EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 66
XA36/17

Lady Clark of Calton

OPINION OF LADY CLARK OF CALTON

in the application

for

Leave to Appeal

Under section 13 of the Tribunals, Courts and Enforcement Act 2007

by

DYARI MOHAMMAD KHEDR (AP)

Applicant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Winter; Drummond Miller LLP
Respondent: Smith; Office of the Advocate General

8 November 2017

Summary

[1] Mr Khedr is a national of Iraq from the Kurdish area of Iraq ("the IKR"). He was refused asylum, humanitarian protection and human rights protection by the respondent. His appeal to the First-tier Tribunal was refused by a decision dated 16 November 2016. In

relation to the merits of the case, his account was considered to be "a fabrication". The First-tier Tribunal also considered the question of Mr Khedr's return to Iraq but did not consider that issue on the basis of preclearance and concluded in paragraph 25 that, "in terms of any journey from Baghdad to the IKR that would appear to be feasible ...". Mr Khedr appealed to the Upper Tribunal on a number of grounds. This included a challenge to the absence of any consideration of country guidance that any return directly to IKR would need to be precleared with the authorities in the IKR and to the approach of the First-tier Tribunal judge who considered a return via Baghdad.

[2] Before the Upper Tribunal the focus of the disputed issues moved to preclearance and the absence of any evidence that the Kurdish authorities had precleared Mr Khedr for entry to the IKR. According to paragraph 7 of the decision of the Upper Tribunal, the representative of the Secretary of State presented the case on the basis that in the findings:

> "... the appellant was returnable directly to the KRG, in keeping with country guidance ... It was accepted that the judge had not considered the feasibility of relocation in Baghdad, but that alternative did not arise".

Mr Khedr relied on the grounds which are set out at the beginning of the determination of the decision of the Upper Tribunal dated 16 February 2017. It was submitted on his behalf that the First-tier Tribunal judge had not taken account of the guidance in *AA (Article 15(c)) CG [*2015] UKUTR 544 (IAC) to the effect that any return directly to the IKR needs to be cleared with the authorities in the IKR; that additionally the First-tier Tribunal judge had not taken the guidance in *AA* into consideration because entry by Mr Khedr into the IKR would be contingent upon him having a CSID or another way to prove his identity in order to be "precleared". The appeal as presented, focused on the issue that there was no evidence that the Kurdish authorities had precleared Mr Khedr and that if not precleared, he would be left in limbo. It was submitted on behalf of Mr Khedr that the approach by the

respondent was in error and that preclearance needed to be established and that the onus was on the respondent to show how return was to be carried out.

[3] In considering these submissions the Upper Tribunal judge, under reference to *AA*, noted that he was not referred to any passage which suggested that the Secretary of State is required to produce individual preclearance at an appeal hearing, failing which an appellant is entitled to protection. He accepted the submissions on behalf of the respondent to the effect that:

> "Removal arrangements are generally made once a person is lawfully removable. It would be cumbersome and wasteful (and probably unlawful) to make them in advance. The Secretary of State is not usually required to prove the specific mode by which return is to be carried out in each case."

In conclusion, the Upper Tribunal judge concluded that he preferred the submissions on behalf of the respondent and could identify no error of law in the decision of the First-tier Tribunal. He considered that the First-tier Tribunal correctly applied country guidance and that the guidance was not subject to appeal on any material point.

[4] The appellant, having failed before the Upper Tribunal, sought leave to appeal to the Court of Session and advanced grounds substantially similar to the grounds advanced before this court. The Upper Tribunal in considering the application for permission to appeal to the Court of Session stated:

> "The SSHD is not arguably obliged to obtain clearance from an appellant's national authorities for his return, in advance of the decision of his appeal."

The application for leave to appeal to this court was accordingly refused.

Application to the Court of Session for Leave to Appeal

[5] There was no significant dispute between the parties about the test to be applied by this court under Rule of Court 41.57(2) in considering whether leave to appeal should be

granted. The only part of the rule relied on by Mr Khedr is sub-section 2(b) that "there is some other compelling reason for the court to hear the appeal". This rule is often referred to as the application of the second appeals test in the sense of the principles set out in *Eba* v *Advocate General* 2012 SC(UKSC) 1. Compelling in the context of this Rule of Court means legally compelling and extreme consequences for an individual are not enough unless in combination with a strongly arguable error of law in which the prospect of success must be very high (*Uphill* v *Brb (Residuary) Ltd* (2005) 1 WLR 2070 paragraphs 19 to 25.

[6] In relation to error of law, there were two main grounds advanced on behalf of Mr Khedr in the Grounds of Appeal. The first ground was an alleged error on behalf of the Upper Tribunal in paragraph 13 to the effect that the Upper Tribunal was wrong in law in its approach to preclearance. Secondly, that the Upper Tribunal erred in its approach in paragraphs 10 and 11 by misapplying the law. Counsel for Mr Khedr adopted his detailed written note of argument which he developed in oral submissions and focussed on the issue of preclearance. Counsel for the respondent submitted that the application was based on a fundamental misunderstanding of the difference between an immigration decision and removal directions. She submitted that the process of removal was not properly the subject of final consideration by the Upper Tribunal and relied on *EH* v *Secretary of State for the Home Department* (2006) Imm AR 19. In this case the Secretary of State had not yet committed to a particular method or route of return and the issue of return was therefore hypothetical. If there was direct preclearance and return to the Kurdish autonomous area (the KAA) the issues to be considered would be different from any return by Mr Khedr to that area via Baghdad. Counsel for the respondent accepted that at the stage of consideration of removal directions, the respondent required to undertake another assessment including ECHR considerations. I understood her to accept that neither the First-tier Tribunal nor the Upper

Tribunal had undertaken any final assessment about this and that the remedy of judicial review would be available to Mr Khedr in the event that any removal directions were alleged to be unlawful. This was not disputed by counsel for Mr Khedr but his submission was that all matters should be decided within the existing proceedings.

[7] I am grateful for the written and oral submissions of counsel for both parties which I have carefully considered. In my opinion, the subtleties of the submissions against a background of the different approaches by the First-tier Tribunal and the Upper Tribunal to the factual issues relating to preclearance make it very difficult for me to accept the submissions on behalf of Mr Khedr. Neither counsel were able to inform me what preclearance involved as a matter of fact. I am not persuaded that, in the context of this case, the Upper Tribunal has erred in law by failing to take account of *AA* or *AK* v *Secretary of State of the Home Department* (2007) Imm AR 81. I accept that in presenting the case to the Upper Tribunal, the representative of the respondent appeared to accept that the only return in prospect was a return of Mr Khedr directly in keeping with country guidance. Counsel for the respondent in oral submissions did not accept that this was a concession to the effect that a return to Baghdad is not an option open to the respondent considering return directions.

[8] Unless and until removal directions are made, I do not consider that any proper assessment can be made in the context of this case taking into account the way in which it has been dealt with to date. In my opinion, this application falls at the first hurdle because I am not satisfied that there are errors of law identified which are strongly arguable. I also have difficulty in accepting the submission on behalf of Mr Khedr that the decision has drastic consequences for the applicant. If and when removal directions are given, the

lawfulness of the directions can be assessed at that point when Mr Khedr continues to be in the UK.

[9] For the reasons given the application for leave to appeal to this court is refused.