not clear to the Adjudicator that the appellant can indicate that the arrest was issued for any other reason other than his illegal trading. In the light of the evidence before him the Adjudicator found that the appellant could not establish that he has a well-founded fear of persecution for a Convention ground and that the appellant's fear was of prosecution for his illegal trading.
8. Leave to appeal was granted by the Tribunal on the basis that it is arguable that the Adjudicator failed to give sufficient consideration to the Article 3 claim and in particular, whether as a result of the prosecution which the Adjudicator found the appellant faced, his human rights would be infringed.

9. We agreed with Mr Mohammed that the Adjudicator did not consider the appellant's human rights claim in depth.
10. Counsel submitted that if the Adjudicator says that the appellant may be prosecuted for his illegal activities, then the Adjudicator ought to have gone on to consider any risk the appellant may face following prosecution. He said that prosecution would involve the arrest, detention and trial of the appellant. Although there is no objective evidence as to the likely punishment for illegal trading between Iran and Iraq, he would safely submit that the appellant would receive a custodial sentence. Had the Adjudicator referred to the objective evidence before him, he would have found that following his arrest and detention, the appellant would face the risk of human rights abuses. Mr Mohammed referred us to paragraph 4.52 of the April 2002 CIPU Report on Iraq in support of his argument that human rights violations occur during detention in Iraqi prisons. He also referred us to paragraph 4.39 which states that prison conditions are extremely poor and life threatening. Therefore upon conviction for illegal trading, the appellant's life would be at risk as a result of the prison conditions and probable mistreatment during any term of imprisonment.
11. In reply Mr Sheikh pointed out that paragraph 4.39 of the CIPU report relates to the Iraqi State and not to the Kurdish Autonomous Area of Northern Iraq.
12. Mr Sheikh submitted that we still had no evidence of the arrest warrant the appellant claims had been issued against him, if indeed it had been handed to his mother before he came to the United Kingdom.
13. Referring to paragraphs 4.18 and 4.19 of the CIPU report, Mr Sheikh submitted that there is a functioning judicial system operating in Northern Iraq. The principle of separation of power is applied and the judiciary is considered to be independent. In both the PUK and KDP areas, judges are appointed by the Government and the Parliament. The PUK have recently established their own Supreme Court in Sulaymaniyah. Everyone in Northern Iraq is entitled to the assistance of legal Counsel, which is customary in legal proceedings. If a party cannot afford legal Counsel, a lawyer is assigned by the authorities. There are currently many legal practitioners in Northern Iraq with little or no work. It is thus not difficult at the moment in Northern Iraq to find a lawyer for a reasonable fee. In the light of this evidence Mr Sheikh submitted that the appellant will be subject to a proper legal process. Although Mr Mohammed said that prison conditions are poor, according to paragraph 4.52 of the CIPU report there has been some improvement in prison conditions over recent years owing to the intervention of the ICRC. At the beginning of 2002 the ICRC visited 500 prisons regularly and as a result of these visits workshops have been set up by the ICRC to improve the quality of prison life, the Northern Iraqi authorities are co-operating with them. Nevertheless, Mr Sheikh submitted that it is complete speculation that the appellant would be found guilty. We have no evidence that he would not be granted bail while awaiting trial. We have no evidence that he would be given a custodial sentence as opposed to a fine. In the light of the objective evidence he would submit that the Adjudicator was right to find that the appellant would not be at risk on return either under the 1950 Convention or the 1951 Convention.

14. In reply Mr Mohammed submitted that because there are no international flights from Northern Iraq, there is no postal service and that is why it has not been possible for the appellant to obtain a copy of the arrest warrant. As Mr Mohammed had no objective evidence to support his submission, we could accept his argument.
15. We note that the Adjudicator's finding that the appellant will be subjected to prosecution for illegally trading between Iran and Iraq was accepted by both parties. In the light of this finding the Adjudicator should have gone on to consider the likely punishment the appellant might receive if convicted and any risks he may face as a result thereof.
16. The objective evidence presented to us indicates that the appellant is likely to receive legal assistance, either through his own efforts or through the authorities. We also find that he will be subject to what we consider to be a fair legal process. We have no evidence before us to suggest that the appellant would receive a custodial sentence as opposed to a fine. If he were to receive a custodial sentence, although we accept that prison conditions are poor, the objective evidence also suggests that prison conditions have improved over recent years owing to the intervention of the ICRC.
17. Therefore, on the totality of the evidence, we find that were the appellant to be returned to Iraq, there are no reasonable grounds for believing that he would suffer ill-treatment in breach of Article 3 of the ECHR. Accordingly his appeal is dismissed.

Miss K Eshun
Vice President