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GH (Former Kaz – Country Conditions – Effect) Iraq CG [2004] UKIAT 00248

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 13/14 July 2004

Date Determination notified

...10th Sept 2004.....

Before:

Mr J Barnes (Vice President)
Mr A R Mackey (Vice President)
Mr S L Batiste (Vice President)

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
For the appellant : Miss S. Naik, Counsel, instructed by Harrison Bundey & Co.
For the respondent : Mr T. Weisselberg, Counsel, instructed by the Treasury Solicitor

DETERMINATION AND REASONS

1. Whilst this appeal relates to the claims of an appellant from Sulaimaniya in Northern Iraq, it is intended to be considered as Country Guidance case which will have some relevance also to claimants originating from other parts of Iraq. There have been a number of issues for decision by the Tribunal and this decision is provided with sub-headings to differentiate these issues. For ease of reference we now list the principal issues by reference to their subject-matter and their relevant paragraphs

    (a) the appellant's accepted factual history – paragraphs 5-7;
    (b) the identification of the Islamic group he claims to fear – paragraphs 8-10;

(c) summary of the determination of the Adjudicator and the grounds of appeal to us – paragraphs 11-17;
(d) the interlocutory application of Miss Naik for a witness summons – paragraphs 19-21;
(e) issues as to whether the burden of proof had on Arif principles shifted to the Secretary of State – paragraphs 22-26;
(f) the relevance to risk of matters going to practicability of return and past published policies (the Abdi point) – paragraphs 27-35;
(g) the burden on the claimant in asylum and human rights appeals – paragraphs 36-40;
(h) the relevance of country conditions in asylum and human rights claims – paragraphs 41-46;
(i) the objective evidence as to the current position in Iraq and the weight to be given to the evidence of Dr Rashidian and Mr Joffe - paragraphs 47-75;
(j) our findings as to the objective situation in Iraqi Kurdistan – paragraphs 76-95;
(k) State provision of protection in Iraqi Kurdistan including a review of Saber v SSHD and related case law and the effect of the handover to the Iraqi Interim Government in June 2004 – paragraphs 87-107;
(l) the UNCHR's intervention in relation to sufficiency of protection and internal relocation – paragraphs 108-118;
(m) the relevance of the views of the Iraqi Interim Government as to repatriation– paragraph 119;
(m) decision as to the appellant's claim and dismissal of the appeal – paragraphs 120-127.

2. The appellant is a citizen of Iraq, born on 23 August 1975 in Sulaimaniya which is in that part of northern Iraq which was formerly known as the Kurdish Autonomous Zone (KAZ). The appellant lived in Sulaimaniya until his departure from Iraq on 12 February 1999. He arrived clandestinely in the United Kingdom on 1 March 2000, having spent the intervening period in Turkey, and immediately claimed asylum.

3. Following submission of a self-evidence form on 14 August 2000, and interview on 10 July 2003, his application was refused by the Secretary of State for the reasons set out in a letter dated 16 July 2003. On 30 July 2003 the Secretary of State gave notice of his decision to remove the appellant from the United Kingdom as an illegal entrant after refusal of his asylum application. The appellant appealed against that decision on both asylum and human rights grounds. By reason of the date of decision of the Secretary of State this appeal is governed by the provisions of the Nationality, Immigration and Asylum Act 2002.

4. His appeal was heard on 10 October 2003 by Mr M. Shrimpton, an Adjudicator, who found the appellant to be credible in his account of his personal history in his home area in Iraq but dismissed his appeal.

The appellant's accepted factual history

5. The appellant comes from a family which has supported the Patriotic Union of Kurdistan (PUK), the dominant political party in his home area. His parents and siblings (one brother and three sisters) still live there and there is another brother in the United Kingdom who arrived in or about 2001. His father, a teacher, and his brother, Soran, are both PUK members of long standing who had been detained by the Iraqi authorities on occasion in the period up to 1991. The appellant joined the PUK Student Movement on 21 March 1990 while still at High School and was promoted to be a member of the executive of the Rizgari Branch six months later. This position involved setting up secret cells within the city, recruiting new members, organising and distributing anti-government leaflets and finding safe houses for the Peshmerga, the armed fighters of the PUK. The appellant subsequently went on to become a member of the PUK. On 7 March 1991 he was part of the PUK group who attacked the Ba'ath Party headquarters in Sulaimaniya and succeeded in taking the building and effecting the release of the prisoners detained there, including his father and brother. After completing high school education in 1993, he went on to study at Sulaimaniya University until 1998 on obtaining his degree.

6. In the course of his political activities the appellant was detained on four occasions. The first detention was from 11-23 September 1990 at the Ba'ath Youth Detention Centre where he was beaten and tortured for possession of anti-government pamphlets before being released without charge. The second detention was from 6-15 September 1996 by the Iraqi troops and Kurdish Democratic Party (KDP), who were at that time acting in conjunction against the PUK of which he was accused of being a member. He was released because all detainees other than the Peshmergas were released. His third detention was from 10 November 1997 to 21 February 1998 when he went with others to recover the bodies of three PUK Peshmergas who had been killed in the conflict with the KDP, but was himself arrested as a PUK members. His release was, he said, procured by the influence of others and by payment of a bribe to a senior KDP member. He does not identify those who procured his release.

7. His fourth arrest was what led him to leave Iraq. He was detained on 1 February 1999 by the Kurdish Islamic Movement (KIM) for organising a seminar entitled 'The Kurds and Islam'. The seminar was perceived by the KIM as being anti-Islamic and he was accused of being

blasphemous. He was ill-treated in detention but was released on 10 February 1999 on signing a paper in which he agreed not to be involved in any similar activities in the future. He said he was warned that if he did so, next time he would be killed. Two days after his release he left for Turkey where he remained for some eleven months because it enabled him to have contact with his father who thought the situation in his home area might improve.

The identity of the Islamic group he claims to fear

8. There has been some confusion as to the identity of the Islamic group he claims to fear. At interview he was quite clear that it was not the Islamic Movement of Iraqi Kurdistan (IMIK) but was a group he called the Islamic Kurdish Movement (IKM). He described the IKM as consisting of five or six Islamic groups centred in Halabja (Q24), the control of which they had lost as a result of the coalition invasion of Iraq which had, of course, taken place by the time of that interview. He claimed they still had influence in most towns and named their leaders as including Mala Krekar, Ali Bapir, Mamos Ali, and He'dar He'dari. It is clear from the objective evidence that Komely Islami, translated as Islamic Group of Kurdistan, is led by Ali Bapir. According to the CIPU Report of April 2004, this is a fringe group centred in Khurmel in north eastern Iraq before the invasion with some 3000 to 5000 local followers. It described itself as moderate and has been in the past supported by the PUK 'in the hope of tempering its radical tendencies' but in early 2003 the PUK decided it was too close to Ansar el-Islam (AI) so that it was included in the group targeted by the American cruise missile attacks designed to break up and dislodge radical Islamic groups. Mala Krekar, who has since been arrested in Norway according to the appellant (Q25 at interview), is recorded as the leader of Jund-al-Islam (Army of Islam), described in the CIPU Report as being a radical faction of IMIK which broke away in 1998 when IMIK allied itself with the PUK. It subsequently changed its name to Ansar-el-Islam (Partisans of Islam) (AI). According to a United States Congressional Research Report in January 2004, this group has connections with Al Qaeda and six hundred primarily Arab fighters lived in the AI enclave near Khurmel. They are strongly opposed by the PUK and were also the subject of the attack on Islamic militants in March 2003 during which their infrastructure was destroyed and they were dispersed. It is said, however, by US sources, to be returning to Iraq and operating in small groups throughout the country; an AI cell was uncovered in Baghdad and they are suspected of having been responsible for the bombing of the Jordanian Embassy in Baghdad in August 2003 as well as the bombing of the United Nations Headquarters in Baghdad in the same month, although they have denied responsibility for the latter attack. In late August 2003, AI militants were involved in a gun battle with a large force of Kurdish police which resulted in the death of three

of the militants and the arrest of the fourth. We note here that according to the CIPU Report an even more extreme group, Ansar al-Sunna, broke away from AI in October 2003 and has claimed responsibility for the attacks on the PUK and KDP offices in Arbil in March 2004 in which over one hundred people died (and to which we shall refer again later) in order to 'punish' the PUK and KDP for their alliance with the Coalition forces.

9. The other two Islamic leaders to whom the appellant referred at interview do not appear to be identified by the objective evidence, but it is clear that those he claims to fear as IKM include extreme Islamic groups to whom the PUK are now utterly opposed.

10. Before the Adjudicator, the appellant's then representative invited the Adjudicator to assume that the group to whom the appellant had intended to refer in his self-evidence form and at interview was IMIK because there was no such group as IMK. The hearing proceeded on that basis by mutual consent (although it is not clear how far the appellant was consulted). In the grounds of appeal to the Tribunal, which were settled by Miss Naik in November 2003, there was an express concession that the appellant had 'nothing to fear from IMIK now' but he maintained a subjective fear of AI and the KDP in his home area. Before us Miss Naik sought to withdraw that concession on the basis that it was factually erroneous insofar as the appellant had never expressed any fear of or identified IMIK as those who had last detained him. Mr Weisselberg made no objection and, for the reasons which we have set out above, that concession is properly withdrawn by Miss Naik as being based on a misconception of the appellant's case.

The determination of the Adjudicator

11. The Adjudicator dismissed the appellant's claim, in essence for the following reasons: first, that any threat from Islamic extremists had been eliminated by the attack upon their enclave in March 2003 and that there was no objective evidence of AI operatives inside Iraq; secondly, that the Saddam Hussein regime no longer existed; thirdly, that in any event there was a sufficiency of protection although it is not clear from the determination who the Adjudicator thought would offer that protection.

12. He also concluded that he could not place reliance on the report before him prepared by Mr E.G.H. Joffe, categorising it as lacking in objectivity, and, in general terms, expressing far too gloomy a view of the situation in Iraq. There was also before him a report from Dr Rashidian, which is also before us, but he does not refer to this.

13. Finally, much of the determination is diverted into speculation as to the practicality of return to Iraq and the status of various bodies for international law purposes, although these issues are then categorised as not determinative of the appeal before him.

The grounds of appeal

14. The grounds of appeal raise a number of discrete issues. First, it is contended that since the appellant must, on the accepted facts, have been in the past entitled to human rights protection, the evidential burden shifts to the Secretary of State to show that on a balance of probabilities there has been such a change in the circumstances in his own country as to undermine the appellant's claim at the date of hearing, applying the ratio in Arif v Secretary of State for the Home Department [1999] Imm AR 271, or alternatively the approach to such cases in the Tribunal's starred decision in Dyli (00/TH/02186). Secondly, it is argued that given his 'subjective' fear of AI and the KDP, there is a lack of sufficiency of protection in the appellant's home area. [Although that is how it was put such a fear would, of course, have to be objectively well-founded.] Thirdly, on the assumption that the appellant would be returned to 'Iraq proper' he would be returned to an unstable country where he would be at risk before returning from the point of arrival to his home area; the UNHCR in its letter of 1 July 2003 advises that by reason of the 'highly volatile and dangerous security environment in many parts of the country' there should be a ban on deportations to Iraq and that host countries should suspend decisions on asylum claims and offer temporary protection to claimants. It is the appellant's case that given these general country conditions as confirmed by the UNHCR and the appellant's expert evidence, removal would be in breach of protected human rights under Article 3 of the European Convention on Human Rights (European Convention). The determination of the Adjudicator fails properly to address either the asylum claim on the basis of whether Article 1C (5), the cessation clause of the Refugee Convention, 1951 applies – this reverts presumably to the Arif/Dyli point – and whether there is a reasonable internal flight alternative given the current country conditions. Fourthly, the Adjudicator erred in failing to consider the Article 3 claim separately and to recognise Article 3 as having extra-territorial effect. Fifthly, the Adjudicator erred in making objective findings without reference to the objective evidence which he relied on as well as in his rejection of the report of Mr Joffe and the ignoring of the report of Dr Rashidian. Finally, that the Adjudicator's determination was flawed in that it failed adequately to address the issues of fact and law but departed 'into an ex-tempore personal essay into the political and military situation in Iraq from a singular non-objective perspective.'

15. Permission to appeal was granted, notwithstanding the view that the appellant might well face difficulties, because the grounds of appeal raised a number of issues in respect of which it was desirable that the Tribunal should give guidance – that is that in accordance with Rule 18(4)(b) of the Immigration and Asylum Appeals (Procedure) Rules 2003 there was some other compelling reason why the appeal should be heard than that it would have a real prospect of success. This appeal has accordingly been listed as a Country Guidance Appeal on Iraq in which the Tribunal has received oral evidence from Mr Joffe as well as substantial documentation relating to country conditions generally.

16. So far as the sustainability of the Adjudicator's determination is concerned, it does not appear that the Arif point was ever taken before him so that he had no opportunity to deal with that issue. Nevertheless, it seems to us that there are errors in the Adjudicator's approach. First, the Adjudicator in our view erred in his approach to Article 3. He says at paragraphs 7 and 8 of his determination that he does not make the assumption that Article 3 has "extra-territorial effect". In that, whatever views may have been expressed in relation to other Articles, the Adjudicator is plainly wrong, as Miss Naik contends. It may be that it makes little practical difference because, as the Adjudicator observes, there are the Refugee Convention reasons of ethnicity and/or political opinion which are capable of engaging that Convention, but it is nevertheless somewhat disquieting to see such a view expressed in relation to Article 3. Claims under that Article cannot always be dismissed in line with a failed asylum claim – see, e.g., D v United Kingdom [1997] 24 EHRR 423. Secondly, whatever his view of the weight to be accorded to it, there was the evidence of Mr Joffe and Dr Rashidian as to their views as to risk to the appellant in his home area from Islamic groups on the basis of his past history. That evidence, at least, should have been properly addressed in the determination since it went to the heart of the appellant's claim, but it was not so dealt with. Finally, the Adjudicator appears to have distracted himself with his consideration of methods of transport to Iraq which might be open to the Secretary of State, and his views, finally abandoned part way through, on the position of the United Kingdom in International Law as an occupying power. For all these reasons, we have come to the view that the Adjudicator's determination is unsafe as being inadequately reasoned. It is therefore for us to consider the claim afresh on the basis of the accepted factual history of the appellant and the latest objective country evidence as to risk on return for one with the appellant's characteristics.

17. We should note at this point that this appeal was heard jointly so far as objective country evidence is concerned with two further appeals, both by the Secretary of State against the allowing of the claimant's appeal

under Article 3 by the respective Adjudicators who heard them. In each case the basis on which these two appeals were allowed followed from the views which each Adjudicator expressed in relation to the risk of breach of protected human rights on return by reason of the general situation in Iraq. Both respondents adopted the evidence of Mr Joffe so that, at least in relation to that general issue, there is a common position between all three claimants. Unfortunately, by reason of time constraints, it was not possible to hear the Secretary of State's submissions or the counter submissions of respective counsel for the Respondents although all submissions in the instant appeal were concluded by the end of the second day of the hearing. We have therefore decided to issue separate determinations for each appeal but, insofar as Mr Joffe's evidence is common to all three and subject to the individual submissions in the remaining appeals, our conclusions as to the general country situation expressed in this appeal may later be incorporated by reference into our determinations in the other two appeals. In this respect we have had the advantage of the written skeleton submissions of Mr Weisselberg in relation to the two Secretary of State appeals and of Counsel for each of those respondents, namely Mr Adler and Mr Jorro. Insofar as they go to the general issue indicated, we have taken into account those written skeleton submissions as we indicate below.

18. It will be convenient to deal with certain discrete issues raised in the appeal before proceeding to consider the objective country evidence but before we do so there is one interlocutory matter to be addressed.

Application for Witness Summons against Respondent's Witness

19. Shortly prior to the hearing the Secretary of State filed and served a witness statement by Miss Hipwell, the Head of the Country Action Team of the Home Office. This set out the Secretary of State's current policy in relation to enforced returns to Iraq as had been previously directed by the Tribunal. The gist of the statement was that following agreement reached with the Coalition Provisional Authority in Iraq, the Secretary of State announced on 24 February 2004 that the United Kingdom was the first country to begin enforced returns of failed Iraqi asylum seekers. The pilot scheme for the return of thirty such asylum seekers monthly had been intended to commence in April but practical arrangements to put removals in place took longer than anticipated. Whilst it was recognised that actions by insurgents had caused difficult problems in some areas, this did not apply to all areas of the country. Whilst humanitarian conditions were still difficult in some areas, they were not sufficiently harsh in any part of the country that they alone would mean that return would lead to breach of the United Kingdom's international obligations under Article 3 of the European Convention. Returns would be on a case-by-case basis and would be directed to

areas assessed as sufficiently stable and where the Home Office was satisfied that the individual concerned would not be at risk. Decisions would be taken on the basis of the most current situation. Spontaneous and voluntary returns were interrupted in April because the Coalition Provisional Authority closed the route being used but it was reopened in May and returns then immediately resumed and still continue. They are operated on the Secretary of State's behalf by the International Organisation for Migration. The Home Office intended to work with the Iraqi Interim Government in making forced returns. That statement represented the position of the Secretary of State as at 8 July 2004.

20. At the commencement of the hearing Mr Weisselberg made it clear that there was no intention on his part to call Miss Hipwell to give oral evidence. Miss Naik made an application for the issue of a witness summons pursuant to the powers of the Tribunal under Rule 47 of the 2003 Procedure Rules to enable Miss Hipwell to be cross-examined as to the mechanics of the return of each claimant. Mr Weisselberg objected on the basis that the witness could add nothing to the statement of policy and intent of the Secretary of State as we have recorded it above. In his submission there was no purpose to be served by cross-examination in those circumstances. Although this did not affect our views, he also informed us that Miss Hipwell would not be physically available to give evidence for some time because she was due to leave the country on the following day.

21. We retired to consider the application which we then refused on the basis that since the witness could speak only as to the Secretary of State's policy it was not in our view appropriate to permit general cross-examination going to the practicality of return which the Tribunal has consistently regarded as outside its remit. The issue for our determination is the hypothetical one of whether at this date return would be reasonably likely to lead to a breach of the United Kingdom's international obligations. This did not, of course, preclude submissions as to what weight should be attached to the statement filed.

The Issue as to Burden of Proof

22. We are surprised that Miss Naik should have pressed the argument that the burden of proof has shifted to the Secretary of State by application of the ratio in either Arif or Dyli. The ratio in Arif is that where it is accepted 'by all sides' that in the past an appellant was entitled to recognition as a refugee and to the protection of the Refugee Convention, if the Secretary of State then seeks to rely on a change in the country circumstances to show that the need for such protection no longer exists, then the burden is on the Secretary of State to show that return now would not be in breach of the United Kingdom's obligations under the Refugee Convention. The factual background in

Arif was that Mr Arif had been detained, tortured and falsely accused for political reasons of grave criminal offences which, after his bail and escape, had led to his conviction in his absence and a sentence of seven years imprisonment. Between his arrival in the United Kingdom (but after the Secretary of State's decision and his appeal) his political opponents had lost power to the party of which he was a member. The corruptly obtained sentence remained effective and there was evidence that the new government would not automatically seek to quash a conviction so obtained so that there remained a real risk that Mr Arif might be wrongly imprisoned on the basis of that conviction. The Court of Appeal held that the evidential burden, on those particular facts, shifted from the appellant to the Secretary of State.

23. In its starred determination in Dyli the Tribunal held that Arif applied only where it is accepted that the claimant was in the past entitled to refugee status.

24. In this appeal, the Secretary of State has never accepted that the appellant was at any point in time entitled to refugee status and nor did the Adjudicator accept that. Mr Weisselberg's position remains that the appellant is not now and never has been so entitled and for the reasons which we give hereafter we have concluded that at the present time the appellant is not so entitled. The essential pre-condition in Arif that it is accepted that the appellant was at some point in the past entitled to refugee status is not met.

25. As we understand Miss Naik's written and oral submissions, she suggested first that the fact of past torture and persecution of itself demonstrated entitlement to recognition as a refugee. No doubt it lays the ground for arguing such a claim but it is not of itself sufficient to show present real risk or one at any past point in time from the date of arrival in the United Kingdom.

26. Secondly, in her oral submissions, she contended that issues as to the current practicality of removal and what was set out in Miss Hipwell's statement as to the current country conditions both led to the inference that the appellant could not now be, nor at any time in the past could have been, safely returned and therefore the burden of proof should be reversed for these reasons. Not only would that would require a considerable extension of the Arif ratio, but it would elevate the issue of practicability of return now or at any time in the past into one which potentially went to the existence of a well-founded fear. Not only is that wrong in principle for the reasons we explain below but it again ignores that past recognition of an entitlement to refugee status is a necessary precondition to the reversal of the burden of proof under Arif. It is a fundamental precept of our asylum law that the position of

the asylum claimant falls to be considered at the date of the making of the decision and that the decision-maker is not in general concerned with what may have been the position at any point in the past (see Ravichandran v SSHD [1996] Imm AR 74). Further, the burden of proof is on the asylum applicant. We see no merit in Miss Naik's attempt to enlarge the Arif ratio and considerable disadvantage to the workings of an already overburdened Tribunal system by a concentration for evidential procedural reasons on issues which are not germane to the issue of which the Tribunal is seized – namely current risk on hypothetical removal (see s.84(1)(g), Nationality, Immigration and Asylum Act 2002). The burden of proof to show that there exists a real risk that return would be in breach of the United Kingdom's international obligations remains on the appellant.

The relevance of the practicability of return

27. Moreover, Miss Naik's submissions in this respect rely, as she said, upon the inferences which she invites us to draw based on the practicability of an enforced return. That is an issue with which the Tribunal is not concerned for the reasons cogently explained in Saad, Diriye and Osorio v SSHD [2001] EWCA Civ 2008 – see particularly paragraphs 53 to 58 of the judgment of Lord Phillips MR. That appeal was under s. 8 of the Asylum and Immigration Appeals Act 1993 but at paragraph 58 of the judgment it was recognised that the ratio would apply equally to appeals under s. 69 of the Immigration & Asylum Act 1999 (whose wording is replicated in s.84(1)(g) of the 2002 Act and itself follows the earlier 1993 Act), and holds that asylum appeals are hypothetical as being concerned with a removal which has not in fact taken place. Our function is to consider first whether the appellant would be at real risk of persecution under the Refugee Convention if today returned to his home area in Iraq (see Dyli). If the answer to that question is in the negative, the Convention is not engaged. Such a finding will usually (but not always – see below at paragraph 38) mean that the appellant cannot succeed in showing a real risk of breach of his protected human rights under Article 3 of the European Convention either, since the risk element must reach the same threshold required to amount to persecution under the Refugee Convention (see Kacaj (01/TH/000634*) and R (Bagdanavicius and Bagdanviciene) v SSHD [2003] EWCA Civ 1605). If there is a real risk in the home area, then the practicability of travel to a safe haven in his own country may be relevant from the proposed point of access to that safe haven (the internal flight alternative) but unless such a real risk in the home area is established that is not an enquiry on which it is either necessary or appropriate to embark for the purposes of the asylum claim. A similar position applies in human rights claims on the basis that removal will not lead to a prospective breach if the claimant chooses not to go to a place of safety in his own country but, again, the practicability of

reaching such an area may be relevant to whether the act of removal will lead to a breach of the claimant's protected human rights. In the light of the Secretary of State's declared policy as to returns as set out in Miss Hipwell's statement, however, it does not seem to us that this issue can arise under either Convention in respect of the method of return envisaged. There is no reason for us to think that the Secretary of State will not comply with the policy on involuntary return which he has clearly set out in that statement.

Relevance of Secretary of State's previously published policies as to returns

28. This was the last discrete issue raised by Miss Naik with which it is appropriate to deal before moving on to our consideration of the evidential burden on the Appellant in asylum and human rights claims and the current country conditions in Iraq.

29. Miss Naik's submission in this respect was that because the Secretary of State had a general policy of granting exceptional leave to remain to Iraqi refugee claimants at the time of the appellant's arrival on 1 March 2000, the appellant had a legitimate expectation that, had his claim been timeously dealt with by the Secretary of State, he would have been granted such leave so that the failure to do so was not in accordance with the law (see s.84(1)(e) of the 2002 Act). In addition, she also sought to argue that removal now would be in breach of the Secretary of State's general policy to consider the grant of discretionary leave and humanitarian protection in accordance with his policy published on 1 April 2003.

30. This submission is, of course, based on the decision of the Court of Appeal in Secretary of State for the Home Department v D S Abdi [1996] Imm AR 148 which was concerned with whether out of country applicants should be granted leave to enter for settlement here under the Secretary of State's published policy on Somali Family Reunion as dependants of a Somali citizen who had been recognised as a refugee here.

31. As to the claim in respect of the past policy of the Secretary of State in relation to Iraq, there was no evidence of any general policy either in March 2000 or subsequently. Miss Naik relied upon a letter dated 12 July 2004 from Des Browne, a Minister concerned with immigration and asylum policies, which stated in reply to a question raised by the appellant's instructing solicitors as to the position of enforced return to Iraq and Somalia:

> 'In October 2002 the Home Secretary announced the end of blanket country specific "exceptional leave" policies. Since then all asylum claims have been assessed on their

> individual merits, in line with our obligations under the 1951 UN Refugee Convention and the European Convention on Human Rights.'

That passage does not, of course, set out what was the policy previously in relation to Iraqi claimants. Mr Weisselberg informed us that prior to October 2000 there was a practice to grant exceptional leave to remain to northern Iraqis but it was not a blanket policy, simply a practice which was not of universal application. From October 2002 the practice changed and there were occasions when exceptional leave was granted to Iraqis from the south of Iraq without any connection with the Kurdish Autonomous Zone. Again it was not a general policy and each case was decided on its own facts. Since the hearing, and in accordance with an undertaking given in the course of the hearing, a letter of 14 July 2004 has been filed and served for the Respondent. It states that the practice operating prior to October 2000 has been confirmed. It originated in the potential difficulty of forcibly removing failed asylum seekers because of the lack of commercial flights to the KAZ. It had no reference to any accepted risk to failed asylum seekers and was discontinued because of the increasing numbers of claimants in 2000. Voluntary returns were made through other channels.

32. Given that, we are satisfied that there was no general published policy under which it could be said that the appellant had a legitimate expectation of being granted leave to remain: so the Abdi point is not engaged.

33. Miss Naik's second argument was based on the Secretary of State's current policy in which it is stated:

> 'Discretionary leave may be granted to an applicant who ... is able to demonstrate particularly compelling reasons why removal would not be appropriate.'

She construed this as involving the exercise of a discretion outside the European Convention but this is a misconception because the scope of discretionary leave is then defined in the policy statement as being applicable to cases where return would be in breach of Article 3 of the European Convention but which are not considered as appropriate for the more usual grant of Humanitarian Protection. It is clear from the context the category is intended to cover situations where Article 3 is engaged by reason of medical conditions or other compelling humanitarian considerations as, for example, in D v United Kingdom.

34. It is quite clear from the particulars of the policy to which Miss Naik refers in her supplemental skeleton argument that the policy is confined to cases where Article 3 is engaged. All that is being explained is why in some cases it should be designated as Humanitarian Protection (the majority) or, exceptionally, as Discretionary Leave. The policy is concerned only with the identification of categories of relief which have now replaced the former Exceptional Leave to Remain which was all that could be hoped for when Article 3 grounds were made out. This line of argument does not in any way advance the appellant's case.

35. We do not accept Miss Naik's submissions on any of these discrete issues. The position is in this, as in almost all asylum and human rights appeals, that the burden is on the appellant to demonstrate to the lower standard of proof that his return will lead either to a real risk of persecution for a Refugee Convention reason or treatment in breach of his protected human rights under Article 3 of the European Convention.

<u>The burden on the claimant in asylum and human rights claims</u>

36. In order to succeed in a claim for asylum an applicant must show that Article 1 A (2) of the Refugee Convention is engaged. This provides that a refugee is a person who:

> "owing to a 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 or, owing to such fear, is unwilling to avail himself of the protection of that country."

37. Such a fear must be referable to discrimination against the applicant either by reason of membership of a particular social group at such general discriminatory risk (see *Shah and Islam v SSHD* [1999] Imm AR 283 HL) or by reason of his individual characteristics.

38. The position under the European Convention differs from that under the Refugee Convention. The claimant is not required to show that degree of discrimination inherent in establishing a Refugee Convention reason in order to show that he is at real risk of treatment in breach of his protected human rights under Article 3 which provides, in terms from which there may be no derogation:

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

39. The claimant must show that there is a real risk of such treatment and it must reach a threshold similar to that required to amount to persecution under the Refugee Convention. The burden of proof is on the claimant and the standard of proof is that of a real risk of such harm eventuating (see Kacaj [00/TH/00634*]). Similarly where the fear test is met the claim will be defeated if there is a sufficiency of protection available to the claimant from the relevant state authority.

40. The issues as to real risk and sufficiency of protection under both Conventions are helpfully summarised in the judgment of Auld LJ in Bagdanavicius at paragraph 55 which we now set out:

> "*The common threshold of risk*
>
> (1) The threshold of risk is the same in both categories of claim; the main reason for introducing s. 65 to the 1999 Act was not to provide an alternative lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.
>
> *Asylum claims*
>
> (2) An asylum seeker who claims to fear persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be an insufficiency of State protection to meet it: *Horvath*.
> (3) fear of persecution is well-founded if there is a 'reasonable degree of likelihood' that it will materialise: *R v SSHD ex parte Sivakumaran, Vathialingam, Vilvarajah, Vathanan & Another, and Navaratnam (UNHCR intervening)* [1988] AC 958, per Lord Goff of Cheiveley, at 1000 F-G.
> (4) Sufficiency of State protection, whether from State agents or non-state actors, means a willingness *and* ability on the part of the receiving State to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear: *Osman, Horvath* and *Dhima*.
> (5) The effectiveness of the system provided is to be judged normally by the systemic ability to deter and/or prevent the form of persecution of which there is a risk, not just punishment of it after the event: *Horvath, Banamova, McPherson* and *Kinuthia*.

(6) Notwithstanding systemic efficiency of State protection in the receiving State, a claimant may still have a well-founded fear of persecution if he can show that the authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection for his particular circumstances: *Osman*.

Article 3 claims

(7) The same principles apply to claims in removal cases of risk of exposure to Art 3 ill-treatment in the receiving State, and are, in general, unaffected by the approach of the Strasbourg Court in *Soering*, which, on its facts, was not only a State agency case at the highest institutional level, but also an unusual and exceptional case on its facts: *Dhima, Krepel* and *Ullah*.
(8) The basis of an Art 3 entitlement in a removal case is that the claimant, if sent to the country in question, would be at risk *there* of Art 3 ill-treatment.
(9) In most, if not all, Art 3 cases in this context the concept of risk has the same or closely similar meaning to that in the Refugee Convention of 'a well-founded fear of persecution', save that it is confined to a risk of Art 3 forms of ill-treatment and is not restricted to conduct with any particular motivation or by reference to the conduct of the claimant: *Dhima, Krepel* and *Chahal*.
(10) The threshold of risk required to engage Art 3 depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of ill-treatment risked and whether the risk emanates from a State agency or non-State actor: *Horvath*.
(11) In most, but not necessarily all, cases of ill-treatment which, but for State protection, would engage Art 3, a risk of such ill-treatment will be more readily established in State-agency cases than in non-State actor cases – there is a spectrum of circumstances giving rise to such risk spanning the two categories, ranging from a breach of duty by the State of a negative duty not to inflict Art 3 treatment to a breach of duty to take positive protective action against such ill-treatment by non-State actors: *Szavas*.
(12) An assessment of the threshold of risk appropriate in the circumstances to engage Art 3 necessarily involves an assessment of the sufficiency of State protection to meet the threat of which there is such a risk – one cannot

> be considered without the other whether or not the exercise is regarded as 'holistic' or to be conducted in two stages: *Dhima, Krepel* and *Szavas*.
> (13) Sufficiency of State protection is not a guarantee of protection from Art 3 ill-treatment any more than it is a guarantee of protection from an otherwise well-founded fear of persecution in asylum cases – nor, if and to the extent that there is any difference, is it eradication or removal of risk of exposure to Art 3 ill-treatment: *Dhima, McPherson* and *Krepel.*
> (14) Where the risk falls to be judged by the sufficiency of State protection, that sufficiency is judged, not according to whether it would eradicate the real risk of the relevant harm, but according to whether it is a reasonable provision in the circumstances: *Osman*.
> (15) Notwithstanding such systemic sufficiency of State protection in the receiving State, a claimant may still be able to establish an Art 3 claim if he can show that the authorities there know or ought to know of particular circumstances likely to expose him to risk of Art 3 ill-treatment: *Osman*.
> (16) The approach is the same whether the receiving country is or is not a party to the Human Rights Convention, but, in determining whether it would be contrary to Art 3 to remove a person to that country, our courts should decide the factual issue as to risk as if Human Rights Convention standards apply there …"

The relevance of country conditions in asylum and human rights claims

41. In asylum claims country conditions cannot of themselves found a claim to refugee status. It is necessary for there to be an additional discriminatory element as we have explained above. This is well illustrated by the case of Secretary of State for the Home Department v Adan [1998] Imm AR 338 which considered the effect of a state of civil war and concluded:

> 'When law and order have broken down and where ... every group seems to be fighting some other group or groups in an endeavour to gain power ... what the members of each group may have is a well-founded fear not so much of persecution by other groups as of death or injury or loss of freedom due to the fighting between the groups.'

As there explained, 'The individual or group has to show a well-founded fear of persecution over and above the risk to life and limb inherent in the civil war.' (per Lord Slynn of Hadley). In such circumstances this is commonly referred to as the need to show a differential impact either on the particular social group of which the claimant forms part or by the individual claimant showing that his fear is for one of the other reasons referred to in Article 1A(2) of the Refugee Convention. If no Convention reason can be established he cannot bring himself within the Refugee Convention.

42. Such differential impact or discriminatory element is arguably not essential to found a claim under Article 3 of the European Convention although in practice it will usually exist. In the exceptional case it is possible that country conditions of themselves may be so extreme as to mean that the act of removal by the receiving State will be in breach of the absolute duty imposed under Article 3, although in practice the European courts usually look for evidence of a differential impact if the claimant is to succeed – see, e.g., Vilvarajah and Others v United Kingdom [1992] 14 EHRR 248 where it was held that there was no breach of Article 3 when in the light of reports on the general situation and the applicants' personal position, they were in no worse a position than any other young male Tamil returning to Sri Lanka.

43. In any case, however, the country conditions must themselves give rise to a risk which reaches the same threshold as that required to amount to persecution under the Refugee Convention.

44. This difference in approach between the two Conventions (as well as the need to demonstrate personal risk, albeit by reference to treatment of a class or group to which the claimant potentially belongs) is well illustrated in the judgments in the recent case of Batayav v Secretary of State for the Home Department [2003] EWCA Civ 1489. Although not directly in point in terms of its factual basis, which related to whether conditions in Russian prisons were such as of themselves to lead to a potential breach of Article 3 rights, there are certain passages in the judgments which are of relevance to the proper approach to claims of a general risk of breach of Article 3 rights by reason of particular country conditions. In the leading judgment, Munby J contrasts claims under the Refugee Convention and under Article 3 of the Human Rights Convention in the following terms:

> 'The appellant's claim to the protection of the Refugee Convention, although founded in large measure on the conditions he might be expected to have to endure if returned to a Russian prison, was based on his fear that he would be singled out for persecution as a non-ethnic

> Russian draft evader and convicted drug dealer. His claim to the protection of Article 3 of the Human Rights Convention, in contrast, was founded not on his own particular circumstances but on the conditions faced generally by persons, whether or not the victims of persecution, incarcerated in the Russian prison system. The dismissal of his claim to the protection of the Refugee Convention accordingly could not be in an way determinative, nor necessarily even indicative, of his quite separate claim to the protection of Article 3.'

At paragraph 6, he summarised the general principles as to why Article 3 makes it unlawful for the United Kingdom 'to remove an individual to a country where he or she is foreseeably at a real risk of being seriously ill-treated' in a manner sufficiently severe to engage Article 3. He continued at paragraph 7 to accept the submission on behalf of the Secretary of State that:

> "An applicant may be able to meet this test whether by referring to evidence specific to his own circumstances or by reference to evidence applicable to a class of which he is a member. The present case falls into the latter category. Mr Garnham QC submits, and I agree, that in the latter category of case an applicant will only be able to demonstrate substantial grounds for believing that there is such a real risk if he can point to a consistent pattern of gross and systematic violation of rights under Article 3."

That is a direct reference to what the Tribunal said in Iqbal [2002] UKIAT 02239 which had been considered by the Court of Appeal in Hariri v Secretary of State for the Home Department [2003] EWCA Civ 807 from which the following passage in the judgment of Laws LJ was then cited as follows:

> '... the points concerning the appellant's individual circumstances had all fallen away ... his case depended entirely upon it being established that there was a real risk that he would suffer unlawful ill-treatment ... as a member of a class or perhaps two classes: draft evaders and those who had left the country without authority. In those circumstances, as it seems to me, the 'real risk' could not be established without it being shown that the general situation was one in which ill-treatment of the kind in question generally happened: hence the expression 'gross and systematic'. The point is one of

> logic. Absent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant would be returning was one in which such violence was generally or consistently happening. There is nothing else in the case which could generate a real risk. In this situation, then, a 'consistent pattern of gross and systematic violation of fundamental human rights' far from being at variance with the real risk test is, in my judgment, a function or application of it.'

45. Subject to the cautionary note struck by Sedley LJ in observing that the above passage in Hariri should not be construed so as to raise the standard of proof from that of a reasonable likelihood to a probability, we adopt those passages as correctly stating the test applicable to the consideration of whether general country conditions can be regarded as giving rise to the real risk of a breach of Article 3 rights.

46. Batayav and most cases in which this 'class' approach is appropriate relate to risks emanating from the state, but in the present appeal the risks complained of arise from the terrorist actions of those who would seek to overthrow the Iraqi State as it exists on the basis of the Law of March 2004 relating to the Iraqi Interim Government and its various regional organs of government. We are therefore here concerned with the actions of non-State actors so that if there is a sufficiency of protection from the State or its organs in the way described in Bagdanavicius the existence of a real risk will be negated by such protection.

The objective evidence as to the current position in Iraq

47. We have before us a considerable volume of objective material. The Secretary of State has filed the current April 2004 CIPU Report together with all the source documents identified in Annexe F. In the course of the hearing we were referred to various of the source documents which we have carefully considered. The appellant has also filed a bundle which includes UNHCR material up to 7 May 2004, reports from various other internationally recognised sources including the US State Department Report for 2003, the United Kingdom Foreign & Commonwealth Office notes, Amnesty International reports and various newspaper and broadcasting media reports. In addition, there are reports from Dr Rashidian (4 May 2004 with supplemental letter), and Mr Joffe (7 October 2003, 29 April 2004, and 6 July 2004 with six source documents annexed). There is also a more recent letter from

UNHCR. Mr Joffe gave extensive oral evidence during the first day of the hearing.

The weight to be given to the evidence of Dr Rashidian and Mr Joffe

48. Both were put forward as expert witnesses for the appellant. An expert witness is in a privileged position because he is able to give evidence relying on hearsay and to give his opinion based on his area of expertise drawing on such hearsay evidence as well as his personal knowledge. But the weight to be accorded to such evidence depends upon demonstrable impartiality and objectivity in addition to the requisite expertise in his subject. If the witness is partial, so that he becomes an advocate for the person commissioning his report, or shows a lack of objectivity in his approach to the body of evidence on which he draws to form his opinions, then the weight to be given to his opinion as an expert witness will be substantially diminished if not altogether eroded. Nevertheless, such testimony may remain of value on a factual basis arising from the witness's expert knowledge even where the weight to be given to expressed opinions is so reduced or eroded. For the reasons which we now set out we have come to the conclusion that neither Dr Rashidian nor Mr Joffe should be treated as expert witnesses for the purposes of this appeal and those heard jointly with it.

49. In asylum and human rights appeals there is one further area where the weight to be given even to evidence which is impartial and objective may be affected. That is in relation to opinions expressed as to whether risk to an applicant engages either Convention unless the evidence makes it clear that the witness understands and is applying the concepts as to what is required to amount to persecution for a Refugee Convention reason or treatment engaging the relevant Article of the European Convention.

50. Dealing with this second point first, although both expressed views as to potential risk, neither witness demonstrated such an understanding of the legal concepts to be applied in evaluating risk. Both clearly wrote on the assumption that we are concerned with whether safety can be guaranteed. We are not.

51. Whilst in his principal report dealing with the situation of the appellant, Dr Rashidian concluded that in the KAZ 'There is a serious risk that [the appellant] would be targeted and his life can be in danger', this reference to 'serious risk' must be read in the context of his earlier statement as to sufficiency of protection on the basis that his safety 'cannot be guaranteed by the KDP or the PUK' and that 'Neither the KDP nor the PUK can provide full protection to any suspect who has been targeted by Ansar-al Islam'. This misplaced approach was

reinforced in his letter of 10 May 2004 where, on being asked about internal flight, he concluded that as a result of animosity between Iraqi Arabs and the Kurds 'the life of no Kurd in the Iraqi Arabs regime can be guaranteed if the life of he or she is not safe in the Iraqi Kurdish regions.'

52. In Mr Joffe's case, in his summary at the end of his first report, he said 'It seems that, generally, conditions in Iraq are not such that individual security and safety can be assured'. A similar approach appears at paragraph 13 of the third report where he says 'It is difficult to argue that, even in apparently secure areas, there is a situation that approximates to genuine stability and security'. In re-examination when he was asked about security levels in the part of Iraq administered by the PUK, he was asked whether the PUK operated a security system generally to guard against attacks and replied : 'They do with mixed success – probably not blanket control to allow guarantee of security'.

53. In our judgment, therefore, neither witness can be regarded as expressing opinions as to risk based on the concept of real risk which it is the duty of Adjudicators and this Tribunal to apply and to that extent such expressed views must be approached with considerable caution as to the evidential weight to be given to them.

54. We now return to the issues of the impartiality and objectivity of their evidence.

55. So far as Dr Rashidian is concerned, we have concerns about the degree to which he may have based his analysis simply on specualtion. He says that 'If [the appellant] as a known secular political activist has been targeted by the Islamic movement before, there is the strong possibility that he would still at risk [sic] of punishment by the Ansar-al Islam agents and his life in such an environment cannot be guaranteed by the KDP or the PUK.' The clear evidence of the appellant is that he came to the adverse attention of the IMK once only, in February 1999 and, however reprehensible the treatment he then suffered during his brief detention, was released after undertaking not to be involved in any activities similar to the organisation of a seminar on the Kurds and Islam which had brought him to the adverse attention of the IMK in the first place. The appellant has never said that he would go back on that undertaking and there is no suggestion that any member of his family has been adversely treated by IMK or any of its subsequent emanations since his departure. Certainly the report referred to attacks on some high ranking PUK and KDP officials and it makes a generalised statement that attacks and assassinations have been widely reported by Kurdish papers and radio broadcasts in the

region, but the only dated evidential source for this is October 2001, and thus at a period before the Coalition invasion. The report concludes this passage (s.4) by saying:

> 'The Islamic movement threat still persists and the main targets are the coalition forces and their allies, secular writers, artists, intellectuals and those people who disregard the Islamic order and virtues.'

The conclusion as to risk to the appellant follows immediately after that passage in the terms we have quoted above. But nothing in the report explains on what evidential basis the appellant is to be included in those categories of targeted individuals given his specific factual history, nor to take into account why the AI (who it is not clear have ever directly targeted him from his account) should now wish to do so when it is clear that their agenda has greatly widened to attacks on coalition forces and their allies generally in Iraq. With respect to Dr Rashidian, it seems to us that his conclusions in this respect are speculative rather than being based on specific evidence to support them and that his misconception of the standard of risk to be applied may also have contributed to this. The report also seems to proceed on the basis that all Islamic groups are to be equated to AI and indeed refers to IMIK and AI as though they are virtually interchangeable, notwithstanding that the appellant clearly differentiates between IMK and IMIK.

There is one further respect in which we have some concern as to Dr Rashidian's objectivity. Part 5 of his report refers to 'The general current situation in Iraqi Kurdistan' and it reads as follows:

> 'The situation in Iraq is currently one of great uncertainty. The Iraqi government and governmental agencies have collapsed but sporadic fighting is continuing. Shooting and violence has been widespread, and in some areas people have been forcibly displaced, further adding to the hardship of the Iraqi population. The US and UK forces have yet to restore order and ensure the provision of humanitarian systems in the areas they control. Beyond immediate concerns, the duration of the military presence of the USA and UK is unknown, prospects for an effective Iraqi transitional authority are unclear and there is disagreement over the role of the UN. The most difficult challenge for Iraq lies ahead: to ensure that in the post-conflict period human rights stand at the centre of reconstruction effort. Addressing impunity for past violations, building a fair

> and effective justice system, ensuring respect for the rights of all without discrimination on grounds of religion, ethnicity or gender, and insisting that the Iraqi people themselves drive the process forward – all will be of central importance. The immediate challenge in Iraq and Iraqi Kurdistan in particular is to ensure respect for the laws and order in the current situation. A great efforts (sic) and time are requires (sic) to ensure that the human rights is respected (sic), and all political parties comply with their obligations under international human rights and humanitarian law.'

56. It seems clear that the report seeks to equate the situation in Kurdistan with that in the whole of Iraq but what it clearly shows is a situation which is patchy throughout the country, which is confirmed by the objective evidence generally. It is also apparent that the author has clear personal views about the way in which the governance of Iraq should develop which may well colour his views of the present situation. What the report signally fails to do is to make any evaluation of the situation in Iraqi Kurdistan although the heading misleadingly suggest that this is what the quoted passage is about. This strikes us as particularly important because, in the course of oral evidence, Mr Weisselberg directed the attention of Mr Joffe to sources referred to in the CIPU Report which deal with the general situation in the former KAZ. Mr Joffe accepted that these fairly reflected the position there: but the clear implication of what Dr Rashidian says is that his description applies to the whole of Iraq but, perhaps, to Iraqi Kurdistan in particular.

57. The first of the source documents to which Mr Joffe was referred was from the Aljezeera website and is dated 6 Aril 2004. It is by an Aljezeera correspondent in Irbil and we quote certain passages as they appear in the source document before us:

> 'Kurdistan comes straight out of a US government press release. It is a place where people look you straight in the eye and, without a hint of irony, call foreign occupation forces "liberators". Unlike most other parts of Iraq ... Kurds do not feel the strains of occupation ... Kurds on the street of Irbil condemn anti-US attacks [here referring to recent events in Baghdad] as "terrorism". A recent poll by foreign broadcasters that suggested most Iraqis were happier since the US-led invasion a year ago was heavily influenced by Kurdish respondents. A survey found only one in three Arabs believed their country was liberated – compared to four

> out of five Kurds ... The road from Baghdad to Kurdistan is littered with so many checkpoints you would eventually lose count. After recent bombings in several Kurdish cities that have left scores dead, the Kurds clearly do not want troublemakers on their soil. ... The region itself has a different feel from the rest of Iraq. ... There are no gun-toting foreign soldiers seen elsewhere in Iraq, nor helicopters whirring overhead. Dr Sherzad Amin al-Najjar, of Irbil's Salah al-Din University, told Aljezeera.net life in Kurdistan had improved considerably in the past year. … Al-Najjar said that ordinary Kurds had particularly noticed the economic benefits of occupied Iraq. "People's standards of living have gone up in the last year. The Coalition Provisional Authority has put a lot of money into this area as have UN agencies. There has especially been a lot of construction of roads, schools, and water facilities. As a result of this political stability, there have been many social and psychological benefits. The only negative thing is there is more terrorism here now, which didn't exist before."'

58. The second source was from an article in the Daily Star by the Chief Editor of Radio Free Iraq and is dated 27 April 2004. It summarises the general economic and social position in Iraqi Kurdistan as follows:

> 'Thanks to hundreds of millions of US dollars made available to the two Kurdish administrations in Irbil and Sulaimaniya by the Coalition Provisional Authority (CPA) the economy is bustling, unemployment is down and livings standards are almost 90% better than a year ago. For example, school teachers' salaries have increased from the equivalent of $70 per month to $400 per month and manual labourers are paid $17 - $20 for a seven hour working day, compared to $4 a year ago. Cities in Iraqi Kurdistan are big construction sites.
>
> Furthermore, law and order exists. Kurdish police and security forces are efficient and the security situation in the self-ruled Kurdish region is a far cry from that in the rest of Iraq. Exemplary relations between coalition troops and the population further enhanced stability, including political stability. The US and British forces are particularly welcomed by the Kurds. Only in the Kurdish region are cities and towns bedecked with US

> and British flags and portraits of President George W. Bush and Prime Minister Tony Blair.
>
> Contributing to efforts by the Coalition to confront the ongoing insurgency in Iraq, the Irbil and Sulaimaniya administrations, led by Masood Barzani's Kurdistan Democratic Party (KDP) and Jallal Talibani's Patriotic Union of Kurdistan (PUK) have deployed some 60,000 – 70,000 Peshmerga fighters along the borders between the Kurdish-controlled and neighbouring Iraqi provinces. Kurdish forces are also involved in protecting vital public installations in northern Iraq. Thanks to fully fledged Kurdish operations, the Americans have little to worry about when it comes to the security situation in the north.'

Even if the figures quoted in the first paragraph are somewhat surprising, the general tenor is of a substantially improved situation.

59. As we have noted above, Mr Joffe readily agreed when these reports were put to him that Kurds feel that they have never had it so good; the economy is bustling and unemployment down and that law and order existed in the manner described in the second paragraph in the Daily Star article. He said that was well known and investment in the area had been going on for some twelve years.

60. This is not, however, reflected in Mr Joffe's first report of 7 October 2003 either where, in the section dealing with Iraqi Kurdistan, he says:

> 'It is certainly the case that economic conditions are now far worse than they were before the conflict. First of all, 60% of the 3.8 million strong population cannot feed themselves and depend on food provided through the oil-for-food programme. This is supposed to be in operation but $400 millions of funds due to Kurdistan have been frozen as nationwide distribution is arranged. The Kurds have thus felt severely discriminated against. Nor has remedial work to cope with the one hundred thousand families who live in severely substandard conditions continued, electricity supplies are still intermittent and public services are still in disarray. Around three hundred thousand persons depend on the state sector for payment of salaries, out of a population of twenty-one million with unemployment levels running at least 30%, and these were only paid for the

> first time at the end of May when $30 millions was made available for salaries in Kurdistan.'

61. In his report of April 29, 2004, he confirms what was said in his first report still applies save as modified, but the second report does not seek to modify what he said about economic conditions in Kurdistan. In his third report in the passage at paragraphs 24 and 25 where he deals with reconstruction, there is no attempt to distinguish between Iraqi Kurdistan and the remainder of Iraq and the picture that is painted is not markedly different from that in the earlier reports.

62. Given his answers in cross-examination, however, it seems to us that what was said in the first report does not fairly reflect the general economic situation in the former KAZ and that, but for the concessions made in cross-examination, the clear inference as to economic conditions in the appellant's home area was that reflected in the first report in the passage which we have quoted. Given that the appellant was known to Mr Joffe to be from Sulaimaniya and that it was his situation there with which the Immigration Appellate Authority would be primarily concerned, the report gives a misleading picture of economic conditions relevant to him as a native of the former KAZ. Since Mr Joffe deals separately with Mosul and Kirkuk earlier in his report, it seems to us that his reference to Kurdistan is clearly intended to refer only to the former KAZ.

63. Mr Joffe in his first report also categorises the security situation in Kurdistan as 'not good' and comments that the Kurdish authorities 'are loath to allow non-local persons to move into the area', although quite what relevance this has to the appellant's situation as a native of Sulaimaniya is not made clear. He goes on to say, however, that the KDP and PUK leaders remain in absolute control of their respective fiefs and that such control is probably more firm than before 'despite the deaths of two American soldiers on July 20 [2003] near Tal Afar in Kurdish-controlled regions.' He says the PUK and KDP are immensely powerful and 'do not tolerate the presence of strangers there'. He says the Kurdish forces are variously estimated at between sixty-three thousand and one hundred thousand strong and have heavy weaponry and armour of a kind they never possessed before. He sums up the position as follows in his first report:

> 'As far as Kurdistan is concerned, its status in international law has not changed as a result of the war; it is still legally a part of Iraq and has no independent status, nor do its two administrations, run independently by the PUK and the KDP, despite the former agreement to unify the administration there. In

> practice, of course, both leaders enjoy virtually total authority in the areas they administer and are, in effect, more powerful now than they were before the war. The overall impression is that the situation in Kurdistan is still not secure and that 'government' – the administrations of the KDP and the PUK – power is still repressive – particularly as far as members of minority parties are concerned. Aid agencies have pulled back their members, the United Nations now only operate in Arbil. Other agencies, led by the Red Cross, have simply removed foreign personnel from Iraq.'

64. In his second report he says that security in Kurdistan has not changed save in relation to the fear that AI has resumed operations (in respect of which he cites the bombing of the KDP and PUK headquarters in March 2004 [which are claimed to be the actions of an even more extreme splinter group from AI – see paragraph 8 above]) and the effect of the law bringing into effect a veto by the Kurdistan provinces in relation to the intended new constitution of Iraq. What effect the latter issue currently has on security issues in the former KAZ is not explained.

65. In his third report, he says that his previous reports are to be considered still to be reflecting the current situation save as modified by that report. In dealing with the security situation, which he considers to have deteriorated generally, it is clear that this is a generalised judgment and not specific to the areas of northern Iraq relevant to the position of the appellant. He says in terms at paragraph 6 of this report that it is 'very difficult to be precise as to where insecurity reigns' because of the difficulties of movement for journalists but expresses the following tentative conclusions at paragraph 7 of the report:

> 'It seems to be the case that most violence is located within the Sunni triangle of Northern Iraq, with significant pockets of violence elsewhere, including the Kurdish city of Arbil and the Mosul region. There are also major security problems around Kirkuk but these reflect the on-going struggle between displaced Kurds and migrant Arab populations. It is certainly the case that up to three hundred thousand people are involved in this situation and that tensions are running very high, occasionally exploding into open violence and involving the Turcoman minority – which, in turn, upsets Turkey and Ankara has warned that it might intervene if their security is really threatened.'

66. At paragraph 54, he says this of the situation in Kurdistan, having said at the conclusion of the preceding paragraph that if Iraqi forces are not competent to act alone there is every reason to fear that instability and insecurity would intensify and spread:

> 'This would include the situation in Kurdistan, where, despite the autonomous administrations of the two Kurdish parties, there has been sporadic violence in the past. There are also claims that the Ansar al-Islam, a group that was supposedly eliminated during the invasion of Iraq last year, has now revived and is engaged in the recent series of bombings, including the two massive bombs in March which killed up to one hundred people, including senior Kurdish politicians. As recently as June 26, 2004, a car bomb severely injured the Kurdish Culture Minister, Mahmad Muhammad, and killed his bodyguard in Arbil. Four Peshmergas were killed at Mosul on the same day and two headless corpses were found at Kirkuk, apparently the bodies of two collaborators with American forces. In these circumstances, it is difficult to argue that, even in apparently secure areas, there is a situation that approximates to genuine stability and security.'

67. In the course of cross-examination it became clear that the references to violence in Kurdistan were principally to the two bomb attacks in the KDP and PUK headquarters respectively and otherwise to isolated attacks against specific individuals. Asked if there had been any such incident in Sulaimaniya, he said there has been two attempts to bring a car bomb into the centre of the city, both of which had been foiled by the PUK authorities. He was referred to the following extracts from the Kurdish Observer of 9 August 2003 (which ante-dated all the reports filed by the appellant) dealing with the contrast in the situation in Kurdistan from other parts of Iraq, thus:

> 'Once over the Jebel Hanrin ridge, you can begin to breathe. Welcome to Iraqi Kurdistan, reads a hand painted sign by the road. Technically this is still Iraq but it is like entering another country. The land, largely untouched by the ravages of the recent war, is a world away from the lawlessness of Baghdad and its surrounds. Here they practice a different culture, speak another language, live a different way, and spend a different currency. And for the most part they are pretty happy.

> To the visitor from the south, the streets of Sulaimaniya and Irbil, the two main Kurdish cities, are not quite paved with gold but they are a stark contrast to the sullen intensity of Baghdad and Fallujah. There is no curfew at night; no nervy American soldiers follow your movements down the sight of a gun barrel. Electricity and water are reasonably constant, and there are mobile telephones, satellite dishes aplenty. Shops brim with food and imported consumer goods. And there is scant need to look over your shoulder when speaking of matters political.'

68. Mr Joffe accepted that was currently applicable with the qualification that freedom of speech would not apply if discussing the KDP, PUK or Islamic issues in an Islamic area. He further accepted that insurgents in Kurdistan were regularly captured by the authorities there and that 'they always did' effect such captures. When asked whether he could point to any targeting of low level individual members of the KDP or PUK, Mr Joffe replied that he would require notice of that question. Given that he had been prepared to assert that the appellant would be at such risk in the reports which were adopted for his evidence-in-chief, we find this a somewhat surprising response.

69. Mr Joffe's third report was written specifically by way of commentary on the CIPU April 2004 Report on Iraq. In evidence-in-chief he made it clear that he had no problem with the sources on which the report was based, which in his third report he categorised as 'considerable supporting information', but he said this at paragraph 2 of his report:

> 'The [CIPU] report was clearly drawn up before the beginning of April 2004 and, given the rapid pace of events in Iraq, is already outdated in many important respects. Furthermore, although it seeks to give an objective review of the current situation and does not overtly take any position about the future, there is an implicit assumption that, overall, as Dr Pangloss would have said, 'All is for the best in the best of all possible worlds'. In other words, given the passage of time, the trend in Iraq is towards the restoration of stability and security, alongside the innovation of prosperity and individual rights, now that the Ba'athist system has been overthrown..

He is factually incorrect in saying it was drawn up before the beginning of April 2004 because the annexe quoting the sources for the report clearly identifies a number of sources dating up to 24 April 2004.

70. In relation to the accuracy of his reports, we note more importantly that he says in his initial summary of the appellant's situation, which he continues to adopt, that the PUK was not prepared to provide protection to the appellant. It is certainly correct that in the self-evidence form and at interview, the appellant said he did not think that they would have provided protection to him at the time he left Iraq but there is no suggestion on his part that he sought and was denied such protection or that his view in this respect was otherwise than subjective and speculative. Mr Joffe has apparently treated such a subjective assertion as meaning that there had been a denial of protection to the Appellant when sought. We note that in the following paragraph, based on his opinion, he puts the issue of provision of protection no higher than saying that it is 'by no means certain that the PUK would have been prepared to offer such protection' because 'it has been very ambivalent about its relations with the mainstream Islamist groups, although it is very antagonistic to the extremist organisations.'

71. There are three final matters which we have taken into account in our assessment of the reliability of Mr Joffe as an impartial expert witness. First, in the passage dealing with the general situation in his first report he says:

> '... The United States and Britain have now recognised that their occupation was fundamentally misconceived and they are seeking United Nations support over security and reconstruction, whilst seeking to place more troops there and retain overall military and civilian control ...'

Whilst it may be that many hold such a view, and Mr Joffe expressly said he regarded the intervention as illegal and inappropriate (although that did not mean he thought the Saddam regime should not have been removed), he was unable to point to any published evidence at the date of his report that either administration has made such a statement, although he initially relied on what he understood Sir Jeremy Greenstock to have said in a television programme a fortnight before this hearing as the authority for the passage quoted. When the date of his report was drawn to his attention, he then amended this to say that he had relied on confidential sources. But the fact that some unidentifiable sources may have said as much on an unattributable basis, does not seem to us to lend support for such a statement being put forward as objectively factually accurate when it is contrary to all

publicly available evidence form the very authorities whose views it purports to summarise. It is in our view an illustration of a tendency to present opinion as verifiable fact and to that extent misleading.

72. Secondly, in his third report he quotes extensively from an article by someone he describes as a 'highly respected American commentator' in the part of his report dealing with issues of reconstruction in Iraq. A footnote reveals that it is an extract from an article of 12 January 2004 'After Saddam: Assessing the Reconstruction of Iraq' but the passage quoted is concerned solely with what might be colloquially termed the 'downside'. Mr Joffe makes no reference at all to the fact that the passage quoted was preceded by a passage headed 'The Good News', which opened:

> "There is enough going well in Iraq that there is no reason to believe that the U.S.-led reconstruction effort is doomed to failure. Indeed, quite the opposite. There is so much good in Iraq, even in the face of numerous and crippling American errors, that pessimists need to be cautious in making prognostications of doom. Four positives stand out as key elements on which the reconstructions of Iraq should be founded: [the writer then identifies these as largely favourable Iraqi public opinion with the majority wishing the United States to remain; that most leaders have shown great patience and urged their followers to co-operate; that the insurgency is not by itself likely to undermine reconstruction; and that there has been considerable success to date with the reconstruction works undertaken 'from the ground up']

The omission of reference to these positive aspects, whilst they may not have assisted Mr Joffe's thesis, hardly supports a balanced approach to the source on which he was placing reliance and we were unimpressed by his answer in cross-examination that we could, had we wished, have gone to the source material identified in the footnote to see what this 'highly respected commentator' had actually said.

Finally, in the course of his oral evidence he took us on what may aptly be described as a 'whistle-stop' tour of the districts in Baghdad in order to emphasise the impossibility of relocation there for a Kurd but omitted to say that of the 1 to 2 million Kurds who live outside the former KAZ, there is a substantial Kurdish population ordinarily resident in Baghdad itself (see CIPU Report paragraph 6.65).

73. Dr Rashidian says that he is an Iranian Kurd who has studied Iranian and Kurdish social and political affairs for more than forty years. He is an Honorary Fellow at the Department for Middle Eastern and Islamic Studies at Durham University. He does not appear to have visited Iraq, nor to have published academically on Iraq although he says he has written numerous articles (which would not therefore have been the subject of peer review as would academic publications), reviewed books, carried out research and supervised postgraduate students at the department referred to. He adds that he has 'provided hundreds of expert reports regarding the Afghani, Iranian and Kurdish asylum seekers for Appeal and Tribunal Courts in the UK.'

74. Mr Joffe has no permanent professorial post but is affiliated to Kings College in London University where he holds a Visiting Professorship in Geography. He teaches an undergraduate and post-graduate course relating to the Middle East and North Africa and was formerly associated in a like capacity at the School of Oriental and African Studies. He is a Research Fellow at the Centre for International Studies at Cambridge University where he is a director of the Centre for North African Studies. Until March 2000 he was also Deputy Director and Director of Studies at the Royal Institute of International Affairs and is an Associate Fellow of the Royal United Services Institute for Strategic Studies. He has not published academically on Iraq since 1995 although he continues to comment in the media. He has provided reports for asylum applicants extensively in relation not only to Iraq but also to Iran, Kuwait, Lebanon, Palestine, Syria, Yemen, Egypt, Libya, Tunisia, Algeria, Morocco, Mauritania and Chad.

75. We have no reason to doubt that both Dr Rashidian and Mr Joffe have considerable knowledge of the countries to which they refer and on a factual basis there is much of assistance to us in their respective reports. For the reasons which we have set out at some length in the preceding paragraphs of this determination, however, we do not consider that either of them ought properly to be relied upon as impartial expert witnesses in this appeal. We have reached this conclusion because we find their reports selective, lacking in objectivity and seeking to promulgate opinions on matters which neither reflect a proper appreciation of the stated and accepted evidence of the appellant, nor the full range of available objective evidence, nor the legal nature of the issues for decision in asylum and human rights appeals. Mr Joffe in particular laid great emphasis on the practicability and logistics of return as well as misunderstanding the nature of the risk to be demonstrated by asylum applicants.

<u>The objective situation in Iraqi Kurdistan</u>

76. We have quoted extensively earlier in this determination, both from what Dr Rashidian and Mr Joffe say, as well as from source material derived from local media commentary which seeks to paint a picture of life currently in the areas under the direct control of the PUK and the KDP.

77. In considering this area of Iraq it is in our view important to keep in mind that it is properly to be viewed as historically divided from the area formerly under the control of the former Ba'athist regime. The current CIPU April 2004 report provides the following information. There are some 3.7 million Kurds in the predominantly Kurdish former KAZ of whom the majority are Sunni Muslims. Outside that area there are a further 1 to 2 million Kurds, mainly in Baghdad, Mosul and the part of Iraqi Kurdistan outside the former KAZ. Sunni Muslims are predominant in northern and central Iraq although taken over Iraq as a whole they are outnumbered two to one by Shia Muslims. The Kurdish Diaspora, which extends over the mainly mountainous area where the borders of Turkey, Iran Iraq and Syria converge, had been promised its own national state after the break-up of the Ottoman Empire under the 1920 Treaty of Sevres but the offer was rescinded three years later in the Treaty of Lausanne. Nevertheless each of those countries has since been concerned to repress the nationalist and separatist tendencies of the Kurds. The Kurdish desire for autonomy has led to significant periods of open revolt in Iraqi Kurdistan since the 1960's and harsh measures of repression against them. The last major revolt against the Saddam Hussein Ba'athist regime was crushed shortly after the 1991 Gulf War but this led the Western led coalition to take steps effectively to establish a temporary haven in northern Iraq which became known as the KAZ. Both the KDP and PUK have stated that they see the future of Iraqi Kurdistan as part of a federal Iraq rather than as an independent state in its own right to be governed in accordance with the Law of March 2004 pending the full elections envisaged in that Law (see further at paragraph 105 below).

78. There have been periods of rivalry and of co-operation between the KDP and the PUK which was formed after a split within the KDP following the 1975 Algiers Accord between Iraq and Iran which ended the Iranian sponsored revolt of that period in Northern Iraq.

79. CIPU quotes from a Unites States Congressional Report of January 2004 at paragraphs 4.13 and 4.14 as follows:

> "In the aftermath of the 1991 Gulf War, the KDP and the PUK agreed in May 1992 to share power after parliamentary and executive elections. In May 1994, tensions between them flared into clashes, and the KDP

> turned to Baghdad for backing. In August 1996, Iraqi forces helped the KDP capture Irbil, seat of the Kurdish regional government; Iraqi forces acted at the KDP's invitation. With U.S. mediation, the Kurdish parties agreed on October 23, 1996, to a cease-fire and the establishment of a 400-man peace monitoring force composed mainly of Turkomens (75% of the force). … Also set up was a peace supervisory group consisting of the United States, Britain, Turkey, the PUK, the KDP, and Iraqi Turkomens.
>
> A tenuous cease-fire held after November 1997, and the KDP and PUK leaders … signed an agreement in Washington in September 1998 to work towards resolving the main outstanding issues (sharing of revenues and control over the Kurdish regional government). Reconciliation efforts showed substantial progress in 2002 as the Kurds perceived that the United States might act to overthrow the regime of Saddam Hussein. On October 4, 2002, the two Kurdish factions jointly reconvened the Kurdish regional parliament for the first time since their 1994 clashes.
>
> In post-Saddam Iraq, both Barzani and Talabani were part of the major-party grouping that has now been incorporated into the Governing Council, and both are part of the Council's rotating presidency. Talabani was Council president during November 2003. The KDP and PUK are said to be increasingly combining their political resources and efforts to re-establish the joint governance of the Kurdish regions that was in place during 1992-1994. The Kurdish parties are also in negotiation with U.S. authorities to maintain substantial autonomy in northern Iraq in a sovereign, post-occupation Iraq, although clashes have flared in December 2003-January 2004 between Arabs and Kurds in the city of Kirkuk as Kurdish leaders have sought to politically incorporate that city into the Kurdish regions."

80. Although it was accepted by Mr Joffe in oral evidence that there is increased cooperation between the KDP and the PUK, it was his view that it would not currently be right to regard them as operating a unified control of the area in the sense that they have merged their separate identities into a single autonomous unit of regional government. We do not agree that matters can be put as high as this. It

may be that on individual issues there will remain differences between the two parties but there is increasing evidence of cooperation following the reconvening of the Kurdish Regional Parliament on 4 October 2002 for the first time since the differences which led to its suspension in 1994. There is said to be freedom of movement in the former KAZ and both parties enacted laws prior to April 2003 establishing an independent judiciary for each area, providing for freedom of religion, freedom of the press, freedom of assembly, and the right to form political parties. The US State Department Report for 2003 published on 25 February 2004 records that according to press reporting and independent observers both the PUK and KDP generally observe such laws in practice. It adds that both established human rights ministries 'to monitor human rights conditions, to submit reports to relevant international bodies, and to recommend ways to end abuses'. We note also that there are differences between commentators as to the degree to which there is now unified control in the former KAZ. For example, a report of 5 January 2004 by Dr Rabwah Fatah Associates contained in the appellant's bundle asserts in paragraph 54 (p. 62):

> "The two Kurdish administrations, controlled by the … (PUK) and … (KDP) have united. Therefore internal flight is not an option any more. Kurdistan is under one administration now."

81. Whilst it may be the case that personal differences still exist on the basis of what took place during the periods when the KDP and PUK were opposed to each other during the mid-1990s, so that in individual cases it may be that some from the PUK area could not live in the KDP area and vice versa, the degree of current co-operation and the common cause which the parties have does not in our view support the contention that there cannot be a general freedom of movement within the area of Iraqi Kurdistan capable of being exercised safely.

82. Again, the general stability within the area is reflected at paragraph 5.40 of CIPU which records:

> "The effectiveness of internal security varies greatly between the Kurdish Regional Government administered areas and elsewhere. According to Lebanese newspaper The Daily Star on 27 April 2004:
>
> > "Furthermore, law and order exists [in the Kurdish Regional Government administered area]. Kurdish police and security forces are efficient and the security situation in the self-ruled Kurdish region is

> a far cry from that in the rest of Iraq. Exemplary relations between coalition troops and the population enhance stability, including political stability."

What is said there seems to us to be strongly supported by the provisions as to devolved government in the Kurdish regional government area contained in the March 2004 Law of Administration for the State of Iraq for the Transitional Period to which we refer in more detail below. The above extract also reflects what Mr Joffe said in cross-examination as we have recorded above.

83. The general picture which emerges is one of comparative stability in a region under a common administration with a functioning security and judicial system. Insofar as Mr Joffe and Dr Rashidian seek to argue to the contrary, we do not find that the generality of the evidence before us supports their views.

84. It seems to us that the more alarming of Mr Joffe's references to the situation in the former KAZ were derived from the large numbers of Internally Displaced Persons (IDPs) there, whose situation may properly be contrasted with the relative affluence and settled life of the indigenous inhabitants.

85. We accept that there are some 800,000 IDPs in Iraqi Kurdistan but those in the former KAZ have been there since before the Coalition invasion and comprise primarily those of Kurdish ethnicity who fled for safety from the Ba'athist regime. The CIPU report at paragraph 6.154 notes that according to UNHCR sources the collapse of that regime did not cause the massive internal displacement that had been anticipated so that at least in Kurdistan the problem of internal displacement ante-dates the Coalition invasion.

86. We accept that there are specific areas of Iraq where those formerly displaced by the Ba'ath Party policies have sought to return in order to reclaim their properties. So far as northern Iraq is concerned this applies particularly to Irbil, Kirkuk and Mosul where in the course of the former 'Arabisation' policies ethnic Kurds had been displaced in favour of ethnic Arabs.

87. Nevertheless, the problem has been recognised and steps are being taken to deal with recovery of property on a formal legal basis. The Coalition Provisional Authority had created an Iraqi Property Reconciliation Facility (IPRF) in June 2003 to be administered by the International Organisation for Migration in order to receive claims and to provide voluntary dispute resolution (CIPU paragraph 6.147). Nor

was there a lack of realism by some parties on the ground. The British-Danish Fact-Finding Mission reported in August 2003 that the disputes between Kurds and Arabs related particularly to the Al Jabur and Al Jabudi clans but continued at paragraph 6.146:

> "Leaders of Arab tribes in these areas have approached KDP and PUK and informed them that the former regime brought these Arab tribes to the Kurdish areas under pressure. The Arab tribal leaders acknowledged that they inhabit Kurdish properties and assured the Kurdish parties that they would leave but asked for this process to be implemented in an orderly way. The Kurdish parties had agreed to this but, according to UNHCR in Amman, to date no mechanism for the orderly and peaceful resolution had been put in place."

88. According to the Foreign and Commonwealth Office in a letter dated 26 April 2004, the Iraqi Governing Council had established a Ministry for Displacement and Migration and an Iraqi Property Claims Commission (IPCC) providing a formal mechanism to register property disputes arising between July 17 1968 and 9 April 2003. The letter said the IPCC had opened offices all over Iraq during March and April 2004 and would continue to receive applications until 1 January 2005. Whilst it was thought it would take over 5 years to process and rule on individual cases this clearly represents an Iraqi Governing Council initiative to establish the appropriate legal mechanisms to provide rulings on individual complaints.

89. The Law of 8 March 2004 under which the Iraqi Interim Government receives its sovereign powers (which is set out at appendix E to the current CIPU report) contains specific provisions going to such issues at Articles 49 and 58. Article 48 confirms, amongst other interim bodies previously set up, the establishment of the IPCC; Article 58 provides that the Transitional Government and its organs, 'especially' the IPCC:

> "shall act expeditiously to take measures to remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality."

In four sub-paragraphs the Article then goes on to specify the particular steps to be taken to remedy such injustices, requiring

restoration of homes and property or the payment of compensation where this is not feasible; resettlement of those newly introduced to specific regions with the provision by the state of land near their former residences and appropriate state compensation; and the promotion of new employment opportunities for those deprived of employment or support in order to force migration in the past.

90. Although attempts to recover property will doubtless create tensions in the particular areas concerned, there is no specific evidence that such issues are causing widespread violence or disruption currently. Mr Joffe refers to three specific incidents in Kirkuk, one in May 2003 and the other two in late August 2003, the third being in a small neighbouring town. In his latest report which we have quoted at paragraph 56 above he puts the matter no higher than saying that the tension in Kirkuk 'occasionally' explodes into open violence but gives no further specific examples than those we have referred to.

91. Apart from these specific situations relating to people who have been internally displaced since the fall of the Ba'athist regime, which has largely been caused by the return of those themselves previously displaced – the majority being Iraqi Kurds returning form the former KAZ or other areas within northern Iraq to which they had been dispersed (CIPU paragraph 6.155) – the remaining IDPs in the north had been there since well before 2003. Those in the KAZ were in camps which had been provided with international support following the end of the first Gulf War in the early 1990s. Although their circumstances may in many cases be Spartan there is no evidence that they live in destitution or impinge to any extent on the lives of the indigenous Kurds in the former KAZ other than that there has been an increasing cost to the local administrations during periods when international aid has been interrupted.

92. One of the bases on which Mr Joffe sought to advance arguments as to general instability in Iraq in his comments on the security situation was set out at paragraph 5 of his final report. After detailing the numbers of Coalition troops recorded as killed and injured, he continued

> "Iraqi losses as the result of military action or during the resistance since 1 May 2003 are far higher but are unknown as the military authorities in Iraq keep no tally of those caused by Coalition action. Estimates of deaths range from 20,000 dead and 25,000 injured to 55,000 dead from March 2003 until the present. The only count of attested losses suggests that the figure by July 6, 2004 was between 11,143 and 13,096 dead."

It is not stated where these higher estimates come from or whether any reliance can be placed upon them. In situations such as that in Iraq currently it is all too easy to pluck figures out of the air. Nevertheless, there is one source which deals with attested losses and this is a website entitled 'Iraq Body Count' a copy of which was annexed as a source document by Mr Joffe. It describes the figures which it quotes as being the minimum and maximum of civilians reported killed by military intervention in Iraq and it explains its provenance and what it means by this in more detail in the following terms:

> "This is a human security project to establish an independent and comprehensive public database of media-reported civilian deaths in Iraq resulting from military action by the USA and its allies. **This database includes up to 7,350 deaths which resulted from coalition military action during the "major-combat" phase prior to May 1st 2003. In the current occupation phase the database includes all deaths which the Occupying Authority has a binding responsibility to prevent under the Geneva Conventions and Hague Regulations. This includes civilian deaths resulting from the breakdown in law and order, and deaths due to inadequate health care and sanitation.** Results and totals are continuously updated and made immediately available on this page and on various **IBC counters** which may be freely displayed on any website, where they are automatically updated without further intervention. Casualty figures are derived solely from a comprehensive survey of online media reports. Various sources report differing figures, the range (a minimum and a maximum) are given. All results are independently reviewed and error-checked by three members of the Iraq Body Count project team before publication."

The emphasis above is not ours but that appearing on the website. Although there is nothing to indicate the agenda of this project, it purports to be checked for its accuracy and for the purposes of this appeal it is the only such evidence which makes that claim. Interestingly, since it derives its information from media reports it is quite clear that comparisons show reporting on a significantly differing numerical basis which may well account for the higher 'estimates' from unidentified sources to which Mr Joffe refers. In order to put these figures into perspective, we note that according to Whitakers Almanack for 2003, the estimated population of Iraq in 2001 was 23,331,985 people. The only attested figures show that the deaths of Iraqi civilians in the period 1 May 2003 to 8 July 2004 (the post "major-

conflict" period) was, adopting the maximum figure, 5769 and this includes an unquantified number who were said to have died from medical failures. That figure represents 0.025% of the estimated population. Mr Joffe says the number of deaths demonstrates widespread insecurity in Iraq. We cannot agree. If that is to be regarded as the proper percentage risk of death throughout the country to civilians by reason of terrorist activities taken against the Iraqi Governing Council and the Coalition forces, then it seems to us that the Secretary of State is right in his submission that the risk to the civilian population arises from the chance of being in the wrong place at the wrong time. Moreover the website does not make it clear whether the figures which they quote include Iraqi citizens who have seen fit to take up arms against the authorities and so have themselves become combatants. If they are included then the small percentage risk to innocent civilians will be reduced even further.

93. Finally, this small percentage risk does not apply evenly across Iraq. The Kurdish regional government area is, for example, accepted as being safer than are some other parts of the country. Insofar as the population density may be lower in this area, it seems to us that the general increased safety of the area more than offsets such a consideration so that the percentage risk in terms of general country conditions must remain so small that it cannot be classified as amounting to a real risk absent specific characteristics in an individual claimant which heighten potential risk.

94. In summary there is no sustainable evidence that in Iraqi Kurdistan the generality of people living there do so in conditions which could arguably engage Article 3 of the European Convention as comprising inhuman or degrading treatment and there is no evidence that in general they are subjected to torture or inhuman or degrading punishment. There is certainly a less settled situation in that there has been an increase in terrorist activity aimed at destabilising the authorities, although perhaps less than in some parts of central and southern Iraq, but, as we have said, there is clear evidence that security and criminal law systems are in place and, in face of a terrorist threat, no government can guarantee the safety of all its citizens. The appropriate legal mechanisms for dealing with property disputes arising from the past forced actions of the former regime have been further developed in the Law of 8 March 2004.

95. Much has been made on behalf of the appellant of the threat posed in Iraqi Kurdistan by AI in particular. Both Dr Rashidian and Mr Joffe refer to it in passages which we have quoted and in Mr Joffe's case also in his oral evidence. We are by no means satisfied that it is as widespread as suggested. Certainly, the bombings of the KDP and PUK

headquarters in two separate incidents on the same day constitute a major terrorist attack and had a devastating impact on those present, but recent events throughout the world have shown that no civilian government can successfully guard against all such attacks and, as Mr Joffe said, this has resulted in tighter security measures. There is no question of the resolution of the Kurdish authorities to prevent such attacks by Islamic extremists to whom they are now bitterly opposed, however far in the past they may have sought to accommodate certain of such groups in order to reach a peaceful solution. In Sulaimaniya itself they have so far been successful in intercepting and destroying two intended car bombs. Such problems do not, for the reasons set out above, arguably engage either Convention unless there is a real risk that the appellant himself will be directly targeted, and there is a current lack of sufficiency of protection in general terms in his home area by the legitimate authorities there.

96. We shall return in due course to those specific issues as they relate to the appellant but it is now appropriate we consider the legal basis for provision of State security in Iraqi Kurdistan and then the UNHCR Guidance upon which Miss Naik placed reliance.

State provision of protection in Iraqi Kurdistan

97. In his reports and in her submissions Mr Joffe and Ms Naik raised the issue of the legal status of the authorities in the former KAZ and their ability as a matter of international law to provide security to their inhabitants.

98. The view has been expressed that it is only a state which is internationally recognised as being able to confer citizenship status and so can be held to be internationally accountable that can provide such a sufficiency of protection in order to satisfy the 'protection test' where the 'fear test' is met in the claimant's home area. According to the cases to which we refer below this is said to be derived in part from views expressed in a paper by Professor J C Hathaway and M Foster, published in 1999, (following earlier publication of the Michigan Guidelines on the Internal Protection Alternative with which Professor Hathaway was also concerned – see below) and in particular the following passage:

> "… the fundamental premise that refugee protection is an interstate system intended to deliver surrogate or substitute protection assumes the right of at-risk persons to access a legally accountable state – not just some (hopefully) sympathetic or friendly group – if and when

> the individual's own state fails fundamentally to protect his or her basic rights. …"

99. The Michigan Guidelines and that subsequent paper are specifically concerned with issues arising in internal relocation cases where a clamant has been able to satisfy the 'fear test' in relation to his home area. If he does not do so, he is not a refugee and there is no need to consider the 'protection test' (see Fadal Dyli [00/TH/02186*], a starred decision of the Immigration Appeal Tribunal cited with approval in Cannaj v SSHD [2001] EWCA Civ 782). As will be seen, however, Dyli dealt also with the protection test in relation to Kosovo, a province of the former Federal Republic of Yugoslavia. In Vallaj v a Special Adjudicator (heard jointly by the Court of Appeal with Cannaj) the principal argument which had been advanced on judicial review before Dyson J was that because the protection in Kosovo was not provided by the country of nationality it was not capable in law of amounting to protection for the purposes of Article 1 A (2) of the Refugee Convention. Simon Brown LJ deals with this argument as follows at paragraph 9 of his judgment:

> "This argument was rejected below on each of the three grounds advanced by the respondent ie because 'that country' [in Article I A (2)] encompasses either (a) any entity which has the obligation in international law within Kosovo to provide the protection envisaged by the Convention, alternatively (b) any entity which in fact provides such protection with the consent of the 'country of nationality' (as UNMIK and KFOR do here with the Federal Republic of Yugoslavia's consent), alternatively (c) any entity which in fact provides such protection with or without the consent of the country of nationality (this being the view of the Immigration Appeal Tribunal in their starred determination in [Dyli]). It was, of course, unnecessary for the judge to choose between the three alternatives: it was sufficient to accept that Article 1 A (2) would certainly be satisfied were protection in fact to be provided by an entity which had both the international law obligation and the country of nationality's consent."

100. In Gardi v SSHD [2002] EWCA Civ 750, a case concerning an Iraqi claimant from the KAZ who had been held not to satisfy the 'fear test' in his home area, Keene LJ went on to deal obiter with the 'protection test' and said he would have been "inclined to find in favour of the appellant on the 'protection test'" for the reasons he briefly advanced at

paragraph 37 of his judgment in the following terms where he dealt "only shortly with the submissions on that aspect":

> "The reference in Art 1A(2) is to an asylum seeker being unable or unwilling to avail himself 'of the protection of that country', a reference to the earlier phrase 'the country of his nationality'. That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognised internationally. That indeed was a point made in the Thje Kwet Koe case at p.11. The KAR does not meet that criterion. I see force also in the point made by Hathaway and Foster in their paper, at p. 46, that protection can only be provided by an entity capable of being held responsible under international law. The decision in [Vallaj by Dyson J] is not inconsistent with that proposition , since the UNMIK regime in Kosovo had the authority of the UN plus the consent of the Federal Republic of Yugoslavia. Yet no one suggests that the KAR or any part of it is such an entity under international law."

101. That decision was subsequently declared a nullity by the Court of Appeal for want of jurisdiction (Gardi v SSHD (no 2) (Declaration of Nullity) [2002] EWCA Civ 1560) but the argument was again run before the Court of Session in Scotland in Saber v SSHD [2004] INLR 222. In that case neither the findings of the Tribunal in Dyli nor those of the Court of Appeal in Cannaj (which expressly left open the issue of whether the decision in Dyli was correct in law) appear to have been referred to and it was clearly not appreciated that the Tribunal from whom the appeal lay to the Court of Session was following its own binding starred decision in Dyli in holding that the KAZ was an entity capable of providing a sufficiency of protection. Moreover the attention of the court does not appear to have been drawn to what the Tribunal had said in Faraj [2002] UKIAT 07376, where it pointed out that when Keene LJ was asked to follow the views expressed by Professor Hathaway it did not appear to have been drawn to his attention that the paper written by Professor Hathaway and Ms Foster was then of recent origin and did not reflect the position which the same Professor had taken with several refugee law experts in the far more widely accepted Michigan Guidelines. These stated that where return to a region controlled by a non-state entity was contemplated this might be acceptable if there was compelling evidence of that entity's ability to deliver durable protection. There is nothing to show in the short passage at paragraph 32 of Saber that the court did anything more than adopt the provisional obiter views expressed shortly by Keene LJ in

Gardi but, whatever respect should be accorded to his obiter view, it is clear that it did not stem from a fully reasoned judgment after full argument. Further it is arguable in Saber that the appeal leading to a remittal was actually decided on the narrower point that the PUK was not capable of providing appropriate protection in its own sphere of influence in part of the KAZ in what was described as a situation of unrest.

102. Moreover, the paper relied on does not, as was pointed out in Faraj, represent a settled and accepted view of the law applicable to internal relocation and does not purport to deal as such with protection issues in a claimant's home area. As noted in Dyli at paragraphs 17-18 in Thje Kwet Koe v MIEE [1997] FCA 912, cited in Gardi (no 1) and Saber, Tamberlin J had made it clear that his interpretation of Article 1 A (2) was confined to the situation where the claimant was stateless. Further, the decision of Decary J in Ahmed Ali Zatzoli v MEI [1991] 3 CF 605 does not appear to have been considered in any of the cases referred to above. In that case the Canadian Court had accepted that it was practical protection that was relevant to refugee status rather than the protection of the official government in circumstances of civil war and the passage we quote must be considered in the context that nothing in the judgment suggested that there might be various entities capable of granting nationality. He expressed the proposition more widely in the following terms:

> "The 'country', the 'national government', the 'legitimate government', the 'nominal government' will probably vary depending on the circumstances and the evidence and it would be presumptuous to attempt to give a general definition. I will simply note here that I do not rule out the possibility that there may be several established authorities in the same country which are each able to provide protection in the part of the territory controlled by them, protection which may be adequate though not necessarily perfect."

103. It seems to us therefore that not only are the views expressed in Saber arguably obiter but that the issue in relation to protection has never been fully argued in respect of the home area of the claimant or of a situation where internal relocation is in point. It is an area where there remain potentially conflicting views from the international jurisprudence point of view. The decision in Saber is persuasive only so far as the English divisions of the Immigration Appeal Tribunal and Immigration Appellate Authority at least are concerned. In those circumstances the Tribunal and Adjudicators should regard themselves as still bound by the starred decision of Dyli on this issue until such

time as there is an authoritative decision to the contrary following full argument.

104. Although what we have said in this respect relates to the position as it was at the date of the hearing before the Adjudicator, there has in any event been a fundamental change in the legal situation in Iraq in the intervening period.

105. Since 27 June 2004 the legal authority in Iraq is the Iraqi Interim Government operating under the provisions of the Law of Administration for the State of Iraq for the Transitional Period enacted upon 8 March 2004. The new government has received international recognition – see Resolution 1546(2004) of the United Nations Security Council of 8 June 2004 - pending the formation of an elected government pursuant to a permanent constitution. Article 4 of the law provides as follows:

> 'The system of government in Iraq shall be republican, federal, democratic, pluralistic, and power shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historic realities and the separation of powers and not upon origin, race, ethnicity, nationality, or confession.'

So far as Kurdistan is concerned, Articles 53(A) and 54(A) and (B) are of direct relevance:

> 'Article 53(A)
>
> The Kurdistan regional government is recognised as the official government of territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyali and Neneveh. The term "Kurdish Regional Government" shall refer to the Kurdistan National assembly, the Kurdistan Counsel of Ministers, and the regional Judicial Authority in the Kurdistan region.
>
> Article 54(A)
>
> The Kurdistan Regional Government shall continue to perform its current functions throughout the transitional period, except with regard to those issues which fall within the exclusive competence of the Federal

> Government as specified in this Law. Financing for these functions shall come from the Federal Government, consistent with current practice an in accordance with Article 25(E) of this Law. The Kurdistan Regional Government shall retain regional control over police forces and internal security, and it will have the right to impose taxes and fees within the Kurdistan region.
>
> Article 54(B)
>
> With regard to the application of Federal laws in the Kurdistan region, the Kurdistan National Assembly shall be permitted to amend the application of any such law within the Kurdistan region, but only to the extent that this relates to matters that are not within the provisions of Article 25 and 43(B) of this Law and that fall within the exclusive competence of the Federal Government.'

106. It follows that the PUK and KDP acting through the Kurdistan National Assembly are the legitimate delegated government in the former KAZ. Miss Naik's submissions regarding their alleged lack of formal authority in relation to the provision of protection within the area no longer – if they ever did – have any application to the situation which now exists. Whatever she might be able to make of legal uncertainty before that date it is clear that since that date as a matter of law the Kurdish Regional Government and its organs are the lawful delegated government there.

State provision of protection in the remainder of Iraq

107. In terms of the existence of a legitimate state and the regional apparatus in the remainder of Iraq, what we have said in the preceding paragraphs now clearly also applies equally throughout the country as is apparent from a reading of the Law of 8 March 2004.

The position of the UNHCR

108. The appellant has filed a letter of 6 May 2004 from Mr Kingsley-Nyinah, the Deputy Representative of the UNHCR in the United Kingdom, to which the UNHCR Guidelines on Internal Protection of 23 July 2003 and Mr Kingsley-Nyinah's Update on the International Protection Response to Asylum Seekers from Iraq dated 4 March 2004 are annexed.

109. The letter of 6 May 2004 was written to the appellant's solicitors for the express purpose of providing the comments of the UNCHR on the issues raised in the present appeal on the basis that UNHCR regarded this appeal as engaging its mandate responsibilities as well as its responsibility to supervise the application of the provisions of the Refugee Convention. Its purpose was to express their views on issues of sufficiency of protection and internal relocation in Iraq. It was written on the basis that both the respondent and the Adjudicator had accepted the appellant's claim of former difficulties from IMIK and KDP and that his asylum claim was dismissed on the ground that the present situation in Iraq is safe for him.

110. The writer expressed UNCHR's view on sufficiency of protection in the following terms:

> "UNCHR's view is that the outcome of any "sufficiency of protection" analysis should be consistent with the objects and purposes of the 1951 Convention, which are to ensure that persons are not returned to a country where their lives and freedoms would be threatened for a Convention-related reason. It is pertinent to emphasise that the protection of the 1951 Convention is intended to enable refugees to *avoid* the threat or incidence of future persecution. This suggests that the correct approach to "sufficiency of protection" should examine whether a given system of national protection is in fact capable of preventing the reasonable likelihood of future persecution against a particular applicant. We would add that any analysis should also bear in mind the definition in Article 1A(2) comprises one holistic test of inter-related elements. How the elements relate to each other and the importance to be accorded to one or another element necessarily falls to be determined on the facts of each individual case.
>
> In UNCHR's view, the correct approach to questions of "sufficiency of protection" is to assess the domestic protection system only as a starting point for a more comprehensive analysis. The aim of this assessment should be to enquire into much more than the mere existence of the system and the willingness of the state to utilise it. Additional consideration should include whether the system is accessible and available to the applicant, and the extent to which – and the timeliness with which – it succeeds in delivering protection. The

> critical question should be whether state protection is effective in averting the incidence of persecution".

Whilst we understand the objectives behind these views, they represent in our judgment a substantial extension of the obligations of signatories to the Refugee Convention into far broader general humanitarian considerations. They ignore the fundamental principle that the burden of proof is on the asylum claimant and that the effect of the judgments in Horvath v SSHD [2000] INLR 149 is directed to the general question of whether the relevant state authority provides a general system of protection to its citizens which it is willing to enforce by appropriate criminal sanctions without discrimination. What the writer is proposing is a system which guarantees the protection of an individual claimant but that, as we have already explained, seeks to impose far too high a burden on the state authority.

111. To that extent, the views of UNHCR do not reflect the asylum and human rights jurisprudence of the United Kingdom courts. This is in our view emphasised by the statement that UNCHR's concerns regarding security situation in Iraq are reflected in UNCHR's continued request to states to suspend, until further notice, forced returns to all parts of Iraq, which is clearly intended to relate to those who have, after due process, been found not to qualify for protection under the Refugee Convention since, if they did, it necessarily follows that no refoulement could lawfully take place.

112. The document of 4 March 2004 which gives UNHCR's update on the internal protection response to asylum seekers from Iraq makes it clear that their current exhortation against forced returns of failed asylum seekers is based on the following concerns:

(1) The generalised climate of instability and insecurity;

(2) A potential for increased violence given the persistence of extremist elements and tensions among Iraq's various ethnic and religious groups;

(3) A lack of housing, the irregular provision of basic services and other infrastructure problems so that sustainable return to Iraq, adequately monitored by the UNHCR, remains severely limited.

113. For the reasons which we have already explained, such advice, to the extent that it is based upon broad humanitarian considerations, is a matter for the discretion of the Secretary of State. These difficulties of themselves are not relevant to or determinative of the decision which we are required to make on the hypothetical issue of whether this

appellant has a current well-founded fear of persecution in his home area for a Refugee Convention reason.

114. Although on the facts the question of internal relocation does not arise in the case of this appellant for the reasons we explain below, we have also considered the UNHCR guidelines on internal flight or relocation.

115. Whilst we agree that the consideration of internal flight may be a part of the holistic process of consideration of whether there is a well-founded fear of persecution for a Refugee Convention reason, that question does not arise if there is no such fear in the home area. What we do not accept is the principle expounded in paragraph A.6 of the paper that for internal flight a particular area must be identified and the claimant provided with an adequate opportunity to respond, insofar as that may be construed as an attempt to shift the burden of proof on to the host country. Under United Kingdom law the burden of proof remains throughout on the asylum claimant. Whilst it may be helpful for the Secretary of State to raise the issue (which he customarily does in the reasons for refusal letter) we do not consider that in all cases an area for relocation needs to be identified before the appellant can fairly deal with the issue. For example, in cases where the fear of persecution in the home area is of a localised non-State actors or in vast countries such as India, it is axiomatic that the asylum claimant will need to deal with why internal relocation is not open to him as an issue obvious on the face of the claim. Whether or not it is raised by the Secretary of State directly or is obviously an issue to be addressed on the face of the claim, what is quite clear is that the burden of proof remains on the claimant.

116. Whilst it is not appropriate to seek to analyse in depth this paper in the present appeal, it is abundantly clear that the UNCHR's propositions on internal relocation do not accord with the United Kingdom jurisprudence on the subject and again stray into areas of general humanitarian concern which have no place in the consideration of internal relocation under our own case law which imposes a significantly higher standard before relocation can be regarded as unreasonable because unduly harsh – see, e.g. Robinson v SSHD [1997] Imm AR 568 and AE and FE v SSHD [2003] EWCA Civ 1032. The following passage from the judgment of Lord Phillips MR in the latter case is particularly relevant in this context:

> "The failure to provide (as opposed to a discriminatory denial of) the 'basic laws of civil, political, and social economic and human rights' does not constitute persecution under the Refugee Convention. An asylum-seeker who has no well-founded fear of

> persecution but has left his home country because he does not there enjoy those rights, will not be entitled to refugee status. When considering whether it is reasonable for an asylum-seeker to relocate in a safe haven, in the sole context of considering whether he enjoys refugee status, we cannot see how the fact that he will not there enjoy the basic norms of civil, political and social-economic human rights, will normally be relevant. If that is the position in the safe haven, it is likely to be the position throughout the country. In such circumstances it will be a neutral factor when considering whether it is reasonable for him to move from the place where persecution is feared to the safe haven. States may chose to permit to remain, rather than to send home, those whose countries who do not afford these rights. If they do so, it seems to us that the reason should be recognised as humanity or, if it be the case, the obligations of the Human Rights Convention and not the obligations of the Refugee Convention".

117. In our view it would be an error of law for an Adjudicator to consider internal relocation by reference to this UNCHR paper.

118. We should perhaps add that there was a further letter from the UNCHR dated 8 July 2004 from the Senior Legal Officer in the United Kingdom specific to this appellant's case but it does not in our judgment add anything to the totality of the evidence going to the issues which we have considered in the course of this determination: there is no need for it to be dealt with separately as was appropriate in the case of the other documents we have referred to which were intended to state the UNCHR's formal position.

<u>The effect of the interim Iraqi Government's expressed views as to current returns</u>

119. Ms Naik also placed reliance on a report of the Iraqi press in Baghdad of 10 June 2004 which recorded that the new interim government had urged Iraqi refugees abroad not to return and had asked countries hosting them not to send them home. We assume that the reference to refugees is intended to include also those who have been unsuccessful in their asylum applications. It does not seem to us that this has any relevance to the issues with which we are here concerned. It has at most relevance to the exercise of the Secretary of State's discretion as to when and where to effect returns of those failed asylum seekers who have exhausted their appeal rights in the United Kingdom. Looking at Ms Hipwell's statement, it seems clear that the Secretary of State will

take such matters into account since she says that "the Home Office continues to monitor developments in Iraq and will take decisions on the basis of the most current situation". It is an issue which again goes to the practicality and logistics of return with which we are not concerned.

The situation of the appellant

120. We turn finally to our consideration of whether on the accepted personal history of the appellant he can demonstrate that on return now he will be at real risk of persecution for a Refugee Convention reason or of breach of his protected human rights under Article 3 of the European Convention. Since we have found the general country situation not to be determinative in establishing a claim on a class basis, it follows that the outcome of this appeal will be determined by his personal characteristics.

121. In this connection we do not consider that he can succeed in establishing a present objectively founded fear on the basis of his past detentions by the KDP. The first of them related to a specific period when there was a short period of co-operation between the KDP and the former Ba'athist regime but that no longer applies. The second arose in the specific circumstances of on-going conflict between the KDP and the PUK and that no longer applies either. On the second occasion the appellant's release was procured by payment by persons he cannot identify. It seems to us that it was likely to have been the intervention of the PUK on his behalf because he had been detained in the course of a PUK mission for the recovery of the bodies of three Peshmergas killed in that conflict. It occurred as long ago as 1997/98 and the appellant has never suggested that it had any relevance to his decision to leave Iraq in February 1999. In any event, there is current co-operation between the KDP and the PUK as we have recorded above.

122. The thrust of his claim has consistently been that he fears Islamic extremists, and specifically AI. It seems to us pertinent, however, that there was only one occasion that he fell foul of what he described as IMK of which we accept on his evidence AI formed part. He was released on a promise not to repeat what had drawn him to their attention but he left the country too soon after his release to test whether there was any continuing interest in him. There has never been any suggestion that AI or anyone else has enquired after his whereabouts or that his family have ever received any adverse attention from them.

123. He and his family have been closely associated with the PUK which is the dominant political party in his area. He makes it clear that he was personally very active on their behalf both as a student and subsequently. In particular he was trusted with a mission to remove the bodies of the killed Peshmergas in late 1997. As a native of Sulaimaniya he can in our view expect at least the same level of protection from those representing the authority in his area, the PUK, as the generality of his fellow-citizens. There has been no suggestion at any time that his family experience any difficulties living in Sulaimaniya.

124. It is the AI whom he claims to fear but they and all extremist Islamic organisations are now bitterly opposed by the PUK and KDP and there is heightened security against their attacks in his home area. Moreover, the form of the AI has changed since their expulsion from the Iraq/Iran borders as a result of the attack on their enclave in 2003. We accept that they have regrouped but it is now on the wider agenda that, with the aid of foreign terrorists, they are mounting attacks against the authorities and those assisting them throughout Iraq, and in particular against the Coalition forces. They are sought and under pressure wherever they are.

125. Whilst we accept that his return would probably become known quite quickly in his home area, he was released by those who detained him over five years ago and there is no evidential basis for saying that those concerned have any current adverse interest in him. Whilst such a possibility cannot be ruled out, we do not regard that as a real possibility on the totality of the evidence. As we have earlier said, neither Dr Rashidian nor Mr Joffe gave any reasoned explanation as to why they said such a real possibility currently existed. It was no more than speculation on their respective parts.

126. We are therefore satisfied that the appellant fails to establish any such real risk as he contends for. Apart from that, and independently of our primary finding, we are also satisfied that those representing the lawful authorities in his home area are currently providing a sufficiency of protection against the Islamic extremists and terrorists and we see no arguable reason why such protection would not be equally available to the appellant. Whilst the terrorists have been successful on occasions in carrying out terrorist atrocities that does not mean that there is currently a lack of sufficiency of protection in his home area. That concept does not import a guarantee of safety for the individual as we have been at pains to make clear. On the facts relevant to his claim he has failed to discharge the burden of proof on him of showing that he is at real risk either of persecution by reason of his ethnicity or imputed political opinion, or of treatment in breach of his protected human

rights under Article 3. It follows that his appeal must be and is dismissed.

J Barnes
Vice President