Asylum and Immigration Tribunal

SM (Entry clearance application in Jordan – proportionality) Iraq CG [2007] UKAIT 00077

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2007

Before

SENIOR IMMIGRATION JUDGE ALLEN
SENIOR IMMIGRATION JUDGE BATISTE

Between

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K A Smith, instructed by Harrison, Bundy and Co
For the Respondent: Ms J Donnelly, Home Office Presenting Officer

Further evidence since the Tribunal's decision in SA (Entry clearance application in Jordan – proportionality) Iraq CG [2006] UKAIT 00011 concerning the procedures and general difficulties facing an Iraqi in returning to Iraq and travelling to Jordan to make an application for entry clearance does not lead to a conclusion different from that in SA that generally it is not disproportionate to a legitimate aim within Article 8(2) to require an Iraqi to return and apply in that way.

DETERMINATION AND REASONS

1. The appellant is a national of Iraq. He claims to have come to the United Kingdom in May 2002. He appealed to an Adjudicator against the Secretary of State's decision of 5 January 2004 to remove him as an illegal entrant. The Adjudicator dismissed his appeal. The particular issue that has assumed prominence in this case is Article 8 of the Human Rights Convention, and therefore it is appropriate that we focus on what was said about that.

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2. The appellant married his wife, Marie, in the United Kingdom on 12 December 2003. She said it would not be possible for her to go to Iraq as she does not know the language and the culture and as a Christian she would be discriminated against. The Adjudicator noted that if the appellant was returned to Iraq he would not be able to make an application from there to return to the United Kingdom but would have to go to Jordan. He had shown his ability to make his way all the way from Iraq to the United Kingdom, and the Adjudicator had no doubt that he also had the wherewithal to make his way to Jordan, particularly since he would not be returned to Iraq without proper documentation.

3. The appellant sought permission to appeal to the Immigration Appeal Tribunal, and permission was granted on 31 July 2004. The Tribunal dismissed the appellant's appeal. It noted background evidence concerning the feasibility of entry clearance applications being made by Iraqis from Jordan, and concluded that there was no error of law in the Adjudicator's determination. Subsequently a Vice-President of the Tribunal refused permission to appeal to the Court of Appeal. That application was renewed to the Court itself, and permission was granted by Buxton LJ on 10 July 2005. In an order dated 6 October 2005 it was ordered that the decision of the Tribunal be quashed and the appeal be remitted to this Tribunal for consideration.

4. The hearing before us took placed on 12 June 2007. Ms K A Smith, instructed by Harrison, Bundy and Co., appeared on behalf of the appellant. Ms J Donnelly appeared on behalf of the Secretary of State.

5. The representatives were in agreement that there was an error of law in the Adjudicator's determination in the assessment of proportionality, and the IAT had erred in upholding his finding. This was essentially on the basis as set out in the grant of permission by Buxton LJ that the IAT had not addressed the issue that the burden was on the respondent to show that return to Iraq would be a proportionate interference with the appellant's Article 8 rights and the respondent had adduced no evidence to support that contention. The hearing before us therefore proceeded on the basis that there was an error of law in the Adjudicator's determination and we could thus consider up-to-date evidence.

6. Ms Smith referred to the decision of this Tribunal in SA [2006] Iraq UKAIT 00011, where it had been held that it was not a breach of an Iraqi appellant's Article 8 rights to expect him to make an entry clearance application from Jordan to come back to the United Kingdom. She argued that it was clear from what had been said in SA in particular at paragraphs 6, 22 and 35 that the Tribunal had based itself on the test in Article 8 cases as set out by the Court of Appeal in Huang [2006] QB1 of truly exceptional circumstances, which had now been shown in the decision of the House of Lords in Huang [2007] UKHL 11 to be flawed. Therefore the proportionality assessment by the Tribunal in SA was flawed.

7. With regard to the evidence before the Tribunal in that case, she argued that the burden was on the Secretary of State to show it would be reasonably practicable for the appellant to be able within a reasonably expedient time to make an entry clearance application in Jordan. Two letters from the British Embassy had been relied on in SA which could be found in the Home Office bundle at pages 352 and

353. There it could be seen that S Series passports were acceptable to corroborate ID and were very easy to obtain. The position now was however, that S Series passports were not acceptable either for entry into Jordan or for an entry clearance application to the United Kingdom. With regard to the former, Ms Smith referred to paragraph 34.02 of the Country of Origin Information Report and with regard to the latter, to the documentation to be found at page 2 of Ms Smith's latest bundle. Page 3 also addressed the difficulties of obtaining a passport. She also referred us to what was said in the Administrative Court's decision in Asad [2007] EWHC 286 (Admin). There, there was an explanation of the rationale for no longer accepting S Series passports as they were too easy to obtain. Comments could be seen there concerning the availability of the new G Series passports which were only issued by the Baghdad authorities. With regard to what was said at paragraph 9, page 11 of the bundle, this was also not a case where there were special circumstances.

8. It seemed that this was now rather different from the situation when SA was decided. A returning individual would have to obtain ID documents, and Ms Smith was told the appellant did not have any, and in any event the BBC report to which she had referred, at page 3 of her bundle, suggested that the person would need new documents which would take time. They would then need to get a passport in Baghdad and then travel to Jordan and apply for entry clearance. From page 1 of her bundle it could be seen with regard to this point that several weeks advance booking was required to be made. SA was premised on the basis that entry clearance applications in Jordan would be done relatively expediently. That could not be shown by the Home Office as of today's date.

9. In her submissions Ms Donnelly said that all the evidence that could be found was before the Tribunal. She referred to paragraph 30.17 of the COIR which indicated that ID documentation was widely available in Iraq. Problems would be more likely to come when the appellant had to apply for a passport, as there was no evidence of any way other than applying in Baghdad, but she argued that passports were being issued and were available to Iraqis who applied for them. Once the appellant obtained a passport there was the issue of getting the entry clearance from Amman. The visa service there was fully functioning and appointments were booked up several weeks in advance and this was not, she argued, a significant delay. It could be seen from page 4 of the appellant's bundle that it might take something in the region of 40 days waiting to get a passport in Baghdad. There would be a wait of several weeks in Amman. There was a general statement that in settlement cases visas could be obtained within fourteen weeks and that was general for all posts. Potentially the delay might be in the region of six months or so. It could take as long on an in-country application in the United Kingdom but there was no specific evidence about other out-of-country applications.

10. By way of reply Ms Smith referred to paragraph 30.17 of the COIR which had been referred to by Ms Donnelly concerning documents being easily available, but also referred us to paragraph 30.22 which mentioned issues of further investigation for people who did not have ID already, so the period could be lengthy. She argued that six months would be the period if all went according to plan but it was likely to be somewhat longer than that, bearing in mind the influx of people and the chaos in Iraq. She argued that in-country applications were not the appropriate comparator as the interference with the Article 8 rights went on all the time during the person's time of

absence from the United Kingdom and therefore out-of-country applications were the appropriate comparator.

11. We reserved our determination.

12. We proceed on the basis that there is an error of law in the Adjudicator's determination as set out above and that therefore we can go on to consider the up-to-date evidence. The existing country guidance in this regard is to be found in the Tribunal's determination in SA, to which we have referred above. There had been earlier cases in MN [2004] UKIAT 00316, and HC [2004] UKIAT 00154 where the IAT had held that the possibility of danger involved in travelling from Baghdad to Iran did not establish a reasonable likelihood that an appellant could not make the journey without adverse consequences such as to amount to a violation of his human rights. Subsequent to that in KJ [2005] UKIAT 00066 it was concluded, primarily on the basis of a letter from the UNHCR written in January 2005, that the evidence showed that it could not be said to be proportionate to require a person to return to Iraq to apply for entry clearance for a neighbouring country because of the dangers in travelling by road or flying to another country.

13. In SA the Tribunal had further evidence before it, in particular a letter dated 20 March 2005 from the British Embassy in Amman. This said that road travel between Baghdad and Amman, Damascus and Beirut remained uninterrupted and the most common way of travel for Iraqi nationals. Royal Jordanian and Syrian Airways flew regular services in to Baghdad and Gulf Airways also operated regularly into Dubai. Those travelling from northern Iraq would usually travel across Syria as the fastest and most convenient route down to Amman. It was easier for Iraqi nationals holding UK travel documents to enter Syria than Jordan. It was believed that other airlines were considering opening routes into Baghdad and Basra in the future.

14. There was a further letter of 16 June 2005 from the British Embassy in Amman which reported that applications for entry clearance did not involve a lengthy process and in fact the Embassy offered a same-day service for all applications and usually aimed to make a decision on the day. At the end of the letter there were references to the relative ease of travel from Baghdad to Amman. The Tribunal also bore in mind evidence in the form of travel advice from the US Department of State and from the Foreign and Commonwealth Office and a report from the Refugee Council. The Tribunal concluded that the picture was different from that before the Tribunal in KJ, and that there were different ways in which an appellant could reach Amman, noting at paragraph 33 the fact there had been over 3,000 applications between April and October 2004 and between October 2004 and March 2005 also, and concluded that it was not satisfied that the circumstances involved in the entry clearance application were such as to make the requirement to make an application from abroad disproportionate.

15. The evidence now before us is clearly different, as was set out by Ms Smith. It can be seen from the BBC News report at page 3 of her bundle that the S Series passports are rejected by most countries because they can easily be faked, and the position in this regard was set out in more detail in Asad to which Ms Smith referred us.

16. It is clear that with effect from 1 September 2006 the United Kingdom Government no longer accepts the S Series Iraqi passport for the purpose of making UK entry clearance applications, and it can be seen from paragraph 34.02 of the COIR of 30 April 2007 that in order for an Iraqi to enter Jordan they must hold the new G generation passport and prove that they have sufficient funds to support themselves. In the BBC News report it is said that there is only one office in Baghdad which is responsible for issuing the G Series passports but before a person can even get into the queue to apply they have to get new ID papers and a passport application form. It was said by Goldring J in Asad at paragraph 4 that the G Series passport is only available in Baghdad and the risk to the claimant of going to Baghdad is self-evident. It can be seen from paragraph 30.17 of the COIR that the main identification documents needed for any kind of interaction with the authorities to access entitlements are "widely common" and, it seems, reasonably available, though they have to be obtained in person rather than by post. However, we note the point to which Ms Smith drew our attention, at paragraph 30.22 of the COIR from a UNHCR assessment of August 2006 that, though returnees still carrying old Iraqi documentation are able to renew documents easily, for those without these documents, further investigation into records must be carried out to prove entitlement. It is said, and we see no reason to disbelieve it, that the appellant has not retained his old documentation, and therefore he would be subject to that further delay.

17. An Iraqi returned to Iraq who wished to apply for entry clearance to the United Kingdom from Jordan would be likely to be required to go first to his home area in order to obtain fresh ID documentation. He would then have to go to Baghdad in order to apply for a G Series passport. There is evidence that one person, referred to at page 4 of the bundle from the same BBC report, was facing a waiting time of more than 40 days. There is also reference to being able to overcome the long waiting list during the issuing process by paying a bribe, though we do not assume the general availability of that option. Thereafter, assuming he had succeeded in getting the ID documentation, the passport application form and then the passport, he would have to travel to Jordan, having in advance presumably made his application for an appointment since that has to be done several weeks in advance. It is relevant at this point to refer to the Operational Guidance Note on Iraq of 12 February 2007 with which Ms Donnelly has provided us. There is reference at paragraph 6.2 to the risks involved in travelling between Amman and Baghdad including insurgent attacks, vehicle ambushes carried out by armed groups and road checkpoints set up by armed groups. It is said that the main routes leading out of Baghdad are highly insecure, however, ordinary Iraqis generally use roads on a daily basis. Road travel between Baghdad and Amman remains uninterrupted, and is the most common way of travel for Iraqi nationals. Royal Jordanian and Syrian Airways fly regular services into Baghdad. It is said that those travelling from northern Iraq would normally travel across into Syria as the fastest and most convenient route down to Amman.

18. In general we do not consider despite the changes which have taken place since SA that it would be a disproportionate interference in the right to family life of an Iraqi to require him to go through the process we have described above, though we accept that there may be particular individual circumstances which militate against the proportionality of removal. These will need to be addressed on a case-by-case basis.

19. The Appellant, who is from Kirkuk, would have to go there in order to obtain fresh ID documentation, and then go to Baghdad and therefore to Jordan, in accordance with the procedures set out in paragraph 17 above. He has no in-country right to make a marriage application under the Immigration Rules and therefore his appeal has to be assessed under the terms of Article 8. The correct approach in making this assessment is the five stage process described by the House of Lords in Razgar [2004] UKHL 27.

> "17. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

20. No issues have been taken before us concerning the first four stages. Thus we conclude that (1) the removal of the Appellant will be an interference with the Appellant's family life in this case, since it is, we think, accepted that his wife cannot be expected to go with him to Iraq even on a temporary basis whilst he seeks entry clearance. That interference could (2) have consequences of such gravity as potentially to engage the operation of Article 8. However (3) the interference is in accordance with the law and (4) is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Respondent's policy of maintaining a firm and consistent immigration policy, to which his decision in this case relates, engages a number of these separate headings. The issue between the parties therefore relates to whether (5) the interference is proportionate to the legitimate public end sought to be achieved.

21. We have to consider this question in the light of the evidence as a whole and whether, as it was put in paragraph 20 of the House of Lords judgment in Huang, in circumstances where the life of a family cannot reasonably be expected to be enjoyed elsewhere, the refusal of leave to enter or remain, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the

Appellant in the manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.

22. The Appellant and his wife were married when the Appellant's immigration status was uncertain; indeed just a couple of weeks before the Appellant's asylum application was refused by the Respondent. We have also had regard to the guidance of the Court of Appeal in Mahmood [2001] Imm AR 229, cautioning against permitting queue jumping in marriage applications.

23. In the light of the evidence as a whole and notwithstanding Ms Smith's helpful submissions, we do not consider that the limited extent of any increase in personal risk to the Appellant in Iraq arising from the adoption of the new procedure for obtaining a "G" type passport, and the additional overall length of time involved in making the application for entry clearance, is sufficient, taken together and with all other factors, to constitute a disproportionate interference with his right to family life in this case.

24. The appeal is therefore dismissed.

Signed Date

Senior Immigration Judge Allen