

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76213

AT AUCKLAND

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| <u>Before:</u> | A N Molloy (Member) |
| <u>Counsel for the Appellant:</u> | I Uca |
| <u>Appearing for the Department of Labour:</u> | No Appearance |
| <u>Dates of Hearing:</u> | 24 and 25 June 2008 |
| <u>Date of Decision:</u> | 30 June 2009 |

DECISION

INTRODUCTION

[1] The appellant is a national of Iraq. He appeals against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining his application for refugee status. He claims that if he were to return to Iraq, he would be seriously harmed by various non-government agents, for reasons which are set out within this decision.

[2] The appeal turns upon whether the appellant's claim is well-founded. This is assessed following the summary of his account which is outlined below.

THE APPELLANT'S CASE

[3] The appellant is a middle-aged man. He is married with one New Zealand-born child. He has lived in New Zealand since 2005, prior to which he spent approximately a decade living in Cyprus for reasons that will be outlined.

[4] The appellant's account is relatively straightforward. He is a Shi'a Muslim

who was born and raised in Baghdad. His mother and several siblings currently live in Sadr City in Baghdad with their respective families.

[5] The appellant was forced to leave Iraq in 1994 following the death of a young woman named XX. They had met approximately a year earlier. Their friendship developed in secret because neither family would have approved of their relationship. XX's family was part of a powerful tribe and, as the appellant soon learned, she was promised in an arranged marriage to a paternal cousin.

[6] Their relationship ended tragically. After it became apparent that XX was pregnant, she was murdered by her brothers to atone for the shame brought upon their family. The appellant later learned that she had been beaten until she identified the appellant as the father.

[7] Her brothers then set about finding the appellant. They came to the appellant's family home with the intention of killing him as well. He had left, having got wind of what was in store. His family helped him to leave Baghdad. While the appellant was in hiding, arrangements were made to help him leave Iraq as his family did not believe that they could protect him. The appellant reached Cyprus where he spent a year in prison with a number of other Iraqi asylum-seekers.

[8] Upon his release from custody, the appellant applied for refugee status in Cyprus. He claimed that he could not return safely to Iraq because of the vendetta against him by the family of his former lover. In addition, he had avoided performing compulsory military service by paying bribes and by purchasing a series of false medical certificates he had used to secure ongoing exemptions on medical grounds. The appellant was unsuccessful, but he was permitted to remain in Cyprus. He stayed there until 2005.

[9] The appellant remained in touch with his family throughout that period. They informed him about the ongoing attempts to locate him made by XX's family. He was unable to return to Iraq even after all that time.

THE APPELLANT'S FAMILY

[10] While the appellant was living in Cyprus, one of his brothers, VV, experienced difficulties with the Ba'athist government in Iraq. He was forced to flee to Iran. VV returned to Iraq after the invasion of the US-led coalition led to the fall of Saddam's government in 2003. He is currently a police officer.

[11] In around 2000, the appellant met a woman, CC, who is also a non-Cypriot.

He helped her to make contact with UNHCR. She was granted refugee status and established a life for herself in Cyprus. The two of them eventually married, although the relationship has been tempestuous. They first parted company in around 2002 when CC came to New Zealand to join her brother.

[12] Before long, CC began to regret the marital breakdown. She made contact with the appellant again and expressed her desire to try to reconcile. Over a period of time, they exchanged telephone calls and letters. CC returned to Cyprus in 2004. She and the appellant married for the second time. The appellant then began a protracted attempt to obtain a visitor's permit so that he could join his wife in New Zealand. He eventually arrived here in May 2005 with the intention of applying for residence as CC's spouse.

[13] The appellant and his wife now have a child. Unfortunately, they parted again in 2007. CC then withdrew her sponsorship of the appellant's application for residence, which meant that the appellant was no longer lawfully entitled to remain in New Zealand. It was only at that point that he was advised to make an application for refugee status. The appellant and CC are currently reconciled again.

[14] The appellant claims that he cannot return to Iraq safely. This is for a number of reasons, but mainly because he believes that if XX's family found out he had returned to Iraq, they would try to kill him.

[15] The appellant's grounds for claiming refugee status arise out of the civil conflict which began after the invasion of Iraq in 2003. He claims that as a member of the Shi'a minority, he is at risk from Sunni militia. He also claims that he is at risk from Shi'a militia and that he would be at risk because his brother, VV, is now a police officer in Baghdad.

[16] Underpinning all of this, the appellant says that because he has lived away from Iraq for over a decade, he has become inherently westernised in his outlook on life and his way of living. He says that it would be obvious to others that he had become westernised, and that he would be a visible and vulnerable target.

[17] It is appropriate to record that the appellant accepts that he would no longer be subject to compulsory military service in Iraq, and would not face any sanction for avoiding service under the former regime. He did not rely upon this as a reason for his appeal.

MATERIAL RECEIVED

[18] The file compiled by Immigration New Zealand (INZ) contains a number of documents provided by the appellant around the time he came to New Zealand under the sponsorship of his wife. These include a temporary travel document issued by the government of Cyprus and copies of newspaper clippings about asylum-seekers from Iraq in Cyprus. One article is accompanied by a photograph which shows a group of the asylum-seekers, including the appellant.

[19] Prior to the appeal hearing, the appellant forwarded a supplementary statement, dated 18 June 2008. Counsel also forwarded opening submissions in writing, together with a translation of the appellant's responses to various questions put by the RSB in their interview report. The responses had been forwarded by the appellant's previous counsel to the RSB, but had not made their way onto the INZ file.

[20] On the day of the appeal hearing, the Authority invited the appellant's counsel to address various reports by United Nations High Commissioner for Refugees (UNHCR) and Amnesty International. She did so within final closing submissions forwarded under cover of a letter dated 30 July 2008. Due to the fluidity of conditions in Iraq, the Authority subsequently invited counsel to comment upon and provide updated country information, which she did under cover of a letter dated 12 June 2009.

THE ISSUES

[21] 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."

[22] 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

[23] Before turning to address the principal issues identified, it is necessary to determine whether the appellant is a credible witness. That assessment is complicated to some extent by the fact that the appellant's claim relies firstly upon events that took place many years ago, and secondly upon more recent events which have taken place in Iraq while he has been outside the country.

[24] The Authority had some concerns about the evidence proffered by the appellant. For example, he did not refer to the problems caused by his relationship with XX in the first statement that he provided in support of his application for refugee status in New Zealand. It is, however, referred to in some detail within a second more detailed statement prepared by the appellant with the assistance of his then lawyer. He explains that his failure to refer to XX in his first statement is due to the fact that he finds it difficult to talk about her death even after so many years.

[25] That is not implausible. Further, the appellant's second statement was voluntarily provided before he was interviewed by the RSB.

[26] The Authority also takes note of country information that is consistent with the predicament described by the appellant. For example, UNHCR refers to the rising incidence of murders (inaptly termed "honour killings") committed by a family member to protect the honour of the family where an individual is accused of behaviour perceived to have brought shame on the family. This includes, for example, loss of virginity (even by rape) or infidelity. The risk is not confined to women and girls, but extends to men and boys: *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers* (Geneva) (April 2009) (the 2009 UNHCR guidelines) (para 256). The societal context in which such events can arise are alluded to at para 32 of the same report:

"Overall, Iraq largely remains a conservative and tribal-based society where social freedoms of the individual, and even more so of girls and women, are limited by the family's "honour" and tribal and religious customs. The number of so-called "honour killings" carried out against family members (most often women) by other family members for perceived or actual behaviour or attitude which is seen to have dishonoured their family, tribe or community, continues to be prevalent in all parts

of Iraq.” (para 32).

[27] In the circumstances, the appellant’s claim cannot be dismissed as implausible. Therefore, in assessing his evidence as a whole, the Authority takes into account the fact that the appellant was a spontaneous and reasonably consistent witness. He did not appear to attempt to exaggerate aspects of his claim that might have been amenable to exaggeration and he made appropriate concessions such as accepting that he is no longer at risk in Iraq for avoiding military service.

[28] The appellant has also provided documentary evidence that corroborates his time in Cyprus as an asylum-seeker. This is not evidence of the truth of his claim, but does confirm that he left Iraq many years ago and also that he contemporaneously sought protection in Cyprus. It is also clear from his INZ file that the appellant made no attempt to conceal the fact that he had been living in Cyprus as an asylum-seeker when he applied to come to New Zealand.

[29] Having regard to all of the available evidence, and having had the benefit of interviewing the appellant in person, the Authority finds that it is appropriate to extend to the appellant the benefit of any doubts it has about the nature of his claim for refugee status. Accordingly the appellant’s claim must be accepted in its entirety.

SUMMARY OF FINDINGS

[30] The Authority therefore finds that the appellant is a Shi’a Muslim and a national of Iraq. His family remain in Sadr city in Baghdad. One of his brothers is a police officer. The Authority finds that the appellant fled from Iraq in the 1990s to evade a family that wanted to kill him in revenge for bringing shame upon them. He has not returned to Iraq since that time.

[31] It finds further that he lived and worked in Cyprus for almost 10 years. During that period, he married a non-Iraqi woman who has since become a New Zealand citizen. The appellant travelled to New Zealand in 2005 under her sponsorship. The Authority finds that the appellant applied for refugee status in New Zealand after his anticipated means of remaining here (namely through the sponsorship of his wife) was withdrawn. Finally, the Authority accepts that his family in Iraq has told the appellant that it would not be safe for him to return even after the fall of the Ba’athist regime, because the problem caused by his relationship with XX had not gone away.

[32] It is upon this basis that the appellant's claim will be assessed. The Authority's assessment will take into account country information available in connection with the current situation in Iraq.

OBJECTIVELY ON THE FACTS AS FOUND DOES THE APPELLANT HAVE A WELL-FOUNDED FEAR OF BEING PERSECUTED IF HE RETURNS TO IRAQ?

[33] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights, such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm, plus the failure of state protection; *Refugee Appeal No 71427* (16 August 2000).

[34] The Authority has consistently adopted the decision in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. The standard is entirely objective.

COUNTRY INFORMATION

[35] The Authority has considered the appeals of a number of Iraqi nationals who have sought refugee status in New Zealand since the invasion of the United States-led military coalition led to the fall of the Ba'athist regime of Saddam Hussein in 2003. The violence that has beset Iraq since that time has been outlined in some detail in those decisions. It does not need extensive additional articulation for the purposes of this appeal.

[36] Counsel provided an extract from *Freedom House* "Freedom in the World 2008 - Iraq", 2 July 2008, which provides that:

"... all religious communities in Iraq have been threatened by sectarian violence ... Thousands of Iraqis have been killed by death squads, insurgents, and militias, and members of both major sects and minority faiths have been driven from mixed or isolated neighbourhoods."

[37] This is echoed by Amnesty International:

"Thousands of civilians, including children, were killed or injured amid continuing sectarian and other violence...."

... [civilians] were victims of sectarian killings by Shi'a and Sunni armed groups. Hundreds of people were abducted, tortured and murdered, with their bodies left in

the street or found by their families at morgues. The increasingly sectarian nature of the violence caused hundreds of thousands of people to flee their homes ...

Armed groups, including Islamist and Nationalist groups fighting against the US-led forces and the Iraqi government, as well as Al-Qaeda and militias affiliated to Shi'a religious groups, committed gross human rights abuses. Many of the abuses were committed in the course of sectarian violence between Shi'a and Sunni armed groups, who sought to clear mixed neighbourhoods of Sunni and Shi'a respectively, abducting people from their homes or in the streets and murdering them." *Amnesty International Report 2008 – Iraq*, May 2008 pp 1-2.

[38] There has been some speculation that the violence may have peaked. There is certainly evidence of a concerted response aimed at minimising the sectarian clashes. Parts of Baghdad, including Sadr city, have been walled to reduce or prevent access between the Sunni and Shi'a enclaves within. Ceasefires attributed to Muqtada Al-Sadr are said to have contributed to a dramatic drop in violence across Iraq. It is also apparent that the ceasefire ordered by Al-Sadr was extended; *Radio Free Europe/Radio Liberty*, "Al-Sadr extends ceasefire, orders peaceful protest" (28 August 2008).

[39] The 2009 UNHCR guidelines state that steps taken to address sectarian clashes between Shi'a and Sunni communities led to a significant reduction in the overall levels of violence (para 5). However, there is force in counsel's submission that the improvements in the levels of violence in Iraq are to be acknowledged, but should be considered in context.

[40] Thus the United Kingdom Home Office *Country of Origin Information Report: Iraq* (12 January 2009) refers to declining casualties and violent incidents, but confirmed that casualties of violence remain "unacceptably high" (para 9.01). Likewise the United States Department of State *Human Rights Report: Iraq* (February 25 2009) (the 2009 DOS Report) confirms the existence of ongoing sectarian attacks.

[41] Despite the reduction in sectarian clashes, indiscriminate violence and targeted killings continue and even increased again to a "remarkable" extent in March 2009, according to the 2009 UNHCR guidelines (para 7).

[42] Additional country information also refers to the ongoing violence in Baghdad: a recent article refers to a series of bombings targeting the Shi'a community in May 2009, and asserted that April was the most violent month in Iraq for a year: Institute for War and Peace Reporting *Baghdadis Resigned to Sporadic Violence* (29 May 2009). Further, according to Human Rights Watch (HRW *World Report 2009 - Iraq* (January 2009) human rights conditions throughout Iraq remain "extremely poor".

[43] The picture that emerges is of an environment throughout Iraq that is still both dangerous and volatile.

THE APPELLANT'S PREDICAMENT

[44] The extent of the humanitarian crisis in Iraq cannot be downplayed. However the focus of the Refugee Convention is quite specific. As a refugee claimant, the appellant is required to demonstrate that he faces a real chance of serious harm and that the anticipated harm is "for reason of" one of the five Convention grounds. As was noted in *Refugee Appeal Nos 75692 and 75693* (3 March 2006) at [101]:

"Those impacted by civil unrest and even generalised violence are not entitled to refugee status on that basis alone."

[45] The appellant is a Shi'a Muslim whose family still live in Sadr City in Baghdad. It is to that part of Iraq that he would return if he were to return to Iraq today, at least initially. The appellant's family have lived in Sadr City throughout this most dangerous and difficult period, apparently without falling victim to serious harm other than that attributable to the general civil unrest. However, the appellant says that the risk to him relates not only to the fact that he is Shi'a or because his brother is a police officer. He also relies upon the fact that he is "westernised" and because he is still the subject of a vendetta.

[46] The appellant says that his indiscretion as a young man offended the values and customs and beliefs of the family of his young lover, at the cost to her of her life. It also put his life in peril. The appellant claims that if he were to return to Iraq, the family of XX would kill him.

[47] In that context, counsel submits that "impure" Muslims have been targeted and killed. The 2009 UNHCR guidelines lend support to the submission that just such an environment prevails in parts of Iraqi society today. As already noted:

"Overall, Iraq largely remains a conservative and tribal-based society where social freedoms of the individual, and even more so of girls and women, are limited by the family's "honour" and tribal and religious customs. The number of so-called "honour killings" carried out against family members (most often women) by other family members for perceived or actual behaviour or attitude which is seen to have dishonoured their family, tribe or community, continues to be prevalent in all parts of Iraq." (para 32).

[48] These attitudes are based in entrenched ideas about what is or is not appropriate "Islamic" behaviour:

“Since 2003, inhabitants in areas under control of Sunni and Shi’ite extremist groups have been increasingly pressured to follow strict Islamic rules and were otherwise intimidated or even killed. Liquor, music or barber shops were regularly attacked as were persons considered to be dressing or behaving in an “un-Islamic” way.” (2009 UNHCR guidelines (para 330))

[49] In this context:

“Women, homosexuals and others considered to be violating strict Islamic rules or their family’s honour are ... frequently targeted, often by their own families” (2009 UNHCR guidelines (para 7)).

[50] Having accepted the appellant’s claim that he left Iraq as the result of such circumstances, the Authority must consider whether the risk to him has dissipated to such an extent that it is no more than remote.

[51] The appellant does not claim that XX’s family are currently looking for him. However, the fact that they are not overtly searching for him today may simply reflect the reality that he has not lived there for so long. It does not mean that they would not find out about his return, and it does not mean that they would not do anything about it if they did find out. In that respect, the Authority notes that the appellant broached the possibility of returning to Iraq shortly after the fall of Saddam Hussein. His family warned him, even at that stage, that it would not be safe for him to return because of XX’s family.

[52] Having been away from Iraq for many years, the likelihood that the appellant will be noticed upon returning is heightened. He will be a newcomer and his presence in the area is likely to become apparent. In that sense, the extent to which the appellant has become “westernised” may increase the risk particular to him in that it may make it more likely that he will be noticed and that the fact of his return will come to the attention of XX’s family.

[53] The Authority finds that, in this context, the appellant has a well-founded fear of being persecuted in Iraq. The Authority cannot quantify the risk to the appellant. However, it is satisfied that even now there is a real, as opposed to a remote or speculative, chance that the appellant may be seriously harmed by the family of XX if he returns to Iraq. The environment in much of Iraq promotes violence to an extent to which it is feasible that those seeking to restore their honour can satisfy their vendetta. They would do by violent means. It is also likely that they would be able to do so with impunity.

WHETHER THE APPELLANT COULD OBTAIN PROTECTION FROM THE IRAQI STATE

[54] The Authority has already drawn upon several extracts from the 2009 UNHCR guidelines that indicate that sectors of Iraqi society commit “honour killings”. The guidelines also state that the legal system does not provide harsh penalties and suggests that such crimes are committed with virtual impunity (para 256) p 145.

[55] In considering the state of the Iraqi police and security forces, the 2009 DOS Report refers to a study which found that the Iraqi government;

“... was making meaningful reform efforts and is substantively addressing problems of lack of efficiency, effectiveness, accountability, and professionalism. Some problems continued, however, with all security services regarding sectarian divisions, corruption, and unwillingness to serve outside the areas in which they were recruited.” (p 9).

[56] Given the “lack of efficiency, effectiveness, accountability and professionalism” of the police and security forces, it is unsurprising that the 2009 DOS Report lists the following exhaustive list of “significant human rights problems” by which Iraq is currently blighted:

“a climate of violence; misappropriation of official authority by sectarian, criminal, and extremist groups; arbitrary deprivation of life; disappearances; torture and other cruel, inhuman, or degrading treatment or punishment; impunity; poor conditions in pretrial detention and prison facilities; denial of fair public trials; delays in resolving property restitution claims; immature judicial institutions lacking capacity; arbitrary arrest and detention; arbitrary interference with privacy and home; other abuses in internal conflicts; limitations on freedoms of speech, press, assembly, and association due to sectarianism and extremist threats and violence; restrictions on religious freedom; restrictions on freedom of movement; large numbers of internally displaced persons (IDPs) and refugees; lack of protection of refugees and stateless persons; lack of transparency and widespread, severe corruption at all levels of government; constraints on international organizations and nongovernmental organizations' (NGOs) investigations of alleged violations of human rights; discrimination against and societal abuses of women, and ethnic and religious minorities; human trafficking; societal discrimination and violence against individuals based on sexual orientation; and limited exercise of labor rights.” (page 1).

[57] In such an environment, the Authority finds that the appellant would not be able to obtain adequate protection from the state in Iraq.

CONVENTION REASON

[58] When considering whether the serious harm contemplated by the appellant is for reason of a Convention ground, the Authority has previously held that the Convention ground must contribute to the cause of the risk of being persecuted.

The Authority noted in *Refugee Appeal No 72635* (6 September 2002):

“The focus is on the reasons for the claimant’s predicament rather than on the mindset of the persecutor...” ([168]).

[59] The family of XX wish to kill the appellant. Their actions are based in general upon a need to satisfy the honour of their family. In the Iraqi context, the Authority is prepared to infer that the appellant’s predicament is broadly contributed to by the fact that his actions were perceived as “un-Islamic”. It might be appropriately characterised as political in the broad sense or as religious. Either way, the appellant’s predicament is for a Convention reason.

CAN THE APPELLANT ACCESS MEANINGFUL STATE PROTECTION ELSEWHERE IN IRAQ?

[60] Having found that the appellant has a well-founded fear of being persecuted in Iraq, there is a live issue as to whether the appellant has an “internal protection alternative”. For the reasons more fully explained in *Refugee Appeal No 76044* [2008] NZAR 719 (NZRSAA), once a refugee claimant has established a well-founded fear of being persecuted for a Convention reason, recognition of that person as a Convention refugee can only be withheld if that person can genuinely access in his or her home country domestic protection which is meaningful. Such protection is to be understood as requiring:

1. that the proposed internal protection alternative is accessible to the individual. This requires that the access be practical, safe and legal;
2. that in the proposed site of internal protection there is no well-founded risk of being persecuted for a Convention reason;
3. that in the proposed site of internal protection there are no new well-founded risks of being persecuted or of being exposed to other forms of serious harm or of *refoulement*; and
4. 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.

[61] Only if an affirmative answer is given to each of these four elements of the inquiry can recognition of refugee status be withheld.

[62] Given the pervasive extent of the conflict throughout Iraq, and its sectarian manifestation, this issue can be answered in brief terms. The appellant is not able to access meaningful domestic protection in Iraq. The appellant is a Shi'a Muslim who has lived away from Iraq for a number of years. In any community outside Sadr City, where his family live, he would be a stranger. The 2009 UNHCR guidelines make it clear that tribal and familial support are vital to anyone seeking to relocate within Iraq. It is unrealistic to suppose that in the conditions prevailing throughout Iraq, he could settle in an area where he has no tribal or family support. It is also clear that in most, if not all, parts of Iraq, he will face issues impacting upon his freedom of movement, freedom of religion (meaning his freedom to observe or not observe the tenets of Shi'a) and access to adequate housing or employment.

[63] Travel throughout much of Iraq is difficult if not unsafe. There is a chance that he will be exposed to the random violence inherent in the ongoing civil unrest. In the prevailing circumstances, it is almost inevitable that the difficulties of living elsewhere in Iraq are likely to drive him back to the seat of his family in Sadr City, where he will again be exposed to the Convention-related risks already identified. In short, none of the four prerequisites are applicable to the appellant.

CONCLUSION

[64] The Authority finds that objectively, on the facts as found, there is a real chance of the appellant being persecuted if he was to return to Iraq. The harm anticipated would be for reason of religion. He is unable to access meaningful state protection elsewhere in Iraq.

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

"A N Molloy"
A N Molloy
Member