EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Reed
Lord Carloway
Lord Hardie

[2009] CSIH 55
XA23/08

OPINION OF THE COURT

delivered by LORD CARLOWAY

in the application for leave to appeal

by

HTA (A.P.)

Applicant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

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Act: SF Winter, solicitor advocate; McGill & Co

Alt: Lindsay; Solicitor to the Advocate General

19 June 2009

1. Background

[1] The applicant is 37 years of age. She is a citizen of Iraq and a Shia Muslim. In 1994, she married a Moroccan national, AB; a Sunni Muslim. They have three children: NB, OAB (now aged 11) and MAB. O is a Sunni name. The family arrived in the United Kingdom, via Jordan and Morocco, on 24 July 2006 ostensibly for a

holiday. The applicant claimed asylum on 7 September 2006, but this was refused on 24 October. The applicant's husband returned to Iraq, but came back with certain documents for the applicant before leaving again. The applicant maintained that she had last seen her husband in November 2006. She said that she did not know where he was staying in the UK, but this was disbelieved by the Immigration Judge who heard the applicant's original appeal against the respondent's refusal of her claim.

[2] That appeal was dismissed on 15 January 2007. The Immigration Judge noted the extent of human rights abuses in Iraq, especially against academics and teachers. He summarised the background material (paras 17 - 23); stating that it was clear that gross human rights violations continued to occur in Iraq and that the state institutions had been unable to protect individuals from these violations. All sides had been implicated in serious violations of the law of armed conflict, including the abduction and executions of civilians. Militias operated outside the law and "death squads and sectarian and religious extremists are equally prone to commit human rights violations". However, he rejected a number of allegations made by the applicant that she and her son, O, had been threatened, and that her brother had been kidnapped. The Immigration Judge did not accept that problems had arisen in relation to her son's name, or at least that they had been exaggerated. He remarked that the son could be called something else or have his name changed (para 29). That suggestion appears to have been derived from the applicant's own written statement, in which she had said that the family had used alternative names for O, when they were in public.

[3] The Immigration Judge did accept that the applicant had been a teacher and might have been told to wear more conservative clothing, including the Hijab. He thought that there was no reason why she could not do that, as a Muslim woman. She did not have pro-Western views and hoped to return to Iraq in due course.

[4] The Immigration Judge addressed the issue of whether the applicant would be at risk because she was in a mixed marriage "since she had married a Moroccan" but he held that the objective evidence did not suggest that there would be a risk from that. He wrote:

> "32 ...There is no indication that the applicant had any difficulties because of that and it is clear from the applicant that her husband left Iraq, came to the UK and returned to Iraq. If there was any suggestion that he was at risk, I do not believe that he would have returned".

2. Reconsideration

[5] Notwithstanding the terms of the passage quoted above, the applicant's request for a reconsideration was granted on the basis that the Immigration Judge had failed to take into account that the applicant was a Shia Muslim and her husband was a Sunni Muslim. A reconsideration of the appeal, "limited to this ground", followed in November 2007.

[6] The applicant claimed that, because of the different religious backgrounds of herself and her husband, and the fact that one of the children had a Shi-ite name, the family unit was at real risk of ill treatment if returned to Iraq. The respondent argued that the applicant could resume living in the area where she had been living and where her mother still lived. The children were being brought up according to the Shia faith (para 15). O could use a different name, as he had in the past. Alternatively, she could relocate to predominantly Shi-ite areas of Iraq, such as Basra.

[7] The Immigration Judge noted:

> "26. The [applicant] has not seen her husband for about a year and has no idea of his whereabouts. She has taken no steps to try to locate him either with her brother in law in Edinburgh or her sister in law in Morocco. While I find that very odd it is the position which she invited me to accept and which I do".

In reconsidering the case, he remarked that the applicant's husband did not appear to have suffered any persecution in Shi-ite areas despite being a Sunni. The applicant

had explained that this was because he was not an Iraqi, but the Immigration Judge did not accept that. He did accept that the applicant had taught in, and her children had attended, a school in the Sunni Abu Ghraib district of Baghdad. The Immigration Judge concluded:

> "31. The [applicant]'s account does not then disclose any difficulty personal to her from July 2003 to July 2006 on account of her mixed marriage, her profession or her religion".

In relation to the particular point for reconsideration, he said:

> "34. Mixed marriages - in the sense of unions between Arab Sunnis and Shiites - are and have been common in Iraq. ...It is now estimated that some two million of the six and a half million marriages in Iraq are mixed in that sense. One of the difficulties for couples of mixed religions is displacement. Hundreds of couples have been forced to divorce due to pressure from insurgents, militias or families who fear they could be singled out".

But, the applicant no longer had any involvement with her husband. However, the applicant told the Immigration Judge that the children regarded themselves as Sunni (cf *supra*), although the family had not attended any mosque in the UK. The Immigration Judge concluded:

> "36 Distilling all of that I consider that this is an example of managed migration by the [applicant] and her husband and not one precipitated by ill treatment for the reasons claimed... Whilst the participants to a mixed marriage undoubtedly face difficulties in Iraq, as the first Immigration Judge noted these difficulties are not such as to engage the protective provisions of the Geneva Convention. Many hundreds of thousands of Iraqi couples face this problem. It is not a problem which a measure such as the Geneva Convention intended to resolve by the conferring of refugee status.
> 37. In my view, following on this and the earlier examination of the [applicant]'s circumstances she and her family could return to live with her mother in the Washash area of Baghdad. She would do so without her husband. She would be able to stay with her mother. Even if the child's name was a problem she could confer on him a different name. His second name in any event is A".

[8] The Immigration Judge's approach to the child's name may have been affected by his misunderstanding that O was a name "obviously connected to the Shiite religious movement" (para 13). This would explain why he appears to found on the fact that the

child was not targeted by pupils at the school in Abu Ghraib because of his name. Since the school was predominantly Sunni, the lack of targeting is not a surprise. This confusion may also have prompted the Immigration Judge's view that internal relocation to the Shi-ite area of Basra would not be unduly harsh. Perhaps this too was based on a misunderstanding of the problem with the name.

3. Grounds of Appeal and Submissions

[9] In addition to the grounds of appeal, the Court had the advantage of detailed written submission by both parties. These were lodged in advance of the hearings and proved to be extremely helpful not only in assisting the Court to understand the precise nature of the arguments to be advanced but also reducing the time necessarily taken in oral presentation.

[10] In his grounds of appeal, the applicant first complained that the Immigration Judge had not taken into account evidence that the applicant had taken steps to find her husband, but this ground was departed from in submissions. The remaining grounds were that the Immigration Judge had erred in a number of respects. In particular, he had failed: (i) to consider, in relation to mixed marriages, the reason in the mind of the persecutor (*Sepet* v *Secretary of State for the Home Department* [2003] 1 WLR 856, Lord Bingham at para 23; and *Noune* v *SSHD* [2001] 1NLR 526, Schiemann LJ at para 8(6)); i.e. the persecutor's objection to the applicant's marriage to a Sunni and her religion; (ii) to realise that the absence of evidence of past persecution was not fatal to the claim and in requiring the applicant to wait until harm occurred (*Noune* (*supra*, Schiemann LJ at para 28(4)); Symes and Jorro : Asylum Law and Practice para 2.62; *Adan* v *Secretary of State for the Home Department* [1999] 1 AC 293; *Nenni* v *Secretary of State for the Home Department* [2006] EWCA Civ 1077; *Katrinak* v *Secretary of State for the Home Department* C/00/3504, Schiemann

LJ at paras 3 and 4; *PS (Sri Lanka)* v *Secretary of State for the Home Department* [2008] EWCA Civ 1213; *Refugee Status Appeals Authority New Zealand*, Refugee Appeal number 70366/07, paras 46-49). The Immigration Judge had failed in his assessment of the "fate" of the applicant's husband; (iii) in not regarding (at para 33) experiences of other family members as neutral (Symes and Jorro (*supra*) at para 2.53); (iv) to take proper account of the COIR, which demonstrated the extent of the sectarian violence (MacDonald's Immigration Law and Practice (7td ed) para 12.28) - notably that by non state agents against those in mixed marriages; (v) in the assessment of internal flight as not unduly harsh (*AH (Sudan) Secretary of State for the Home Department* [2008] 1 AC 678, Lord Bingham of Cornhill at para 5). The Immigration Judge had overlooked information in the COIR which did render internal relocation unduly harsh. Specific reference was made to the security situation in Southern Iraq; (vi) in his overall assessment accordingly; and (vii) by finding that the applicant could confer a different name on her son to disguise his religion - since a person should not be expected to modify or hide an attribute or characteristic to avoid persecution (*J* v *Secretary of State for the Home Department* [2007] Imm AR 73, Maurice Kay LJ at para 8 under reference to the majority opinions in the Australian High Court case: *S395/2002* v *Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112; *HJ (Iran)* v *Secretary of State for the Home Department* [2009] EWCA Civ 172; *IK* v *Secretary of State for the Home Department* [2004] AIT 00312). This, it was said was unreasonable and contrary to the right to personal identity (article 8(1) of the United Nations Convention of the Rights of the Child).

[11] The respondent replied that no error of law was apparent. The Immigration Judge had looked at the evidence "in the round" and had given adequate and comprehensible reasons for his decision. He had held that: (i) the applicant no longer had any

involvement with her Sunni husband; (ii) there was no evidence that she wanted her marriage to continue; (iii) the applicant and her children could return to the Washash area of Baghdad, where her mother lived; (iv) she would do so without her husband; (v) she could stay with her mother; and (vi) the child's name could be changed. Evidence of the absence of past persecution was a relevant and material consideration (*B* v *Secretary of State for the Home Department* [2006] EWCA Civ 1267, Hooper LJ at para 22, under reference to *MS* v *Secretary of State for the Home Department* [2004] UKIAT 192 and *IK* v *Secretary of State for the Home Department (supra)*. Evidence of how the applicant and her family had been treated in Iraq was also relevant and material (*B* v *Secretary of State for the Home Department* (*supra*, Hooper LJ at para 26)). The Immigration Judge had properly understood and taken account of the COIR and had quoted passages from it in relation to sectarian violence. Although in his answers to the grounds of appeal, it was argued that the respondent had also correctly applied the test for internal relocation set out in *AH (Sudan)* v *Secretary of State for the Home Department* (*supra*), that submission was departed from in submissions. The Immigration Judge's approach to internal relocation was not supported.

4. Decision

[12] From a reading of the Immigration Judge's determination, there is no reason to suppose that he did not take into account the mind of the persecutor in assessing whether there was a real risk of persecution. There was an abundance of evidence, even if it were not a matter of judicial knowledge, that there have been, and continue to be, numerous random and planned sectarian killings in Baghdad; especially following upon, as the Immigration Judge specifically noted (para 27), the bomb explosion in the Shi-ite Al-Askari shrine in Samarra in February 2006. Nevertheless,

the Immigration Judge held that there was no real risk of the applicant being targeted simply because she had been married to a Sunni Muslim or because one of her children was called O. That assessment was one of fact for the Immigration Judge to determine as the first instance reconsideration tribunal. The COIR certainly explained that the upsurge in sectarian violence had caused problems for those involved in Sunni-Shia marriages (2007 edition paras 25.59-60), but the information does not appear to be to the effect that a person of one particular group in a mixed marriage would be targeted, at, for example, an unofficial roadblock, by his or her own group. There was also no evidential basis for the proposition that a person would be targeted because one of his or her child's names was discovered to be indicative of one group or another.

[13] There is no basis for the contention that the Immigration Judge thought that the absence of past persecution meant that there could be none in the future. But such an absence, and the extent of any violence offered or not offered to the applicant and her family in the past, is something which can, and in many cases must, be taken into account. It is a factor which assists in predicting the prospects of future persecution, but it is by no means determinative. The weight to be attached to it will depend on the facts and circumstances of the case. It is for the tribunal hearing the evidence to assess that weight and any perceived imbalance in that exercise cannot be criticised as an error of law. It is worth adding that there is nothing uncertain in relation to the applicant's husband ,other than that the applicant says that she does not know where he is. There is no indication that he has suffered anything untoward.

[14] The Immigration Judge did not doubt the extent of sectarian violence. This was specifically covered by the earlier Immigration Judge's determination (*supra*), and the findings on this could hardly be open to challenge. As already noted, the Immigration

Judge reconsidering the case also had regard to the extremes of this violence and quoted the relevant passages from the COIR.

[15] In relation to the Immigration Judge's remark that the name of the child be changed, very little turns on this. It is important to notice the context in which this matter arose. It was the applicant who had mentioned that the family had used different names for the child when out in public. This had prompted the respondent to submit to both Immigration Judges that, in that situation, no problem with the name could arise (and none had arisen, in any event). The applicant had not responded to that submission. In particular, she had not argued that asking a person to change his name was a violation of that person's right to identity or was an unreasonable or intolerable request (*vide XY (Iran)* v *Secretary of State for the Home Department* [2008] EWCA Civ 911, Stanley Burnton LJ at para 14). The Immigration Judges simply remarked, almost as asides, on the prospect of a name change as an incidental to their general finding on the lack of any real risk of persecution. Their remarks were not central to that finding. In these circumstances, the Court does not consider that this is a case where it is necessary to examine this issue of whether obliging a person to change his or her name can amount to, or be a material part of, persecution.

[16] In all these circumstances, there is no error of law apparent from the Immigration Judge's decision. The grounds of appeal can, upon analysis, ultimately be seen essentially as disagreements about the weight which the Immigration Judge has placed on particular parts of the evidence and the inferences drawn from that evidence. There is no real prospect of a different decision being reached upon a reconsideration. The application must therefore be refused.