

KJ (Entry Clearance Proportionality) Iraq CG [2005] UKIAT 00066

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 8 February 2005

Date of notification:

10th March 2005

Before:

Mr C P Mather (Vice President)
Rt. Hon. Countess of Mar
Ms S E Singer

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation

For the appellant : Mr T Hussain, Counsel, instructed by Reiss & Co.

For the respondent : Mrs R Giltrow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Iraq.
2. With permission he appeals the determination of an Adjudicator (Miss D.M. Lambert) which was promulgated on 15 June 2004. In that determination, the Adjudicator dismissed, on both asylum and human rights grounds, the appellant's appeal from the respondent's decision dated 13 November 2001. In that decision the respondent indicated that he had issued directions for the appellant's removal to Iraq following the refusal of his asylum application.

3. Permission was granted only in respect of an Article 8 claim arising from the respondent's relationship with a British citizen. At the time of the determination, the appellant had been in a relationship with Audrey Lewis (who is now his wife but was not then) for about eight months, but had known her for considerably longer. Because of possible difficulties with her two adopted daughters, he usually only stayed with her at weekends when the children were with their adoptive father. If he occasionally stayed during the week, he did so as a 'friend' in order not to interfere with his girlfriend's relationship with her adopted children. It is said they had major emotional problems with their relationship in the past and he did not wish to do anything to upset the relationship between them and their mother.

4. The Adjudicator found that there was no family life. She entirely failed to consider whether there was any private life and the expression 'private life' does not feature anywhere in the determination. Even if the Adjudicator was right and the appellant's relationship did not amount to family life within the meaning of the Convention, it may well have formed the basis of a protected private life and that possibility should have been considered. Having found there was no family life, the Adjudicator then dismissed the Article 8 aspect of the appeal. In doing so, she went on to say that if she had found there was family life such that it would be breached by returning the appellant, then it would have been disproportionate to require him to return to Iraq in order to obtain entry clearance because of the general conditions. She did not give any details saying only:

'In the light of the current security situation in Iraq and in particular that there is no British Embassy in Iraq, the appellant would have to travel to Amman to apply for entry clearance and that travel between Baghdad and Amman is fraught with danger, I would have to find that it is not viable for the appellant to make an out of country application for entry clearance as a fiancé in accordance with paragraph 290 of HC 395.'

5. There are several problems with that finding. First of all, the appellant was not a fiancé, there had simply been an expression of hope that he would become engaged to his now wife. Secondly, the Adjudicator did not consider whether it would be proportionate, following Mahmood [2001] INLR 1, to return the appellant in the light of the fact that he had commenced the relationship, knowing full well that his application for asylum had been refused and that his immigration status in the United Kingdom was precarious. That was not a consideration on the part of the Adjudicator. It is not material, but there is an Embassy in Baghdad, albeit that it does not offer entry clearance facilities.

6. It is apparent from what we have said above that the Adjudicator's consideration of Article 8 was wholly inadequate. There are several major errors of law. She did not consider private life at all, and her approach to proportionality was deficient.
7. It falls to us to consider the issue afresh, on the facts as at today's date. There is evidence that the appellant has now married and is living with his wife and new family. It is therefore clear that if the appellant were returned to Iraq now there would be a breach of his family life. Mrs Giltrow did not seek to argue that the appellant's wife, with or without, her two adopted children (who regularly see their adoptive father), should be expected to go with the appellant and live in Iraq. Nor was there any suggestion that she could accompany him on a temporary basis. The only question therefore was whether it would be proportionate to return the appellant to Iraq and expect him to apply for entry clearance.
8. There was a slight difficulty over this aspect of the appeal, insofar as the respondent had not put in a respondent's notice to challenge the Adjudicator's finding that, if her primary decision was wrong, it would be disproportionate to expect the appellant to return and apply for entry clearance. This had been noted by the Vice President who granted permission. Mr Hussain had come prepared to argue that aspect of the appeal. He did not take any point that there had not been a respondent's notice. Nor did he seek to argue that the Vice President was wrong to raise the issue when granting permission.
9. Mr Hussain took us to MN (entry clearance facilities – availability) Iraq [2004] UKIAT 00316 which is a country guidance case. He correctly said that the case did little more than approve HC (availability of entry clearance facilities) Iraq [2004] UKIAT 00154. Insofar as MN was concerned, he started by saying that inability to pay to return, go to Amman and return to the United Kingdom was not a factor which could not be taken into account. MN only said it was not usually a factor to be taken into account. He then referred us to paragraph 18 of MN, where the Tribunal said
‘There has been no new evidence produced to us to persuade us that it would be appropriate to differ from the views of the Tribunal as expressed in HC’.
10. In HC the Tribunal considered the absence of entry clearance facilities in Iraq itself and considered the various routes i.e. by air or road, to Amman. MN recognised that there was the possibility of danger involved in travelling from Baghdad to Amman. It accepted that the Tribunal in HC did not consider that the possibility of that danger

established a reasonable likelihood that a claimant could not make the journeys without adverse consequences sufficient to amount to a violation of his human rights. That Tribunal noted that Jordanian Airlines operate an almost daily flight between Amman and Baghdad and the cost was rarely considered to be a decisive factor in Article 8 appeals. This finding followed the reasoning in HC which dealt with availability of passports, and travel documents, to make the journey to Amman. It was acknowledged that from time to time the border was closed between Iraq and Jordan, but that only delayed travel. The decision found that the background evidence was to the effect that whilst there may be dangers involved in travelling from Baghdad to Amman by land, that did not establish a reasonable likelihood a claimant could not make a journey without adverse consequences or a violation of his human rights. The Tribunal also found that it would not be impossible for a claimant to travel by air.

11. Mr Hussain said that there was now fresh and cogent evidence which went to the question of risk in undertaking the journey, and therefore proportionality. He took us to a letter from the UNHCR, wrongly dated 19 January 2004, when it was clearly written in January 2005. The letter merits the quotation of a considerable extract. The UNHCR had been asked to comment on the safety of routes for individuals returning to Iraq. It replied:

‘The road from Amman to Baghdad, the only major international road into Iraq, is very unsafe. The risks for travellers to date have included: insurgent attacks, mainly against drivers suspected of transporting goods for multinational forces, and contractors; also vehicle ambushes carried out by armed groups aimed not only at multinational forces, but also regular travellers who often carry valuables and money in the absence of functioning banking system. UNHCR Amman confirmed that on this road, which travels through Ramadi and Fallujah, there are random checkpoints throughout manned by militia, bandits and unpaid police. Someone travelling on this road could face extortion, or abduction. If travellers do not have money to pay the ‘toll’, they may be killed for it. UNHCR does not allow its own national staff to travel on that road. Further, there is no official United Nations travel allowed on the road between Baghdad and Amman because of security reasons. Travelling on this road “represents hardship beyond description”.’

12. The letter goes on to say that within Iraq the Sunni triangle (through which the road goes) is particularly dangerous for Iraqis of Kurdish origin due to the increasing tensions between the different ethnic groups in Iraq.

13. As to the safety of air travel, the letter says this:

‘It is our understanding that Royal Jordanian Airlines is the only airline flying into Baghdad. However, due to insurgent activities around Baghdad, most people are choosing not to fly. UN staff are only authorised to travel in and out of Baghdad in aeroplanes fitted with counter measures such as to deflect heat seeking missiles. However, this equipment is too expensive for commercial companies. Commercial aeroplanes are not a safe option as they are easy targets to attack from the ground. Moreover, at the end of 2004, a bomb was found on board a commercial flight. For those who do choose to travel by aeroplane, it must be noted that the road between Baghdad’s International Airport in the centre of the city is known as ‘Ambush Alley’ leaving international personnel no choice but to use military helicopters to get to and from the airport from the fortified green zone.’

14. The letter finishes by explaining that the UN security system has five phases, where phase 1 is normal and phase 5 is a complete suspension of operations and evacuation of all personnel. The current situation is that the United Nations has a phase 4 security regime in place for the entire country (relocation outside the country of all remaining internationally recruited staff members except those directly concerned with emergency or humanitarian relief operations or security matters). The exception to this is the governorates of Al-Anbar, Diyala and Wasit. Those are subject to the phase 5 security regime. The letter goes on to say that the route between Baghdad and Amman runs through the Al-Anbar governorate.

15. Mr Hussain made the obvious point that if the appellant were travelling to Amman he would have to take funds with him, which could make him the subject of adverse interest when travelling around.

16. He also referred to evidence from the appellant and his wife to the effect that he is receiving state benefits and that they can only just make ends meet. He argued that the appellant could not afford to travel by air between Baghdad and Amman even if it were safe to do so.

17. Mr Hussain argued that the travel dangers referred to by the UNHCR in graphic terms; the appellant's inability to pay to fly; the fact that he is a non-Arabic speaking Kurd; that, as a Kurd, he would need to return to Baghdad, then get himself somewhere where he could safely stay until such time as he was able to arrange to travel to Amman; all combine to establish that it would be disproportionate to expect the appellant to return to Iraq in order to apply for entry clearance as a spouse.
18. We are persuaded that Mr Hussain is correct. It is primarily the letter from the UNHCR which has persuaded us of that. The evidence shows that those who fly between Baghdad and Amman are diplomats and businessmen. It is also clear that many of those get to the airport by helicopter from a secure area. The dangers of the road are much more explicit in this correspondence than previously.
19. Mrs Giltrow did not seek to argue that there is any alternative mission to which it would be less hazardous to apply for entry clearance.
20. In our view it cannot be argued that could be proportionate, in the circumstances which we have set out above, to require the appellant to return to Iraq to apply for entry clearance.
20. For those reasons the appellant's appeal under Article 8 is allowed.

C. P. MATHER
Vice President
Date: 4 July 2005