IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: **9 & 10 October 2001**
Date Determination notified: **16/11/2001**

Before:

The President, The Hon. Mr Justice Collins
Mr. C. M. G. Ockelton
Mr. G. M. Warr

SECRETARY OF STATE FOR THE HOME DEPARTMENT APPELLANT
And
AZAD GARDI RESPONDENT

Mr. R. Husain For the Appellant
Mr. P. Deller For the Respondent

DETERMINATION AND REASONS

1. This appeal was listed together with 9 others all of which involve claims by ethnic Kurds who had come from the so-called Kurdish Autonomous Area (KAA) in North Iraq. In each case, (save one), the removal directions specified that removal would be to Iraq. In one case (CC/22240/2001) which involved a refusal of leave to enter, there was a proposed direction and no more detail was given. In the others, including this one, the removal directions stated:-

> "Directions have now been given for your removal from the United Kingdom by scheduled airliner to Iraq at a time and date to be notified."

At present, the only scheduled airline to Iraq must go to Baghdad. In any event, there is no means of getting any of those seeking asylum to the KAA by air except through Baghdad and no other feasible means of return to the KAA exists.

2. One case was disposed of on 9 October and need not concern us further. We have chosen this one to serve as a vehicle for our determination of the effect of the inability to return anyone to the KAA. That determination will decide what happens to the others and the reasons in those appeals can be stated very shortly. Indeed, in all but two there has been no determination of the substantive issues or there has been a finding that the account given was not to be believed and the appellant did not leave because of a fear of persecution. Nonetheless, the adjudicator allowed the asylum claim because of an inability to return except via Baghdad and the conclusion (which is not challenged) that there is a well-founded fear of persecution in parts of Iraq under Sadam Hussain's control. In two cases, the appeal was dismissed because the adjudicator in question did not regard the inability to return to establish that to remove in accordance with the directions would be a breach of the Convention because of an undertaking not to return via Baghdad or so long as it was possible to avoid doing so through an area where persecution would be suffered.

3. Most of these cases involve appeals by the Secretary of State. Those and the relevant representatives we should identify. They are:-

The present case:	Mr. R. Husain	(Gill & Co)
Mohammed Rashid RAMAZAN (HX/14037/2001)	Mr. R. Husain	
Adnan Ibrahim MOHAMMAD (HX/10878/2001)	Mr. R. Husain	
Hushmar Abdul Razaq ISMAIEL (HX/10852/2001)	Mr. N. Moloney	(IAS)
Aram Migid KRIM (HX/12014/2001)	Mr. N. Moloney	
Najat Rashed MAULUD (HX/10886/2001)	Mr. N. Moloney	
Behman Abdul MOHAMMED (HX/11698/2001)	Mr. N. Moloney	

There are two appeals against the Secretary of State. These are:-

Hussain KAKAKHAN (HX/12015/2001)	Mr. J. Fountain	(IAS)
Johar Rebas Adulah HAJI (CC/22240/2001)	Mr. L. Adio	(IAS)

In all the appeals, Mr. P. Deller, HOPO, represented the Secretary of State.

4. We have been much assisted by a skeleton argument submitted by Gill & Co. on behalf of their three clients. In addition, we heard oral argument over a period of one day (split over two half days). The points raised are not by any means easy and there has been a divergence of approach among adjudicators. A considerable number of cases have had to be adjourned pending this determination. We are also aware that a judicial review of the refusal of an asylum claim when there is no intention to return is due to be heard by the Court of Appeal sitting as a Divisional Court on 21 November in *Ex parte Hwez.* It is also being said in *Hwez* that all these cases should be adjourned in accordance with the approach of the Tribunal in *Number 19 v Secretary of State for the Home Department* (the 'flying Afghan' case). We considered whether we should await that decision, but have decided that we should not and that it would be of more assistance to the Court if we made our position clear. For obvious reasons, we have decided that this determination should be starred.

5. Mr. Gardi (whom we shall call the applicant) claims to have arrived in the United Kingdom in the back of a lorry on 8 August 2000. He spent some 15 days in Turkey en route from Iraq to the United Kingdom. His claim to asylum was based on detention and ill-treatment because of his membership of the PUK, one of the two main groups which now exercise power in different parts of the KAA. He was, he said, now at risk of persecution by the other main party, the KDP. At the hearing before the adjudicator (Mrs. M. Austin), the applicant's representative claimed that she had no jurisdiction to hear the appeal since there were no reasonable prospects of removal. He then and presumably in the alternative applied for an adjournment until the Secretary of State had found a way of returning to the KAA. These submissions were correctly rejected. There was then an application that there was no need to consider the merits of the claim since the KAA could not provide the protection required by the Convention and so the applicant must be found to be a refugee. That submission was also rejected and the adjudicator proceeded to consider the merits of the claim.

6. The adjudicator for good reason did not believe that the applicant had been persecuted or ill-treated as he had alleged. He did not leave the KAA because he feared persecution by anyone. Nonetheless, she allowed his asylum appeal because at present the only means of removal was via Baghdad and if he went there he ran a real risk of persecution for a convention reason. She records that the HOPO drew to her attention the undertaking not to return to a part of Iraq where persecution might occur, but decided that arrangements for a supervised return were not yet in place and so could not be taken into account.

7. In the refusal letter, the Secretary of State suggested that if there was a fear of persecution by the PUK or by the KDP, the individual could resettle in a part of the KAA controlled by the party which was not going to persecute him. Thus the possibility of internal flight is raised. On the facts as found by the adjudicator, that particular issue does not arise, but we should consider it in due course since it does arise in some cases involving Kurds from the KAA.

8. Most of these cases involve illegal entry and so the appeal is against removal directions under s.69(5) of the 1999 Act on the ground that 'removal in pursuance of the directions would be contrary to the Convention'. There will usually be an appeal under s.65 as well on the ground that in deciding to direct removal the Secretary of State acted in breach of the appellant's human rights. It will be exceedingly rare for the human rights appeal to avail the appellant if his asylum appeal is dismissed. Sometimes there is a refusal of leave to enter where the appellant has arrived openly and claimed asylum. The approach will be similar (provided that Iraq is specified as the removal destination) since the appeal under s.69(1) is on the ground that 'his removal in consequence of the refusal would be contrary to the Convention'. The existence of a removal destination would provide a contrast with the *No 19* case.

9. It is very difficult to understand why the Secretary of State chooses to decide to direct removal when he knows that it cannot be achieved. The scheme of the Act is not in our view consistent with the existence of a status appeal since all the subsections in s.69 (save for the incredibly badly drafted 69(3) of which we may have in due course to try to make sense) are based on removal and the tribunal has, in accordance with the decision of the Court of Appeal in *Ravichandran*, to consider whether there is a well-founded fear of persecution if removal takes place. We have in the *No 19* determination given our reasons for adopting this view and there is no need to repeat them. Since the situation may have changed when removal can be effected, there may have to be a further application and appeal. Adjudicators and the Tribunal are under enormous pressure because of the large numbers of cases now in the system. The tribunal is facing some 650 applications for leave to appeal each week and the numbers are likely if anything to increase. If a determination that an appeal should fail is not going to lead to removal because removal cannot be achieved, there is no good reason why the I.A.A. should be burdened with that case.

10. However, we cannot refuse to hear appeals simply because we believe it to be a waste of our time and resources to do so. If a removal direction is made, a right of appeal is triggered and the matter must be determined. As we said in *No 19*, that was a wholly exceptional case because there had been a positive decision not to return those on the plane to any destination. Here, there is a decision to return to Iraq, but it is accepted that that can as a matter of fact only be done if the means to do it are established. It seems that steps are being taken to try to establish such a means. Since there is a present intention to remove to a particular country as soon as it is practical to do so, the tribunal is able to and must consider whether a real risk of persecution or ill-treatment in breach of human rights has been established.

11. It is in our view important that the purpose behind the Convention should always be borne in mind. It is intended to provide surrogate protection for those who face persecution where they live in the country of their nationality. We must yet again remind ourselves of the relevant provisions of Article 1A(2). These are:-

> "For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country..."

As the House of Lords decided in *Adan v Secretary of State for the Home Department* [1998] 2 All E.R. 453, the language of the Article shows by the use of the present tense that there must be a current well-founded fear of persecution and an unwillingness owing to that fear or an inability to avail oneself of the protection of the country of one’s nationality. Thus the existence of a fear when the asylum seeker left his country will not suffice; that fear must persist and must continue to be well-founded. What if there was no fear on leaving and such fear did not lead to the leaving of the country of nationality? Usually that will mean that the individual in question is not outside his country owing to such fear. Thus he will not meet the test. This is, of course, subject to the possibility that he may be a refugee sur place if the situation in his country has changed (for example, a coup has taken place which means that he will run a real risk of persecution on return) or his circumstances have altered (for example, there has been publicity which exposes him to a real risk of persecution on return). Sometimes a person may establish that he is a refugee because the mere fact that he is returned as a failed asylum seeker lays him open to persecution.

12. It is submitted that the expression ‘the protection of the country’ in Article 1A(2) requires that the State or at least a body which can provide and protect the benefits set out in the Convention must be available. Reliance is placed on the views of Professor Hathaway who in a recent paper commissioned by the UNCHR for the 50th anniversary of the Convention said this (at p.46):-

> "The fundamental problem ... is that none of the proposed protectors - whether it is ethnic leaders in Liberia, clans in Somalia or

embryonic local authorities in portions of Northern Iraq - is positioned to deliver what Article 1A(2) of the Refugee Convention requires, namely the protection of a State accountable under international law. The protective obligations of the Convention and Articles 2 - 33 are specifically addressed to 'States'. The very structure of the Convention requires that protection will be provided not by some largely unaccountable entity with de facto control, but rather by a government capable of assuming and being held responsible under international law for its actions."

He expressed similar views in his book 'The Law of Refugee Status' at pages 124-125.

13. In the starred decision *Dyli v Secretary of State for the Home Department* (00/TH/02100) the Tribunal said this (Paragraph 13):-

"The Convention is designed for the benefit of persons who need the protection of the international community because they are at risk of persecution in their own countries. A person who, for whatever reason, has protection in his own country has no basis for fear of persecution, and there is no basis for imposing international duties of surrogate protection in respect of a person who has adequate protection in his own country. How it is achieved, whether directly by the authorities of the country or by others, is irrelevant. There can be no basis for allowing a person to require other countries to take him in as a refugee if he is not in fact at risk at home."

In *R v Special Adjudicator ex parte Vallaj* (21.12.2000) Dyson J upheld the result in *Dyli*, namely that the protection provided by UNMIR and KFOR was sufficient, but, it is said, did not expressly approve the passage cited. Neither did he disapprove it. However, he said at Paragraph 36:-

"... it is difficult to imagine circumstances in which the requisite degree of protection can be provided except by or on behalf of (a) the country of nationality or (b) a body (such as UNMIK) to which the duty of protection has been transferred both as a matter of fact and of international law ... it seems to me that the better analysis is that 'protection of that country' refers to the protection by the entity that is charged with the duty of protection, and that, on the true construction of Article 1A(2), a person may have a well-founded fear of persecution only if there has been a failure to protect by that entity or its agent."

This provides some, albeit limited, support for the view that is espoused by Professor Hathaway.

14. A person cannot be a refugee unless he is outside the country of his nationality (assuming that is, as in this case, the relevant part of Article 1A(2)) owing to a well-founded fear of persecution for a convention reason. If he has no such fear, he cannot qualify within Article 1A(2). Nor in our view should he since it is not necessary for him to be provided with surrogate protection. There are two elements to Article 1A(2). Both must be satisfied. We see no reason to write into the first element any requirement other than that he is outside the country of his nationality owing to a well-founded fear of being persecuted. If there is no persecution and if he left for other reasons, there is no reason why he should require protection from another State. An inability to obtain protection from the State rather than in any other way seems to us to be an irrelevant consideration.

15. We see no reason to depart from the approach in *Dyli*. If that be right, there is no reason to construe the phrase 'the protection of that country' in the narrow way suggested by Professor Hathaway and perhaps by Dyson, J, whose observations were obiter. It would be strange if a person who did not leave his native country because of any fear of persecution could not be returned simply because he was protected from persecution not by the State but by another agency. This would mean the mere act of leaving transferred him into a refugee. That in our view would be to extend the ambit of the Convention far beyond what was intended. In our view, the phrase 'the protection of that country' is descriptive of a factual situation and does not require that the protection is provided by the State or indeed by anyone in particular. If it exists, that suffices.

16. The next question is whether an inability to return except to a part of the country where a well-founded fear of persecution is established means that a person becomes a refugee. In *Dyli* at Paragraph 37 the tribunal, speaking of Kosovans, said this:-

> "It follows that a Kosovan who fails to establish a well-founded fear of persecution for a Convention reason in Kosovo, and who is to be returned to Kosovo, is not a refugee. If such a person is to be returned to another part of the Federal Republic of Yugoslavia, he is a refugee if and only if he cannot get to Kosovo without being at risk of persecution for a Convention reason on the way."

So here the analogy is if the only method of getting to the KAA is by way of Baghdad, an applicant will be a refugee. He clearly ought not to be returned to a real risk of persecution in the country of which he is a national and whether or not he is a refugee he would in the United Kingdom be protected by Article 3 of the European Convention on Human Rights. Article 33 of the Refugee Convention prohibits refoulement of refugees only. It seems to us that it does no real violence to the language of Article 1A(2) to construe it to prevent a refoulement in such circumstances since the lack of fear in the part of the country where the person was living is translated into a fear in the part to which he is to be returned and he can then be truly said to be outside the country of nationality and unwilling to avail himself of the protection of it because of such fear.

17. But he is only a refugee if he is to be returned to a part of the country where he fears persecution. If he is not to be so returned, he is not to be regarded as a refugee. It is said by the Secretary of State that there is a general undertaking not to return to Baghdad. This is based on a report approved by the then Minister, Barbara Roche, on 26 March 2001, which reads as follows:-

> "ENFORCED RETURNS TO NORTHERN IRAQ
>
> The government recognises that there may be certain people from northern Iraq who are in need of international protection under the

terms of the 1951 United Nations Convention relating to the Status of Refugees. However, there are also some asylum seekers from that region who, after careful consideration of their application, do not appear to meet the criteria set out in the Convention. The Office of the United Nations High Commissioner is on record as saying that it would not object to the return to northern Iraq of asylum seekers from that area who have been found through fair and objective procedures not to be in need of international protection.

To that end, the Government is in the process of exploring the options for returning Iraqi citizens of Kurdish origin to the northern part of Iraq, and these arrangements will be used to return such Iraqi nationals who do not qualify for leave to enter or remain in the United Kingdom. "

18. That hardly amounts to an undertaking that in every case a removal direction will not be put into effect until some means can be found to avoid Baghdad, particularly as the Secretary of State has chosen to refer to a scheduled flight. If a HOPO has attended the hearing before the adjudicator, an express undertaking is often given. Judging from Paragraph 4.4 of the adjudicator's determination in this case, the HOPO did not give such an explicit undertaking. We find it quite extraordinary that an explicit undertaking has still not been given and the directions for removal continue to refer to a scheduled flight. It is even more extraordinary that where a HOPO has not been provided the undertaking is not sent in writing. We strongly suggest that problems will be avoided if an explicit undertaking is given and the removal directions are changed so it is clear that return is being directed to the KAA part of Iraq. An adjudicator should accept any explicit undertaking given in an individual case.

19. On the facts of this case no question of internal flight arises. There is no fear of persecution in his home area. The conclusion in *Dyli* (see Paragraphs 34 and 35) that that means that questions pertinent to internal location, simply do not arise was upheld by the Court of Appeal in *Canaj* - see Paragraphs 30 and 31 in the judgment of Simon Brown L.J.

20. Sometimes it is said by the Secretary of State (as was done in this case) that there can be internal location within the KAA to avoid persecution in a particular part. In such cases, the ordinary considerations applicable to internal location will become material. None of these cases raises that particular issue on the facts found (or in some cases not found) by the various adjudicators. We see great difficulties in the way of the Secretary of State since not only can he not return to the KAA but there is no guarantee that, if he could, he would be able to return a particular individual to the correct part of the KAA. The absence of any proper State authority might raise issues of undue harshness. On the other hand given that the precise process of return is at present unknown, an Appellant (who has the burden of proof) would no doubt have difficulty in showing a risk of his being returned to a part of the KAA where he would be persecuted. It would be quite wrong to assume that the Secretary of State would return any individual to a place of persecution. However, particularly as the issue has not been fully argued before us, we do not think it is necessary or desirable to reach any concluded views in these cases, but it must not be assumed that we necessarily accept the approach set out in the so-called Michigan Guidelines.

21. We come back to the facts of this case. The adjudicator rejected the applicant's account. He has failed to established any real risk of persecution. He is therefore not a refugee. The adjudicator should have accepted the HOPO's assertion that the applicant would not be returned by way of Baghdad, as binding on the Secretary of State, particularly as it was consistent with the statement approved by the Minister to which the adjudicator referred. She was therefore wrong to regard the applicant as refugee and to allow the appeal. This appeal by the Secretary of State is accordingly allowed.

22. We summarise our conclusions thus;-

(1) An adjudicator should always consider the facts of a particular case. If the particular appellant does have a well-founded fear of persecution in some part of the KAA, he may be a refugee since he will probably be unable and certainly unwilling to seek protection from the government of Iraq. If his account is rejected, he is not likely to be a refugee.

(2)An adjudicator should never find that an appellant is a refugee or can claim the protection of the European Convention on Human Rights without considering the facts.

(3) Since it is by now apparent that an undertaking not to return to Baghdad is given, if the Secretary of State is unrepresented, the adjudicator should not assume that a return will be to a part of Iraq other than the KAA without giving the Secretary of State the opportunity of clarifying the position.

(4) If there is no well-founded fear of persecution in the appellant's home area, internal location does not arise.

Sir Andrew Collins
President