WD (Article 3 – not undue harshness) Iraq [2005] UKIAT 00034

IMMIGRATION APPEAL TRIBUNAL

Date: 12 January 2005
Date Determination notified:
..4 February 2005.....

Before:

The Honourable Mr Justice Ouseley (President)
Ms C Jarvis (Vice President)
Mr P S Aujla

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
APPELLANT

And

RESPONDENT

Appearances:
For the Appellant: Ms P Ramachandran, Home Office Presenting Officer
For the Respondent: Mr P Norris, instructed by Hackman Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Miss Moira Dawson, promulgated on 1 March 2004.

2. The Claimant arrived in the United Kingdom on 11 September 2003, and claimed asylum the day after. His claim was that he was a Kurd from Northern Iraq, born on 1 July 1986, which meant that he was seventeen when he arrived.

3. The basis of his claim was that he had left after he had been threatened by the father of his girlfriend. In early 2003, he had asked the father's permission on two occasions to marry his daughter, but had been refused. Subsequently, the daughter lost her virginity to him. The father found out and killed her. He then came to the Claimant's family house with security forces and the police to arrest him. The Claimant was not there and was told of the

father's anger and that the father was looking to kill the Claimant. The father was said to be a man from a large and powerful tribe in Iraq, and a member of the Islamic Movement Party. The Claimant was advised by his brother-in-law to leave and was assisted by other members of his family to do so. He travelled and arrived unaccompanied.

4. The Secretary of State rejected the asylum claim, taking the view that the Claimant would be able to receive protection in the KAZ area, because the law there had changed to make honour killing illegal. Both the KDP and the PUK were seeking to address this problem, and punishments for honour killings were much more severe. The PUK or KDP authorities would be able to protect the Claimant from the girlfriend's father as they do in relation to militant Islamic groups generally. In any event, it was considered that it was not unduly harsh for failed asylum seekers to return to KAZ or its surrounding areas even if they had no connection with KAZ. The option of internal flight was available as there were areas of KAZ as well as other parts of Iraq outside of the KAZ where he did not have a well-founded fear of persecution. The Secretary of State also took the view that the Claimant was rather older than he claimed.

5. There was no Home Office Presenting Officer present at the hearing before the Adjudicator. She found that the Appellant's evidence was credible and consistent having considered background information in relation to honour killings in the KAZ and more generally. She rejected the Secretary of State's contention as to age and found that the Claimant had been born in July 1986 as he said. The Adjudicator then pointed out that the refusal of asylum had been based on background information relating to the changes in 2002 to the law on honour killings, and continued:

> "38. Although I accept that the background information does refer to the changes in the law and changes in punishment I do not agree that this necessarily reflects a change of attitude at grass roots where the influence of tribal and religious law persists. I am also aware from the background evidence that since the war there has been an increase in such killings and an ever increasing presence of the Islamic Movement."

6. The Adjudicator found that the Appellant had not established a well-founded fear of persecution for a conventional reason. She then turned to the question of whether there would be a sufficiency of protection for the Claimant on return. She appeared to have considered this for the purposes of the Article 3 ECHR claim. She said:

> "40. I now address the issue of whether there would be a sufficiency of protection for the Appellant on return. I am aware from the Appellant's evidence which I have accepted as credible and which the Respondent has not questioned that although it was known that

> Dilman's father had killed his daughter the security forces and the police accompanied him to the Appellant's home to arrest him. I find that this is at odds with Respondent's assessment of the background information and I do not find that the Appellant could rely on the authorities for protection."

7. In paragraph 41, the Adjudicator said that in the light of that and the background information, she concluded that if the Claimant were returned to KAZ there was a real risk that that would breach Article 3 ECHR.

8. In the next paragraph, and this was a contentious paragraph on this appeal, she said:

> "42. I have found the Appellant's evidence as to his age credible. He is a minor and accordingly I find that it would be unduly harsh for the Appellant to re-locate to another part of Iraq where he has no support."

9. Finally, in paragraph 44 she concluded that if the Claimant were "*returned to Iraq (KAZ)*", it would breach his rights under Article 3 ECHR.

10. The Secretary of State advanced two grounds for his appeal. The first related to paragraph 42 of the Adjudicator's determination. The question of whether relocation would be unduly harsh was not a point which arose, at least as such, in considering whether Article 3 ECHR would be breached by the return of the Claimant to Iraq. That was an issue peculiarly related to the Refugee Convention. It followed that the Adjudicator had failed to apply the necessary high threshold of Article 3 to her consideration of the return of the Claimant to Iraq outside of the KAZ. Miss Ramachandran supported her submission by reference to passages from the Tribunal decision in AL (Afghanistan) [2003] UKIAT 00076. She pointed out that returns took place to Baghdad and not to the KAZ, and that the removal directions in this case had referred to Iraq and not to the KAZ.

11. Her second submission was that the Adjudicator had failed to consider whether the risk to the Claimant was localised to the KAA, and so did not exist throughout Iraq, or indeed whether it was localised to certain areas within the KAZ where the Islamic Movement Party might have influence. It was said that the Adjudicator had ignored the material related to the localised nature of the Islamic Movement Party.

12. Finally, she submitted that if she was correct in submitting that the Adjudicator had made a material error of law it was relevant for the Tribunal, in considering how to dispose of the case, to consider material from the October 2004 CIPU Report on Iraq which dealt with honour killings and the position of the party which she submitted

was being referred to, namely the Islamic Movement of Iraqi Kurdistan (IMIK).

13. The material on honour killings in that Report appears to be the same as that summarised by the Adjudicator in paragraphs 28 and 29 of her determination drawn from the Home Office Bulletin 8/2003 of December 2003. This referred to the fact that, notwithstanding the change in law in the KAZ saying that males could be prosecuted for the honour killings of female family members, such killings still occurred. Indeed, the number of honour killings had increased rapidly since the war, particularly in rural Shiite dominated areas. Dozens of young women had been killed by male relatives and women might be killed because they had lost their virginity before marriage. Such killings were treated leniently within the Iraqi judicial system. There was a reference to a couple who fled to the KAZ after eloping three years before, and were in fear of their lives because of the freedom of travel between the KAZ or Kurdish Regional Government administered area, and the rest of Iraq. They had moved back to the relative anonymity of Baghdad, where despite the protection of a women's group, they had to change address regularly.

14. The CIPU Report pointed out that Northern Iraq had particularly high levels of honour killings, compared with the Middle East as a whole. The change in law had caused a dramatic drop, but the law was difficult to enforce and, although perhaps fewer than claimed, the killings continued to occur. It was perfectly clear that by far the largest number of victims of such killings were women.

15. The evidence from the CIPU about political parties in Iraq showed that IMIK had at times had alliances with the KDP and had been involved in clashes with the PUK. It was described as having very local support in the north of Iraq, in five areas. It no longer rules in Halabja. It now was thought to have normal relations with the PUK, and to want to merge with the Iraqi Islamic Party but it was not known whether anything had happened to that end. IMIK was the party which Ms Ramachandran submitted the murderous father had belonged to. It did not have connections throughout Iraq. It was based in the KAZ where it had limited reach. There was no evidence of an Iraq wide Islamic party which had roots in KAZ. Two splinter groups had left IMIK ultimately to form Ansar al-Aslam, a radical terrorist group. A further splinter group had formed the Islamic group of Kurdistan which had become closer to Ansar al-Aslam.

16. The material before the Adjudicator was not so explicit as the CIPU Report about the parties. But it did not identify any party which had connections with the Kurdish areas and which also had a wider reach in Iraq. Those Islamic parties referred to were the small splinter and extreme groups based in the KAZ.

17. Mr Norris submitted for the Claimant that the Adjudicator had made an error in the way in which she dealt with undue harshness on return but that it was not the one alleged by the Secretary of State. She did not need to deal with that issue because on her findings of fact, including her acceptance of the Claimant's credibility, he faced a risk of treatment which breached Article 3 wherever he was in Iraq. She must be taken to have accepted his claim that the father had contacted all the different departments of the party in Iraq on the very day when he killed his daughter, leaving the Claimant no hiding place in Iraq. The evidence before the Adjudicator dealt with the increasing influence throughout Iraq which tribal leaders had after the fall of Saddam and the growing enforcement of strict Islamic ways. The CIPU material also showed honour killings throughout Iraq.

18. We accept that the determination should be read in the way Ms Ramachandran said that it should be. It seems to us clear that the Adjudicator would have had no other need to deal separately, in paragraph 41, with the breach of Article 3 which return to the KAZ would entail, and in paragraph 42 with undue harshness elsewhere in Iraq if she was of the view that Article 3, or at least that same risk which applied in KAZ, applied throughout Iraq. She has clearly applied that Refugee Convention concept to the rest of Iraq. This is also consistent with the reference to Article 3 in paragraph 44 where she refers to return to Iraq (KAZ).

19. She has adopted that structure to her determination because she is dealing with and in sequence rejecting the Secretary of State's arguments from his decision letter. He dealt first with return to the part of the KAZ whence the Claimant came, and then with undue harshness elsewhere, including the rest of Iraq.

20. True it is that the background evidence in part relates to the whole of Iraq, but the bulk of it concerns the north. Her conclusion, however, was that the growth of tribal and religious power generally countered the Secretary of State's claim that the change in the law in KAZ provided effective state protection for the Claimant there. Mr Norris puts too much weight on the acceptance of the Claimant's credibility. Clearly that covers the essential features of the evidence which he gave about his age, his relationship, the murder and the threat to him by the father. We think that it goes somewhat too far to say that it means that everything which he said is therefore accepted as both accurate and reliable. After all, the point relied on is a response point in a statement which also deals with honour killings more generally in KAZ and appears to draw a distinction between KAZ and the rest of Iraq, suggesting that he would be better of in KAZ than the Adjudicator accepted. Likewise what he says about what his would-be killer told his party officials elsewhere

in Iraq can only be hearsay, and not from the father on his evidence, and is unsourced. Its effect also depends upon the knowledge of the reach of the party in question about which the Adjudicator makes no findings. It would appear to us that if that is a matter which the Adjudicator thought had been proven, she would not have differentiated as she did between the various parts of Iraq for the purposes of Article 3.

21. Indeed, if Mr Norris' argument were to be accepted, it would create a further problem for him in that the Adjudicator's reasoning would then be flawed for other reasons. There would have been no evidential basis and no findings about the extensive reach throughout Iraq which the father or his party would have had to have. The tribal power as a counter to the effect of the law would not have been relevant in the absence of the threat from the father being capable of effect generally in Iraq.

22. Mr Norris did not contend that on that reading of the determination there was no error of law. Clearly there has been one. The Court of Appeal in AE and FE v SSHD [2003] EWC Civ 1032, paragraph 64, makes it clear that the concept of the undue harshness of internal relocation is an asylum related concept which should not be used to bring in general humanitarian considerations. The Tribunal in AL (Article 3- Kabul) Afghanistan XG [2003] UKIAT 00076, at paragraph 14, says:

> "To put it another way, when one is considering the specific action of the UK Government being challenged by an applicant as being in breach of Article 3 (usually in our jurisdiction removal to his own country) we may only take into account matters which relate to that decision, and which individually or in aggregate are of sufficient severity to engage Article 3, (and also Article 2 which is also an absolute obligation that may for practical purposes be subsumed within this). Matters that do not constitute "torture or inhuman or degrading treatment or punishment" as defined in human rights jurisprudence are not material. The Robinson derived tests of reasonableness and undue harshness are part of the assessment of refugee status. They are inappropriate to Article 3 consideration, which should be assessed on the basis of whether there is a real risk that the decision or action of the UK government complained about, would result in a breach of the terms of that Article."

23. We agree with that. What is unduly harsh may or may not show that there would be a breach of Article 3. For the purposes of Article 3, the language of Article 3 should be deployed. The question is whether the circumstances as a whole show that there is a real risk of a breach of Article 3. Whether the country to which the individual would be returned has areas where Article 3 would not be breached is material, if they can be accessed without a breach of Article 3. It would be a difficult case to make out that although one's rights under Article 3 would not be breached in a particular place, return to the country in question would nevertheless constitute a breach of

Article 3, because circumstances in that place are such that the individual would be impelled to go to that part of the country where Article 3 would be breached.

24. The second submission is that the Adjudicator has not considered whether the threat is localised to the KAZ or to parts of the KAZ. We think that the Adjudicator in dealing with the two parts of Iraq, KAZ and non KAZ, differently must be taken to have concluded that there would be no breach of Article 3 in those other parts at least arising out of the father's threat. On the other hand it appears that she accepted that it applied generally in KAZ. It may be debatable how much material she really had to support such a conclusion but the Home Office provided no submissions and we do not conclude that we can say that she was not entitled on the albeit somewhat sparse material to conclude on that as she did.

25. However, there has been a material error of law. The determination cannot stand. We can examine the new material in order to see what we should now do about the appeal. The additional material shows that IMIK would not have the wide reach even in the KAZ which must have been assumed and no other party to which the Claimant could have been referring is near that reach. It also suggests that this threat should be seen as a threat of a simple revenge killing, rather than one in which tribal powers would feel that the woman had to be sought out and killed to avenge family honour; she has already been killed. Nonetheless, even if the threat was only effective in those parts of Iraq, KAZ or not, where the Claimant and his parents lived, the implications for someone of his age, living away from his home, unsupported, in Iraq would need to be considered. We do not see it as likely that Article 3 would be breached but this is an issue which would need to be considered. This is, of course, a different basis for the engagement of Article 3 from the threat posed. We do not consider that it can be taken as resolved or bound to be resolved against the Claimant merely because of the reference to the different question of undue harshness. There may be other factors which engage Article 3 and in view of the uncertainty over that part of the determination we remit the case to another Adjudicator rather than decide ourselves whether they do. We have indicated the reasons for the remittal but we are not exercising any power to restrict its scope.

26. The appeal is allowed to the extent that the case is remitted for determination to a fresh Adjudicator. It is reported to note our endorsement of what the Tribunal said in AL.

MR JUSTICE OUSELEY

PRESIDENT