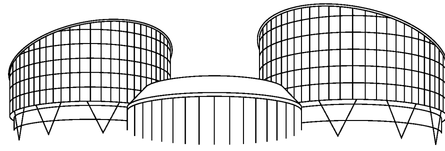

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF J.K. AND OTHERS v. SWEDEN

(Application no. 59166/12)

JUDGMENT

STRASBOURG

4 June 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of J.K. and Others v. Sweden,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 21 April 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 59166/12) against the Kingdom of Sweden lodged on 13 September 2012 with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Iraqi nationals. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Ms Canela Skyfacos, a lawyer practising in Limhamn. The Swedish Government ("the Government") were represented by their Agent, Mrs Gunilla Isaksson, of the Ministry for Foreign Affairs.

3. The applicants alleged that their deportation to Iraq would involve a violation of Article 3 of the Convention.

4. On 18 September 2012 the President of the then Third Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicants should not be deported to Iraq for the duration of the proceedings before the Court.

5. On the same sate the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, a married couple and their son, were born in 1964, 1965 and 2000, respectively. Their religious affiliation is unknown.

7. On 14 December 2010, the applicant husband applied for asylum and a residence permit in Sweden. On 11 July 2011, his application was dismissed since he was registered as having left the country.

8. On 25 August 2011, the applicant husband applied anew for asylum and a residence permit in Sweden, as did the other applicants on 19 September 2011.

9. Before the Migration Board (Migrationsverket), all the applicants were heard in an introductory interview on 26 September 2011. Subsequently, the adult applicants were heard anew during a longer interview, which took place on 11 October 2011 and lasted almost three and a half hours. The applicant son was interviewed briefly for a second time and the applicant husband was interviewed a third time. The applicants were assisted by appointed counsel.

10. The applicants maintained that upon return to Iraq they risked persecution by al-Qaeda and that the applicant husband appeared on their death list. The applicants had been brought up in Baghdad. Since the 1990s the applicant husband had run his own business exclusively with American clients and had had his office at the American base "Victoria Camp". Several of his employees had on occasion been warned not to cooperate with the Americans.

11. On 26 October 2004, the applicant husband had been the target of a murder attempt carried out by al-Qaeda. He had had to stay in hospital for three months. There, unknown men had asked for him, after which he was treated in three different hospitals.

12. In 2005, his brother had been kidnapped by al-Qaeda who had claimed that they would kill him due to the applicant's collaboration with the Americans. His brother had been released through bribes a few days later and had immediately fled from Iraq. The applicants had fled to Jordan and stayed there until December 2006, before returning to Iraq.

13. Soon thereafter, al-Qaeda members had placed a bomb next to their house. However, it had been detected by the applicant wife, and the Americans had arrested the perpetrator. During interrogations, the perpetrator had confessed that he had been paid by al-Qaeda to kill the applicant husband and had disclosed the names of 16 persons who had been designated to watch the applicants. Thereafter, the applicants had moved to Syria although the applicant husband had continued his business in Iraq. During this time, al-Qaeda had destroyed their home and their business stocks.

14. In January 2008, the applicants had returned to Baghdad. In October the same year, the applicant husband and his daughter had been shot at when driving. The daughter had been taken to a hospital where she had died. The applicant husband had then stopped working and the family had started to move around in Baghdad. The business stocks had been attacked four or five times by al-Qaeda members, who had threatened the guards. The applicant husband stated that he had not received any personal threats since 2008, as the family was moving around. The applicant son had spent most of his time indoors for fear of attacks and had only attended school for the final exams. They had never sought protection from the domestic authorities as they lack ability to protect the family and for fear of disclosing their address, knowing that al-Qaeda collaborated with the authorities. The applicant husband still had an open and infected wound on his stomach where he was shot in 2004. The applicant wife had cysts on her liver and in her uterus. They submitted several documents, including identity papers, a death certificate for the applicants' daughter and a medical certificate for the applicant husband's injury.

15. On 22 November 2011, the Migration Board rejected the application. It found that all of the applicants had proved their identity and that their asylum story was credible. However, the Board noted that the applicant husband had ended his collaboration with the Americans in 2008 and that, thereafter, he had stayed in Baghdad for two years without being victim of any attacks except for the ongoing threats against his work stocks. Moreover, the applicant couple had three daughters who still lived in Baghdad and who were not harassed. The Board acknowledged that the applicants had been the victims of severe violence and harassment but observed that they had not sought any protection from the domestic authorities in Baghdad. Although it was true that al-Qaeda had infiltrated the domestic authorities, this had to a great extent diminished. Therefore, the Board concluded that the applicants had not made probable that they would be unable to seek the domestic authorities' protection. Furthermore, the applicants' state of health was not poor enough to grant them asylum. Consequently, there were no grounds on which to grant the applicants asylum or residence permits in Sweden.

16. The applicants appealed to the Migration Court (*Migrationsdomstolen*) and maintained that the Iraqi authorities had been and would be unable to protect them. They had contacted the police following the fire at their home and business stock in 2006 and 2008 and the murder of their daughter in 2008, but thereafter they had not dared to contact the authorities due to the risk of disclosing their residence. Together with their written submissions, they enclosed a written translated testimony attestation allegedly from a neighbour in Baghdad, who stated that a masked terrorist group had come looking for the applicant husband on 10 September 2011 at 10 p.m. and that the neighbour had told them that the

applicants had moved to an unknown place. The neighbour also stated that, just after the incident, the applicant husband had called him and been told about the incident. The applicants also submitted a translated residence certificate/police report allegedly certifying that the applicants' house had been burned down by a terrorist group on 12 November 2011. Furthermore, the applicants submitted a recording of a public debate on TV concerning the corruption and infiltration of al-Qaeda members within the Iraqi administration. The applicants mentioned in that connection that the applicant husband had participated in the public debate, which was broadcast on the Alhurra Channel in Iraq on 12 February 2008, thus four years earlier. Finally, submitting various medical certificates, the applicants contended that the applicant husband's health had deteriorated and that he could not obtain adequate hospital care in Iraq. Before the Migration Court the Migration Board was heard. It stated, among other things, that the documents submitted concerning the alleged incidents on 10 September and 12 November 2011 were of a simple nature and low value as evidence.

17. On 23 April 2012, the Migration Court upheld the Migration Board's decision. The court stated that the criminal acts of al-Qaeda had been committed several years before and that the applicant husband no longer had any business with the Americans. In the event that a threat still remained against the applicants, the court found it probable that the Iraqi authorities had the will and the capacity to protect them. Finally, referring to the applicants' health, the court noted that these could not be seen as exceptionally distressing circumstances. In view of the above, there were no grounds on which to grant the applicants asylum or residence permits in Sweden.

18. The applicants appealed to the Migration Court of Appeal (Migrationsöverdomstolen). Their request for leave to appeal was refused on 9 August 2012.

19. On 29 August 2012 the applicants submitted an application to the Migration Board for a re-examination of their case. They maintained that the applicant husband was under threat from al-Qaeda because he had been politically active. They enclosed a video showing the applicant husband being interviewed in English, a video showing a demonstration, and a video showing a TV debate. The applicants' request was refused on 26 September 2012. The applicants did not appeal against the decision to the Migration Court.

II. RELEVANT DOMESTIC LAW

20. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the Aliens Act (*Utlänningslagen*, 2005:716).

21. An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (Chapter 5, section 1, of the Act). The term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Chapter 4, section 1). This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, inter alia, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

22. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (synnerligen ömmande omständigheter) to allow him or her to remain in Sweden (Chapter 5, section 6). Special consideration should be given, inter alia, to the alien's health. According to the preparatory works (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

23. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

24. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has acquired legal force. This is the case where new circumstances have emerged which indicate that there are reasonable grounds for believing, inter alia, that an enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment or there are medical or other special reasons why the order should not be enforced (Chapter 12, section 18). If a residence permit cannot be granted under these criteria, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall be carried out where it may be assumed, on the

basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and these circumstances could not have been raised previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Board shall decide not to grant a re-examination (Chapter 12, section 19).

25. Matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal.

26. A deportation or expulsion order may – save for a few exceptions of no relevance to the present case – be enforced only when it has acquired legal force. Thus, appeals to the courts against the Migration Board's decision in ordinary proceedings determining the right to asylum and a residence permit have an automatic suspensive effect. If the alien, subsequent to the ordinary proceedings having acquired legal force, lodges a petition under Chapter 12, sections 18 or 19, it is up to the Board to decide whether to suspend the enforcement (inhibition) on the basis of the new circumstances presented. Accordingly, such a petition has no automatic suspensive effect, nor does an appeal to the courts against the Board's decision taken under section 19 (no appeal lies against a decision pursuant to section 18).

III. RELEVANT INFORMATION ABOUT IRAQ

27. Extensive information about the general human rights situation in Iraq and the possibility of internal relocation to the Kurdistan Region can be found in, inter alia, M.Y.H. and Others v. Sweden, no. 50859/10, §§ 20-36, 27 June 2013 and A. A. M. v. Sweden, no. 68519/10, §§ 29-39, 3 April 2014.

The information set out below concerns events and developments occurring after the delivery of the latter judgment on 3 April 2014.

28. Following clashes, which began in December 2013, in mid-June 2014 the Islamic State of Iraq and the Levant (ISIS) and aligned forces began a major offensive in northern Iraq against the Iraqi Government during which they captured Samarra, Mosul and Tikrit.

29. A briefing by Amnesty International on 14 July 2014, "Civilians in the line of fire" set out:

> "The takeover in early June by the Islamic State in Iraq and al-Sham (ISIS) of Mosul, Iraq's second largest city, and other towns and villages in north-western Iraq has resulted in a dramatic resurgence of sectarian tensions and the massive displacement of communities fearing sectarian attacks and reprisals. Virtually the entire non-Sunni population of Mosul, Tal 'Afar and surrounding areas which have

come under ISIS control has fled following killings, abductions, threats and attacks against their properties and places of worship.

It is difficult to establish the true scale of the killings and abductions that ISIS has committed. Amnesty International has gathered evidence about scores of cases. To date, ISIS does not appear to have engaged in mass targeting of civilians, but its choice of targets – Shi'a Muslims and Shi'a shrines – has caused fear and panic among the Shi'a community, who make up the majority of Iraq's population but are a minority in the region. The result has been a mass exodus of Shi'a Muslims as well as members of other minorities, such as Christians and Yezidis. Sunni Muslims believed to be opposed to ISIS, members of the security forces, civil servants, and those who previously worked with US forces have similarly fled – some after they and their relatives were targeted by ISIS.

ISIS has called on former members of the security forces and others whom they consider were involved in government repression to "repent", and has promised not to harm those who do. The process involves a public declaration of repentance (towba), which in effect also entails a pledge of allegiance and obedience to ISIS, in mosques specially designated for the purpose. Many of those who have remained in ISIS-controlled areas are taking up the invitation and publicly repenting. The practice, however, is not without risks, as it allows ISIS to collect names, addresses, ID numbers and other identification details of thousands of men, who it could decide to target later.

Meanwhile, Amnesty International has gathered evidence pointing to a pattern of extrajudicial executions of detainees by Iraqi government forces and Shi'a militias in the cities of Tal 'Afar, Mosul and Ba'quba. Air strikes launched by Iraqi government forces against ISIS-controlled areas have also killed and injured dozens of civilians, some in indiscriminate attacks.

This briefing is based on a two-week investigation in northern Iraq, during which Amnesty International visited the cities of Mosul, Kirkuk, Dohuk and Erbil and surrounding towns and villages in these areas, and the camps for displaced people in al-Khazer/Kalak and Garmawa; and met with survivors and relatives of victims of attacks perpetrated by ISIS and by government forces and allied militias, civilians displaced by the conflict, members and representatives of minorities, religious figures, local civil society organizations, international organizations assisting the displaced, and Peshmerga military commanders. All the interviews mentioned in the document were carried out during this visit.

...

Amnesty International's assessment is that all parties to the conflict have committed violations of international humanitarian law, including war crimes, and gross abuses of human rights. What is more, their attacks are causing massive displacement of civilians.

Where armed actors operate in populated residential areas, the warring parties must take all feasible precautions to minimize harm to civilians. They must take precautions to protect civilians and civilian objects under their control against the effects of attacks by the adversary, including by avoiding – to the maximum extent feasible – locating military objectives within or near densely populated areas. International humanitarian law also expressly prohibits tactics such as using "human shields" to prevent attacks on military targets. However, failure by one side to separate its fighters from civilians and civilian objects does not relieve its opponent of its obligation under international humanitarian law to direct attacks only at

combatants and military objectives and to take all necessary precautions in attacks to spare civilians and civilian objects. International humanitarian law prohibits intentional attacks directed against civilians not taking part in hostilities, indiscriminate attacks (which do not distinguish between civilian and military targets), and disproportionate attacks (which may be expected to cause incidental harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated). Such attacks constitute war crimes. These rules apply equally to all parties to armed conflicts at all times without exception.

The conflict in northern Iraq has displaced hundreds of thousands of civilians, who have fled to neighbouring Kurdish areas administered by the KRG. Most are living in dire conditions, some in camps for internally displaced people (IDPs) and others sheltering in schools, mosques, churches and with host communities. At first civilians who fled after ISIS captured large areas of north-western Iraq were being allowed to enter the Kurdistan Region of Iraq (KRI), but in recent weeks access for non-Kurdish Iraqis has been severely restricted by the KRG. Some of those who fled are seeking refuge in the KRI while others, mostly Shi'a Turkmen and Shabak, want to travel southwards to the capital and beyond where the majority of the population is Shi'a and where they feel they would be safer.

While the Iraqi central government remains beset by political and sectarian divisions, and the KRG appears increasingly focused on annexing more territory to the areas it controls, Iraqi civilians caught up in the conflict are finding it increasingly difficult to find protection and assistance.

Amnesty International calls on all parties to the conflict to put an immediate end to the killing of captives and the abduction of civilians; to treat detainees humanely at all times; to refrain from carrying out indiscriminate attacks, including the use of artillery shelling and unguided aerial bombardments in areas with large concentrations of civilians. It also reiterates its call on the KRG to allow civilians who are fleeing the fighting – whatever their religion or ethnicity – to seek refuge in and safe passage through KRG-controlled areas."

30. The UNHCR position on returns to Iraq of October 2014 stated, among other things:

"Introduction

1. Since the publication of UNHCR's 2012 Iraq Eligibility Guidelines and the 2012 Aide Mémoire relating to Palestinian refugees in Iraq, Iraq has experienced a new surge in violence between Iraqi security forces (ISF) and Kurdish forces (Peshmerga) on the one hand and the group "Islamic State of Iraq and Al-Sham" (hereafter ISIS), which operates both in Iraq and Syria, and affiliated armed groups on the other hand. Civilians are killed and wounded every day as a result of this surge of violence, including suicide attacks and car bombs, shelling, airstrikes, and executions. As a result of advances by ISIS, the Government of Iraq is reported to have lost full or partial control over considerable parts of the country's territory, particularly in Al-Anbar, Ninewa, Salah Al-Din, Kirkuk and Diyala governorates. Although the ISF and Kurdish forces, supported by US airstrikes, have recently regained control over some localities, mostly along the internal boundaries with the Kurdistan Region, overall frontlines remain fluid. The conflict, which re-escalated in Al-Anbar governorate in January 2014 and since then spread to other governorates, has been labelled as a non international armed conflict. Casualties so far in 2014 represent the highest total since the height of sectarian conflict in 2006-2007.

...

UNHCR Position on Returns

27. As the situation in Iraq remains highly fluid and volatile, and since all parts of the country are reported to have been affected, directly or indirectly, by the ongoing crisis, UNHCR urges States not to forcibly return persons originating from Iraq until tangible improvements in the security and human rights situation have occurred. In the current circumstances, many persons fleeing Iraq are likely to meet the 1951 Convention criteria for refugee status. When, in the context of the adjudication of an individual case of a person originating from Iraq, 1951 Convention criteria are found not to apply, broader refugee criteria as contained in relevant regional instruments or complementary forms of protection are likely to apply. In the current circumstances, with massive new internal displacement coupled with a large-scale humanitarian crisis, mounting sectarian tensions and reported access restrictions, particularly into the Kurdistan Region of Iraq, UNHCR does in principle not consider it appropriate for States to deny persons from Iraq international protection on the basis of the applicability of an internal flight or relocation alternative. Depending on the profile of the individual case, exclusion considerations may need to be examined."

31. The United Kingdom Home Office, Country information and Guidance, Iraq: internal relocation (and technical obstacles) of 24 December 2014, set out the following under the heading "Policy Summary":

"Return arrangements from the UK

1.4.1 Current return arrangements from the UK to Iraq, either via Erbil or Baghdad, do not breach Article 3 of the ECHR.

Obtaining civil documentation in a new place of residence

1.4.2 The Civil Status ID Card and the Nationality Certificate are two of the most important forms of civil documentation, because they directly or indirectly provide access to a range of economic and social rights.

1.4.3 A person returned to Iraq who was unable to replace their Civil Status ID Card or Nationality Certificate would likely face significant difficulties in accessing services and a livelihood and would face destitution which is likely to reach the Article 3 threshold.

1.4.4 However, persons from non-contested areas of Iraq who are returned either to Erbil or Baghdad would in general be able to reacquire their Civil Status ID Card, Nationality Certificate and other civil documentation by either returning to their place of origin or by approaching relevant government and non-government agencies found across the non-contested areas.

1.4.5 Persons from contested areas of Iraq who are returned to Baghdad would in general be able to reacquire their Civil Status ID Card, Nationality Certificate and other civil documentation by approaching relevant agencies found in Baghdad and Najaf.

1.4.6 Persons in the UK seeking to reacquire their Civil Status ID Card and Nationality Certificate would be able to approach the Iraqi embassy in London for assistance, providing they can first prove their identity. This would generally be possible for persons compulsorily returned to Baghdad, as they would be in possession of a valid or expired passport of Laissez Passer document.

1.4.7 For those unable to prove their identity to the Iraqi embassy, the individual may be able to reacquire documents via a proxy in Iraq, e.g. from a relative or lawyer with a power of attorney.

Relocation to the Kurdistan Region of Iraq (KRI)

1.4.8 Persons originating from KRI will in general be able to relocate to another area of the KRI.

1.4.9 Persons of Kurdish ethnicity who originate from outside of KRI and who are returned to Baghdad will in general be able to relocate to KRI providing they first regularise their documentation in Baghdad (or elsewhere).

1.4.10 For non-Kurdish persons with established family or other links to KRI (e.g. tribal or previous employment), internal relocation will usually be a reasonable alternative.

1.4.11 If a person is of Arab or Turkmen ethnic origin, internal relocation to KRI will be difficult. Internal relocation to Baghdad or the south is more likely to be reasonable. If this is not reasonable due to the particular circumstances of the case, a grant of protection may be appropriate.

Relocation to Baghdad and the south

1.4.12 In general Arab Sunnis; Kurds and Shias will be able to relocate to Baghdad, where it is noted there is a sizable Arab Sunni IDP population.

1.4.13 Shia Muslims seeking to internally relocate will in general be able to relocate to southern governorates. Sunni Muslims may be able to relocate to the south.

1.4.14 In general currently there are no insurmountable barriers preventing Iraqi nationals from relocating to Baghdad or the governorates in the south, although all cases need to be decided on their individual facts.”

32. Human Rights Watch, World Report 2015, Iraq, of 29 January 2015, set out, *inter alia*:

“Abuses by Security Forces and Government-Backed Militias

In March, former Prime Minister al-Maliki told senior security advisers that he would form a new security force consisting of three militias: Asa’ib, Kita’ib Hezbollah, and the Badr Brigades. These militias kidnapped and murdered Sunni civilians throughout Baghdad, Diyala, and Hilla provinces, at a time when the armed conflict between government forces and Sunni insurgents was intensifying.

According to witnesses and medical and government sources, pro-government militias were responsible for the killing of 61 Sunni men between June 1 and July 9, 2014, and the killing of at least 48 Sunni men in March and April in villages and towns in an area known as the "Baghdad Belt." Dozens of residents of five towns in the Baghdad Belt said that security forces, alongside government-backed militias, attacked their towns, kidnapping and killing residents and setting fire to their homes, livestock, and crops.

A survivor of an attack on a Sunni mosque in eastern Diyala province in August said that members of Asa’ib Ahl al-Haqq entered the mosque during the Friday prayer, shot and killed the imam, and then opened fire on the other men in the mosque, killing at least 70 people. Three other Diyala residents reported that Asa’ib Ahl al-Haqq had kidnapped and killed their relatives.

Iraqi security forces and militias affiliated with the government were responsible for the unlawful execution of at least 255 prisoners in six Iraqi cities and towns in June. The vast majority of security forces and militias are Shia, while the murdered prisoners were Sunni. At least eight of those killed were boys under age 18.”

33. The German Federal Office for Migration and Asylum, Information Centre Asylum and Migration: Briefing Notes (9 February 2015), stated for example:

> Iraq ...
>
> Security situation
>
> Daily reports of armed clashes and suicide bombings continue unabated. A suicide attack carried out in Baghdad on 9 February 2015 killed at least 12 people. More than 40 people were wounded. The attack was carried out in the Kadhimiya district which has a large Shia population. So far, no one has claimed responsibility for the attack. On 7 February 2015, more than 30 persons were killed and more than 70 were wounded in suicide bombings in Baghdad. The majority of casualties were reportedly Shia Muslims and security officers.
>
> The night-time curfew was lifted in Baghdad on 7 February 2015.
>
> The Islamic State (IS) is said to have killed 48 people on its territory in Iraq since the beginning of the year, the vast majority in the city of Mosul (Ninive province) and in the suburbs surrounding Mosul.
>
> ...”

34. On 9 March 2015, Iraqi News (IraqiNews.com) reported that the US Chief of Staff Martin Dempsey in a joint press conference with Iraqi Minister of Defense, Khalid al-Ubaidi, had said that: “Protecting Baghdad and al-Mosul Dam as well as Haditha district are among the top priorities of the International Coalition.”

THE LAW

I. THE ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicants complained that their return to Iraq would involve a violation of Article 3 of the Convention. This provision reads as follows:

> “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

36. The Government contested that argument.

A. Admissibility

37. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

(a) The applicants

38. The applicants essentially submitted the same claims and relied on the same circumstances as those presented before the Swedish authorities. They emphasized that al-Qaeda had been looking for the applicant husband not only in the period between 2004 and 2008 but also on 10 September 2011 at their house in Baghdad. Moreover, on 12 November 2011 their house had been burned down by terrorists.

39. In their observations of 9 January 2013, referring to the recording of a televised public debate submitted to the domestic authorities and the Court, in which the applicant husband allegedly participated in February 2010, the applicants added that the applicant husband now also risks being persecuted by the Iraqi authorities because he publicly criticised the Iraqi Government during the said debate, or at best the authorities will be unwilling to protect him.

40. The applicants contested the country information taken into account by the Swedish authorities during the domestic proceedings and by the Government in their observations to the Court. In the applicants' view the Government was wrong when assuming that Iraq was becoming safer compared to 2011, on the contrary, there had been an increase in attacks.

41. Finally, the applicants contended that there was no suitable internal flight alternative for them. They do not speak Kurdish, they have no family or social network in the north of Iraq and they would not have the means to support themselves.

(b) The Government

42. The Government, while not wishing to underestimate the concerns that could legitimately be expressed about the current human rights situation in Iraq, maintained that this did not in itself suffice to establish that the forced removal of the applicants to that country, including Baghdad, would breach Article 3 of the Convention.

43. As to the present case, the Government first asserted that the Migration Board and the courts had made thorough assessments. In the proceedings, the applicants had been given many opportunities to present their case. The Migration Board had conducted several interviews with the applicants with the assistance of their legal counsel. They had been invited to submit written observations on the interviews. Moreover, having regard to the expertise held by the migration bodies, the Government maintained that significant weight should be given to their findings.

44. In regard to the applicants' personal risks, the Government accepted that the applicant husband had cooperated with Americans and that, as a

result thereof, the applicants were subjected to serious threats and violence by al-Qaeda during the years from 2004 to 2008. However, since the applicant husband stopped working with American companies in 2008 and the applicant family stayed in Baghdad until December 2010 and September 2011, respectively, without being subjected to further direct threats, the Government considered it unlikely that the threats against the applicants were still so present and concrete as to conclude that their removal to Iraq would entail a breach of Article 3 of the Convention.

45. In respect of the allegation that al-Qaeda had still been looking for the applicant husband on 10 September 2011 at their house in Baghdad, the Government pointed out that the applicant husband had not said anything about this threat in his interviews with the Migration Board, which took place a few weeks after the alleged threat, namely on 26 September and 11 October 2011; on the contrary he confirmed that he had not received any personal threats since 2008.

46. Likewise, as to the alleged burning down of the applicants' house by a terrorist group on 12 November 2011, the Government noted that the document submitted in support thereof had also been of a simple nature and was found of low value as evidence by the Migration Board.

47. The Government did not question that the applicant husband had participated in a debate broadcast on the Alburra channel on 12 February 2008. However, they noted that it was only in his written submission to the Migration Court on 1 February 2012 that he mentioned his participation in this debate at all. In his appeal to the Migration Court of Appeal and in his request to the Migration Board for a re-examination, he changed his statement, claiming that the debate had taken place in February 2010. The Government drew attention to the fact that when opening the DVD on a computer, it can be seen that the file was last amended on 4 March 2008. Against this background, the Government held that there were reasons to question the applicants' credibility on this point. Moreover, it was only in their observations of 13 January 2013 to the Court that the applicants submitted that the applicant husband now also risks being persecuted by the Iraqi authorities because he publicly criticised the Iraqi Government during the debate. The Swedish authorities were never presented with this claim and, in any event, the applicants have failed to submit any documents or evidence in support of their allegation that the Iraqi authorities are looking for the applicant husband or that any judicial proceedings have been initiated against him for criticising the Iraqi Government.

48. Finally, should the Court find that the applicants were at risk in Baghdad from al-Qaeda, the Government asserted that there was an internal flight alternative in that the applicants would be able to relocate to the Kurdistan Region. Such relocation did not require a reference person and internally displaced persons in the Kurdistan Region had the same rights as

other residents, including access to health care, education and the labour market.

2. *The Court's assessment*

(a) General principles

49. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67; *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42; and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008-...).

50. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires the Court to assess the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

51. The assessment of the existence of a real risk must necessarily be a rigorous one (*Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. In this respect, the Court

acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

52. In cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations (*NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

(b) The general situation in Iraq

53. The Court notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (*H.L.R. v. France*, cited above, § 41). However, the Court has never ruled out the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (NA. v. the United Kingdom, cited above, § 115).

54. Over the last five years, in numerous cases concerning deportation to Iraq, the Court has concluded that the general situation in Iraq was not so serious as to cause, by itself, a violation of Article 3 of the Convention in the event of a person's return to that country (see, among many others, *F.H. v. Sweden*, no. 32621/06, § 93, 20 January 2009; *M.Y.H. and Others v. Sweden*, no. 50859/10, § 57, 27 June 2013 and *A. A. M. v. Sweden*, no. 68519/10, § 63, 3 April 2014).

55. The Court notes that the situation has significantly worsened since June 2014 when ISIS and aligned forces began a major offensive in northern Iraq against the Iraqi Government during which Samarra, Mosul and Tikrit were captured (see paragraphs 28-30 above). It also notes the UNHCR position on returns to Iraq of October 2014 that UNHCR urges States not to forcibly return persons originating from Iraq until tangible improvements in

the security and human rights situation have occurred (see paragraph 31 above). Nevertheless, so far there are no international reports on Iraq which could lead the Court to conclude that the general situation in Iraq is now so serious as to cause, by itself, a violation of Article 3 of the Convention in the event of a person's return to that country (see paragraphs 31 to 34).

56. Moreover, the applicants are not claiming that the general circumstances pertaining in Iraq would on their own preclude their return to Iraq. Instead, they assert that the general situation together with the threats received from al-Qaeda in Iraq would put them at real risk of being subjected to treatment prohibited by Article 3.

(c) The particular circumstances of the applicants

57. The Court first notes that the applicant wife and son were heard twice by the Migration Board and that the applicant husband was heard three times. Their claims were carefully examined by both the Board and the Migration Court which delivered decisions containing reasons for their conclusions. Both instances acknowledged that the applicant husband had cooperated with Americans and that, as a result thereof, the applicants were subjected to serious threats and violence by al-Qaeda during the years 2004 to 2008. However, since the applicant husband stopped working with American companies in 2008 they considered it unlikely that any possible threats against the applicants were still so present and concrete as to justify the granting of asylum.

58. Before the Migration Board, the applicant husband confirmed that he had not received any personal threats from al-Qaeda since 2008. However, having been refused asylum by the Migration Board on 22 November 2011, the applicants changed their explanations and stated that al-Qaeda had come looking for the applicant husband also on 10 September 2011 at their house in Baghdad and burned down their house on 12 November 2011. The Court notes that in its submissions to the Migration Court, the Migration Board did not find the applicants and the documents submitted on these points credible. The Court finds it noteworthy that the applicant husband did not mention the first incident before the Migration Board despite being interviewed before that instance three times. Moreover, it observes that the documents, which have also been submitted to the Court, namely a translated witness statement by a neighbour and a translated residence certificate/police report allegedly certifying that al-Qaeda searched for the applicant husband also on 10 September 2011 and that they burned down the applicants' house on 12 November 2011, are of a very simple nature, which could cast doubts on their authenticity. Accordingly, it finds no reason to disagree with the Migration Board that the applicants have not substantiated their allegation that they were threatened and persecuted by al-Qaeda after 2008.

59. Likewise, there are credibility issues as to the applicants' allegation that the applicant husband participated in a televised public debate in February 2010 in which he criticized the Iraqi Government, and that therefore he is now also at risk from the Iraqi authorities. The Court notes that the applicants did not mention the recording at all before the Migration Board, despite being interviewed several times. The applicant husband submitted the recording for the first time with his written submission to the Migration Court on 1 February 2012. However, he just mentioned that the recording was from 12 February 2008. He did not in any concrete way rely on the recording in support of the family's claim for asylum. It was only in his appeal to the Migration Court of Appeal and his request to the Migration Board for a re-examination that he changed his explanation and stated that the debate had taken place in February 2010, and it was only in his observations of 13 January 2013 to the Court that he submitted that, due to the debate, he now also risks being persecuted by the Iraqi authorities. In so far as this issue has been presented before the Swedish authorities, the latter were not convinced that the recording was from February 2010 or that the applicants would be unable to obtain protection from the Iraqi authorities because the applicant husband publicly criticised them during the debate. In addition, before the Court the Government have pointed out that when opening the DVD on a computer, it can be seen that the file was last amended on 4 March 2008. The DVD has been submitted to the Court as well, and in so far as the applicants have exhausted domestic remedies as to this submission, the Court cannot but agree with the Swedish authorities, that the applicants have failed to substantiate that the recording was made after 4 March 2008 and notably that the applicant husband now also risks being persecuted by the Iraqi authorities on account of this.

(d) Conclusion

60. Having regard to the above, and recalling that the applicant husband ceased his business with the Americans in 2008, that the most recent substantiated violent attack by al-Qaeda against the applicants took place in October 2008, almost 6 and a half years ago, and notably that the applicant family stayed in Baghdad until December 2010 and September 2011, respectively, without having substantiated that they were subjected to further direct threats, the Court endorses the assessment by the Swedish authorities, that there is not sufficient evidence to conclude that the applicants would face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon return to Iraq.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

61. The applicants also complained under Article 6 of the Convention that their right to fair proceedings had been violated. The Court notes that

this provision does not apply to asylum proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000-X). It follows that this complaint is incompatible ratione materiae with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

62. The applicants further complained under Article 14 of the Convention that their case was not as thoroughly investigated as other cases before the Swedish courts and that therefore they had been discriminated against as foreign nationals. The Court has not found any elements which could indicate that the applicants have been discriminated against on the basis of their nationality. It follows that this part of the application is also manifestly ill-founded and must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. RULE 39 OF THE RULES OF COURT

63. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

64. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above paragraph 4) must remain in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 3 admissible and the remainder of the application inadmissible;

2. *Holds*, by five votes to two, that the implementation of the deportation order against the applicants would not give rise to a violation of Article 3 of the Convention;

3. *Decides*, unanimously, to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to expel the applicants until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 4 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Mark Villiger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Zupančič;
(b) statement of dissent of Judge De Gaetano.

M.V.
M.B.

PARTLY DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I am unable to join the majority in finding no violation in this case.

The judgment is replete with details concerning the general situation in Iraq as well as with the particulars of the applicant's individual situation. However, as I have pointed out in my other separate opinions, law is poorly equipped to deal with future events, i.e. in the vast majority of cases it deals with past historical events. The exceptions to this are rare, among them predictions for the purpose of pre-trial detention of the defendant's likelihood to abscond, to repeat his offence or to interfere with the evidence, on the one hand, and predictions as to what is in the best future interest of the child in custody cases, on the other. In most other cases we deal with events that have already happened and are somehow frozen in the past.

A special sub-category of legal scholarship deals with the "prediction and prevention of harmful conduct" – and it is an established view that such predictions are speculative. The famous Gluecks' Prediction Tables[1] concerning juvenile delinquents were based on extensive and long-term statistical data, which in individual cases are not available. In other words, where statistically confirmed data on a sufficiently large sample are available, prediction as to what will happen makes some sense. In individual cases it is pure conjecture.

For example, in *R v. Adams* [1996] 2 Cr App R 467, [1996] Crim LR 898, CA and R v. Adams [1998] 1 Cr App R 377, the well-known Bayes theorem was applied to assess the retrospective probability of a *past* event. Bayes theorem is a mathematical formula permitting the regression from an abstract probability to an ever more concrete likelihood. The use of this device in evidence law is a subject of controversy and yet it is the only mathematically rational mode of assessing the probability of a *future* event. On the basis of large statistical data it is used in insurance actuarial tables in order to assess the more specific probability, for example, of a particular driver being involved in a possible traffic accident.

Clearly, no such rational possibility exists in establishing the probability of torture of the asylum applicants upon their *refoulement* to the country of origin. Moreover, if these risks were to materialise, the Court would be unlikely to be apprised of them. It is a fact that the Court just does not know how many false negatives concerning torture upon *refoulement* to the country of origin it has adjudicated in the past. These are people we never hear from again.

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1. See, for example, Kurt Weiss, *The Glueck Social Prediction Table--An Unfulfilled Promise*, 65 (3) (6) Journal of Criminal Law and Criminology 397 (1975) at http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5907&context=jclc [Updated 22 April 2015]

Herein rests another important difference between an ordinary legal case concerning a past historical event, on the one hand, and a prognostic judgment concerning what will or will not happen in the future, on the other.

In cases concerning an historical event, with rare exceptions leading to the trial *de novo* and recently deriving mostly from the use of DNA evidence, any court's judgment stands unperturbed. It stands as unconditionally final: *res judicata pro veritate habetur*. Thus the legal systems, with rare exceptions, are not adapted to the negative feedback from reality. Anyway, owing to this lack of contact with reality, law is not a science; its judgments about historical events are adamantly not, as Karl Popper would have put it, falsifiable.

However, when it comes to predictions as to what will happen upon *refoulement* to the country of origin, this is no longer true. Such judgments *are* falsifiable. The person so expelled, extradited or returned *in fact* will, or will not, suffer the consequences this Court had speculated about. The question remains whether this Court will ever be apprised of them (most likely not). Here, as opposed to most other legal cases, the negative feedback would be made available only if there was a legal instrument in place enabling the Court to verify the consequences of its conjecture concerning the future events.

In turn, the language of the UN Convention on Torture (UN CAT) prohibits, in its Art. 3 (1)[2], the *refoulement* if the applicant would be in danger of being subjected to torture. Subsection (2) provides that the competent authorities must take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[2.] UN CAT, Article 3:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Clearly, the latter criterion has to do with the *abstract* probability that must be taken into account, whereas “all relevant considerations” pertain to our *Chahal* test[3], according to which the danger must be “real and personal”, that is to say *concrete* and specific. This is entirely logical, but the question remains as to what are these real risks of being subjected to treatment contrary to Article 3 of the ECHR in the receiving country. The unfortunate past experiences of the applicants in this case ought to be perceived as a concrete basis for the inference that something comparable is likely to happen to them upon being expelled to Iraq. However, the assessment of the probabilities is ineluctably subjective and speculative.[4]

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3. The Case of *Chahal v. the U.K.*, Application no. 22414/93, 15 November 1996, § 74: “However, it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where *substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country*. In these circumstances, Article 3 (art. 3) implies the obligation not to expel the person in question to that country (see the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and the above-mentioned *Vilvarajah and Others* judgment, p. 34, para. 103).” (Emphasis added.)

4. As a former member of the UN Committee against Torture (1995-1998) I can decidedly maintain that before the UN CAT the request for an interim measure in this case would, at least at that time, readily have been made admissible under Art. 22 of the UN Convention against Torture:

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph I and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

The Committee, its Working group of the Rapporteur in the case would have transmitted to the Government a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations. It is worth noting that the UN CAT initially takes such decisions on the basis of unilateral information submitted by the complainant.

Moreover, UN CAT is a Convention covering 66 States worldwide, and one would expect the standards of a European regional Court to be higher than the standards of the world at large.

On 14 August 2014, Sweden had 13 interim measure cases pending before the UN CAT under Art. 22 of the UN Convention against Torture. In 20 cases the interim measure had been approved, in 41 cases it had been denied. Apart from Switzerland (155 cases), Sweden with its 123 cases before the UN CAT is in second place concerning requests for an interim measure by the UN CAT. See Status of the Communications dealt with by UN CAT under Art. 22 of the UN Convention against Torture at http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx, Statistical Survey on Individual Complaints.

See also UN CAT/C/3/Rev.6 at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/152/79/PDF/G1415279.pdf?OpenElement, Rule 113 at p. 34:

Rule 113 *Conditions for admissibility of complaints*
With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a Rapporteur designated under rules 104 or 112, paragraph 3, shall ascertain:

(a) ***That the individual claims to be a victim of a violation by the State party concerned of the provisions of the Convention.*** *The complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and, when appropriate authorization is submitted to the Committee;*

In purely epistemological terms, this is nothing new as the law in action had always been obliged to deal with the dearth of evidence. In Roman law, for example, the *praetor* was bound to issue a judgment – he was mostly precluded from resorting to the *non-liquet* decision –, although the evidence was inconclusive or even scant. The obvious solution to this problem is to resort to presumptions, that is to say the burden of proof on the one hand and the carrying of the risk of non-persuasion on the other. In certain cases law has even resorted to fictions, which are very close to irrefutable presumptions.

(b) That the complaint is not an abuse of the Committee's process or manifestly unfounded; (c) That the complaint is not incompatible with the provisions of the Convention;

(d) That the same matter has not been and is not being examined under another procedure of international investigation or settlement;

(e) That the individual has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(f) That the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party.

Rule 114 *Interim measures*

1. At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it ***take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations****.*

2. Where the Committee, the Working Group, or Rapporteur(s) request(s) interim measures under this rule, the request shall not imply a determination of the admissibility or the merits of the complaint. The State party shall be so informed upon transmittal.

3. ***The decision to grant interim measures may be adopted on the basis of information contained in the complainant's submission.*** *It may be reviewed, at the initiative of the State party, in the light of timely information received from that State party to the effect that the CAT/C/3/Rev.6 35 submission is not justified and the complainant does not face any prospect of irreparable harm, together with any subsequent comments from the complainant.*

4. Where a request for interim measures is made by the Working Group or Rapporteur(s) under the present rule, the Working Group or Rapporteur(s) should inform the Committee members of the nature of the request and the complaint to which the request relates at the next regular session of the Committee.

5. The Secretary-General shall maintain a list of such requests for interim measures.

6. The Rapporteur on new complaints and interim measures shall also monitor compliance with the Committee's requests for interim measures.

7. The State party may inform the Committee that the reasons for the interim measures have lapsed or present arguments why the request for interim measures should be lifted.

8. The Rapporteur, the Committee or the Working Group may withdraw the request for interim measures. (Emphasis added.)

The law may for example adopt a rule that the judge speculating about the defendant's likelihood to abscond, must, when in doubt, follow the presumption that this will indeed happen, which means that he must rule in favour of pre-trial detention. More generally, in child custody cases the court is obliged to follow what it considers to be in the best interests of the child. When in doubt, it must follow this recommendation.

When it comes to the *refoulement* cases the obvious solution derives from Blackstone's famous formulation: *"All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer."*[5] Is it too much to ask the same concerning the innocents that are expelled or returned to their country of origin? With Blackstone, the presumptive probability is one to ten in favour of acquittal, namely of a person for whom there had almost certainly been a degree of probability that he had committed a crime.

A fortiori, such a presumption in favour of completely innocent people ought to be higher than that: *argumentum de maiore ad minus.*

II

We now turn to the specific details of this case. The applicant is 51 years of age, his wife is 50 and their son is 15 years old.

The applicants maintain that if they return to Iraq they risk persecution by al-Qaeda. The applicant husband had already been, and perhaps still is, on the al-Qaeda death list in that country. On 26 October 2004 the applicant husband had been the target of a murder attempt carried out by al-Qaeda, as a result of which he had been confined to hospital for a period of three months. In 2005, the applicant's brother was kidnapped by al-Qaeda because of the applicant's alleged collaboration with the Americans. The applicants then fled to Jordan and stayed there until December 2006. Some time thereafter a bomb was placed next to their house (the bomb did not explode as it was detected in time) and the perpetrator had later confessed that he had been paid by al-Qaeda to kill the applicant husband. In January 2008 the applicants had nevertheless returned to Baghdad. In October 2008 the applicant husband and his daughter had been shot at while driving. In this incident the daughter was killed. Subsequently, the family started to move around in Baghdad in order to avoid being killed. Allegedly, a masked terrorist group came looking for the applicant husband on 10 September 2011 at 10 p.m. (see § 16 of the judgment). The applicants also submitted a translated residence certificate/police report certifying that their house had been burned down by a terrorist group on 12 November 2011 (ibid.).

However, the Swedish Migration Board, while acknowledging that the applicants had proved their identity and that their asylum story was credible

[5] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 1897, p. 713.

(§ 15), and while acknowledging also that they had been the victims of "severe violence and harassment", dismissed their request for asylum mainly on the ground that they had not sufficiently shown that they would be unable to seek the domestic authorities' protection if returned to Iraq. On appeal by the applicants to the Migration Court, the Migration Board submitted that the further documentary evidence submitted on appeal (regarding the incidents of September and November 2011) were of "a simple nature and low value". The Migration Court, in its decision upholding the Migration Board's decision, held that the Iraqi authorities will "probably" be able and willing to protect the applicant and his family (§ 17). The Migration Court rejected the applicant husband's allegations as to his poor health for which he could not obtain adequate hospital care in Iraq. The judgment, in paragraph 16, does not explain what the medical certificates submitted by the applicant actually certified. In paragraph 19 of the judgment we find a reference to the continued al-Qaeda threat in connection with the applicant's political activity since he was interviewed in English in a TV debate.

A request for the re-examination of the case in light of additional evidence was refused by the Migration Board on 26 September 2012 (§ 19).

As usual, the grounds for the decision of the Swedish authorities were evidentiary and based on the estimated credibility of the applicants' allegations on the one hand, and on a perceived ability of the Iraqi authorities to provide protection on the other. Admittedly, as to evidentiary estimates of credibility, those made by the Swedish authorities are more accurate than any estimates, based on the case-file, which this Court could make.

At least two indisputable facts, however, on which there can be no doubt, concern the direct attack by al-Qaeda on the applicant on the one hand, and the death by shooting of his daughter in Baghdad on the other. These two facts are connected to the general situation in Baghdad and in Iraq, that is to say to the more or less continuous presence and threat of this terrorist organisation. The fact that someone had already been a direct victim of an attack of the sort described above should, in principle, lead this Court to examine very carefully (albeit based on imperfect induction) the unremitting danger to the applicants.

Again, irrespective of the allegedly low evidentiary value of *some* of the proofs submitted to the Swedish authorities, it is irrational to maintain that the burden of proof and the risk of non-persuasion ought to be squarely on the shoulders of the applicants. The attacks on the applicant, on the one hand, and the death of his daughter at the hands of al-Qaeda, on the other, are more than sufficient to create the *prima facie* case for the applicants' asylum request. In turn, this means that the burden of proof and the risk of non-persuasion should be on the state – and this especially so before the European Court of Human Rights. The evidentiary burden, as distinct from

the burden of proof, is therefore shifted on to the respondent state to prove that the applicant (or applicants in this case case) will not, on their return to Iraq, be subjected to conditions or situations which would contravene Article 3.

III

As in so many other Swedish cases one is here confronted with the outlandish approach to the appraisal of evidence before the Swedish Migration authorities, as if the lack of credibility of the applicants on *some* issues would in itself nullify the evidentiary value of other well-attested facts.

In any event, there is repeated speculation as to what will or will not happen upon the expelling of the applicants to their country of origin, as if the credibility of the applicants on some of the issues submitted to the Swedish Migration Board would prove that the rest of their allegations, too, are without probative value. For example, it is maintained (by the Migration Board) that the burning of the applicants' house has not been sufficiently proved and that this lack of proof casts a bad light on other evidence adduced by the applicants. This contagion effect is a constant in Swedish cases. The Migration Board in particular is willing to overlook hard facts due to the perceived lack of credibility of the applicants on other alleged facts at hand. But the issue is not the (dis)honesty of the immigrants, who will obviously try by all possible means to avoid being expelled.

It cannot be overemphasised in this and in other similar cases that the evidentiary burden and the risk of non-persuasion, once the *prima facie* case has been established in favour of the applicants, lies squarely on the Government.

The European Court of Human Rights is the court of last resort where this ought to happen.

STATEMENT OF DISSENT BY JUDGE DE GAETANO

I do not agree with the finding that the implementation of the deportation order against the applicants would not give rise to a violation of Article 3 of the Convention, and this for substantially the same reasons advanced by Judge Zupančič in parts II and III of his separate opinion.