

TK (Article 3- Blind Person – KAA-Prison Condition) Iraq CG [2002] UKIAT 03576

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 10 May 2002

Determination Promulgated
8 August 2002
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Before:

**Professor D B Casson - Acting Vice President
Mrs E Hurst - JP**

between

The Secretary of State for the Home Department

Appellant

and

Tafiqh Hassan KADIR

Respondent

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Tribunal against the determination of an Adjudicator (Mr S M Hildreth) allowing on human rights grounds an appeal by Tafiqh Hassan Kadir (whom we shall refer to as Mr Kadir) against the decision of the Secretary of State on 17 August 2001 to refuse to grant leave to enter the United Kingdom. Before us the Secretary of State was represented by Mrs M Banwait. Mr Kadir was represented by Mr S Revindran of Refugee Legal Centre.
2. Mr Kadir is a Kurdish citizen of Iraq from the Kurdish Autonomous Area, born on 10 May 1966. He arrived in the United Kingdom, apparently via the Channel Tunnel at Dover, on 10 August 2001. He claimed asylum the following day. He was without documentation and said he had travelled from Turkey.
3. The asylum claim was withdrawn by Mr Kadir's representative at the outset of the hearing before the Adjudicator. The appeal proceeded on human rights grounds only.

4. Mr Kadir's story is set out as follows in a letter from Refugee Legal Centre dated 14 August 2001:

"Mr Kadir is from Sulaymania in the Kurdish Autonomous Region of Northern Iraq. He left his country because of the fear of harm and persecution from the Patriotic Union of Kurdistan (PUK), who controlled the area where he lived. In his legal and SEF interviews he recounted the events that made him flee his country.

Our client was self-employed as a scrap metal dealer in Sulaymania. He owned a small shop where he bought scrap metal and melted it to make cooking utensils for sale. Sometime in 1997, officials of the PUK raided his shop, seized all his machines and charged him for operating illegally and for not paying tax. Our client had ostensibly not sought permission from the PUK to build and operate such machinery. Mr Kadir was not aware that the machines he operated were illegal. Neither was he aware that he was liable to pay tax. He was fined 100,000 Iraqi dinars by the PUK and given four weeks to pay this. Mr Kadir could not afford to pay what was to him an extortionate sum. Besides, even if he could pay the amount, he had no avenue to generate income since his machines had been seized by the PUK.

Mr Kadir failed to pay the fine and a warrant was subsequently issued for his arrest. Due a (sic) fear of reprisals from the PUK including possible imprisonment and execution, our client decided to leave the country. Consequently he fled Iraq for Turkey where he has resided illegally since 1997. However, a recent decision by the Turkish government to deport all illegal immigrants to their country of origin compelled him to leave Turkey."

5. Mr Kadir gave evidence at the hearing before the Adjudicator. The Secretary of State was not represented and so there was no cross-examination. Mr Kadir told the Adjudicator that he and his business partner had both been imprisoned for a short time by PUK. His business partner had also fled the country and was now a refugee in Denmark. Mr Kadir had been in a Northern Iraqi jail once before for a month in 1983 because of a fight and the conditions were then very bad. He was certain he would be arrested if he returned. It was not unusual for people to be imprisoned for failure to pay tax.
6. The Adjudicator noted discrepancies in Mr Kadir's story but he took the view that there was not enough to impugn the overall credibility of the core story. He therefore found that the PUK controlled all aspects of life in Mr Kadir's home town, that they imposed an arbitrary and extortionately high tax on his machines ex post facto and that his inability to pay would be treated as defiance. There were substantial grounds for believing that there was a real risk that he would be consigned to jail if he were returned to Northern Iraq. The Adjudicator considered the documentary evidence but he was unable to discern anything which dealt specifically with prison conditions in the Kurdish Autonomous Area. He expressed his conclusions at paragraph 16 of his determination as follows:

"I therefore decide that the clear weight of evidence before me in this case leads me inexorably to the conclusion that there are substantial grounds for

believing that there is a real risk of imprisonment and that the prison conditions in the KAA would constitute treatment in violation of Article 3 of the ECHR. The internal flight alternative has really grown up in the asylum context - but in any event I would make it clear that in the circumstances of the KAA that it would be unduly harsh to expect relocation to an area controlled by the rival KDP.”

7. The Adjudicator therefore allowed the appeal on human rights grounds and directed the Secretary of State to grant exceptional leave to remain. We shall revert to the latter point later in this determination.
8. The grounds of appeal claim that the Adjudicator erred in finding that Mr Kadir would suffer treatment in violation of Article 3. The representatives addressed us on that ground. Mrs Banwait submitted that the documentary evidence before the Adjudicator (the CIPU Report dated October 2001) had no information on any prison in Northern Iraq. The Adjudicator had wrongly relied on Mr Kadir’s own evidence of conditions when he had been imprisoned for a month in 1983. The Netherlands Ministry of Foreign Affairs official general report on Northern Iraq dated April 2000 states:

“Conditions in prisons in Northern Iraq do not meet international requirements as laid down in 1955 in the United Nations’ minimum standards for the treatment of prisoners. Human rights violations do occur upon arrest and during detention. Conditions of hygiene in the prisons leave much to be desired.

Otherwise the situation in the prisons has improved over the last two years, owing also to the intervention of the ICRC. The International Red Cross (ICRC) is able to visit all prisons in both the PUK and the KDP areas. At the beginning of 2000, the ICRC was able to visit about 500 prisons on a regular basis. The Northern Iraqi Authorities are co-operating constructively with the Red Cross which, for example, organises workshops to improve the quality of prison life or provides lectures on basic rules of conduct for Peshmergas during military actions. At the request of detainees, the ICRC can issue statements of proof of their detention. Such statements contain, inter alia, dates of visits by ICRC staff and of release. The ICRC issues such cards only to Peshmergas and other detainees for whom the ICRC considers that there are particular grounds for protection. ‘Ordinary’ criminals are not included in this category.

Visiting arrangements differ from one prison to another in Northern Iraq. The usual frequency of visits is once a week. Visitors may bring in food, although the prison provides the necessary basic nutrition. Visits are not possible as long as criminal investigations into detainees are still in progress.

As far as is known, there is no question of forced or voluntary labour in the prisons. In some prisons, the possibility is said to exist of carrying out manual labour, etc. As far as we know, there are no arrangements for home leave. The western concept of rehabilitation is unknown in Northern Iraq.”

9. Mr Revindran referred us to the decision of the European Court of Human Rights in Dougoz v Greece, in which the European Court of Human Rights held that detention conditions alone could amount to a breach of Article 3. He invited us to dismiss the appeal or, if the Adjudicator's credibility finding was flawed, to remit to another Adjudicator.
10. We have considered the submissions of both representatives in the light of the documentary evidence before us. We proceed on the basis that Mr Kadir's story was accepted as credible by the Adjudicator. On his own evidence he had been living in Turkey since 1997. His case rested solely on his assertion that if he returned to the KAA he would be imprisoned because of the matters he described and that conditions of imprisonment would breach his rights under Article 3 of the European Convention on Human Rights. We are far from persuaded that there is a real risk that, after absence from the KAA for so long, there is a real risk that Mr Kadir's offences would attract imprisonment. If that is wrong, he must show that the prison conditions he would encounter would be such as to breach the high threshold required to constitute inhuman or degrading treatment contrary to Article 3 of the European Convention. In our judgment the documentary evidence, including the extract from the Netherlands Report of April 2000, extracts of which we have set out above, do not in any way suggest that imprisonment conditions in the KAA would amount to inhuman or degrading treatment. The Adjudicator was wrong to have allowed Mr Kadir's appeal on the basis of such evidence as was before him. The appeal by the Secretary of State is therefore allowed.
11. The Adjudicator saw fit to direct the Secretary of State to grant Mr Kadir exceptional leave to remain. The direction falls with our decision. It should, however, be noted that neither an Adjudicator nor the Tribunal has jurisdiction to direct the Secretary of State to grant exceptional leave to remain in any circumstances. The purported direction by the Adjudicator was ultra vires and unlawful. Exceptional leave to remain is a matter for the Secretary of State, not for the Appellate Authority.
12. The appeal by the Secretary of State is allowed.

D B Casson
Acting Vice President