

CO/7328/2006

**Neutral Citation Number: [2008] EWHC 1321 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Friday, 16th May 2008

**B e f o r e:**

**MR JUSTICE COLLINS**

**Between:**

**THE QUEEN ON THE APPLICATION OF K**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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(Official Shorthand Writers to the Court)

**Mr S Cox** (instructed by Refugee Legal Centre) appeared on behalf of the **Claimant**  
**Mr R Kellar** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

**J U D G M E N T**  
(As Approved by the Court)

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1. MR JUSTICE COLLINS: This claim for judicial review by an Iraqi Kurd was originally brought against the refusal of the Secretary of State to recognise that, having regard to the lapse of time and to the particular circumstances, the claim made by the claimant that he should not be returned to Iraq should be reconsidered and he should have a fresh right of appeal if refused. But also there was a claim in respect of his detention for the purposes of removal between 26th July 2006 and 6th September when he was released.
2. The former claim is no longer pursued because the Secretary of State has accepted that he is entitled to a fresh consideration which she will give, and if that consideration results in an adverse decision he will be given a right of appeal.
3. He originally came to this country in March 2003. He made a claim for asylum which was refused at the end of July 2003 and he was then served with a notice of a decision to remove him to Iraq. He appealed and his appeal was heard by an adjudicator on 29th October 2003. His claim was that based upon his assertion that he was a member of the Communist Party and that he had, partly because of that and partly through his father, got across the KDP (the Kurdistan Democratic Party) and the IMK (the Islamic Movement of Kurdistan). He as a result was arrested by the authorities then in power, that is Saddam Hussein, who were at that time cooperating with the KDP. Effectively he was, as a result of the information given by the KDP to the regime, arrested and detained for a period of seven years, during which time he was tortured.
4. He was eventually released because of a general amnesty. He returned to his home area and he was then warned, it would seem, by an uncle or some relation, that the KDP were looking for him because they still were concerned at his opposition to them. The result of that was that he decided that it was necessary to leave the country and that is what led to him coming to this country and seeking asylum.
5. His arrest in fact occurred in August 1996 when the KDP and the Iraqi regime jointly raided Irbil city, he then being resident in Irbil, having been born in the province of Irbil. He claimed too that on his release the IMK had issued a fatwah against him and so he was afraid that if he returned he would be persecuted by both the KDP and the IMK. He also raised some medical issues relating to his psychiatric condition which he asserted justified his being allowed to remain here. Those issues I need not consider further.
6. The Adjudicator accepted that he was, generally speaking, credible. What he said was:

"Pursuant to evaluating the appellant's evidence in accordance with the correct approach, I considered him to be believable. His evidence throughout has been consistent and appeared plausible."

In dealing with his fear of return the Adjudicator said this:

"The appellant claims that he has a fear if returned to the KAZ he fears both the KDP and the Islamic movement. However, I note from

paragraph 1.8 and 1.9 of the Iraq bulletin 3/2003 that there is considered to be adequate protection to be available to the appellant from the PUK. I also note from bulletin number 7, paragraphs 3.11 to 3.13 that the PUK are capable of offering effective protection to those living within its territory and, according to paragraph 3.14, persons within the former KAZ with a local problem can safely and reasonably relocate to Kurdish dominated areas outside the Kurdish autonomous area or elsewhere. I can find no evidence in the various Iran bulletins to which I refer that the appellant would be at special risk on return to Iraq as a result of his membership of the Communist Party or by virtue of the fatwah issued against him by the Islamic movement, since there appears to be protection available within the former Kurdish autonomous zone as I have indicated."

That makes clear that, in the view of the Adjudicator, he recognised that there was a well-founded fear of persecution at the hands of the KDP and the Islamic movement but that protection could be afforded to him if he was within an area under the control of the PUK. That is the significant finding on which Mr Cox relies.

7. It took the usual lengthy period for the Secretary of State to get round to taking steps to remove. It is perhaps to be noted that in September 2004 the claimant indicated that he wished to return voluntarily but two months or so later he withdrew that request. It now appears that his brother has been given, I think, indefinite leave to remain in this country and accordingly he too wishes to remain here. One of the reasons for voluntary return appears to be that he as a failed asylum seeker he had no means of support in this country. That appears to have been overcome.
8. In any event, on the 26th July the Secretary of State decided that he should be detained for the purpose of being removed. No removal directions in fact then were made and the reason for detaining the claimant was set out in the Form IS 9IR, which is the standard form used by the Home Office in the circumstances and the form itself says that detention is only used when there is no reasonable alternative available. It is of the very greatest importance to bear that in mind. Detention should never be used routinely. It is a last resort, as it were, and it must always be justified based upon a correct factual understanding of the relevant situation. All too frequently cases come before this court where it appears that although the principles are there set out, lip service only is paid to them and there seems to be a tendency to detain far more readily than is in reality justified.
9. There are a number of boxes which can be ticked which indicate the reasons why detention has been decided on. In the case of the claimant, the following were ticked. They are in fact divided into two parts, (a) to (f) and (1) to (14); (a) to (f) being, it seems, the reasons and (1) to (14) being the basis upon which those reasons have been relied on. The two reasons were:

"(a) You are likely to abscond if given temporary admission or release.
10. (c) Your removal from the United Kingdom is imminent."

The factors which justified those reasons were said to be:

"(1) You do not have enough close ties, for example, family or friends to make it likely that you will stay in any one place.

(2) You have previously failed to comply with conditions of your stay, temporary admission or release.

(8) You have previously failed or refused to leave the UK when required to do so."

Factor (2), failure to comply with conditions, is simply wrong. There had never been any such claim. Quite why that box was ticked other than because of the greatest degree of carelessness is not at all clear.

11. The other question mark that arises is the reason (c), namely "your removal from the United Kingdom is imminent". Mr Cox submits that the word "imminent" must be given its natural meaning. In this case no removal directions had yet been served, and indeed none were served until 21st August 2006 when it was decided that directions should be given for his removal on 5th September. If it is to be said that removal is imminent there must be, it is submitted, at the very least removal directions available and either immediately about to be given or already given. One can understand that normally the detention will ante-date the serving of directions for obvious reasons, because if there is a genuine concern that a person might abscond, that is far more likely to happen when the removal directions are served.
12. It is difficult to see in this case what could have led, absent any removal directions, to a concern that he would abscond. He had been here for some time. Nothing had been done to remove him and it is difficult in the circumstances to see, in the absence of any evidence called on behalf of the Secretary of State, what justification there was for detention on the assertion that removal was imminent four weeks or so before any removal directions were set. So however one construes the word "imminent", it seems to me that in the circumstances of this case it was not justified.
13. So far as the likelihood of absconding is concerned, once it was known that he was likely to be removed that is a question of judgment, and it is difficult for a judge to say that that was an irrational basis for deciding on detention. One then has, of course, to look at all the circumstances and decide whether actually that was a valid reason or not. That will not normally go to lawfulness but may go to whether detention should continue or bail be granted.
14. Following the provision of the directions, the claimant's solicitors wrote to the Home Office stating that the detention was likely to be lengthy and would be unlawful, and that he should either be bailed and certainly should not be removed. There was a response to that on 31st August which stated, among other things, that it had been noted that he had applied for voluntary return, but that had been withdrawn and it was stated "This action would serve to show that your client no longer wished to return to Iraq". That may well be, but in itself it does not take the matter very far. Reliance is placed

on his failure to leave when his appeal rights were exhausted and further that he had insufficient close ties. It was said that he was a failed asylum seeker, all appeal rights had been exhausted and therefore it was not appropriate to release him.

15. There was also a letter of 25th August from Harmondsworth Immigration Removal Centre asking for reconsideration of the decision to return on the basis of his lack of family in Iraq, the medical issues which I have touched on, and his brother having a British passport. It was said that none of those gave rise to any basis for permitting him to remain in this country.
16. On 3rd September the Refugee Legal Centre wrote a lengthy letter setting out the reasons why the question of removing the claimant should be reconsidered, and attention was specifically drawn to the findings of the Adjudicator. It was stated that the intended destination of removal was Irbil and it was there that he had been targeted by the KDP and on the Adjudicator's findings it was clear, it was submitted, that return to Irbil would be unlawful and contrary to the Human Rights Convention because he would be at risk from the KDP. The precise destination and means of removal had not hitherto been disclosed by the Secretary of State, but it is the position, and that is accepted, that return would in fact be to Irbil.
17. The letter was responded to remarkably quickly on 4th September. Incidentally, there was also included a note from an expert, Sheri Laizer who has given evidence in certainly many -- I sometimes think it must be hundreds -- of these cases in relation to return to Iraq. It was said that no new factors had been raised and reliance was placed upon the Adjudicator's decision. It was said: "The Adjudicator did not consider that your client would be at risk on return to Iraq". Mr Cox submits -- and in my judgment correctly submits -- that that simply is an insufficient response because it fails to grapple with the findings of the Adjudicator which were that the claimant would be at risk from the KDP. True it is, that the Secretary of State has indicated that those removed to Irbil will be transported, because taxis will be made available to any part of Iraq to which they wish to go, but the key point is that return to Irbil means that he is returned to the authorities in charge in Irbil, in particular the authorities at the airport in the form of the immigration officials, and the persons in control there are the KDP. Accordingly, to return him to Irbil is to return him to the KDP and thus expose him to the very risk that the Adjudicator found was a real risk, namely that he would be persecuted by the KDP.
18. I am far from saying that in every case the Secretary of State must consider the detailed circumstances in the sense that she must look to see whether there are any matters which could have been raised and which could indicate that there was something which had to be taken into account, but if matters are drawn to her attention then she has to have regard to them. But more importantly, in the context of a case such as this, she decided that return was imminent in the knowledge that the only means whereby she could return would be via Irbil and that Irbil was under the control of the KDP. It seems to me that in those circumstances there is very considerable force in the submission made by Mr Cox that to act in such a way was to act contrary to the decision made on the facts by the Adjudicator and there is an obligation on the Secretary of State not only to have regard to the factual decision but to comply with it,

unless she has material to which she needs to refer which indicates that that conclusion has been overtaken by events or is clearly wrong because of subsequent material that has come to light. That is not the situation which has arisen in the circumstances of this case.

19. I have been referred to a number of authorities but I do not think it is necessary or helpful to consider them in detail. It seems to me that the principles are clear enough. Detention is a matter that has to be justified, should only be used when absolutely necessary and should only be used on a proper basis and understanding of the situation. If one looks at the grounds upon which he was apparently detained on 26th July, one finds that it is said that he was a clandestine illegal entrant in March 2003. Asylum was refused, appeal was dismissed and then there is the fact that he is a widower, his wife having died in 1998, no dependants in the UK, two children in Iraq, adult brother and sister in UK. He comes from Irbil. The asylum decision post-dates 16th June 2003. He does not fall foul of **Rashid**, the case dealing with Iraq returns which could only take place via Baghdad. He has not applied to the Tribunal and his application for voluntary return has been withdrawn. He was suitable for removal in what was called Operation Consiminar. I think that was because it was anticipated that there would be a charter flight on the date in question in September.
20. As again Mr Cox points out, there is no suggestion there that the individual in question has considered the reasons why the decision of the Adjudicator was reached. It is one thing if, for example, there is a finding that the claim is not credible. It is another, as in this case, if the claim is found to be credible but it is said that he does not qualify for asylum or surrogate protection of any sort because he can relocate to a safe area. That is a very different situation.
21. It seems to me in all those circumstances that there was a failure by the Secretary of State, for the reasons that I have given, properly to consider whether detention was justified. The return was not imminent at the time the detention was made. At that time (that is July) there was no reason to suppose that he was likely to abscond. On the basis of imminence and likelihood of absconding, the detention would have been lawful, so far as those reasons are concerned, once the removal directions were in existence. That would be some time after 22nd August. But, for the further reason that there was a failure to have proper regard to the findings of the Adjudicator and to recognise the impossibility of removing this claimant to Irbil, again that was something which ought to have been taken into account, was not, and in the circumstances the detention for the purpose of the removal was, in my judgment, not justified on that ground too.
22. Accordingly, I think all I need do is to declare that the detention was in my judgment unlawful.
23. MR COX: My Lord, your Lordship queried the date the detention finished. It was 6th September. Would your Lordship also order that the question of damages be transferred.

24. MR JUSTICE COLLINS: Yes, I think the sensible thing is to transfer the question of damages to the Queens Bench and I shall indicate that in my view it is a question which is fit to be determined by a Master if, obviously, there is no agreement as to the amount.
25. MR COX: My Lord, on the question of costs there are two matters. My solicitors have given the Treasury Solicitors a notice of our intention to apply for wasted costs for the costs thrown away at the adjourned hearing.
26. MR JUSTICE COLLINS: That is aimed at Mr Kovats?
27. MR COX: It is, my Lord.
28. MR JUSTICE COLLINS: That is a bit harsh.
29. MR COX: My Lord, I am instructed to make the application. The reasons for that --
30. MR JUSTICE COLLINS: Can you remind me where I find that.
31. MR COX: Page 106 is my instructing solicitor's letter to the Treasury Solicitor, the Treasury Solicitor indicating that he does oppose that order. The matters are set out, if your Lordship will look at page 106 --
32. MR JUSTICE COLLINS: Are you saying he acted improperly because he failed to ensure his instructions on a matter central to the claim and this resulted in an unnecessary adjournment.
33. MR COX: Yes.
34. MR JUSTICE COLLINS: Why do you want a wasted costs order against him? You are going to get your costs anyway?
35. MR COX: Because we do not want to have wasted costs, my Lord, in this system.
36. MR JUSTICE COLLINS: Come on, you do not need this order, Mr Cox. It will involve a hearing, if I am with you, which will incur yet further costs. Your solicitors are not going to lose anything because, subject to Mr Kellar, it seems to me that you are entitled to your costs of the proceedings.
37. MR COX: My Lord, I understand that. It is a matter for your Lordship.
38. MR JUSTICE COLLINS: It smacks a little bit of, well --
39. MR COX: My Lord, this case is now almost a year from that hearing. The only reason that hearing was abandoned was because the Secretary of State through counsel refused to concede Irbil was controlled by the KDP.
40. MR JUSTICE COLLINS: That turned out to be wrong. It may be that Mr Kovats has some personal blame for that but I am not going to entertain a parasitic hearing on costs in the circumstances.

41. MR COX: So be it, my Lord.
42. MR JUSTICE COLLINS: It would be different if your clients otherwise were not going to get their costs.
43. MR COX: I am reminded to ask your Lordship if your Lordship would confirm the interim order for anonymity.
44. MR JUSTICE COLLINS: Yes.
45. MR COX: The claimant is anxious he should remain anonymous both here and abroad.
46. MR JUSTICE COLLINS: I am happy to maintain that.
47. MR COX: If your Lordship would make an order that the defendant pay the claimant's costs to be subject to detailed assessment and an order for Legal Aid assessment.
48. MR JUSTICE COLLINS: You need the usual. Mr Kellar, I do not think you can resist costs.
49. MR KELLAR: I cannot resist costs.
50. MR JUSTICE COLLINS: I am not going to entertain any wasted costs.
51. MR KELLAR: I am grateful. My Lord, the only point left is my leave application. My Lord, the concern that is expressed from those instructing behind me is that it may be thought on your Lordship's judgment that every time removal directions are set that the person issuing removal directions, or perhaps detaining, needs to reappraise themselves of the documents in the list.
52. MR JUSTICE COLLINS: No, I am not suggesting that for a moment. I am suggesting that if they are going to remove someone and they simply say the Adjudicator on the appeal has decided no, in many cases that will not be material because in most countries you simply return and there is no issue as to whether it is safe to return to any particular place. If they had checked this, as in my view they should have done, they would have found that there were real objections.
53. MR KELLAR: Well, my Lord.
54. MR JUSTICE COLLINS: Why on earth is it necessary in a case such as this to detain before? The answer, I suspect, is administrative convenience. That is not a very good basis for detaining someone.
55. MR KELLAR: Yes. The answer is that this is a case that depends entirely on its own circumstances and I will make it clear that I am not saying that every case should involve a reconsideration of the grounds. As I say, in 99 out of 100 -- and certainly which are not Iraq where there is no question as to the destination -- this will not matter. The mere fact that the appeal has been lost will suffice. Can I take instructions?



56. MR JUSTICE COLLINS: Yes. I take it, Mr Cox, you did not expect it to go further.
57. MR COX: No. All we say is that there is an obligation to read the decision at some stage.
58. MR KELLAR: My Lord, the only point which caused the concern and on which we seek leave to appeal would be the public importance point and clarifying the issue on the point about whether at the time the decision to detain the claimant is taken removal directions need to have been set. The second point is whether the Secretary of State is entitled.
59. MR JUSTICE COLLINS: I have said the Secretary of State must be in a position to know that they are going to be set within a few days.
60. MR KELLAR: Well, as I say, that causes potentially some concern.
61. MR JUSTICE COLLINS: Well, all right, but --
62. MR KELLAR: I am not necessarily sure that that is the usual practice. I hear what your Lordship says about it.
63. MR JUSTICE COLLINS: It ought to be the practice, in my view.
64. MR KELLAR: The only other point is whether the Secretary of State is entitled to treat removal as imminent when it is within six weeks of detention. Your Lordship will take a view about that but it may be a point relied upon in future cases. It is for those reasons I seek leave.
65. MR JUSTICE COLLINS: All right. Mr Cox, I can see there is an underlying concern in the importance of this and I think I ought to give leave to appeal.
66. MR COX: May I try to persuade your Lordship. The judgment your Lordship has given is very clear and specific to the facts. An Adjudicator has already made the finding that a particular part of the country is controlled by the KDP. It arises in the context of a published policy that the Secretary of State said he would give case by case consideration. In my submission, there is no reasonable prospect of success in arguing about where this passes a period of six weeks. If she wishes to change the policy she is free to do so. She does not need the authority of Parliament to do so.
67. MR JUSTICE COLLINS: She has chosen it.
68. MR COX: Yes.
69. MR JUSTICE COLLINS: I think, as I said, that seems to me to be consistent with the situation where she is aware that removal directions are about to be set.
70. MR COX: Yes.

71. MR JUSTICE COLLINS: The fact that removal directions are about to be set, but for whatever reason cannot be implemented for a period of time, does not stop removal being imminent.
72. MR COX: In my submission those are issues for a different case. The questioning in this case, and after your Lordship's decision on imminence, is not a necessary aspect.
73. MR JUSTICE COLLINS: Well, I am not using this case to seek to lay down general principles. I am applying the facts of the case. I think that all I am really saying about the Adjudicator's determinations or the approach to them is that if you are going to remove someone you ought at some stage before you decide to detain someone -- because after all detention is a serious matter -- at least to check what the Adjudicator has actually said. It may be that in many cases, as I have indicated, there is no conceivable reason to do more than simply recognise that there has been a rejection but it would help usually to see whether it is on the basis of lack of credibility. It could be very important in deciding whether removal is actually appropriate, bearing in mind so often the Secretary of State waits before he gets round to doing anything.
74. MR COX: My Lord, the only other point is, with respect, the point on imminence is neither arguable nor, in my submission, is the kind of principle --
75. MR JUSTICE COLLINS: No, you will have to go to the Court of Appeal and seek leave. All right. Thank you.
76. MR COX: May I just say thank you to your Lordship. I know your Lordship has had a long day. Thank you for your Lordship sitting so late.
77. MR JUSTICE COLLINS: Well, it is a Friday afternoon.