HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 57
on appeal from:2003 SLT 1409

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Saber (AP) (Appellant) v Secretary of State for the Home Department (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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Simon Collins
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Respondents:
Ailsa Carmichael
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LORD BINGHAM OF CORNHILL

My Lords,

1. For the reasons given by my noble and learned friend Lord Hope of Craighead, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

2. A decision as to whether or not an asylum seeker is in need of international protection must depend on the state of the evidence. So it is in this case. The question which lies at the heart of it is whether, following a series of appeals, the need for protection should be determined on the evidence as it stood originally or whether, before the final decision is taken, account should be taken of changed circumstances. The issue of whether a person's removal would be contrary to the United Kingdom's international obligations is always a prospective one, as it must be decided before any steps are taken to effect the removal. Common sense indicates that the final decision, whenever it is made, should be based on the most up to date evidence that is available. Facts which are of historical interest only do not provide a sound basis for a determination that an asylum seeker is entitled to protection now. This principle has been recognised by rule 32 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) which allows the Asylum and Immigration Tribunal, on

reconsideration of an appeal, to admit and consider evidence which was not submitted on any previous occasion.

3. The appellant is a Kurdish citizen of Iraq. He entered the United Kingdom illegally in a lorry in July 2000. At that time the government of Iraq was in the hands of a repressive one-party apparatus dominated by Saddam Hussein and members of his extended family. A Kurdish Autonomous Region ("the KAR") had been formed in 1970. But relations between the two main political factions, the Patriotic Union of Kurdistan ("the PUK") and the opposition Kurdish group ("the PDK"), were extremely volatile and they often descended into armed conflict. Secret agents were also known to be operating in the area on behalf of Saddam Hussein's government. The appellant had joined the PUK. He was involved in promoting and recruiting for it while he was at university. Prior to his escape from Iraq he had been engaged in smuggling machine parts and medicines into the KAR for use by the PUK. On 31 July 2000 he claimed asylum in the United Kingdom. He maintained that he was a refugee within the meaning of article 1A(2) of the Geneva Convention on the Status of Refugees and that his removal would also be in breach of his rights under article 3 and 5 of the European Convention on Human Rights. His application was refused on 13 February 2001.

4. The appellant appealed against the refusal to an adjudicator under the procedure that was then in force: see sections 65 and 69 of the Immigration and Asylum Act 1999. On 29 July 2001 his appeal was allowed by an adjudicator sitting in Glasgow. If his decision had not been further appealed, it would have been treated by the respondent as final recognition that the appellant was a refugee. At that time it was the policy of the United Kingdom for indefinite leave to remain to be granted under the immigration rules once a person's status as a refugee had been recognised.

5. The adjudicator based his decision on two different assumptions. The first, and primary, assumption was that the return of the appellant to Iraq would mean his return to Baghdad. There was an obvious risk of imprisonment and torture if that were to happen, as the appellant was known to be someone who was politically opposed to the Iraqi State. The second, and very much secondary, assumption was that it might be possible for him to be returned to the KAR. The adjudicator accepted the appellant's evidence that even then he would be at real risk of capture or death as Iraqi secret agents moved throughout that region with virtual impunity. So he allowed the appeal. But the Secretary of

State had already given an undertaking in March 2001 that he would not for the time being enforce the return of any failed Iraqi asylum seeker either to or via territory controlled by the Iraqi government. The adjudicator appears to have overlooked this undertaking. His assumption that the appellant's return to Iraq would mean return to Baghdad was incorrect.

6. In June 2002 the immigration appeal tribunal allowed the Secretary of State's appeal against the decision of the adjudicator. It did so for two reasons. The first was that the adjudicator ought to have accepted the Secretary of State's undertaking that Kurds from the KAR would not be returned to Baghdad. The second was based on its assessment of whether or not the appellant had a well-founded fear for a Convention reason if he were to be returned to the KAR. The tribunal concluded that there was no adequate evidential basis for a finding that Iraqi secret agents moved with impunity within the KAR. But it went one step further. It said that in its view the evidence was the other way. It showed that the PDK and the PUK had almost complete freedom in their areas. There was no reason at all why the PUK would not provide the appellant with protection, and every reason why it should.

7. The appellant appealed against this decision to the Court of Session. It was heard by the Second Division (the Lord Justice Clerk (Gill) and Lords Osborne and Johnston): 2003 SLT 1409. By the date of the hearing in the Inner House circumstances in Iraq had changed dramatically as a result of the US-led invasion in March 2003. Saddam Hussein was no longer in power. His regime's secret agents were no longer operating in the KAR. The facts which had been before the adjudicator and the tribunal were of historical interest. But they were no longer determinative of the question whether the appellant's removal from the United Kingdom would be a breach of the Refugee Convention and of the European Convention on Human Rights. Nevertheless counsel for the respondent told the court that, on instructions, she would not pursue the point of which notice had been given that the appeal raised issues that were of academic interest only.

8. The opinion of the court was delivered by the Lord Justice Clerk. At the outset of his opinion he referred to the air of unreality that had been lent to the discussion by the respondent's attitude to the appeal: para 4. Then, after reviewing the facts, he said there were three questions before the court in the appeal: (1) whether the tribunal was right to substitute its own findings for those of the adjudicator, (2) whether the tribunal was right to hold that the appellant would receive

appropriate protection if he were to be returned to the KAR and (3), if the court were to sustain the appeal, what should be the appropriate disposal: para 27. The court answered the first two questions in the appellant's favour. It held that evidence which was before the adjudicator gave some justification for the conclusion that operations by Iraqi and Iranian intelligence units were likely to be continuing at the time of the hearing and that the tribunal erred in concluding that the evidence went the other way. Furthermore there was no evidence before the tribunal as to the willingness of the PUK to protect the appellant. The respondent has not appealed to your Lordships against that part of the decision. As for disposal, the court held that the appropriate course was to return the case for a hearing *de novo* by a new adjudicator. The question whether it was right to take this course is the only live question in this appeal.

9. The reasons for this decision are set out in para 34 of the Lord Justice Clerk's opinion. He said that it was in the court's discretion whether to restore the decision of the adjudicator, to make a finding that the appellant had refugee status or to remit the case for a further hearing. It was a material consideration that it would bear hard on the appellant if he had to re-litigate the case more than two years after he had claimed asylum. But it would be wrong merely to reinstate the decision of the adjudicator. His decision had been based to a material degree on his understanding that the removal of the appellant would mean his removal to Baghdad. That view was at variance with the ministerial statement, of which the adjudicator seemed to have been unaware. Moreover to reinstate the decision would be to allow the asylum appeal on a basis of fact that had been materially affected by subsequent events in Iraq. It was preferable that the appeal should be determined on up to date facts.

10. Mr Bovey QC for the appellant accepted that the court had a discretion as to how to dispose of the appeal. But he submitted that it had failed to take account of what was at stake for the appellant. He conceded that on up to date facts the appellant would be bound to fail in his claim that he is entitled to asylum under article 1A(2) of the Refugee Convention and that his removal from the United Kingdom would be in breach of his rights under articles 3 and 5 of the European Convention on Human Rights. But the parties were agreed that when counsel for the respondent was making submissions in the Inner House on the appropriate remedy she had conceded that the appellant would be granted indefinite leave to remain if the court were to decide to restore the decision of the adjudicator. In other words his decision would in that event be treated as final despite the changed circumstances and would not be the subject of any further appeal, nor would the respondent seek

to invoke article 1C(5) of the Refugee Convention on the ground that the circumstances in connection with which the appellant was recognised as a refugee had ceased to exist.

11. Mr Bovey said that the court had not had regard to this concession when it was assessing the consequences of restoring the adjudicator's decision on the one hand and requiring the matter to be re-litigated on the other. It had failed to appreciate that the issue of how the appeal was to be disposed of would be determinative of whether the appellant was to be entitled to remain in the United Kingdom. Re-litigation of this issue would deprive him of the benefit of the respondent's concession that she would not challenge the decision of the adjudicator. In the result its decision was unfair to him and was plainly wrong.

12. The short and simple answer to this argument is that the concession on which the appellant relies did not deprive the court of its responsibility to decide what, in all the circumstances, was the appropriate way in which to dispose of the appeal. The decision by the adjudicator had been shown to be inconsistent with the ministerial undertaking that persons such as the appellant would not be returned to Baghdad. The tribunal had been wrong to substitute its own findings as to the situation in the KAR for those of the adjudicator, but the court had held that the appellant's evidence about this was not supported by the background evidence: para 30. So it cannot be said that the adjudicator's decision was so obviously right, at the time when it was made, for it to have been plainly wrong for the court to require the matter to be re-litigated.

13. Most important of all, however, was the fact that subsequent events in Iraq had altered so fundamentally since the decision to allow the appellant's claim was taken by the adjudicator. This brings me back to the point with which I began. The current situation in the relevant country will always be relevant to the question whether a person's removal from the United Kingdom would be contrary to its international obligations. The respondent's concession, such as it was, did not deprive the court of its discretion to take this factor into account, and to give such weight to it as it thought fit when it was deciding how the appeal should be disposed of. I would dismiss the appeal.

LORD RODGER OF EARSLFERRY

My Lords,

14. I have had the advantage of considering the speech of my noble and learned friend, Lord Hope of Craighead, in draft. I agree with it and, for the reasons which he gives, the decision of the Second Division was plainly right and the appeal must be dismissed.

BARONESS HALE OF RICHMOND

My Lords,

15. For the reasons given in the opinion of my noble and learned friend, Lord Hope of Craighead, with which I agree, I too would dismiss this appeal. I do not believe that the appellant has come anywhere close to demonstrating that this is a case in which this House should interfere with the exercise of discretion in the court below.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

16. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hope of Craighead. I agree with it and, for the reasons which he gives, I too would dismiss the appeal.