Appeal No. HX 27815-02
SF (Sufficiency of Protection-KAA-Michigan Guidelines) Iraq CG [2002] UKIAT 07376

IMMIGRATION APPEAL TRIBUNAL

Date heard: 27 February 2003
Date notified : 24/03/2003

Before:-

DR H H STOREY (CHAIRMAN)
MR A A LLOYD JP

Between

MR SALAR MOHAMMAD FARAJ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, a national of Iraq, has appealed with leave of the Tribunal against a determination of Adjudicator, Mrs C M Graham, dismissing the appeal against the decision of the Secretary of State giving directions for removal having refused asylum. Mr S Vokes of Counsel instructed by Rais Solicitors appeared for the appellant. Mrs G Collinge appeared for the respondent.

2. The Tribunal has decided to dismiss this appeal.

3. The adjudicator found the appellant credible. He accepted that the claimant came from Jalawla, an area inside Baghdad-controlled Iraq. Of Kurdish ethnic origin, he had joined the PUK in 1995. The Iraqi authorities discovered this. In September 2001 they arrested, detained and ill treated him. His father, a wealthy man, engaged a friend of his to bribe the authorities to secure the appellant`s release. The appellant escaped from custody on 25 October 2001 and after hiding for four days at his father`s friend's house in Monsul, he left Iraq illegally. In view of these experiences the adjudicator accepted the appellant had experienced persecution and would face a risk of further persecution if returned to Central Iraq.

4. The appellant said he was unable to relocate to the KAA because of tribal difficulties which had arisen following his father`s inheritance of a large piece of land in the Kalar region of Kurdistan. Neighbouring families from a different tribe claimed ownership. The appellant's father realised that to contest ownership would mean engaging in a blood feud. Since these families had powerful connections in the PUK and the KDP, the appellant would be at risk from these families against which he would not receive effective protection.

5. However, the adjudicator did not accept that it would be unduly harsh for the appellant to relocate within the KAA. He considered that the appellant`s life would only be in danger if he returned to Kalar and attempted to claim ownership of the land. Since the appellant`s father had left Kurdistan before there was any confrontation with the rival tribe, he did not accept that a blood feud existed. Whilst he accepted that the rival tribe had powerful relatives in the PUK and KDP and that the rival tribe was a very large one with members spread out over the KAA, he considered that this presented no risk to the appellant since any confrontation was avoided by the father removing himself and his family from Kurdistan before any tribal confrontation began.

6. Given the evidence that the appellant and his family had had no difficulties with the PUK authorities in moving from Central Iraq to the Kalar region, we see no basis in this case to consider that the appellant would be someone who the KAA authorities would not admit into their territory as a former resident. Mr Vokes did not adduce any evidence to demonstrate that the appellant would not be admitted back.

7. Mr Vokes challenged the adjudicator`s findings on a number of grounds.

8. Mr Vokes maintained that the adjudicator should not have concluded that the appellant would be safe in the KAA since he would face two different sources of harm. One was that from Iraqi agents who were known to be active within the KAA. The other was from members of the powerfully-connected and widely spread Nauroli tribe who had taken over the appellant`s father`s land in the Kalar region. In relation to both these sources of harm he asked us to view the adjudicator`s reasoning as flawed.

9. We would accept that the adjudicator failed to address the issue of harm from Iraqi agents active within the KAA, although since nothing was said about this in the grounds of appeal Mr Vokes has left it somewhat late to raise now. We would also accept that there is objective evidence to show that Iraqi agents do operate to some extent within the KAA. Equally, however, there is insufficient evidence to suggest that they have been able to prevent the PUK or KDP from effectively protecting its own population against harm from such agents, except in unusual circumstances. In the case of this appellant, he was a member of the PUK and so in our view would be in a better position to gain protection from the PUK than members of the population in that area who were not former or present PUK members. Furthermore, on the appellant`s own account, the reason why he had fallen foul of the Iraqi authorities was

because they had come to learn he was an active PUK member. There was no indication that they perceived him as a high-profile opponent of the Baghdad regime. Furthermore, the Iraqi authorities had been prepared to release him on payment of a bribe. That again was a clear indication that he was not considered a serious threat to the regime. Whilst the adjudicator was entitled to conclude that if returned to Iraq the authorities might again target him for his PUK past, the adjudicator was also entitled to conclude that it was not reasonably likely that the interest of the Iraqi authorities would extend beyond the territory they controlled.

10. As regards the issue of harm from members of the Nauroli tribe in the KAA, we are not at all persuaded by Mr Vokes` submissions that the appellant faced any real risk from them, certainly not outside the Kalar region. If the appellant did not relocate within the Kalar region, members of this tribe would have no reason to perceive him as a threat to them. In this regard it must be recalled that it was the appellant`s own evidence that his father had not pursued his claim to the disputed land. To assert as did Mr Vokes that members of this tribe might view the appellant`s return to anywhere in the KAA save for the Kalar region as evidence that he would try and win back the land - and so would be at real risk of a pre-emptive strike by them - was far too speculative. Any such risk was remote, not real. Insofar as Mr Vokes sought to argue that the wrongful deprivation of the appellant`s property amounted to a violation of his right to property and so was a factor showing undue hardship, it seems to us that if the appellant`s father had decided not to pursue it, there was no real basis for considering that the appellant would; and he did not say that he would. In any event, we do not see that deprivation of this property would wholly extinguish the appellant`s right to acquire and own property within the KAA.

11. We also consider the adjudicator was right to conclude that relocation would not be unduly harsh for any other reasons. There was no evidence that the appellant was in poor health. He was a young single male. He had some familiarity with the PUK region through prior residence there and was a PUK member. His family, being wealthy, could be expected to do what they could, even if at a distance.

12. Given that the appellant had failed to establish he would face a real risk from any source within the KAA, it is not necessary to consider as such whether the authorities in the KAA could effectively protect against such harm. But accepting as we do that in the context of internal relocation, a claimant establishing risk in his home area satisfies the fear test, we recognise that the extent to which an appellant can access meaningful protection in an alternative site remains a central issue. Such an approach is in conformity with that adumbrated by Brooke LJ in *Karanakaran* [2000] Imm AR 271 at 294 and by the Tribunal in the starred determination *AE and FE* [2002] UKIAT 05237 at paragraph 17. It is also in conformity with that adopted in the Michigan Guidelines at paragraph 13 which identifies three remaining stages of inquiry once the first stage of establishing a well-founded fear of

persecution in at least some part of the country of origin has been established:

> "(a) Does the proposed site of internal protection afford the asylum-seeker a meaningful "antidote" to the identified risk of persecution?
> (b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?
> (c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention`s minimalist conceptualisation of 'protection'?"

13. Essentially what we have concluded in this case is that relocation within the PUK area would afford the appellant a meaningful antidote to the identified risk of persecution from agents of the national government in control in Central Iraq. We have further concluded that the PUK area is free from risks of serious harm from the Nauroli tribe. And we have found no evidence to show that the local conditions in the PUK region would deny the appellant`s fundamental human rights.

14. On the protection issue, Mr Vokes nevertheless contended that in view of the acceptance by the Secretary of State that there was at present no practical way to implement removal directions, it could not be said that the appellant could genuinely access KAA territory. In the Michigan Guidelines and elsewhere the requirement of realistic access was seen, he said, as an essential part of the internal flight/relocation/protection test.

15. Mr Vokes is quite correct in our view to describe genuine or realistic access as a prerequisite to showing the existence of a viable internal relocation alternative.

16. The Michigan Guidelines, whose full text is published as an annex to the New Zealand case, *Refugee Appeal No. 71684/99* reported in [2000] INLR 165, put the matter this way:

> "9. Because the prospective analysis of internal protection occurs at a point in time when the asylum-seeker has already left his or her home state, a present possibility of meaningful protection inside the home state exists only if the asylum-seeker can be returned to the internal region adjudged to satisfy the 'internal protection alternative' criteria. A refugee claim should not be denied on internal protection grounds unless the putative asylum state *is in fact able safely and practically to return the asylum seeker to the site of internal protection*." (Emphasis added).

17. We also note that to very similar effect paragraph 3 of the UNHCR`s 2ND Track Global Consultations on International Protection, San Remo September 2001 Summary Conclusions on the Internal Protection/Relocation/Flight Alternative states:

> "The individual whose claim to refugee status is under consideration must be able – practically, safely and legally – to access the proposed IPA/IRA/IFA. This requires consideration of physical and other barriers to access, such as risks that may accrue in the process of travel or entry; and any legal barriers to travel, enter or remain in the proposed IPA/IRA/IFA."

18. However, it is clear from principles enunciated by higher courts that the test of genuine access cannot in the UK context extend to the practicalities of implementing removal. The effect of the judgments in *Saad, Diriye and Osorio* [2002] Imm AR 471 and *Hwez* [2002] Imm AR 491 is that assessment of whether a person qualifies as a refugee is a hypothetical exercise which focusses on whether removal would be contrary to the Refugee Convention at the time of hearing. It is an assessment which has to be made even if the Secretary of State has no intention to remove in the immediate future for practical reasons. Applying this approach to the situation in Iraq, it then becomes necessary to take account of the March 16, 2001 undertaking given by the Secretary of State not to remove nationals of Iraq to the KAA via Baghdad or any other part of Iraq controlled by its Government, unless and until a Convention-compliant method of doing so can be achieved or a means is found of achieving access to the KAA which avoids Iraqi-controlled territory altogether.

19. Thus in assessing the viability of internal relocation, it is not valid in the UK context to take account of any difficulties prior to arrival which are covered by a Secretary of State`s undertaking. It remains, of course, valid to assess difficulties *as from the point of return*, including difficulties of physical or safe access to the alternative site of protection. As the Court of Appeal made clear in *Robinson* [1997] Imm AR 568 and *Karakaran* [2000] Imm AR 271, such *in-country* difficulties of access go directly to the issue of whether return would be unduly harsh. But prior difficulties covered by the undertaking are of a different order.

As we have sought to clarify by citing from the Michigan Guidelines and the UNHCR Global Consultations document, that approach does not in our view distort the international jurisprudence, since the appellant is effectively guaranteed by the UK government that return will not take place unless a safe and practical and legal method is found to return the appellant to a part of the territory of his or her country.

13. Mr Vokes secondly asked the Tribunal to take the same view as Lord Justice Keene in *Gardi* and the Tribunal in *Magdeed* and conclude that the de facto authorities in control in the KAA were not entities capable of furnishing protection within the meaning of Art 1A(2) of the Refugee Convention. As we explained to Mr Vokes, we consider that on this question we should follow the starred determination of the Tribunal in the case of *Dyli* [2002] INLR 372 whose reasoning was not contradicted by either Mr Justice Dyson (as he then was) in *Vallaj* [2001] INLR 455 or the Court of Appeal in *Canaj and Vallaj* [2001] INLR 342. The judgment of *Gardi* [2002] 1 WLR 2755 was now a nullity

and the remarks of Lord Justice Keene were obiter. It remains, of course, that the views of a senior judge should carry weight. However, despite being asked to follow the views of Professor Hathaway, it does not appear that his lordship's attention was drawn to the fact that the paper written by Professor Hathaway and Ms Foster was of recent origin and did not reflect the position the same Professor together with several refugee law experts took in the far more widely accepted Michigan Guidelines at paragraph 10 where it was stated that return on internal protection grounds to a region controlled by a non-state entity *could* be contemplated, albeit only where there was compelling evidence of that entity's ability to deliver durable protection. Nor does it appear that his attention was drawn to the fact that UNHCR`s position is that de facto entities are at least in principle capable of affording protection under the Refugee Convention. Moreover, taking a line through the House of Lords judgment in *Adan* [1997] 2 All ER 723, we consider there are cogent reasons for taking a pragmatic or functional approach according to which the issue of whether a de facto entity could afford Refugee Convention protection is essentially a question of fact. Such an approach also best reflects the principle of surrogacy according to which international protection should only be granted when there is in fact a denial of domestic protection.

14. In the alternative Mr Vokes asked us to consider that in the context of a claim in which it has been accepted that the appellant has a well-founded fear of persecution in the area of the country in which the government is the only internationally recognised government, it should be regarded as much easier for a claimant to satisfy the unduly harsh test.

15. We would agree with Mr Vokes that when assessing whether as a matter of fact de facto authorities can protect it is relevant to consider the political geography of the state as a whole. It is relevant in this case that the appellant is at risk in all parts of the country under the control of the national government. However, we do not see that this is enough to make out this appellant`s case. From the objective country materials, the October 2002 CIPU Assessment at paragraphs 5.26-5.47 in particular, there is sufficient evidence to show that both the PUK and the KDP have established institutions of government which are capable of protecting their own populations against serious harm. And as we have already noted, the appellant in this case was a PUK member and so would be in a better position than some other members of the population to access protection from the authorities and favourable treatment.

16. For the above reasons this appeal is dismissed.

DR H H STOREY
VICE-PRESIDENT