LSH
Heard at: Field House
On 23 September 2004

SM (credibility issues-absence of appellant) Iraq [2004] UKIAT 00279

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

05 October 2004

Before :

Mr G Warr (Vice President)
Mr M L James
Mr A Smith

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the appellant: Mr D Uljarevic, Lawson Adefope, Solicitors
For the respondent: Mr D Saville, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Iraq, appeals the determination of an Adjudicator, (Professor J Ritson), who dismissed his appeal against the decision of the Secretary of State to refuse his application for asylum. He entered the United Kingdom on 22 February 2002 and applied for asylum on that day. The date of the Secretary of State's decision refusing the application is 28 July 2003.

2. The Adjudicator determined the appellant's appeal in his absence. The appellant was represented by Counsel. The Adjudicator was satisfied that the appellant had been notified

of the hearing by his solicitors and by the Appellate Authority. The Adjudicator heard submissions from the appellant's representative. He was told that the appellant claimed to have a fear of return to Iraq as a former member of the Ba'ath Party. The Adjudicator's conclusions are expressed as follows:

"4. The evidence of the appellant is that when at secondary school he was forced to join the Ba'ath Party. After graduating from University he started a teaching career in a secondary school and was approached by members of the Ba'ath Party to promote their ideology. On 12 November 2002 he claims to have been arrested at his school by the security forces and advised to change his ethnicity from Kurdish at Arabic. Pursuant to this arrest he was detained for 80 days, claims to have been beaten, held in solitary confinement, interrogated and threatened. He was then he alleges offered a conditional release on a promise that he would spy for the Ba'ath Party in Northern Iraq. He was expected to report back to the Ba'ath Party two days after his release to receive further instructions on the basis of his past involvement with the Ba'ath Party, his arrest and detention, the appellant claims that he fears a return to Iraq in that he may be the victim of revenge killings.

5. In terms of the credibility of the appellant, I note from the decision in **Coskuner (16769)** that the failure of an appellant to give evidence, although neutral as to credibility, where no evidence is given is no need for an Adjudicator to make credibility findings. It is simply open to me to conclude as I do in this instance that the appellant has not discharged the burden of proof upon him. Although I do not make any credibility findings as such, I do find the appellant's evidence to be implausible that he would after a period of 80 days of detention and questioning interrogation, and of having been subjected to ill-treatment, that he would be released by the security forces and told to report back two days later to receive further instructions when those instructions could more effectively have been given to him during detention.

6. Before arriving at my decision I reminded myself that the burden of proof in terms of both the asylum and human rights claims within this appeal is upon the appellant. The standard of proof required of him in terms of the asylum claim is that as laid down in the decisions of **Sivakumaran [1988] Imm AR 147** and **Kaja [1995] Imm AR 1** in which it was held that an appellant must demonstrate that there was a reasonable chance or a serious possibility, that if returned to his country of origin he would be a victim of

persecution for one of the reasons listed in Article 1(a) of the 1951 United Nations Convention relating to the Status of Refugees as amended by the 1967 New York Protocol. An appellant must demonstrate both a subjective and an objective fear. With regard to the human rights claim, I note from the decisions in **Kacaj [2002] Imm AR 213** and **Dhima [2002] EWHC 80** but it must be shown there are substantial grounds for believing that an appellant would face a real risk of having any of the human rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms violated by a return to the national country. Notwithstanding my conclusions above that the appellant has failed to discharge the burden of proof upon him, I have considered whether his return to Iraq would place the United Kingdom in breach of its obligations under either the Geneva or European Conventions on the basis of him being a former member of the Ba'ath Party. In this context I have considered the Country Information and Policy Unit Iraq Bulletins 3, 3A and 7. I note from Bulletin 7 that in Section 6.1 only those former Ba'athists who were known to have abused their position were being targeted for reprisals. There is no evidence before me to indicate that the appellant involved in any such activities and therefore I do not consider on the basis of the information contained in the Iraq Bulletins, to which I have referred, that the appellant has a well-founded fear of return to Iraq simply on the basis of his being forced to join the Ba'ath Party and his activities on its behalf.

7. In the circumstances and for the reasons I have given, I do not consider that the appellant has established to the lower standard of proof required of him that he is entitled to the international protection he seeks by virtue of either the asylum or human rights claims within this appeal which I accordingly consider should be dismissed on both counts".

3. In the grounds of appeal it was argued that the Adjudicator had failed to take into account the objective material. He had limited himself to the Country Information Bulletin rather than the Amnesty International reports. There was no distinction, it was said, between former Ba'athists who were known to have abused their provision and those who did not abuse their power.

4. The Tribunal, in granting permission, did not grant leave on this point however. The Tribunal granted leave on the point that it was arguable that the Adjudicator had erred in failing to make credibility findings. That point raised an arguable point

of law which merited further consideration, in the Vice President's view.

5. Mr Saville lodged before us the case of **Coskuner (16769)** notified on 23 July 1998. He submitted that the Tribunal indicated in that decision that the Adjudicator's approach was perfectly proper. The Adjudicator had also indicated that aspects of the appellant's account were implausible.

6. We noticed that the appellant was present in the hearing room. We also noted that a large bundle of material had been submitted to the Tribunal which did not seek to explain the appellant's absence before the Adjudicator. It was noted that in the reply to the directions from which had been submitted prior to the Adjudicator hearing on 22 September 2003 the appellant's address had been given as Flat A, 140 Gregory Boulevard. It was to that address that the notice of the proceedings had been sent. Subsequent to the hearing the appellant notified a change of address to a different flat in Gregory Boulevard. That notice was submitted on 30 December 2003. The Adjudicator heard the appeal on 29 October 2003. It was promulgated on 25 November 2003. There was no evidence that the appellant had communicated his change of address to anyone prior to December 2003. The appellant could not remember when he had moved. In the premises Mr Saville submitted that notice of proceedings had been properly served.

7. We noted that there had been no complaint in the original grounds of appeal that there had been improper service of notice of proceedings and there had been no complaint about the appellant not having been available to give oral evidence before the Adjudicator. Permission had not been granted on this point, moreover, but on a different point. The only point before us was the question mark over the Adjudicator's approach to the credibility assessment.

8. Mr Saville submitted that on the issue before us the Tribunal had indicated what the approach of an Adjudicator should be in the case that he had cited. The Adjudicator's approach had been perfectly proper. He had moreover gone on to find the appellant's account implausible. The appellant would not in any event be at risk as a low level Ba'ath Party member.

9. The appellant's representatives submitted that the appellant would be at risk and the Adjudicator had misdirected himself on the background material.

10. It is quite clear to us that the only issue before us is the question of the Adjudicator's approach to credibility issues. The Vice President who granted permission considered that it was questionable that the Adjudicator should not make a

credibility assessment despite the absence of the appellant. We note the approach of the Tribunal of **Coskuner**. It appears to us largely a matter of semantics. Where credibility is in issue as it was in the case – see the Secretary of State's refusal letter – an Adjudicator will normally look to an appellant to assist him in disposing of credibility concerns. The unexplained absence of an appellant from a hearing may lead the Adjudicator to the conclusion that the points raised by the Secretary of State have gone unrebutted. The Adjudicator may reach the conclusion on all the material that the appellant is not to be believed. It is perhaps splitting hairs to say whether this is an adverse credibility assessment or not. As the Tribunal put it in **Coskuner**:

"We entirely endorse the view that merely not giving evidence cannot, of itself, be a factor tending to show the person is not to be believed. It is also, however, and equally clearly, not a factor tending to show that the person is to be believed. If doubts have been raised about the credibility or plausibility of certain evidence, and the facts related by that evidence are not supported by other evidence, the position may be that the fact finder remains in doubt. The consequence of a fact finders doubt is or may be that the burden of proof is not discharged and so the party who has the burden of proof loses his case."

11. The Tribunal went on to observe that the fact finder did not in such circumstances strictly need to reach any view on credibility at all. But "tactically, the position may be that if the appellant does not answer questions or meet points made against him, the Adjudicator may not be prepared to accept the evidence. Overall, the Adjudicator's task is to decide whether the appellant has made his case."

12. In this case the Adjudicator correctly addressed himself on the burden and standard of proof. The Adjudicator was plainly not satisfied that the appellant had discharged that burden of proof. He plainly found the appellant's evidence to be implausible – see paragraph 5 of the determination. In the light of the guidance by the Tribunal in **Coskuner** he did not err in his approach. The Adjudicator had in mind the background material when he made his conclusions. Permission was not granted to argue any point based on this aspect. Permission was solely limited to the point on which we have ruled against the appellant. The Adjudicator's findings of fact were properly open to him given the appellant's unexplained absence from the hearing. His approach to credibility issues was not flawed.

13. Accordingly, for the reasons we have given, this appeal is dismissed.

G Warr
Vice President