

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76505

AT AUCKLAND

<u>Before:</u>	B L Burson (Chairperson) S A Aitchison (Member)
<u>Counsel for the Appellant:</u>	D Mansouri-Rad
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	3 & 4 May 2010
<u>Date of Decision:</u>	14 June 2010

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining refugee status to the appellant, a national of Iraq.

INTRODUCTION

[2] The appellant claims to have a well-founded fear of being persecuted in Iraq on account of his former Ba'ath Party membership in the rank of *Naseer Mutakadim*, and due to his father's position as Branch Member of the al-Amed Organisation for the Ba'ath Party in City A. He fears persecution at the hands of members of the Mahdi Army – a Shi'a militia group in Iraq, the police who collaborate with them, and the Iraqi Government that is infiltrated by militias.

[3] The principal issues to be determined in this appeal are the well-foundedness of the appellant's fears and whether he can genuinely access meaningful domestic protection.

THE APPELLANT'S CASE

[4] What follows is a summary of the appellant's evidence in support of his claim. It will be assessed later in this decision.

Background

[5] The appellant is a single man in his early-30s. He was born in Suburb A in City A. He is one of three children, the youngest of two boys. He and his family are of the Shi'a faith.

[6] He completed intermediate school in 1991 and began working in his father's fabric business. This business was the largest of its kind operating within Suburb A of City A. The business operated a shop in a retail market, and also supplied fabrics wholesale to various stores. The appellant and his family enjoyed an affluent lifestyle as a result of this business.

[7] In 1993, the appellant's sister, AA, married BB, a Iraqi-Kurdish merchant, and moved to Erbil in the Northern Governorates to live with him. BB owned a restaurant and operated a rice trading business, which involved regular travel amongst the provinces.

Ba'ath Party membership

[8] The appellant's father was a prominent member of the Ba'ath Party in City A. He joined the Party sometime between 1982 and 1985. He was known in the area as al-Hizbi, meaning 'the man of the party'. There were two chief organisations for the Party in City A: the Al-Samed Organisation and the Imam Ali Organisation. His father held the rank of Branch Member and Colleague, and was responsible for the Al-Samed Organisation in City A. This organisation was composed of three branches that included the Al-Ekhtaf, Al-Lawahad and Al-Huria branches. Under his father's leadership, the organisation was responsible for arresting military deserters, collecting donations, and recruiting for Ba'ath Party paramilitary groups such as the Al-Quds Army and Fedayeen Saddam in their suburb.

[9] His father did not talk about his party role with the appellant. The appellant knew that he held regular meetings at the family home, and the appellant would sometimes be required to attend when prominent party representatives visited the area. He acquired most of his knowledge of his father's involvement in the party through his brother, DD, who as the eldest son was taken into his father's

confidence more. DD was also a member of the Ba'ath Party. He held the rank of *Naseer Mutakadim*.

[10] The appellant held this same rank, although he was not as involved in the Party as his older brother. The appellant considered his rank to be one in name only. This membership made him exempt from military service and assisted his freedom of movement throughout the country. The position of *Naseer Mutakadim* included a range of responsibilities, such as daily training, giving training orders, erecting checkpoints, and attending raids on residences of persons wanted by the authorities. Unlike his father and DD, the appellant did not fulfil any of these responsibilities; he spent most of his time operating the family's fabric business. The only training the appellant received for the Party was in handling weapons.

Detention and mistreatment of appellant and family members

[11] After the fall of Baghdad in 2003, the appellant and his family closed the family business and remained at home. They considered leaving Iraq but his father's health would not permit this and, in any event, it was difficult to move on the street for security reasons.

[12] At this time, the Mahdi Army, a militia loyal to Moqtada al-Sadr, began operations in City A, targeting former Ba'ath Party members. Other Shi'a militia (such as the Badr Brigades aligned to the Supreme Council for the Islamic Revolution in Iraq ("SCIRI")) entered Iraq from Syria and Iran. These groups also abducted and killed former members of the Ba'ath Party, particularly those who carried out security and police functions.

[13] On 28 January 2005, armed militias forcefully entered the appellant's family home and abducted him along with his father and DD. They were beaten, blindfolded and placed in a vehicle. As the appellant attempted to enter the vehicle he fell on his knees and was initially dragged behind the vehicle.

[14] They were transported, blindfolded, to a store and upon arrival the appellant and DD were separated from their father. Once detained inside the store, the appellant and DD were beaten again. Their blindfolds were removed and they were asked about their father's relationship to the Al-Quds Army, Fedayeen Saddam, and the Ba'ath Party. They were asked for the names of members of these armies. They both responded that this was their father's business and that they had no knowledge about this.

[15] While held in detention the appellant was beaten with the butt of a gun, which damaged a number of his teeth and nose. He was also beaten with a piece of wire from a cooling system. He was suspended from the ceiling of the store and, to this day, experiences shoulder pain as a consequence. After approximately a day in detention, the appellant and DD were separated. The appellant was gang-raped by his captors on the second day of detention; at the same time he was beaten with a cutter on his back.

[16] Throughout his detention he was held in a store without windows, and he could not see if it was day or night. Various psychological methods were employed during the questioning and mistreatment of the appellant, including threats that he would be executed in the same manner as former President Saddam Hussein. He was also shown photos of decapitated persons.

[17] The appellant believes that the persons who detained and mistreated him were Mahdi Army members. They used an expression 'ah-Mahdi' and he noticed that one of the members of the group wore a pendant bearing the photo of Moqtada al-Sadr.

[18] After being detained for three days, the appellant and DD were released upon the condition that they collect the names of former Ba'ath Party members. It was agreed that the appellant and DD would be contacted within a week of their release to supply these names. They were blindfolded and transported around midnight to an area near Suburb A and released.

Events following the appellant's detention

[19] Upon release the appellant and DD went directly home. Their mother was no longer there and a neighbour told them that she had been taken to stay with their maternal aunt. They visited their mother at their aunt's residence and found that she had suffered a stroke.

[20] The appellant and DD discussed how they might secure the release of their father, and considered offering a ransom. They went back to the shop from where the family business operated and where they kept goods and money in a safe. After retrieving money to pay a ransom DD left and the appellant remained a while longer. Not long after DD had left, approximately half an hour later, a boy from a neighbouring shop, EE, appeared and told the appellant that DD had been shot. The boy, clearly frightened, ran away after conveying this news.

[21] Concerned about his safety, the appellant immediately left the shop and then directly caught a bus to Baghdad. To enhance his security, he asked the driver if he could appear as his co-driver on the bus. He told the bus driver that his Civil Identity Card had been placed through the wash and was in poor condition. The driver agreed to assist the appellant, and the appellant sat next to him, on the top of the bus engine. Upon arrival in Baghdad the appellant stayed with a friend and fellow merchant, FF. FF contacted the appellant's brother-in-law, BB, and told him what had happened to the appellant. BB made arrangements to collect him from Baghdad and take him to Erbil, in the north of Iraq.

[22] The appellant remained in Baghdad for a week with FF after which BB arrived and transported him to Erbil in a truck full of goods. BB had arranged a driver who spoke Arabic and Kurdish. BB had made prior arrangements for them to pass smoothly through checkpoints on their journey. The appellant did not know what these arrangements were. He carried with him his Civil Identity Card and Citizenship Certificate.

[23] The appellant went to live with his sister, AA, and her family in their home in the centre of Erbil. He did not register with the Kurdish authorities and kept within the confines of the home, not venturing outside. BB told him not to leave the house as he risked being identified. The appellant was too afraid to venture out on account of the detention and torture he had recently experienced. When someone knocked on the door of the house he would run and hide in the bathroom.

[24] While in Erbil, the appellant received little information about his mother and no information about his father. He believes AA and BB protected him from details about the condition of his mother. No one was prepared to make enquiries about his father for fear of their own safety.

[25] The appellant remained in his sister's house for approximately four and a half years. He never ventured outside. He never registered with the Kurdish authorities at any stage. If he sought to register in Erbil he would be required to explain why he had come to the area and what he planned to do there. The appellant was too afraid to do this. The appellant considered that the Kurdish and Iraqi authorities colluded against former Ba'ath Party members, seeking revenge for past mistreatment of them and their families.

[26] During this time in Erbil he hoped that the situation might change in Iraq, that his father might be released, and that a government might be established. He considered that if change occurred he might be able to return to City A and see his

mother and possibly his father. He was anxious and fearful during this time. He took sleeping pills daily. He also took Valium and other medication.

[27] During one of BB's visits to Baghdad in early 2009 he met with FF. FF told him that he had recently visited the market in City A where the family's business was located and made discreet enquiries about developments there. The surrounding shop owners told him that they had received visits from militia members from the Mahdi army and had been instructed to report to the Al-Sadr offices if they heard anything about the appellant. The appellant believes that if he is found by the Mahdi army he will suffer a similar fate to what he experienced before and will probably be killed.

[28] Upon receiving this news, the appellant, his sister and her husband, decided that he should escape Iraq. BB arranged for a smuggler to assist the appellant to leave. The smuggler visited the home twice, once to arrange for a photograph of the appellant and the second time to escort the appellant to Syria. He prepared a false passport for the appellant, which the appellant used to enter Syria. From Syria he travelled to Malaysia, where he obtained a second false passport and then travelled on to New Zealand.

[29] The appellant arrived in New Zealand on 13 September 2009. He lodged his claim for refugee status with the RSB on 30 September 2009. He was interviewed by a refugee status officer on 20 November 2009. By decision dated 18 February 2010 the RSB declined the appellant's claim. The appellant duly appealed to this Authority.

[30] Once the appellant arrived in New Zealand he called his sister to ask after his mother. His sister told him that she was doing all right but told him not to ask any more questions. The appellant's mother has since deceased. He has received no news about his father.

Materials filed with the authority

[31] Counsel filed submissions with the Authority on 30 April 2010. Attached to these submissions were the following:

- (a) A letter dated 26 April 2010 from Andrew Duirs, Psychologist.
- (b) A report dated 31 March 2010 by Dr Grant Galpin, Consultant Psychiatrist.

(c) A further report dated 3 March 2010 by Dr Grant Galpin.

[32] At the hearing counsel also provided a translated copy of a Death Registration for DD. Subsequent to the hearing, on 4 May 2010, counsel submitted further closing submissions by way of letter.

THE ISSUES

[33] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[34] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[35] Prior to determining the identified issues, it is necessary to make an assessment of the appellant's credibility.

[36] The appellant presented as a credible witness. His evidence was spontaneous, detailed, and broadly consistent with the accounts recorded in his written statement, advanced during his interview with the RSB, and with available country information.

[37] Although two credibility issues arose during the hearing, the appellant provided satisfactory explanations for these.

[38] The Authority notes that the appellant's demeanour during the hearing appeared consistent with someone having undergone the experiences he claimed to have suffered. The medical evidence filed in the form of psychological and psychiatric reports, detailing the appellant's treatment for Post Traumatic Stress Disorder and Major Depression, in this context, provide further corroboration of the veracity of the appellant's account.

[39] Weighing these matters, the Authority finds that the appellant is a credible witness. His account is accepted in its entirety.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Iraq?

[40] Persecution is defined in refugee law as the sustained or systemic violation of basic or core human rights such to be demonstrative of a failure of state protection; see Hathaway, *The Law of Refugee Status* (1991) p104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at [15].

[41] In order to assess whether the appellant's fear of harm is objectively well-founded, it is necessary to consider country information concerning the treatment of former Ba'ath Party members in Iraq, and the nature and activities of the Mahdi Army in Iraq, in particular, in relation to former Ba'ath Party members.

Country information

[42] On 20 March 2003, the United States, together with the United Kingdom and a coalition of allies overthrew the government of Saddam Hussein. A governing body, the Coalition Provisional Authority ("CPA"), headed by Paul Bremer, assumed formal control of the Government of Iraq. The Iraqi police force and army were immediately demobilized, and by May of the same year a de-Ba'athification process had been initiated, removing more than 30,000 members of the former Ba'ath Party from official posts.

[43] Despite Iraqi sovereignty being restored in June 2004 and elections for the 275-member Iraqi National Assembly held in January 2005, the security situation in the country remained highly unstable. In this milieu, various paramilitary and insurgent groups orchestrated anti-coalition and sectarian-related violence. While the CPA created Iraqi irregular forces for defence purposes, various ethnic, religious and political groups within Iraq developed militias of their own. The leading Shi'a political party, SCIRI, expanded its existing Badr Brigades, and new

ones, such as the Mahdi Army were established: See Global Policy Forum “War and Occupation in Iraq”, June 2007.

Mahdi Army

[44] The Mahdi Army is the armed wing of The Organisation of the Martyr Sadr (“OMS”): Jane’s World Insurgency and Terrorism, *Mahdi Army*, 23 September 2008. They constitute a group of loyalists to Moqtada al-Sadr. The al-Sadr movement, established by Ayotollah Mohammed Sadiq al-Sadr – a Shi’a cleric who was killed by the Ba’athist regime in 1999, and Moqtada Al-Sadr’s father – rose to prominence after the Ba’ath regime’s demise. Its membership consists of mostly young, unemployed Shiites from Sadr city and southern cities in Iraqi like City A: Council on Foreign Relations, *Iraq’s Militia Groups*, 26 October 2006, www.cfr.org.

[45] The Mahdi Army has been classified as one of the most powerful militias operating in Iraq. It is not a unitary bloc, and the political wing of the OMS has consistently failed to maintain control over the Mahdi Army at a local level. There is little centralised command and a number of specialist assassination and abduction cells are associated to it: Jane’s World Insurgency and Terrorism, *Mahdi Army*, 23 September 2008.

[46] Since Moqtada al-Sadr officially announced the formation of the Mahdi Army on 18 July 2003, it has engaged in counter-insurgency operations against Iraqi and US-led coalition targets throughout the Central and Southern Governorates. Significantly for present purposes, one of its initiatives has been justice, involving the punishment of criminals and former Ba’athists: Jane’s World Insurgency and Terrorism, *Mahdi Army*, 23 September 2008.

[47] In January 2005, Moqtada al-Sadr engaged in the political process in Iraq and participated in elections. Winning 23 out of 275 parliamentary seats, Sadrists became the largest bloc in the Iraqi parliament. By December, they increased their representation to 32 seats: International Crisis Group Report, 11 July 2006 cited in United Kingdom Home Office, *Country of Origin Information Report: Iraq*, 10 December 2009.

[48] Since this time, Moqtada al-Sadr has imposed a series of unilateral ceasefires upon the Mahdi Army in an attempt to regain control. Moqtada al-Sadr announced on 28 August 2008 that a ceasefire implemented on 29 August 2007 was extended indefinitely. This ceasefire has been honoured by mainstream

members of the Mahdi Army, however, a number of breakaway factions continue to disrupt the security environment: See UNHCR Guidelines, April 2009 cited in United Kingdom Home Office, *Country of Origin Information Report: Iraq*, 10 December 2009; "Al-Sadr extends cease-fire, orders peaceful protest" *Reuters* (28 August 2008).

[49] Jane's Defence Weekly reported that:

"While 'resistance' to the coalition will continue to be waged by a small cadre of dedicated fighters, Sadr said, most of the Mahdi Army will commit itself to laying down its arms in favour of a general "struggle against Western secular ideology"; Iraqi militia leader lays down arms for politics", Jane's Defence Weekly, 22 December 2009."

[50] The resurgent Iraqi Army and Coalition forces have launched military offensives against the Mahdi Army, and by the middle of the 2008 more than 2,000 members of the Mahdi Army were estimated to have been killed, of a reported 40,000 member force: Jane's Defence Weekly, *Iraqi militia leader lays down arms for politics*, 22 December 2009.

Treatment of former Ba'ath Party members

[51] Following the fall of the Ba'athist regime in Iraq in 2003, and in particular following the elections of 2005 which saw Shi'a parties come to power, former members of the Ba'ath Party have been subject to systematic attacks, mainly by Shi'a militias: United Nations High Commissioner for Refugees April 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009 ("UNHCR Report").

[52] In December 2003, one news source described revenge killings in Iraq as "the fastest growing crime in Baghdad and in other major Iraqi cities": Cox News Service, 28 December 2003 cited in Immigration and Refugee Board of Canada 2004, IRQ42228.E *Iraq: reports of violence and acts of revenge by the general population against the officials and their families of Saddam Hussein's regime following Hussein's fall*, 15 January 2004 ("IRB Report"). At the same time, *BBC News* reported that in Iraq: "the killings are targeting anyone from the previous regime, and not only senior figures connected with ousted leader Saddam Hussein": *BBC*, 9 December 2003 cited in IRB Report. Between June and December 2003, there were 40 revenge killings of former Ba'ath party members in City A alone: Cox News Service, 28 December 2003 in IRB Report.

[53] Over the ensuing years reports of revenge attacks against former members of the Ba'ath Party continued. In July 2007, the *IRIN News* service reported that

militants in southern areas in Iraq were targeting ex-members of the Ba'ath Party to exterminate them. Some 200 former members had reportedly been killed since the fall of the Hussein regime. A non-governmental organisation reporter was quoted with saying: "Militias are conducting a campaign to exterminate over 4,000 members of the Ba'ath Party. Most of these people didn't have a choice and were obliged to join the party during the ex-regime": "Families in south displaced as former Ba'athist targeted" *IRIN News* (30 July 2007).

[54] By 2009, reports of attacks on former Ba'ath Party members had lessened considerably. The UNHCR stated that: "targeted attacks against former members and associates of the Ba'ath Party and the former regime also appear to have lessened to a large extent": United Nations High Commissioner for Refugees April 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009 ("UNHCR Report"). Possible reasons reported for these diminishing attacks were that many ex-Ba'athists had fled Iraq since 2003, while those remaining had often aligned themselves with current parties in power or been re-employed in the public sector or the Iraqi Security Forces ("ISF"): *Ibid.* Many former Ba'athists, UNHCR reported, had found a new identity in society as professionals, tribal leaders or politicians.

[55] In addition to reprisals from Shi'a militia, former Ba'ath Party members have been subject to formal sanctions by the interim government in Iraq. Soon after the regime change, efforts were made to purge the party from the public sector and government through the interim governing authorities. Paul Bremer, the US civilian administrator for Iraq, assured that they would strip Ba'ath party members of their positions if they were guilty of "abuses of power": AFP, 19 September 2003 cited in IRB Report. In September 2003, the Interim Governing Council determined that all but the lowest-ranking members of the Ba'ath party would be removed from their positions.

[56] In May 2003, an order was instituted that dissolved the Ba'ath Party, removing senior party members from their positions and future employment in the public sector: "DRC Report". Soon after this, however, Bremner concluded that "in order to get the various services up and running in Iraq, he needed competent and experienced personnel, and most of these were Ba'athists": AFP, 19 September 2003 cited in IRB Report. The Justice and Accountability Law of January 2008 was drafted, *inter alia*, to reverse the effects of the former "de-Ba'athification" process, where some 150,000 former Ba'athists, predominately Sunni Arabs, were

excluded from government employment and pensions. To date, this law has not been implemented.

[57] *BBC News* reported that middle and lower-ranking members of the Ba'ath Party were resuming positions in the new regime in Iraq, and that many of the Iraqi police included former Ba'ath Party members: *BBC News*, 18 December 2008. *BBC* also reported the return of lower-ranking Ba'ath Party members to various ministries including the interior ministry: *BBC News*, 18 December 2008.

[58] The issue of Ba'ath Party membership became prominent during the lead-up to the recent elections in Iraq in March 2010. Prior to the election the Accountability and Justice Commission imposed bans on hundreds of candidates suspected of links to the outlawed Ba'ath Party. These bans caused tension and fears of increased sectarian division; see Institute for War and Peace Reporting, *Anti-Baathist purge spreads across Iraq*, 3 March 2010. An Iraqi Appeals Court later suspended this ban: Aljazeera.Net, "Iraq court suspends candidate ban", 3 February 2010, <http://English.aljazeera.net>. However, since the election a ruling of the Justice and Accountability Panel on 26 April 2010 disqualified 52 candidates on account of their links to the Ba'ath Party: Radio Free Europe Radio Liberty, "Iraqi Bloc Plans Response to Candidates' Disqualification", 27 April 2010, <http://www.rferl.org>.

Assessment of the Appellant's claims in light of the country information

[59] Applying this country information to the particular facts of this case, the Authority concludes that the appellant would face a real chance of being persecuted should he return to Iraq.

[60] The appellant's claim to fear persecution at the hands of Mahdi Army members is supported by his own experiences in City A and country information. Since the fall of the Ba'athist regime in Iraq, former members of the Ba'ath Party have been subject to reprisals at the hands of various Shi'a militia groups, including the Mahdi Army.

[61] Attempts have been made by various international organisations, including the UNHCR, to identify a profile of risk for former Ba'ath Party members in Iraq. The UNHCR advises that, notwithstanding that attacks have notably lessened against former Ba'ath Party members, there may be individual cases where former Ba'ath Party members are at risk, for example, in cases of personal revenge of victims or their families against perpetrators: UNHCR Report. The Danish

Refugee Council reported the International Organisation for Migration's ("IOM") position that whether a person had been member of the Ba'ath Party was not "really relevant anymore". However, they considered that sometimes former Ba'ath party membership was abused in settling private scores: Danish Immigration Service, *Security and Human Rights Issues in Kurdistan Region of Iraq (KRI), and South/Central Iraq (S/C Iraq): Report from the Danish Immigration Service's (DIS), the Danish Refugee Council's (DRC) and Landinfo's Joint Fact-Finding Mission to Erbil and Sulaymaniyah, IRI; and Amman, Jordan, 6-23 March 2009*. DRC reported that both high level and low level members of the party have been targeted, and that the degree to which they are at risk depends, according to the UNHCR, to:

"[T]he extent of association with Baath ideology, the human rights violations committed during the Saddam era, the rank or position previously held and whether or not the person is known to have been involved in political activities."

[62] While there is no general profile of risk for former Ba'ath Party members, and clearly not all Ba'athists are at risk, the Authority considers that the personal circumstances and characteristics of the appellant are such to heighten his risk of persecution to the level of a real chance. The appellant held the Senior Partisan rank of *Naseer Mutakadim* in the Ba'ath Party. His father held the most senior rank, that of Branch Member, in City A; in the district, he was known as *Al Hizbi*: 'the man of the party': For a categorisation of ranks of the Ba'ath Party, see United Kingdom Home Office, *Country of Origin Report: Iraq*, 16 September 2009; International Crisis Group, *War in Iraq: Political Challenges After the Conflict*, 25 March 2003.

[63] Many significant Ba'ath Party meetings were held at the appellant's family home. The family and their links to the Ba'ath Party are well-known in City A. Their home and business addresses are similarly well-known. While it cannot be said that all Shi'a militia seek the appellant, it is evident that he and his family have become personal targets of members or supporters of the Mahdi Army on account of their Ba'ath Party membership and the activities carried out by his father.

[64] During the appellant's period of hiding in Erbil, efforts were made by Mahdi Army representatives to locate him in City A. Shop owners at the market where the family business was located were instructed to report any news of the appellant's whereabouts to the Mahdi Army. This evidences a continued interest in the appellant.

[65] There is clear evidence that persons associated with the Mahdi Army have detained and ill-treated the appellant, along with his father and brother. The appellant was questioned about his father's relationship to the Al-Quds Army, Fedayeen Saddam, and asked for names of former members of the Ba'ath Party. He was subjected to both mental and physical torture.

[66] Such evidence of personal past persecution, while not determinative of the risk of future persecution – that requires a forward-looking assessment of risk – is directly relevant to the inquiry. The appellant's brother has been killed and his father, following his initial arrest, has never been seen again. These details inform the degree of risk that the appellant will face if returned to Iraq.

[67] There is no reason to suppose that the treatment of the appellant by this militia would be any different to that which he suffered in the past. There is a real chance of the appellant being persecuted in Iraq.

Is there a Convention reason for that persecution?

[68] While the appellant claims that his membership of the former Ba'ath Party was less for ideological reasons and more for family and economic purposes, the Authority considers that a political opinion has been imputed to him by the Mahdi Army. The relevant Convention reason is political opinion.

Protection

[69] Recognition of a person as a refugee can be withheld if that person can genuinely access meaningful protection in his or her home country. As outlined in *Refugee Appeal No. 76044* (11 September 2008), such protection requires consideration of four key elements, namely:

- “(a) That the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal.
- (b) That in the proposed site of internal protection there is no risk of being persecuted for a Convention reason.
- (c) That in the proposed site of internal protection there are no new risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*.
- (d) That in the proposed site of internal protection basic norms of civil, political and socio-economic rights will be provided by the State. In this inquiry reference is to be made to the human rights standards suggested by the Refugee Convention itself.”

[70] The Authority considers that there is no real prospect of the appellant being able to access meaningful protection in Iraq. Step (a) of the inquiry is a substantial impediment.

[71] The Mahdi Army is active throughout the Central and Southern Governorates in Iraq. While the Mahdi Army does not appear to have a notable presence in the Northern Governorates, the Authority finds that there is a real danger the appellant would not obtain practical, safe and legal access there.

[72] The Kurdistan Regional Government (“KRG”) authorities implement controls on the entry of persons to the Northern Governorates, who have not originated from the Kurdistan Region. According to the UNHCR Guidelines:

“Depending on the applicant, especially his or her ethnic and political profile, he/she may not be allowed to relocate to or take up residence in the three Northern Governorates for security, political or demographic reasons; UNHCR “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers”, April 2009, 54 (“UNHCR Guidelines”)”

[73] Persons seeking to enter the Erbil Governorate, the area where the appellant’s sister is located and where it may *prima facie* be feasible for the appellant to live, are subject to security checks and required to obtain a permit to remain. The UNHCR explains:

“[P]ersons seeking to relocate to Erbil Governorate are questioned by the security at the checkpoint about the purpose of visit, the intended duration of stay and the place of residence while in Erbil. All relevant data will be filled into an information card and the person will then be allowed to enter the governorate. He/she will be told to contact the Security Department in the intended place of residence in order to obtain a permit to stay. Persons without an acquaintance **or otherwise deemed a security risk** are generally denied entry [...]; UNHCR Guidelines, p 54.” (emphasis added)

[74] As explained in the UNHCR Guidelines, there are certain groups of persons who may not be able to find protection within the Governorates. These persons include, *inter alia*:

“Arab males, as well as those suspected of supporting the insurgency or intending to carry out terrorist attacks in the Region of Kurdistan [...]

Former Ba’athists and members of the former security/intelligence services, unless their background has been cleared and no involvement in crimes has been established.”

[75] While the fact that the appellant is an Arab male, who has held an advanced partisan position in the Ba’ath Party, without any known record for commission of crimes, may not in itself be sufficient to exclude him from obtaining legal entry and a permit to remain in the Northern Governorates, these facts combined with his father’s most senior rank for the Party in the district of City A,

and prominence in the area, may well come to the attention of the authorities and serve to exclude him.

[76] It follows that there is no internal protection alternative for the appellant in Iraq.

Exclusion

[77] As the appellant was a member of the Ba'ath Party, holding the rank of *Naseer Mutakadim*, the Authority has considered the applicability of Article 1F(a) of the Refugee Convention.

[78] Article 1F(a) of the Refugee Convention provides as follows:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes.”

[79] The “serious reasons for considering” standard is well below that required under criminal law (beyond a reasonable doubt) and civil law (on the balance of probabilities); See *Refugee Appeal No 1248/93 Re TP* (31 July 1995) at [32], and *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301, 306 (Smellie J).

[80] A general principle of both national and international criminal law is that a person may not be held accountable for an act he or she has not personally performed, or in some other way participated. As articulated by the ICTY Appeals Chamber in the case of *Tadić*, ICTY AC, 15 July 1999 (Case No IT-94-1-A) at para 186:

“Nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).”

[81] The Authority questioned the appellant closely on his involvement with the Ba'ath Party, and is satisfied that he did not participate, in any manner, in the commission of war crimes and crimes against humanity. The Authority finds that while persons holding the rank of *Naseer Mutakadim* may potentially commit such crimes, and upon the appellant's evidence could be called to attend night raids, the appellant did not participate in any such events. The Authority accepts the appellant's evidence that he held the rank of *Naseer Mutakadim* in name only.

Contrary to the likely perception of the agents of persecution, the Authority is satisfied that the appellant did not fulfil any of the accompanying responsibilities of that position.

[82] In light of the above, we find that the evidence does not establish there to be serious reasons for considering that the appellant has committed a war crime or crimes against humanity. On the evidence available to the Authority there is no basis upon which the exclusionary effect of Article 1F(a) of the Refugee Convention applies with respect to this appellant.

CONCLUSION

[83] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

"S A Aitchison"

S A Aitchison
Member