H-TW-V1

MN (Entry clearance facilities – Availability) Iraq CG [2004] UKIAT 00316

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 7 September 2004
Date Signed: 27 September 2004
Date Determination Notified: 18 November 2004

Before:

Mr J Barnes - Vice President
Mr C P Mather - Vice President
Mr J G Macdonald

Between

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

For the Appellant: Mr C Yeo, a Legal Representative of the IAS (Tribunal Unit)
For the Respondent: Mr A Hutton, a Home Office Presenting Officer

1. This appeal is being issued to give country guidance on the question of proportionality of removal of Iraqi citizens under Article 8 of the European Convention having regard to the availability of entry clearance facilities in Jordan for Iraqi citizens. It follows and adopts the reasoning of the Tribunal in two reported decisions, namely *HC (Availability of Entry Clearance Facilities) Iraq 2004 UKIAT 00154* promulgated on 9 June 2004 and *EA (Article 8 - Entry Clearance - Delay) Iraq [2004] UKIAT 00236* promulgated on 25 August 2004.

2. The Appellant is a citizen of Iraq born on 21 March 1982 in Jalola. He is of Kurdish ethnicity. He arrived in the United Kingdom

clandestinely on 22 February 2002 and claimed asylum on that date. Following the submission of a statement and an interview the Secretary of State refused his application for the reasons contained in a letter dated 9 December 2003. There was no consideration in that letter of the basis of the Article 8 claim which the appellant subsequently made before the Adjudicator. On 15 December 2003 the Secretary of State issued notice of his decision to remove the Appellant to Iraq as an illegal entrant after refusal of his asylum claim. Illegal entry papers had in fact been served on him on 22 February 2002, the day of his arrival in the United Kingdom.

3. The Appellant appealed against that decision on both asylum and human rights grounds and his appeal was heard on 4 March 2004 by Mrs N A Baird, an Adjudicator. She did not accept that the Appellant would have any problems on account of the accepted fact that he had in the past sold car parts belonging to the army, given that the Ba'ath party were no longer in power and the regime of Saddam Hussein had fallen. This was accepted by the Appellant. She rejected his claim based on a blood feud as there was no credible evidence that the Appellant would be at any risk for this reason in his home area. For those reasons both the asylum and Article 3 claims were dismissed. The Appellant does not seek to challenge the findings of the Adjudicator in this respect.

4. Before the Adjudicator he also claimed that his removal would be in breach of his right to family life under Article 8 of the European Convention by reason of the relationship which he had entered into with [ ]. At the date of the hearing before the Adjudicator it was some eleven months since the commencement of their relationship and they had been living together for the previous five months. They became engaged in January 2004 and planned to marry in the future. [ ] had a 5 year old daughter from her former marriage who had regular weekend contact with her father but since they had been together the Appellant had developed a relationship with the child also. [ ] said that she could not go to live in Iraq because this would interfere with her daughter's contact with the daughter's father. The Appellant had explained his immigration status to [ ] soon after they had met.

5. The Adjudicator dealt with the Article 8 claim at paragraphs 45 to 49 of her determination in the following terms:

> "45. The fact is that both parties knew that the Appellant had no status in this country when they became involved in a relationship. When they got engaged in January this year, they knew this appeal was pending.
>
> 46. I accept that they live together. I accept that they have a family life together. I accept that there would be an

interference with this family life if the Appellant had to return alone to Iraq.

47. In considering whether there are insurmountable obstacles to the Appellant's fiancée travelling with him to Iraq, I find that the fact that she had a 5 year old child who lives with her own father every weekend does constitute an insurmountable obstacle. There is a court order granting contact. I do accept that this could be varied but I see no reason why it should be. The child would suffer if she did not have regular contact with her father. I therefore think that this is an insurmountable obstacle.

48. I turn now to the question of whether the interference with the family life of the couple which would result from him having to return to Iraq to seek entry clearance as a fiancé would be disproportionate to the need for effective immigration control. I understand that the British Embassy in Jordan is dealing with applications from Iraqi citizens who want entry clearance to come to the United Kingdom. The system appears to be working. Ms Taylor [who represented the Appellant before the Adjudicator] suggested that the ECO dealing with the Appellant's application might be biased. I cannot assume this. I do not think I can take this into account. The ECO is charged with the task of establishing whether or not an applicant complies with the Immigration Rules, and given the support of the Appellant's fiancée and her family and the fact that they have been together for eleven months, I must take the view that any application made by the Appellant would be dealt with fairly, and in accordance with the Immigration Rules. There would also of course be a right of appeal if the application were refused.

49. In finding that it would not be disproportionate for the Appellant to have to apply for entry clearance, I take account of the fact that his girlfriend does have family here. The couple are not married. She has her daughter here. She and her family would be able to provide documentary evidence of the strength of their relationship. I take account of the fact that they both knew that he had no status when they became engaged, and that there was a possibility that he might have to return to Iraq."

6. The Adjudicator then went on to find there would not be a disproportionate interference with the family life of the Appellant with his fiancée and her child if he had to return to Iraq and proceed to Jordan to make an application for clearance as the fiancé of a British citizen. She accordingly dismissed the Article 8 claim also.

7. The Appellant applied for and was granted permission to appeal to the Tribunal on the practicability of applying as an Iraqi for entry clearance from Jordan. This was put in the grounds of appeal in the following terms:

> "1. The Appellant does not have any kind of passport or Interim Travel Document (ITD). The British Embassy in Amman makes clear in its procedures for Iraqi nationals that '*Interim Travel Documents are acceptable for travel to the UK*'. The Appellant would be in difficulties obtaining an ITD as there is currently no Iraqi consular presence in the UK to issue such a document. Moreover, there is some suggestion that the ITD's have been restricted to 'senior officials, businessmen and journalists', according to Tareek al-Shaab, a publication issued by the Iraqi Communist party.
> Therefore the Appellant would not be able to travel to Jordan to make the relevant applications.
>
> 2. The IAS Counsellor who had conduct of this matter before the IAA made submissions to the Adjudicator on this very point. The Adjudicator appears not to have considered or alluded to these submissions.
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> 3. The Adjudicator states the system 'appears to be working'. However she does not state where this information emanates from."

8. At the hearing Mr Hutton relied upon the two Tribunal reported decisions to which we have referred in paragraph 1 above. Mr Yeo accepted that in light of these decisions he was in some difficulties but nevertheless drew our attention to a feature article broadcast on Radio 3 Europe/Radio Liberty on 3 February 2004 entitled "Iraq: Now that Saddam's gone, Iraqis are free to travel the world - at least in theory". This article claimed that obtaining ITDs from the Coalition Provisional Authority in Iraq (which was the responsible authority at the date of the hearing before the Adjudicator) was a problem "due to the high demand and long lines". It was also claimed that possession of an ITD did not necessarily result in admission to Jordan although under Jordanian law no visas for Iraqi citizens are required before they are admitted. It was claimed that Iraqis are subjected to special security checks at the border and many are turned back despite having the proper documents. The report went on to say, however, that the Chargé d'affaires at the Jordanian Embassy in Baghdad said that it was simple for Iraqis to reach Jordan as they did not require visas but simply a valid ITD or a valid Iraqi passport. He did, however, say that the Jordanian authorities were concerned by the number of forged travel documents presented which

would result in people being turned away at the border. Those who had genuine travel documents, however, could travel into Jordan.

9. It seems to us clear - and Mr Yeo did not demur from this - that the article in question does confirm on the basis of what is said by a Jordanian official that a regularly issued ITD or a valid Iraqi passport previously issued will each be accepted as a proper basis for entry without further requirements into Jordan where, as the Adjudicator rightly states, the British Embassy has made special arrangements to process applications for entry clearance to the United Kingdom from Iraqi citizens provided that they can attend at an interview in the British Embassy at Amman.

10. The facts of the present appeal are very similar to those considered by the Tribunal in *HC* where the appellant had married a British national in June 2003 following a relationship which commenced in February 2002 and their living together since May 2002. In that case also there were children of a former marriage. There were also claimed difficulties for the British spouse and her children in accompanying the appellant to Iraq. Proportionality of removal was the issue before the Tribunal.

11. Applying the ratio in *Mahmood* [2001] INLR 1, absent exceptional circumstances, it is not disproportionate to require a claimant who has entered into a family relationship in the United Kingdom whilst his or her own immigration status is uncertain, to return to his or her own country for the purpose of making a relevant application under the Immigration Rules for admission as a spouse or fiancée as the case may be. The fact that the application may not be successful does not affect the issue of proportionality of removal for the purposes of Article 8, the underlying reason for such a requirement for making an out of country application being that it is to avoid those in the country securing an unfair advantage over those waiting to make the relevant application from their own country. It is also implicit that any normal procedural delays in the course of making such an application cannot affect issues of proportionality either.

12. The impossibility of making an application from a foreign national's own country is not restricted to Iraq. A similar situation applies in the province of Kosovo in the Republic of Serbia and Montenegro and this was considered by the Tribunal in *[2003] UKIAT 00011 J (Serbia and Montenegro*). The Tribunal held that the absence of any facilities within Kosovo operated by the United Kingdom to manage the grant of visa applications did not make it disproportionate to expect the claimant to make such an application from neighbouring countries to which he would have access and where the appropriate Embassies or High Commissions existed.

13. In the case of Iraq the objective evidence shows that since at least 18 September 2003 the British Embassy in Amman in Jordan has been designated as the appropriate point at which Iraqi citizen should make applications under the Immigration Rules, HC 395. Paragraph 28 of the Rules, dealing with applications other than for European Area family permits, provides that they:

> "...must be made to the post in the country or territory where the applicant is living which has been designated by the Secretary of State to accept applications for entry clearance for that purpose and from that category of applicants. Where there is no such post the applicant must apply to the appropriate designated post outside the country or territory where he is living."

14. The post in Amman is so designated and a letter of 18 September 2003 from UK Visas (whose headed notepaper mentions both the Foreign and Commonwealth Office and the Home Office) states that 15 per cent of the caseload of the visa section in Amman is spent dealing with Iraqi applications and that "Iraqi applications are made every day of the week".

15. In *HC* the Tribunal, after reviewing all the relevant evidence about the practicality of making applications through the Embassy in Jordan, summarised the situation as follows at paragraph 17 of their determination:

> "The Tribunal is able to deduce the following from this material:
>
> a. Iraqi citizens are able to travel to Jordan either using a passport issued under the regime of Sadaam Hussein or an Interim Travel Document issued by the Coalition Provisional Authority or the present Iraqi Ministry of Interior Office.
> b. There is no suggestion that the Jordanian government itself requires a visa for entry.
> c. Were the Jordanian government preventing Iraqi nationals entering the country, we would expect this to have been mentioned.
> d. There is no suggestion that any distinction can be drawn between an Iraqi passport holder and an Iraqi national holding an ITD. There would be very little point in the present Iraqi authorities issuing ITDs if they were unable to perform the task for which they were issued, namely, the facilitation of international travel.
> e. From time to time, the border between Jordan and Iraq may be closed for security reasons but this does not prevent travel to Jordan and but [sic] may delay it.

f. The fact that 15 percent of the workload of the British Embassy in Amman is concerned with Iraqi applications indicates that there is a substantial traffic of Iraqi nationals into Jordan for the purpose, at least in part, of applying for entry clearance. "

16. The Tribunal then went on to consider claims that such travel would be too dangerous but rejected such claims saying that whilst it was accepted the background evidence established that there was a possibility that there might be dangers involved for those travelling from Baghdad to Amman (especially for Western journalists and Coalition soldiers), they did not consider it established a reasonable likelihood that the claimant could not make the journey without adverse consequences or a violation of his human rights. It was pointed out that it was accepted that there were large numbers of persons making the journey. They noted that the Royal Jordanian Airline operated an almost daily flight between Amman and Baghdad which was said to be popular among Iraqi and Jordanian businessmen and diplomats from some western countries and that more than 600 Iraqi citizens legally cross the border between Iraq and Jordan on a daily basis where they could enter without a visa and stay for up to six months (derived from the British/Danish Fact-finding Report on Iraq of July 2003). The Tribunal noted further that cost to the appellant was rarely considered to be a decisive factor in Article 8 appeals and that there was no evidence that cost was so prohibitive as to render its use by *HC* impossible.

17. For those reasons the Tribunal considered that there was a viable option available to *HC* to return to Iraq and apply for entry clearance as a spouse and that "although this will involve travel to Jordan, we do not consider the difficulties are such as to render this decision of the Secretary of State disproportionate."

18. There has been no evidence produced to us to persuade us that it would be appropriate to differ from the views of the Tribunal as expressed in *HC.* Taking into account the totality of the evidence before us, we therefore conclude that even if there are insuperable obstacles to the family travelling to Iraq, it would nevertheless not be disproportionate to the right to family life of the Appellant for him to be required to return to his own country where appropriate facilities via the British Embassy in Jordan for making an application for entry clearance under the Immigration Rules HC 395, as amended, exist. There are no exceptional circumstances which would render removal disproportionate.

19. It follows that the grounds of appeal before us do not identify any material error of law on the part of the Adjudicator but that, on the contrary, on the evidence before her and by reference to the principles enunciated in *HC*, which were followed and applied by the Tribunal in *EA*,

the decision of the Adjudicator is clearly sustainable. Absent such a material error of law, and since this is an appeal to which the provisions of the Nationality, Immigration and Asylum Act 2002, we have no jurisdiction to interfere with the decision of the Adjudicator. On similar evidence, however, had it been appropriate for us to reconsider the position as at the date of this hearing, we would have reached the same conclusion.

20. This appeal is accordingly dismissed.

J BARNES
VICE PRESIDENT