Case No: C5/2008/1722(A)
C5/2008/1722

Neutral Citation Number: [2009] EWCA Civ 462
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/14270/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 30th March 2009

Before:

LORD JUSTICE WARD
LORD JUSTICE KEENE
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between:

SH (IRAQ)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Mr R Husain and Ms S Knights (instructed by Messrs Sheikh & Co) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

Lord Justice Keene:

1. This appeal from the Asylum and Immigration tribunal (the AIT) concerns the topic of internal relocation within Iraq for an asylum seeker who is an Iraqi Kurd.

2. The appellant is a Sunni Muslim who entered the United Kingdom in August 2006 aged 22 and claimed asylum some three days later. He had lived in Kirkuk in northern Iraq. His father was there the custodian of a shrine of the Darwesh, followers of a Sufi interpretation of Islam, the larger centres of their faith being in Kurdistan and Baghdad.

3. A number of facts about events in Kirkuk were established as the result of a decision by an immigration judge whose decision was found to have contained an error of law but who accepted much of the appellant's evidence. Thus it was accepted that the appellant and his brother had for reasons of their own set fire to the shrine, destroying it and a number of holy books. It seems also to have been accepted that the two brothers initially went off to stay with their uncle in Mosul but that the appellant's brother came back to find out what had happened to the shrine and had then been killed in Kirkuk. Precisely by whom he was killed was not established.

4. It was not accepted, however, that a warrant had been issued for the arrest of the appellant, nor that his father had issued a fatwa against him. It was accepted that his father had circulated the appellant's photograph to other shrines in the area around the shrine in Kirkuk but not around the country more generally.

5. On the basis of these facts the first immigration judge to deal with the appellant's appeal concluded that the appellant would be at risk of persecution in the Kirkuk region from the more extreme militant Muslim groups in the area because he would be perceived as responsible for the destruction of a shrine containing copies of the Koran. However, that judge found that the appellant could safely relocate within the area of the Kurdish Regional Government (the KRG) in the north of Iraq.

6. On the first stage reconsideration before Senior Immigration Judge Waumsley, the Secretary of State conceded that the Immigration Judge had not taken account of material country guidance which showed that relocation to the KRG was not an option. Stage 2 reconsideration was therefore ordered on the limited issue of whether the appellant could relocate in safety to some other part of Iraq, and if so whether it would be unduly harsh for him to do so.

7. Those issues came before Immigration Judge Davidge, whose decision it is which is under appeal in these proceedings. He found that the appellant could relocate internally within Iraq, in particular in parts of Baghdad. In so finding the Immigration Judge relied upon a country guidance case decided by the AIT in June 2005, SM and Others (Kurds-Protection-Relocation) Iraq CG [2005] UKAIT 00111. That decision had considered a number of reports up to

the end of 2004 and some material in early 2005. It had dealt with a number of issues concerning Iraqi Kurds, one of which was the possibility of relocation to southern or central Iraq. The tribunal had there noted evidence that Baghdad was a real multi-ethnic and multi-religious city, and that about 1 million Kurds lived outside the north of the country including very significant numbers in Baghdad. It had concluded that relocation to the south for a Kurd could in general be effective without this being unduly harsh and without giving rise to a real risk in all but the most exceptionally high profile cases.

8. Immigration Judge Davidge in the present case cited the relevant passages from SM in his determination. It was urged upon him on behalf of the appellant that the situation in Iraq had changed since that case had been decided, and that he should therefore depart from it. The judge observed that he could only do so where the evidence before him clearly showed that the country guidance was inapplicable. He considered expert evidence put before him from Ms Alison Pargeter and other material, but he concluded that the evidence did not establish that the position was significantly different from that in SM. The judge found that the appellant had not shown that he faced a risk of persecution in Baghdad on the basis of his ethnicity, and that is not now in dispute. The judge then said this at paragraphs 67 and 68 of his determination:

> "67. The appellant is a young Kurdish single man, without health problems or disability, because of the fire-setting in his home town, he has placed himself [without] the support of his family, save for an uncle in Mosul. He would need to find a job and accommodation. He has worked in a restaurant.
>
> 68. Unduly harsh requires treatment sufficient to satisfy a high threshold. As was made clear in Januzi the test is a rigorous one. A person can be expected to relocate even where the level of civil, political and socio economic human rights in the place of relocation is poor. Someone who travels to the UK because they do not enjoy those rights will not qualify for refugee status without establishing persecution within the terms of the convention. The fact of having travelled to the UK cannot put him in a better position. The place of comparison is with that of habitual residence, ie where the appellant is found to be at risk of persecution ie in this case his home area of Kirkuk. I have found that the difficulties that the appellant complains of vis a vis relocation are dangers and deprivations arising from the invasion and occupation of Iraq and which are exacerbated by the struggles to gain political power amongst militarised sects. The volatility of Iraq leads to fluctuations in degree of difficulty even in

> the same area from week to week and from month to month. Looking at all the evidence in the round I find that the appellant has not satisfied me, to the lower standard, for the reasons I have set out above, that it is unreasonable, in the sense of being unduly harsh, to expect the appellant to go to Baghdad."

He then went on to reject the associated claims for humanitarian protection and under the European Convention on Human Rights Articles 2 and 3.

9. His decision is now challenged on a number of grounds. It is first contended that the judge adopted the wrong approach when considering whether it would be unduly harsh to relocate in Baghdad. It is of course well established that, though there may be what is sometimes called a "safe haven" in the claimant's home country where he would not be at risk of persecution, that will not prevent him from qualifying as a refugee if it would be unduly harsh for him to relocate there; see the case of Robinson [1998] QB 929 and the case referred to by the Immigration Judge in the passage which I have just read, Januzi v SSHD [2006] 2 AC 426.

10. The point made by Mr Husain on behalf of the appellant in this connection is that the Immigration Judge elided the test for undue harshness with that of the risk of persecution. Reliance is placed especially on a passage in the determination at paragraph 61, where the judge dealt with one of Ms Pargeter's reports. It is necessary to read the whole of the relevant paragraph to see the context:

> "Ms Pargeter's second report is focussed on the position of the appellant as a Kurd in central and southern Iraq. She says that it would be extremely dangerous for him to relocate there because of his ethnicity as a Kurd because Kurds are associated with the occupation. However the evidence does not support that position, the expert refers to hostility and suspicion, and to attacks on Kurds in Baghdad in 2005, she refers to an incident involving three Kurdish officials, who carried out the attack she described is not specified, but it is clear that although the victims were Kurds they were targeted because of their official positions. I do not consider the appellant to be in a comparable position. The reports describe hostility and suspicion, even discrimination, Ms Pargeter states at paragraph 3 iii 'Furthermore, without knowing people inside an area it would be impossible to rent property or to go about one's daily business.' However there is no evidence that treatment is of the sort of level that amounts to persecution so as to indicate that the appellant would, in Baghdad generally or more particularly in its Kurdish areas, be so unsafe

> because of his ethnicity, as to make it unreasonable or unduly harsh to expect him to go there to avoid the problems he had in Kirkuk."

It is that last sentence which gives rise to this particular ground. Mr Husain argues that the wording of that sentence shows a failure on the part of the judge to distinguish the two issues of safety and undue harshness. He also relies on paragraph 68 of the determination, which I have read, where the Immigration Judge referred to the dangers and deprivations in Iraq because of the invasion and occupation of that country. It is therefore submitted that the judge has applied the wrong test for undue harshness and has in effect equated it with that of the risk of persecution.

11. For my part I can see why this ground can be advanced, particularly in the light of the last sentence of paragraph 61, but when that particular sentence is put in context it does not in my view have any real force. I say that for two reasons. First, in paragraph 61 the Immigration Judge was dealing with an expert's report which itself was dealing both with risk and with undue harshness. It was not remarkable that the judge should have commented on both issues at the end of the paragraph, albeit that he does not seem to have distinguished as he should have done between the two tests there in that one sentence. Secondly, and of greater significance, the structure of the judge's determination read as a whole shows that he did consider the issues of safety, that is to say risk of persecution, and undue harshness separately, and did not require a risk of persecution to be established in order to show undue harshness. At paragraph 66 he in effect concluded that the appellant would not face a risk of persecution in Baghdad because of his ethnicity. He then went on in paragraph 67, which I have read, to deal with matters which clearly appertain to undue harshness, such as the issues of employment and homelessness. He noted there that the appellant was a young man, a single man without health problems who had worked in a restaurant, all of those matters being clearly relevant to undue harshness. He concluded in express terms at the end of paragraph 68 that it would not be unduly harsh for him to relocate to Baghdad. It seems to me that when one looks at the matter in the round the Immigration Judge applied the proper test on that aspect of internal relocation. Nor was he ignoring the difficulties in Iraq because of the occupation and civil strife, but simply making the point in paragraph 68 that those were widespread conditions in Iraq as a whole and part of the context in which any problems faced by the appellant in conducting his life there had to be seen when judging the unreasonableness of relocation.

12. Mr Husain at one point this morning has sought to argue that one should not measure undue harshness against such a background and that the security conditions in Iraq can contribute to undue harshness. It seems to me that the Immigration Judge rightly took account of the widespread conditions in Iraq when considering undue harshness. Whether life for the appellant in Baghdad would be unduly harsh does require the judge to have regard to conditions in Iraq generally and in that city generally.

13. The next issue concerns the reliance by the judge on the case of SM. Initially this was challenged on the basis that the guidance in SM was out of date. That particular point is no longer pursued and for good reason. The fact is that the objective evidence about the situation in Iraq for Kurds and their prospects of internal relocation in central or southern Iraq has much more recently been examined in great detail by the AIT in the case of SI (expert evidence Kurd SM confirmed) Iraq CG [2008] UKAIT 00094. That, as the reference indicates, has the status of being a country guidance case. There the Asylum and Immigration Tribunal considered the material put before the Immigration Judge in the present case, including the various UNHCR reports and the COIS report, and it concluded as follows, as one can see from the head note at paragraph 3:

> "3. The guidance given in SM regarding relocation of a Kurd from the KRG to central or southern Iraq, which was that it can in general be effected without this being unduly harsh and without giving rise to a real risk 'in all but the most exceptional high profile cases' of their relocation being brought to the attention of [any of the KRG authorities], also remains valid."

It is now said, however, that the AIT in that case of SI did not make any specific findings about Baghdad, which should be seen as one of the most dangerous areas in Iraq. Mr Husain has referred us to some passages to substantiate that latter point.

14. It is of course true that the guidance in SI related to central and southern Iraq as a whole, but the evidence put before the tribunal in that case related to Baghdad along with other locations, and there can be no doubt that the tribunal's conclusions about central and southern Iraq were intended to apply to Baghdad as well as to other parts of those areas. The tribunal in that case said this at paragraph 62:

> "On the whole a Kurd who can relocate safely within central and southern Iraq to an area where there is a significant Kurdish community can find protection there and will be able to avoid unduly harsh living conditions."

That description of an area where there is a significant Kurdish community includes Baghdad, where it is well established that there is such a sizeable community of Kurds. The exceptions relate not so much to places or areas as to individuals, namely those with an exceptionally high profile.

15. Linked with this issue is an argument based upon the UNHCR documents which were before the Immigration Judge in the present case. Mr Husain has cited a number of passages which seek to show that internal flight to central and southern Iraq is not feasible for Kurds fleeing from the north of the country. He refers to UNHCR reports dated December 2006 and August 2007

to this effect, and emphasises that the UNHCR has a special status where the Refugee Convention is concerned. So it does, but both these reports to which reference has been made were put before and considered by the AIT when dealing with the case of SI to which I have just referred. The views of UNHCR and the evidence in those reports were patently taken into account by the AIT in that case along with a lot of other material in arriving at the conclusions which they did.

16. It is not for this court to embark on the task of second-guessing the detailed exercise carried out by the specialist tribunal, especially when it has heard oral evidence from expert witnesses, as happened in SI. I cannot see any basis upon which the Immigration Judge in the present case can be said to have erred in saying that those reports did not persuade him to depart from the guidance in SM. That was a country guidance case which he was required to follow unless persuaded that it did not apply or was out of date. SI now confirms that he clearly was entitled to treat it as remaining applicable. That covers *inter alia* this argument, therefore, about the UNHCR reports.

17. Next, arguments are advanced about the way in which the Immigration Judge treated Ms Pargeter's reports. It is said in the written argument on behalf of the appellant that the judge required corroboration of Ms Pargeter's evidence. That is because he said this at paragraph 55 of his determination:

> "The appellant argues that he would not be able to relocate to Baghdad because there is a similar system operating there to that in the KRG, ie he needs to have a connection to someone in Baghdad who can vouch for him … '… These militias are generally only willing to allow someone into the area if they have come with a recommendation from someone already living there.' [That is a quotation from the expert's report]. In the footnotes to her report she refers to telephone conversations with Iraqis in Baghdad in which she has been told of such a system. Those conversations are not described in detail. There is no other evidence supporting that position. There is an absence of detail, the expert referring to her sources says that they are telling her what the militias are said to do generally. There is no detail as to what 'recommendation' means. I do not doubt that Ms Pargeter is accurately reporting what she has been told. The representative explains the absence of detail on the basis that the expert is protecting her sources. Anonymity of the sources would be sufficient to achieve that aim. The representative also says that Ms Pargeter's expert status means that I should accept her evaluation of the evidence, and her conclusion. However in this particular regard if such a system operated to have the effect that is

> asserted it would neither be secret nor contentious, and I would expect details of it to be in the public domain in much the same way as the position of entry to the KRG is documented. I find that the paucity of detail in the report is simply a reflection of the lack of available evidence. I find that the evidence does not establish that there is a system in place which would mean that the appellant could not relocate to one of the Kurdish areas of Baghdad."

18. Mr Husain argues also that Ms Pargeter is an acknowledged expert on Iraq whose evidence was accepted on other aspects of the case and should have been accepted on this aspect. Moreover, one would not expect the system which she described to be publicly documented, unlike the more official situation in the KRG.

19. It seems to me, first, that the judge was not requiring corroboration. He was properly observing that Ms Pargeter's evidence was not supported by other evidence, and clearly that was a relevant factor in any assessment. He then went on entirely rationally to explain why he did not accept her evidence, principally because it lacked detail and there was nothing in the public domain to that effect. So it cannot be said that he disregarded her evidence; he simply did not accept it on this issue. He was entitled to do that. The fact that he accepted some of her evidence on other issues did not in any way require him to accept it on this. He was entitled, in my view, to act as he did. There was no documented support for what Ms Pargeter was saying about the militias and the need for a recommendation. His reference to the KRG was entirely understandable since, as the passage I have quoted indicates, this was being advanced on the basis that the situation was comparable to that within the KRG.

20. Finally, it is argued that the judge did not consider the practicalities including the physical dangers of obtaining access to Baghdad. Mr Husain emphasises that such factors will often be relevant to the issue of whether internal relocation is unduly harsh, as indeed the case of Robinson itself shows. He submits that the evidence shows that travel in Iraq is highly dangerous. The Immigration Judge, it is contended, should have taken this into account and the decision therefore should not be allowed to stand.

21. There are two problems about this argument. First, it was not raised below on behalf of the appellant as an objection to relocation in Baghdad. An immigration judge is not obliged to deal with issues on his own initiative unless they are obvious in the sense used in Robinson and in the subsequent case law. Mr Husain makes the point that in the case of A (Iraq) v SSHD [2006] Imm AR 114, **[**2005**]** EWCA Civ 1438 it was said at paragraph 22 that "obvious" in the Robinson sense means simply a point which clearly has a strong prospect of success. That is so. But that principle, as the case of A (Iraq) itself demonstrates, applies where on the facts found by the

Immigration Judge there is an obvious point of Convention jurisprudence which he has overlooked. As was said in Robinson:

> "…it is the duty of the appellate authorities to apply their knowledge of Convention jurisprudence to the facts as established by them…"

That passage was cited in A (Iraq) at paragraph 28 where Carnwath LJ went on to say this:

> "At first sight, therefore, if the facts found by the Adjudicator lead in law to the opposite conclusion to that found by the Adjudicator, it is the duty of the appellate authorities to correct it."

22. The difficulty with this line of argument advanced on behalf of the appellant in the present case is that because the point was not taken before the Immigration Judge he made no findings of fact about it. There are no findings of fact in his decision about the hazards or lack of them in obtaining access to Baghdad by whatever method is being contemplated. That in a sense is hardly surprising, and leads on to the second difficulty which the appellant faces in advancing this point. No removal directions have yet been settled for the appellant's return, and it is therefore unclear as to how and where he would be returned. The issue of accessibility, its safety and its practicality cannot therefore yet be judged in any meaningful sense. Those issues will of course change over time as well as being dependent upon the method and location to which return is to be effected. If, when those removal directions are set, there would be a real risk of this country breaking its obligations under the Refugee Convention or the ECHR because of those directions, they themselves could then be challenged but there is nothing it seems to me in this particular point.

23. In all those circumstances none of the arguments advanced on behalf of the appellant have persuaded me that the AIT here erred in law, and for that reason I for my part would dismiss this appeal.

Lord Justice Ward:

24. I agree

Lord Justice Lawrence Collins

25. And so do I.

Order: Appeal dismissed