REPUBLIC OF AUSTRIA

HIGHER ADMINISTRATIVE COURT JUDGMENT
No. 99/20/0401-8 of 21 March 2002

In the name of the Republic,

The Higher Administrative Court, with divisional chairman Dr. Kremla presiding, Dr. Nowakowski, Dr. Sulzbacher, Dr. Grünstäudl and Dr. Berger as judges, and Dr. Hohenecker present as court clerk, has reached the following verdict with regard to the complaint filed by A in W, born on 9 March 1971, represented by Mr. Walter Dreischütz, lawyer at Alserbachstrasse 35/1/3, 1090 Vienna, against administrative decision No. 200.902/0-VI/16/98 issued on 31 March 1999 by the Independent Federal Asylum Senate concerning Article 7 of the Asylum Law (additional party: the Federal Minister of the Interior):

The contested administrative decision is being annulled for illegality of its substance.

The Federal Government shall reimburse to the complainant, within two weeks, costs amounting to EURO 908, on pain of seizure of assets.

Reasons for the verdict:

The complainant, a national of Iraq, entered the federal territory on 4 May 1997 and applied for asylum on 6 May 1997.

In the interview held on 7 May 1997 concerning the reasons for his flight, he contended that he belonged to the Kurdish ethnic group and had grown up in Baghdad. In the Gulf War he had been engaged in duty in Kuwait and had fled during allied air-raids. However, two months after the end of the war he again enlisted. In 1993 (he could not state the exact period of time), he was "engaged against the Kurds during their uprisings". He was required to undertake military action against his own ethnic group "and thus against his own family members and acquaintances", and he therefore deserted. In the ensuing period he remained in hiding at his home in Baghdad. He was looked for on a number of occasions but was able to hide on the roof. On 28 April 1994, Saddam Hussein's birthday, he fled to Arbil, where he stayed with an uncle until July 1994 and had no problems. Owing to "disturbances between different political parties", he subsequently moved with his uncle and the latter's family to Shaqlawa, where he stayed until July 1995 without any problems. In July 1995 he went to Zakho and in August 1995 departed for Turkey.

In the interview concerning his personal particulars and route, which, according to the case documents, was not held until 12 May 1997, the complainant stated *inter alia* that he was "currently without means", was "not being sought by any courts, prosecution services or other authorities" and "had no previous convictions". If he returned to Iraq, he feared "the death penalty because I left Iraq illegally".

By administrative decision of 14 May 1997, the Federal Asylum Office dismissed the complainant's asylum application pursuant to Article 3 of the 1991 Asylum Law. It reproduced the statements made by the complainant at his initial interview, noted from the second interview the sentence concerning the absence of any prior convictions and the assertion that the complainant was not being sought (but not the related comment regarding the threat of the death penalty in the event of his return to Iraq), set out very brief observations on the Iraqi constitution, compulsory military service in Iraq and the Kurdish autonomous "safe haven" north of the 36th parallel, and based its dismissal of the asylum application essentially on the grounds that desertion and draft evasion are punishable "also in traditionally democratic and constitutional States" and the "severity and nature of the threatened penalty were not relevant". It also cited the ground for exclusion provided in Article 2, paragraph (2) 3, of the 1991 Asylum Law since the complainant, after leaving Iraq, had stayed in Turkey "and inevitably in Romania, Bulgaria, Hungary, the Czech Republic or Slovakia".

In his appeal against that decision, the complainant claimed *inter alia* that in April 1991 he had been in custody in Baghdad for taking part in activities of a Shi'ite opposition group and from that custody had been drafted into a military unit. He was subsequently "engaged in military action against the Kurdish civilian population" north of the 36th parallel and deserted in Kirkuk because the military action against the Kurdish civilian population was incompatible with his own membership of the Kurdish ethnic group and, moreover, offended the "basic rules of human conduct". Members of the Kurdish ethnic group were harshly discriminated against by reason of the "conscription and military service implementation practice" and on account of the sanctions imposed on deserters compared with other persons required to perform military service. Also asylum relevant is the complainant's fear of "persecution by reason of his refusal to participate in the Iraqi army's military action, which had been condemned by the United Nations Security Council and thus by the international community as contrary to the basic rules of human conduct", hence the reference to paragraph 171 of the UNHCR Handbook. Performance of military service in the "UN safe haven" north of the 36th parallel was for the purpose of achieving the Iraqi leadership's objectives, which constituted an act of genocide against the Kurdish civilian population outlawed by the international community under Article II (a) and (b) and Article III (e) of the Convention on the Prevention and Punishment of the Crime of Genocide. Precisely the military engagement which caused the complainant to desert clearly shows that the aforementioned "safe haven" was not permanently safe for him and he therefore had no internal "flight alternative".

Information regarding parts of the foregoing submissions was requested by the authority proceeded against from the UNHCR Regional Office in Vienna and was supplied on 22 December 1998 in a communication worded as follows:

"Dear Ms. Magele,

With reference to your inquiry of 16 September 1998, we have consulted our Office in Ankara and can advise you as follows:

UNHCR does not possess any information to the effect that, with regard to call-up, discharge of military duty or punishment for draft evasion or desertion, Kurds

are discriminated against in comparison with persons of other ethnic origin who are required to perform military service.

We trust that the above is satisfactory and, with season's greetings, remain,

Yours sincerely …".

When consulted regarding that information, by letter dated 19 January 1999, neither the complainant nor the Federal Asylum Office expressed any comment.

The complainant was further questioned at the oral appeal hearing on 25 March 1999. He confirmed his statements of 7 May 1997, answered the challenge (which was at variance with the case records) that he had at the time claimed that in the Gulf War he had fled after ten days with the assertion that he did not abandon his unit until February 1991, and stated that approximately one month after the end of the Gulf War he had again enlisted by reason of an amnesty for deserters. In late March 1991, his unit was sent to Kirkuk in order to drive out the Kurds, whereupon he again deserted. He went to Baghdad, joined a group of Shi'ite dissidents and took part in armed disturbances, primarily in the district of Al-Thawra. In early 1993, the two Shi'ite soldiers with whom he had deserted were arrested and forced under maltreatment to reveal his name and that of a friend. As a result, the complainant was sought by the police. Police officers told his parents that an arrest warrant had been issued against him because he deserted in 1991.

The statement in the appeal, which was not drawn up by him, that he was in prison in Baghdad in April 1991 is untrue. At the interview, he did not say, as was stated in the written record of 7 May 1997, that the second desertion had taken place in 1993 and not 1991. In 1993, his parents and elder brother were imprisoned for a period of three to four weeks because the complainant had not been found. His father was mistreated in prison and has since been hemiplegic.

When challenged about his having previously said nothing concerning an arrest warrant or sanctions against family members, the complainant replied that he had not been questioned on those matters. At the initial interview, the Egyptian interpreter had repeatedly put it to him that his documents were forged and that it was doubtful whether he was an Iraqi at all. Also, the complainant's statement that one of his brothers had been executed in 1987 for sympathizing with the Kurds was dismissed by the interpreter as unimportant, which is why it had not been noted in the written record.

On being asked why he had not remained in Northern Iraq, the complainant stated that there had been many disturbances and armed conflicts there and his uncle had had many problems as a member of Barzani's party. However, the complainant had not been sought by "the authorities", "nor" did he have "any problems".

In conclusion, the authority proceeded against also examined, together with the above-mentioned communication from UNHCR, an extract from a CIREA report dated 14 December 1998 (which in fact dealt with a different matter, namely the conditions in Northern Iraq) and noted that it was apparent from the documents "that, with regard to call-up, discharge of military duty or punishment for draft evasion or

desertion, Kurds were not discriminated against in comparison with persons of other ethnic origin who are required to perform military service". That was refuted by the complainant, who contended "as an example" that his Arab comrades in the army had called him a traitor owing to the simple fact that he was a Kurd.

By the contested administrative decision, the authority proceeded against dismissed the asylum application pursuant to Article 7 of the Asylum Law. It essentially followed the complainant's oral testimony concerning his two desertions and his period of residence in Northern Iraq and also his assertion that, after the second desertion, he was frequently looked for in Baghdad, and held that, "with regard to call-up, discharge of military duty or punishment for draft evasion or desertion, Kurds were not discriminated against in comparison with persons of other ethnic origin who are required to perform military service" and that "simple soldiers" who deserted were "not subject to persecution by the Iraqi authorities" in Northern Iraq. The complainant's statements regarding his participation in activities of Shi'ite dissidents, the existence of an arrest warrant for desertion, the arrest of family members and the execution of a brother in 1987 were deemed by the authority proceeded against to be implausible amplifications of the submissions.

The authority proceeded against assessed the legal aspects of the case as follows:

"With regard to the draft evasion and desertion claimed by the asylum seeker, it should be noted that the punishment envisaged in Iraq for such offences does not justify the assumption that the fear claimed by the asylum seeker contains any aspect relevant to the question of asylum. Desertion and draft evasion are also punishable in traditionally democratic and constitutional States. The severity and nature of the threatened penalty are irrelevant. Also, in accordance with the established judicial practice of the Higher Administrative Court, refusal to perform military service – whether through non-compliance with drafts or through desertion – does not in itself constitute a reason for granting asylum (cf. Higher Administrative Court judgment No. 89/01/0059 of 31 May 1989). Since military service is compulsory in Iraq, there is no targeting of persons having particular characteristics or convictions. Recruitment and thus also punishment for evasion or refusal therefore is not evidently targeted against the personal attributes of persons liable for military service qualifying for protection (race, religion, political opinion, etc.). Government measures to ensure fulfilment of military service are the manifestation of the law of each and every State and, as such, do not constitute persecution within the meaning of the 1951 Convention relating to the Status of Refugees.

In accordance with the Higher Administrative Court's established practice, a fear of persecution that is relevant to the question of asylum exists only in those cases where a call to arms takes place for one of the reasons set forth in Article 1 A (2) of the 1951 Refugee Convention, where it would have to be expected that an asylum seeker would, by reason of his treatment or engagement during military service, be discriminated against in comparison with members of other groups, on such grounds, in a harsh manner with a degree of intensity amounting to persecution, or where it could be presumed that a punishment to which the asylum seeker would be liable for draft evasion would for the Convention reasons be imposed more severely than in the

case of other nationals (cf. Higher Administrative Court judgments Nos. 96/01/0157 of 30 April 1997 and 97/01/0302, 0802 of 28 January 1998).

It is, however, apparent from UNHCR's letter of 22 December 1998 that, with regard to call-up, discharge of military duty or punishment for draft evasion or desertion, Kurds are not discriminated against in comparison with persons of other ethnic origin who are required to perform military service and the complainant's remarks to the effect that, if apprehended and sentenced, he would be subjected to discriminatory punishment compared with other Iraqi nationals are thus void. Also, the remarks made by the complainant at the oral hearing before the Independent Federal Asylum Senate on 25 March 1999, where, on being questioned about UNHCR's written reply of 22 December 1998, he stated that his comrades of Arab descent in the army had called him a traitor because he was a Kurd, do not allow for any other outcome to the proceedings, particularly since, in accordance with the established practice of the Higher Administrative Court, it is necessary for the persecution to be by State authorities in the asylum seeker's country of origin or for the State concerned not to be in a position or not to be willing to oppose the persecution by other authorities.

Moreover, in the asylum seeker's entire submissions there is no evidence to indicate that, by reason of his desertion, he had had serious problems of any nature whatsoever with the authorities in his country of origin which, from an objective viewpoint, would have made it intolerable for the asylum seeker to remain in his country of origin. On the contrary, he expressly contended that, from 28 April 1994 until his departure on 23 August 1995, he had remained in Northern Iraq (with his uncle), did not personally have any problems there and was not sought by the authorities there. However, in accordance with the established practice of the Higher Administrative Court, it is necessary for the persecution or fear of persecution to have existed over the entire territory of the asylum seeker's country of origin (cf. Higher Administrative Court judgment No. 92/01/0555 of 4 November 1992), which, as just stated, was not true at all in the case of the asylum seeker.

The complainant's statements regarding the very difficult living conditions prevailing in Northern Iraq and the occurrence of disturbances involving different political parties cannot alter that conclusion, particularly since no specific individual acts of persecution against the asylum seeker that are relevant to the question of asylum can be deduced from his remarks."

The Higher Administrative Court's findings on the present complaint filed against the above decision are as follows:

1. The contested administrative decision, inasmuch as it is based on the denial of a risk of persecution for a Convention reason, can have no validity on procedural grounds. In support of what, in its view, is the essential finding that, with regard to military duty, Kurds (meaning: in Iraq) were not discriminated against, *inter alia*, in cases of punishment for desertion in comparison with persons of other ethnic origin who are required to perform military service, the authority proceeded against has used a communication that amounts to nothing more than a statement to the effect that there is no information available to its author of any such discrimination. If – contrary to the asylum seeker's express submissions – the finding of the authority proceeded

against is deduced from that communication, then, according to the rules of logic, that requires the assumption (subject to substantiation on its part) that, with a sufficient degree of probability compared with the evidentiary value of the asylum seeker's statements, discrimination could not take place without the knowledge of the person issuing the communication. It cannot be inferred from the contested administrative decision that that requirement is satisfied with reference to the UNHCR offices in Vienna and Ankara. In fact, it emerges only from the subject heading ("*Irak-Wehrdienst*") on the facsimile that the communication actually relates to Iraq and not, say, to Turkey. If it is presumed that the authority proceeded against had to be in no doubt about the matter (although the file note dealing with the inquiry answered by the communication does not refer to Iraq either), then, given the complainant's claims and the limited outcome of the inquiry, it was, in the Higher Administrative Court's view, the task of the authority proceeded against to broaden the basis of the facts by drawing on additional sources that did not amount simply to a reference to the absence of information. Only then could it have been assessed whether the punishment of persons of Kurdish origin who are required to perform military service and who desert in an engagement directed against Kurds (to which the inquiry submitted to UNHCR and the communication issued by it do not in fact refer) is carried out in Iraq without asylum relevant discrimination based on membership of an ethnic group. For the sake of completeness, it should be added that the complainant's reference to the remarks of his comrades is not given sufficient consideration in the reply by the authority proceeded against, who, interpreting that submission as a claimed risk of persecution stemming from private individuals, refers the complainant to the availment of State protection from the Iraqi authorities. The complainant did not claim that he fled from private persecution by his comrades. He mentioned their remarks "as an example" of the reasons why he feared discriminatory treatment with regard to punishment for desertion.

2. What the complainant was in danger of by reason of his (last) desertion if apprehended by Iraqi authorities was not treated by the authority proceeded against as a matter for investigation or recognized as such, even if only in general terms. It adopted the legal opinion that the "severity and nature" of the threatened punishment were "not relevant" and, in order to substantiate the view that – on the presumption of equal treatment of persons of Kurdish and other ethnic origin who are required to perform military service – the punishment has no aspect of relevance to the question of asylum, cited the Higher Administrative Court's established practice, quoting one ruling preceding and two rulings subsequent to the judgment handed down on 29 June 1994 by an enlarged court division, i.e. judgment No. 93/01/0377, case record No. 14.089/A.

The enlarged court division's above-mentioned decision, which forms the basis of the further judicial interpretation of the Higher Administrative Court on questions of persecution by reason of draft evasion and desertion, was concerned with the fear of severe punishment ("several years' imprisonment if not the death penalty") and referred to statements in still earlier rulings of the Higher Administrative Court, beginning – in a chain of referral – with a judgment pronounced concerning the risk of execution of a draft evader (judgment No. 84/01/0275 of 7 May 1986; cf. also, regarding Iran, to whose sanctions that ruling referred, judgments Nos. 86/01/0155 of 10 February 1988 and 92/01/0408 of 6 May 1992, which date from before the

enlarged court division's ruling; in the last-quoted case, the risk of torture was also claimed).

In those decisions, which were pronounced on the basis of the 1968 Asylum Law, continued with the 1991 Asylum Law and combined in the enlarged court division's judgment, it was held that the risk of what in Steiner, *Österreichisches Asylrecht* [1990], 32, and in subsequent judicial decisions was termed "possibly severe" punishment for draft evasion or desertion had no connection with a Convention reason. Sufficient substantiation was provided by the observation that compulsory military service affects all young nationals (i.e., according to the quoted judgment of 10 February 1988, which was concerned with a regular officer, all "citizens who are in similar positions") in the same way. With regard to threatened sanctions in Iraq, it was noted in judgment No. 88/01/0198 of 19 October 1988, initially without any further explanation, that "the consequence of failure to perform military service does not constitute a reason for persecution within the meaning of the 1951 Refugee Convention". Judgment No. 89/01/0059 of 31 May 1989 (quoted in Steiner, *loc. cit*., and in the contested administrative decision), which was concerned with a claimed death sentence against a draft evader from Iraq, referred, along the lines stated above, to all nationals of relevant age "at least of the male sex" being affected. However, no importance was attached to the reasons for the draft evasion or desertion (cf., regarding "refusal to report for military duty for reasons of conscience", judgment No. 89/01/0022 of 1 February 1989; regarding religious reasons, judgment No. 88/01/0272 of 29 March 1989 and the rulings following it; and in somewhat more detail, regarding political reasons, judgment No. 92/01/0782 of 17 February 1993). Draft evaders and/or deserters are considered to be at risk of punishment "irrespective of the reason why they have behaved in that way" (as stated in the last-quoted judgment).

However, the ruling of the enlarged court division – as the combination of a line of decisions beginning with judgments handed down in 1992 – admitted the possibility, which is relevant to the determination of refugee status, that a "call-up had taken place for one of the reasons set forth in the 1951 Refugee Convention or that a threatened punishment for draft evasion had for such reasons been harsher than in the case of other nationals". That was linked – regardless of the subsequent inclusion, in the text of the judgment, of circumstances under which military service has to be performed – to the phrasing, as contained in the administrative decision now being challenged, to the effect that, in accordance with the Higher Administrative Court's established practice, the relevance of call-up or punishment to the question of asylum can be accepted "*only*" in such cases.

In the period following the decision rendered by the enlarged court division, asylum seekers from Iraq – invoking German case-law (cf. the Federal Administrative Court's decision of 24 November 1992, *Neue Zeitschrift für Verwaltungsrecht* (NVwZ) 1993, 789) – on a number of occasions claimed that the particularly drastic punishment for non-fulfilment of the military service obligation was in that country based on the fact that oppositional views were imputed to all draft evaders or deserters. In at least three such cases, the Higher Administrative Court denied – contrary to its customary judicial practice – the relevance to the question of asylum of persecution by reason of an asylum seeker's merely imputed political opinion ("… does not alter the fact that it was not such an opinion which gave rise to the

complainant's behaviour"; as stated in judgments Nos. 94/20/0687 of 21 February 1995, 94/20/0758 of 28 November 1995 and 95/20/0110 of 6 March 1996). It was also held – in a further case involving Iraq – that "inhuman punishment enforcement practice against deserters" had no relevance to the question of asylum because there was no connection with a Convention reason (judgment No. 95/20/0370 of 20 March 1997; cf., solely by way of example regarding the sanctions applying at the time in Iraq, the UNHCR publication "Asylum Seekers in Austria: An Analysis and Case Study of the Legal situation and Administrative Practice" [1995], 141 ff., with further evidence).

Contrary to that, Ulrike Davy, in a comparative law study which also includes Austrian case-law (Suffolk Transnational Law Review, vol. XVIII No. 1 [Winter 1995], 94 ff., 109 ff., 121 ff.), took the view that military service enforcement regulations in which no possibility of performing alternative non-military duty is provided are only seemingly neutral. With reference to draft evaders and deserters, they expressed the idea that any political or religious motives that they may have were not tolerated. The prevailing opinion that the related sanctions do not – in normal cases – have any relevance to the question of asylum, even with regard to persons having such motives, is based on consensus regarding the legitimacy of enforcing military service, even with regard to persons who could fulfil that duty only in conflict with their personal convictions. In such cases, the connection with a Convention reason is not lacking but the sanctions lack the nature of persecution, the crucial point here being the absence to date of any internationally recognized right to draft evasion (*loc. cit.,* 109 ff.). This stance to a considerable extent coincides with that contained in Goodwin-Gill's standard work *The Refugee in International Law* [1998 edition], 54 ff., in particular 57 f.; cf. also, regarding Convention reasons, the consistent opinions of the judges in the United Kingdom Court of Appeal decision of 11 May 2001 in the case of Sepet and Bulbul, paragraphs 82, 88 ff., 154, 161, 168 f., 178 ff. and 185; see generally, regarding laws of general application, Goodwin-Gill, *loc. cit*., 52 f. and 365 in footnote 153).

The Higher Administrative Court endorses Davy's foregoing remarks, which, given that the present decision is being issued concerning a law whose form is new and the above-mentioned word "only" appearing in the enlarged court division's judgment has to date not been significant in the rulings concerning the current law that have referred to that judgment, does not call for any enlargement of the court division now ruling.

On that basis, the Higher Administrative Court holds the view that the danger of an equal punishment being imposed on all draft evaders or deserters in their country of origin can *inter alia* lead to the granting of asylum if the behaviour of the person in question is in the individual case concerned based on political or religious convictions and the sanctions – as, for example, in the use of torture – lack any proportionality (cf., in this connection, Goodwin-Gill, *loc. cit*., 58; in the above-cited decision of the United Kingdom Court of Appeal, paragraphs 61, 63, 65 and 111). Should the latter be the case, this can also be based on the – general – imputation of oppositional views, where the required connection with a Convention reason exists irrespective of any religious or political convictions actually forming the basis of the draft evasion or desertion in the specific case involved. For the sake of completeness, it should be noted that this would also be true from the viewpoint of an – albeit

generally – "harsher" punishment for Convention reasons according to the criteria set out in the enlarged court division's decision. Insofar as the above-quoted prior rulings do not seek to attach importance to an oppositional view which is merely imputed to the asylum seeker precisely in this connection, they need not be adhered to with regard to the current law.

In the light of the notorious conditions in Iraq and especially the treatment of deserters which has become known in the past, the authority proceeded against would have had cause to make investigations and factual evaluations concerning the nature of the treatment that awaited the complainant if he were apprehended by Iraqi authorities. If it was no longer a question of measures which, for the purpose of enforcing military service, could be understood, in the phrasing used by the authority proceeded against, as the "manifestation of the law of each and every State" and the desertion was based on the complainant's religious or political convictions or the disproportionate nature of the sanction was based on imputed oppositional views, then, according to the foregoing remarks, a risk of persecution relevant to the question of asylum existed even in the case of "equal treatment" of all deserters.

3. In his appeal, the complainant also claimed that the military engagement which caused him to desert was directed against the Kurdish civilian population and was contrary to the "basic rules of human conduct", as referred to in paragraph 171 of the UNHCR Handbook. That aspect of the submissions was not examined by the authority proceeded against, either when questioning the complainant in the oral appeal hearing or in the substantiation of the contested administrative decision. Also, the Higher Administrative Court, in its rulings relating to the 1991 Asylum Law, never attached prime importance to such arguments, often noting – without substantial reasoning – that the Handbook has "no normative force", and its own deliberations in the administrative court proceedings that preceded the enlarged court division's judgment were a matter "simply of rapporteur provision" (cf., for example, in this respect, judgment No. 96/01/0341, 0342 of 24 June 1998). Regarding the current law, which refers to the 1951 Refugee Convention and thus, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, calls for due consideration of States' practice and the Handbook's significance in that respect, the above mentioned rulings need not be adhered to immutably. In that connection, reference is, pursuant to Article 43 (2) of the Higher Administrative Court Law, made to judgment No. 98/20/0261 of 22 November 2001 and to the prior rulings referred to therein (judgment No. 2000/01/0072 of 21 December 2000, with the same outcome but different substantiation; cf. additionally, in that respect, the above-quoted decision of the United Kingdom Court of Appeal, paragraphs 61, 65, 111, 152, 169, 173 and 203). From the viewpoint of compulsion to undertake military action in violation of international law, a "mere" sentence of imprisonment can accordingly constitute persecution relevant to the question of asylum.

4. In his interview on 12 May 1997, the complainant finally stated that, if he returned to Iraq, he feared the death penalty because he had "left Iraq illegally". This part of the submissions – it was the only point in the administrative proceedings where it is clear that the complainant was directly questioned about sanctions that he was at risk of incurring – no longer appears in the reproduced version of the submissions in the administrative decision rendered by the first instance authority and the contested decision. As regards its possible relevance to the question of asylum in

the light of the particular political conditions in Iraq, reference can, pursuant to Article 43 (2) of the Higher Administrative Court Law, be made to the supporting evidence in judgment No. 98/20/0221 of 22 November 2001 (cf. judgment No. 99/20/0577 of 26 February 2002; by contrast, judgment Nos. 95/20/0344 to 0346 of 5 June 1996 relating to the 1991 Asylum Law). The viewpoint concerning disproportionately severe punishment, which was previously mentioned in relation to sanctions for draft evasion or desertion, has already found expression in the judicial rulings concerning the current law in connection with the risk of persecution by reason of unauthorized exit from Iraq (cf., in comparison with earlier decisions on "infringement of passport and immigration control regulations or of other regulations governing residence abroad", judgment No. 99/20/0520, 0521 of today's date).

5. Still to be addressed, therefore, is the argument by the authority proceeded against that the complainant did not "personally have any problems" in Northern Iraq. That part of the substantiation of the administrative decision is substantively connected with the finding that "simple soldiers" who desert are "not subject to persecution by the Iraqi authorities in Northern Iraq", which the authority proceeded against bases on the CIREA report, dated 14 December 1998, by a Netherlands delegation, which was examined in the appeal hearing ("There are no indications that low-ranking deserters are at risk").

Apart from the title page of the Netherlands delegation's report, only the page from which the above-mentioned finding was taken was examined at the hearing and added to the records, with the result that those parts of the report that could provide information in greater detail about its preparation and the nature of the underlying sources are not available. On the page referred to, which deals, *inter alia*, with the "role of Baghdad" in Northern Iraq, the text relating to the dangers to which individual inhabitants of Northern Iraq could be exposed from the Iraqi Government amounts to only five lines in all.

The extent to which that delegation's report has to be viewed in conjunction with the aims of the European Union action plan adopted on 26 January 1998 concerning the "influx of migrants" from Iraq and the neighbouring region does not require any examination since the authority proceeded against made no other observations regarding the protection that the complainant could find in Northern Iraq and thus did not sufficiently substantiate its decision with regard to that point. The consideration, based on past situations, of the question whether the complainant had had "problems" in Northern Iraq in 1994 and 1995, an assessment on which the authority proceeded against placed particular emphasis, is solely of limited significance as regards the assumption of the existence of an internal protection alternative. A decision as to whether the complainant, despite a risk, in the present case, of his being persecuted by the authorities in his country of origin, is not in need of protection as a refugee within the meaning of the 1951 Refugee Convention requires a prediction from the assessment perspective of the time of the decision (cf., regarding the relevant criteria, whose still contentious points in international practice need not be examined here, more recently the UNHCR working paper by Hathaway and Foster entitled "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination" [2001]).

In the case of Northern Iraq, it would – with reference to the aspect of the threat from the Iraqi State – not only be relevant whether "simple deserters" (who have remained for a lengthy period in Europe and applied for asylum there) belong to the category of persons in whom the Iraqi authorities are sufficiently interested to pursue them, even in the present conditions in Northern Iraq. If it is presumed that in central Iraq the complainant is in danger of persecution relevant to the question of asylum, it would also be a question of what circumstances in law or in fact, in the opinion of the authority proceeded against, prevent the Iraqi State from again establishing full territorial authority over the currently "autonomous" parts of its territory at any time and without advance notice, or whether information is available to the authority proceeded against to the effect that the Iraqi leadership is not planning to do so in the foreseeable future (cf., for example, regarding the lack of any safeguarding of the so-called "safe haven", the decision of the Swiss Asylum Appeals Commission of 12 July 2000, case record EMARK 2000, No. 15). With regard to the repeated confirmation of assumptions of a Northern Iraq "flight alternative" in the earlier judicial rulings concerning the 1991 Asylum Law, it should be noted that those decisions were rendered before Iraqi troops marched into the "safe haven" in August 1996 (in judgment No. 94/20/0858 of 19 December 1995, case record No. 14.372/A, there was the presumption of a presence of "allied forces" whose possible "withdrawal" was only a "hypothetical" assumption on the complainant's part).

Given the lack of treatment of this question in the contested administrative decision, it is no longer necessary to examine further the details of the additional criteria regarding an internal protection alternative or the complainant's evidential and procedural objections with regard to the opposition activities claimed by him.

Since the authority proceeded against has misjudged the criteria for assessing the question of the complainant's refugee status, the contested decision has to be annulled, pursuant to Article 42 (2) 1 of the Higher Administrative Court Law, by reason of illegality of its substance.

The pronouncement concerning reimbursement of costs is based on Articles 47 ff. of the Higher Administrative Court Law in conjunction with the Higher Administrative Court Cost Reimbursement Regulations of 2001.

Vienna, 21 March 2002