REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74666/03

AT AUCKLAND

Before: RPG Haines QC (Member)

Representing the Appellant: D Mansouri-Rad

Date of Hearing: 4 August 2003

Date of Decision: 3 November 2003

DECISION

INTRODUCTION

[1] The appellant is a twenty-nine year old married man and a citizen of Iraq. He arrived in Australia on 31 August 1999 by sea and applied for refugee status. After a period in detention he was recognised as a refugee and a Temporary Protection Visa was granted on 6 December 2000 valid to 6 December 2003. Known technically as a Subclass 785 (Temporary Protection) visa it permitted the appellant to remain in, but not to re-enter, Australia for a period of three years or until an application made by him for a permanent visa was finally determined, whichever occurred sooner. As the letter dated 5 December 2000 to the appellant from the Department of Immigration and Multicultural Affairs explained, a Subclass 785 (Temporary Protection) entitles the visa holder to work without restriction in Australia but such person is ***not*** able to sponsor family members to Australia. In short, the appellant was entitled to live and

work in Australia but unable to bring to Australia his wife, son (five years) and daughter (four years).

[2] Meanwhile the appellant's wife and two children arrived in Indonesia from Iran in 2000 and the Authority has been given copies of letters dated 11 December 2001 and 28 March 2003 from the UNHCR office in Jakarta advising that the appellant's wife has been recognised as a refugee under the mandate of the Office of United Nations High Commissioner for Refugees.

[3] The appellant, a goldsmith by occupation, began working for a jewellery concern in Melbourne, Australia and made several efforts to obtain the permission of the Australian federal government to visit his family in Indonesia. His efforts failed. He told the Authority that he regarded himself as being persecuted by the Australian federal government by being separated from his wife and children. He decided to travel to New Zealand and to seek refugee status in this country in the hope and expectation that once refugee status had been secured he would be reunited with his family as New Zealand does not presently have a regime which mandates the separation of refugees from their families.

[4] Travelling on a false Australian passport, the appellant arrived in New Zealand on 2 April 2003. At the airport he sought refugee status, concealed the fact that he had been living in Australia as a recognised refugee, and was initially detained. However on 9 May 2003 he was granted conditional release from Auckland Central Remand Prison following his interview by a refugee status officer on 12 April 2003. In a decision published on 26 May 2003 his refugee application was declined, the broad grounds being:

(a) Following the invasion of Iraq by United States and British forces, the regime of Saddam Hussein had come to an end and the appellant's fear of being persecuted by that regime could no longer be described as a well-founded fear;

(b) In the alternative, the appellant having already been recognised as a Convention refugee by Australia, he was able to avail himself of the protection

of that country and a formal determination to this effect under s 129L(1)(e) was made.

[5] It has at all stages been accepted by the appellant that his claim to refugee status in New Zealand must be established anew and that the grant to him by the federal government of Australia of a Temporary Protection Visa has no force outside of Australia.

[6] The appeal was heard on 4 August 2003. At the conclusion of the hearing counsel for the appellant sought seven days in which to file further country information. That application was granted. The country information and submissions subsequently filed under cover of letters dated 12, 13, 14, 15 and 20 August 2003 and 29 September 2003 have all been taken into account.

THE APPELLANT'S CASE

[7] On appeal before this Authority the appellant relied on his written statement dated 8 April 2003 prepared for the interview with the refugee status officer. He also relied on the evidence given at that interview on 12 April 2003. It is not intended, in this decision, to provide a compendious account of his claims nor is it intended to set out his case at length. It is proposed to provide a summary only of the principal elements. The Authority's assessment of the appellant's case and of his credibility follows in a later section of this decision.

[8] The appellant has spent little time in Iraq, being only five years of age when he last left that country. He says that his father and other members of his family including his grandfather, uncles and aunts were opposed to the Ba'athist regime led by Saddam Hussein and were active in the Al-Da'wah Party (Al-Da'wah). That party (and the consequences of membership) were described by the Country Information and Policy Unit of the UK Home Office, *Country Assessment: Iraq* (October 2000) in the following terms:

> The Al-Da'wah Party, or Islamic Call, is a militant Shi'a organisation, formed in 1968 and is based in Tehran. The Al-Da'wah was not just a reformist movement but rather a revolutionary party advocating the replacement of the modern secular state by an Islamic social political order. It was inspired by the prominent Iraqi Ayatollah

> Muhammad Baqir al-Sadr. After the Iranian Revolution a massive wave of enthusiasm engulfed the Shi'a community in Iraq and drove the Al-Da'wah party, which openly endorsed Ayatollah Khomeini as its spiritual leader, to step up its activities against the regime. In 1989 the Ba'ath regime responded to demonstrations in support of Khomeini by imposing martial law in southern cities. Membership of the Al-Da'wah Party became punishable by death. It has made assassination attempts on Saddam Hussein.

[9] In approximately 1979 or 1980, when the appellant was approximately five years of age, the Iraqi authorities arrested his paternal uncle, his maternal uncles, his grandfather and several of his father's friends on the grounds that they were involved in the Al-Da'wah Party. The authorities also searched for the appellant's father. The entire family comprising the appellant's father, mother and eight children were able to escape to Kuwait. Because the Kuwaiti authorities were at that time co-operating with Iraq, the appellant's father subsequently left for Syria. The appellant, his mother and siblings remained living in Kuwait for the next ten years. After the Iraqi invasion of Kuwait in 1990 they left Kuwait and entered Iran where they were reunited with the appellant's father. The family lived in Qom, a leading centre of Shi'ia theological seminaries and site of the second most important Shi'ia shrine in Iran.

[10] In Qom the appellant found work at a jewellery but from 1994 set up as a self-employed goldsmith. Qom was a centre of Al-Da'wah activities and the appellant's father was an active participant. The appellant does not know with any precision what his father did beyond acting as a judge or arbiter in disputes or disagreements within the party. The appellant himself decided at eighteen years of age that he was a supporter of the party but when asked by the Authority what activities, if any, he had engaged in he said that he had not been involved in any activities. He was simply a supporter who would attend meetings and seminars.

[11] From the time of their arrival in Iran members of the family gradually migrated overseas and no member of the appellant's immediate family remains in Iran. Presently five siblings live in Denmark and two in the United Kingdom. Both his parents are also in Denmark, having entered that country in May or June 2000. The appellant says that all members of the family have been permitted to stay in either Denmark or the United Kingdom as refugees. The Authority has not sighted any information to confirm this alleged status but

nothing presently turns on the question whether members of the family have or have not been successful in obtaining refugee status. There is the possibility that they have been granted entry on humanitarian grounds or been given a temporary status or they may have no status at all.

[12] The appellant himself left Iran in July 1999 because he believed that his status in that country did not give him the right to move about Iran or to work legally. In addition, neither his wife (whom he met and married in Iran) nor his children (both of whom were born in Iran) had identity papers and he decided to seek a more stable situation for his family. As mentioned, he arrived in Australia on 31 August 1999. His wife and children left Iran and entered Indonesia the following year, in 2000.

[13] The appellant was successful in obtaining a Temporary Protection Visa under the Migration Act 1958 (Cth) which was to expire on 6 December 2003 or until an application made by him for a permanent visa was finally determined, whichever happened sooner. His decision to come to New Zealand, notwithstanding his status in Australia, was explained as follows:

(a) He felt persecuted by the Australian federal authorities who had issued him with a Temporary Protection Visa of a kind which prohibited him from sponsoring family members to Australia and which also prevented him from visiting his family in Indonesia without forfeiting his visa status.

(b) He anticipated that upon the expiry of his visa he would be taken back into custody for a determination to be made as to whether his temporary protection status would be continued.

(c) He believed that it was unlikely that that status would be continued. In his mind the Australian authorities intended to return him to Iraq.

[14] Addressing his refugee application in New Zealand, the appellant concedes through his counsel that following the Coalition invasion of Iraq in March-April 2003, there has been a change of circumstances in that country. However, in his written statement prepared for the appeal hearing the appellant contends that the Ba'athist regime continues to rule Iraq, but under a

different name and that the old regime's police and security officers are "currently still employed and working very carefully with the new American security system in order to get rid of the politicians who are becoming active in forming a new opinion in Iraq". He also asserts (inter alia):

(a) Ba'ath Party people are in control of the security system. It is impossible to live in Iraq without being in danger from them.

(b) Ba'ath Party officers are threatening anyone who has an opinion or who wants to give an opinion to put someone in power or get rid or someone.

(c) There have been many assassinations organised by the Americans.

(d) It is not permitted for demonstrations to be organised to object to the American led foreign presence in Iraq.

(e) Any person who tries to reveal the "deal" between the Ba'ath regime and the Americans is in danger.

(f) Al-Da'wah Party members are at risk of arrest and possibly assassination in Iraq by both Americans and the Ba'ath regime. In submissions it was added that as it is likely that Iraqi intelligence (Mukhabarat) has a file on the family the appellant will soon be exposed as an Al-Da'wah supporter and either imprisoned or killed.

(g) In submissions it was also said that the appellant is opposed to the Coalition Forces and will find himself in conflict with them.

[15] In support of these claims the appellant says that the uncles arrested in 1980 have not been released from prison, though he concedes that this might be because they are no longer alive. He also relies on the fact that a paternal uncle, also arrested but released in the mid-1990's on health grounds and who lives in [X] near Al Nasariyah, was recently visited by the appellant's second paternal uncle who lives in Syria. While the appellant has not spoken to the uncle who lives in Iraq, he has spoken to the uncle who lives in Syria subsequent to the return of the latter to Syria. The conversation with the

Syrian-resident uncle occurred some sixteen or seventeen days prior to the appeal hearing. This uncle reported that in July 2003 he had crossed from Syria into Iraq and visited the appellant's uncle who lives in [X]. The purpose of the visit was not only to visit the uncle's brother but also to inspect his (the Syrian-based uncle's) home and to check the situation in general and the possibility of re-establishing in Iraq. Through the Syrian-based uncle it has been reported to the appellant that the uncle living in Iraq claims that following the fall of Sadaam Hussein, Ba'athist authorities continue to pressure the family and to carry out assassinations. He had strongly advised the Syrian-based uncle to leave Iraq before he was killed. It is largely on this information that the appellant fears that should he return to Iraq he will be killed by the Ba'ath Party which presently masquerades in Iraq under a different name. He also advances a claim that because the Al-Da'wah Party opposes the occupation of Iraq by the Coalition Forces, members of Al-Da'wah are being persecuted by the Coalition Forces and that many have been killed or assassinated. In the suppression of Al-Da'wah it is claimed that the Coalition Forces have also enlisted the services of the Ba'ath intelligence staff (counsel's appeal submissions page 18). While there is evidence that members of the former Mukhabarat have been recruited by the Coalition Forces, counsel conceded in his submissions of 12 August 2003 that:

> Counsel was unable to locate any country information which would *directly* refer to Al-Dawa members being persecuted post-war Iraq. However, there are indications that the CF are increasingly targeting 'Islamic militants' mosques and Shiat figures.

[16] The refugee claim is based not only on the appellant's fear of being persecuted by reason of his being a supporter of the Al-Da'wah Party and the member of a large family which for a large number of years has been active in the Al-Da'wah Party, he advances also a separate claim based on his refusal to perform military service. His objection is not to military service as such, but to being required to serve in an army which engages in the persecution of Iraqis and in the waging of wars of aggression (the invasions of Iran and of Kuwait). He acknowledges that he would readily serve in an army which did not engage in persecution or acts of aggression.

THE ISSUES

[17] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly 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 is unable or, owing to such fear, is unwilling to return to it."

[18] In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

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

2. If the answer is Yes, is there a Convention reason for that persecution?

[19] It is a fundamental principle of refugee law in New Zealand that the relevant date for the assessment of refugee status is the date of determination. See *Refugee Appeal No. 70366/96 Re C* (22 September 1997) at 33-39; [1997] 4 HKC 236, 264-268 where the authorities are collected. This jurisprudence was more recently confirmed in *Refugee Appeal No. 71684/99* [2000] INLR 165 at [46]. The definition in Article 1A(2) mandates a forward looking assessment of the risks faced by the refugee claimant if returned to the country of nationality or habitual residence. What is required is an assessment of the future risk of harm. The inquiry into refugee status is concerned only with the prospective assessment of the risk of being persecuted: Professor James C Hathaway, *The Law of Refugee Status* (1991) 69, 75, 87.

ASSESSMENT OF THE APPELLANT'S CASE

[20] Before the identified issues can be addressed an assessment must be made of the appellant's credibility. In this regard the Authority has concluded that he is not an honest and truthful witness.

[21] The appellant concedes that his departure from Australia was driven by his desire to find a way of reuniting with his family. But the refugee claim based on his alleged association with the Al-Da'wah Party has been substantially eroded by recent events in Iraq. Specifically, the Ba'athist regime has been deposed from power. Driven by his single-minded determination to reunite with his wife and children he has succumbed to the temptation of creating a new case for refugee status which has no foundation in truth. He has done his best to disguise the baselessness of his case by exaggerating every piece of news or information he can find which might add a cloak of plausibility to his re-moulded claim to refugee status. The appellant struck the Authority as an opportunist who will say and do anything to achieve his one objective in life, namely to be reunited with his family.

[22] The appellant's claim to be at risk of being persecuted in post-Sadaam Hussein Iraq is based on his evidence that his uncle who lives near Al Nasariyah warned the uncle visiting from Syria that the latter should leave to avoid being killed by Ba'athist authorities. The uncle who lives near Al Nasariyah is also the appellant's father-in-law. The last occasion on which the appellant spoke to his father-in-law was in January 2003 when the latter telephoned the appellant in Australia to inquire about the well-being of his (the father-in-law's) daughter. It was two months after that that the appellant came to New Zealand. The interests of the appellant, his wife and father-in-law all converge on bringing to an end the long separation of the appellant, his wife and two children. The appellant's claim that on the information provided by his father-in-law he faces persecution in Iraq is a self-serving one. So too is his claim that he felt persecuted in Australia and that he was forced to come to New Zealand. Having had the opportunity of questioning the appellant, the Authority is of the view that try as he may to disguise his arrival in New Zealand as an escape from 'persecution' in Australia, the entire refugee claim and his evidence has been driven by his wish to find a country in which he and his family can enjoy a high standard of living. As to the father-in-law, he has for obvious reasons not been available for questioning by the Authority. The Authority is asked to rely entirely on the appellant's veracity and to accept as truthful evidence the claim that the uncle in Syria reported to him that the father-in-law in Iraq had said that families which support the Al-Da'wah Party

are at risk of assassination in post-Ba'athist Iraq. As mentioned, after careful consideration the Authority does not believe the appellant. The supposed "threat" to his safety has been invented to overcome the fact that with the fall of the Ba'athist regime, the refugee claim he advanced in Australia is now without foundation.

[23] Nor does the Authority accept the appellant's claim that he is a member of an extended family which has had a long history of involvement with the Al-Da'wah Party. With (allegedly) several uncles in jail since the early 1980's, with his own father having been allegedly forced to flee Iraq and to live for some time separated from his family, with the appellant's own claimed exile from Iraq and his wife's own alleged experience of hardship, one would have expected the appellant to be aware of the aims of the Al-Da'wah Party and of his father's activities in it. The more so since the family allegedly spent some time living in exile in Qom, a centre of Al-Da'wah activity. Yet the appellant claimed to have had no activities in the party. He was only a "supporter" and while in Qom only attended "some" seminars. He could only describe his father's party activities in the most general of terms, particularly his father's activities in Qom where the Al-Da'wah Party operated. He said his father was like a judge. Asked what his father actually did, he said that because the party was large it had many problems but because of his father's long experience, his opinion was well respected. Asked what his father did as a judge, he said that in any party there would be disagreements on issues and his father would be a person who would enter between the disagreeing parties and find a solution and establish links with overseas branches. The Authority found this account surprisingly vague. As to the appellant's knowledge of the aims and activities of the Al-Da'wah Party, the refugee status officer at p 147 recorded that the appellant knew very little:

> [The appellant] was unable to explain what the Al-Da'wah Party's activities consisted of and all he knew was that it involved scientific and conceptual activities.

[24] Asked at the appeal hearing what the aims of the party were, the appellant was vague to the point of obscurity:

> Q What do you understand to be the aims of the Al-Da'wah Party?

A First, like any other party, encourage people to work together to develop the country and try to put an end to corruption, killing, imprisonment, killing ulamas, intellectuals. Develop the people through enlightenment as to what is needed for the country's development and give freedom of expression for everyone for the benefit of the country.

Q Can you be more specific, less vague?

A They don't want any occupation forces then and now. Don't want a government in place that deals with the country's resources to the disadvantage of the people.

[25] What the appellant singularly failed to mention is that the main objective of the Al-Da'wah Party is to preserve and fortify Shi'ite believers' religious identity against the influence of Western ideologies. See International Crisis Group, *Iraq Backgrounder: What Lies Beneath* (1 October 2002) 29:

> The Da'wa Party is the oldest of the currently active Islamist organisations in Iraq. Reports differ on when it was founded and by whom, but it is reasonable to assume that it was formally launched under that name in the late 1950s in the holy city of Najaf and that Sayyid Muhammad Baqir al-Sadr was the principal architect of its ideological and organisational structure. From the outside, the Da'wa was a clandestine movement organised around tightly knit secret cells (*halaqat*) and a strict hierarchy. It developed a comprehensive ideology based on the religious-philosophical and economic theories of Baqir al-Sadr. Its main objective is to preserve and fortify Shi'ite believers' religious identity against the influence of Western ideologies (in the Da'wa's earlier days, communism) through the renewal of Islamic thought and the reform and modernisation of religious institutions, including the hierarchally structured traditionalist clergy.
>
> Unlike other Iraqi Islamist groups, the Da'wa possessed from the outset a defined political programme based on a strict Islamic interpretation of the nation's history and social structure. Early on, it called for a government deriving its constitution and laws from *shari'a* law; later it attacked the Ba'ath regime's secular character...

[26] To similar effect see the Country Information and Policy Unit of the Home Office, *Country Assessment - Iraq* (October 2000), Annex A, a passage cited at page 182 of the file.

[27] Asked by the Authority what distinguished the Al-Da'wah Party from the Ba'athist Party, the appellant replied that the Ba'ath Party was put in control by foreign governments in order to destroy Iraq. The foreign governments were the Americans with the support of many Arab countries. He singularly failed to mention the secular character of the Ba'ath regime and its overwhelmingly Sunni identity.

[28] In these circumstances the Authority does not accept that the appellant is the member of an extended family which for generations has been deeply involved in the Al-Da'wah Party.

[29] Compounding the appellant's credibility difficulties is his claim that Al-Da'wah Party members are presently at risk of arrest and possibly assassination in Iraq by both the Americans and the Ba'athist regime. As already recorded, counsel has been forced to concede that there is no evidence to support this claim.

[30] At some point reality must be allowed to intrude on the appellant's claims. He has not lived in Iraq since he was five years of age and there is simply no evidence that were he to now return to Iraq he would face a real chance of being persecuted for a Convention reason. His bizarre and unsupported claim to be at risk of being persecuted because of a 'deal' between the Ba'athist regime and the Coalition Forces merely underlines the fanciful nature of his refugee claim. Even allowing for the fact that former members of the Mukhabarat now work with the Coalition Forces and even accepting that they may have access to files on members or suspected members of the Al-Da'wah Party, there is no evidence of such persons being at risk of harm. So even assuming (contrary to the Authority's express finding) that there is a 'file' on the appellant, there is no basis for a finding that his anticipation of harm is a well-founded one, as opposed to mere speculation. As to this, the Authority has recently emphasised in *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [154] that conjecture or surmise has no part to play in determining whether a fear of being persecuted is well-founded. Such fear is 'well-founded' when there is a real substantial basis for it. A substantial basis for a fear may exist even though there is less than a 50 percent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Refugee Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation.

[31] In this regard it is to be noted that the appellant has never been arrested, detained or questioned by the Iraqi authorities and would not have a 'profile'.

[32] It should also be pointed out that not only is there no evidence that members or supporters of the Al-Da'wah Party are being persecuted or are at risk of being persecuted in present day Iraq, other groups which advocate the installation of a Shi'ia theocracy in Iraq have not been persecuted by the Coalition Forces even though the United States has said that it will not allow a theocracy to be established. Indeed, one such group, namely the Supreme Council for Islamic Revolution in Iraq, is represented on the Governing Council. See for example Juan Cole, "Iraq: The Shia Contenders" *Le Monde Diplomatique* (July 2003) 5.

[33] The submission that the appellant is opposed to the Coalition Forces and will find himself in conflict with them was unsupported by the appellant's own evidence and no weight is given to the submission. In any event the appellant does not strike the Authority as a person who would come into conflict with the Coalition Forces.

Conclusions on credibility

[34] For the foregoing reasons the Authority rejects in their entirety the claims made by the appellant in support of his refugee application. The application has been driven not by a genuine risk of being persecuted, but by the appellant's desire to establish himself and his family in a country where they will enjoy a standard of living superior to that available in Iraq.

Military service

[35] The appellant's objection is not to military service as such, but to being required to serve in an army which engages in the persecution of Iraqis and in the waging of wars of aggression. This aspect of the appellant's claim has

been overtaken by events in that the Iraqi army has been defeated and disbanded and the Ba'athist regime destroyed. Presently the army is being reconstituted under the supervision of the Coalition Forces. There is no evidentiary basis for a finding that if required to serve in the new army such service would or might require the appellant to commit atrocities or gross human rights abuses or participate in a conflict condemned by the international community. This aspect of the appellant's refugee claim must fail for the same reasons which led to the failure of the refugee claims in *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856; [2003] 3 All ER 304 (HL). In that case the finding that neither applicant would be required to engage in military action contrary to the basic rules of human conduct, even assuming that they were required to serve, was dispositive.

[36] In the present case there is no more than a speculative possibility that the appellant will be required to serve in the reconstituted armed forces but even were it to be assumed that he will be conscripted, there is no evidence to establish a real ground for believing that he would be required to engage in conduct to which he objects.

Relevance of the mandate status of the wife

[37] The Authority places no significance on the fact that the appellant's wife holds documentation issued by the Jakarta office of the UNHCR in which she is advised that she is recognised as a refugee 'under the mandate' of the office of the United Nations High Commissioner for Refugees:

(a) The UNHCR mandate encompasses individuals who meet criteria much broader than those prescribed by Article 1A(2) of the Refugee Convention. See generally Volker Türk, "The role of UNHCR in the development of international refugee law" in Nicholson & Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999) 153-159.

(b) In addition, the Authority is not aware of the information provided by the wife to the UNHCR or the degree to which the credibility of that information has been tested.

(c) If her mandate status was based on the appellant's successful refugee claim in Australia, her status may well require revision in the light of the findings now made by this Authority on a closer examination of the evidence.

[38] For very much the same reasons the alleged refugee status of family members in Europe is not a matter to which any weight can be attached in determining the appellant's own refugee claim.

Generalised violence

[39] It is abundantly clear that there is armed opposition to the occupation of Iraq by the Coalition Forces and that violent incidents do occur. Most, but not all of these incidents occur in Baghdad and the area immediately to the north. The same level of violence is not seen in the southern areas inhabited mainly by Shi'ia and from which the appellant and his family originate.

[40] Those impacted by civil unrest and even generalised violence are not entitled to refugee status on that basis alone. The focus of the Refugee Convention is quite specific. First, it requires the refugee claimant to demonstrate that he or she faces a real chance of serious harm ie a well-founded fear of being persecuted and second, it requires that the anticipated serious harm is "for reason of" one of the five Convention grounds (ie race, religion, nationality, membership of a particular social group or political opinion). In the words of Professor Hathaway in *The Law of Refugee Status* at 93, refugee law is concerned only with protection from serious harm tied to a claimant's civil or political status. Persons who fear harm as the result of a non-selective phenomenon are excluded. Returning to this point at op cit 188 he emphasises again the general proposition that victims of war and violence are not by virtue of that fact alone refugees.

[41] The finding of this Authority is that the appellant has failed by a clear margin to establish to the well-founded standard a risk of being persecuted for

a Convention reason. Furthermore, there is nothing to suggest that the appellant faces any risk of harm in Iraq other than a highly speculative and theoretical risk of random harm.

APPLICATION OF S 129L(1)(E) IMMIGRATION ACT 1987

[42] As earlier mentioned, the appellant's case failed at first instance because (inter alia) the refugee status officer found that s 129L(1)(e) applied.

[43] Among the statutory functions conferred on refugee status officers by s 129L(1) of the Immigration Act 1987 is the power to determine, in the case of a person who has already been recognised as a Convention refugee by a country other than New Zealand, whether that person may avail himself or herself of the protection of that country. The provision reads:

> 129L. Additional functions of refugee status officers—
>
> (1) In addition to their function of determining claims for refugee status, refugee status officers also have the following functions:
>
> ...
>
> (e) Determining, in the case of a person who has already been recognised as a Convention refugee by a country other than New Zealand, whether that person may avail himself or herself of the protection of that country:
>
> ...

[44] The apparent intention of this provision was to address the situation where an individual recognised as a refugee in one country leaves that country and, having arrived in New Zealand, lodges a further refugee application. The logic is that the individual in question should be readmitted to the first country to avoid the waste of resources involved in New Zealand redetermining the refugee claim. The potential for asylum systems to be abused in this way by refugees has been specifically recognised by the Executive Committee of the UNHCR Programme in *Excom Conclusion No. 58. Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection* (1989). The opening paragraph of this *Conclusion* acknowledges the destabilising effect which irregular movements

of this kind have on structured international efforts to provide appropriate solutions for refugees:

> (a) The phenomenon of refugees, whether they have been formally identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on structured international efforts to provide appropriate solutions for refugees. Such irregular movements involve entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation. Of similar concern is the growing phenomenon of refugees and asylum-seekers who wilfully destroy or dispose of their documentation in order to mislead the authorities of the country of arrival.

[45] *Excom Conclusion No. 58* explicitly states that refugees who have found protection in a particular country should not normally move from that country in an irregular manner in order to find durable solutions elsewhere:

> (e) Refugees and asylum-seekers, who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action taken by governments and UNHCR as recommended in paragraphs (c) and (d) above.

[46] Excom *Conclusion No. 58* explicitly recognises that refugees who move in an irregular manner from a country where they have already found protection may be returned to that country if they are protected there against refoulement and their conditions of residence satisfy basic human standards:

> (f) Where refugees and asylum-seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if:
>
> (i) They are protected there against refoulement and
>
> (ii) They are permitted to remain there and to be treated in accordance with recognised basic human standards until a durable solution is found for them. Where such return is envisaged UNHCR may be requested to assist in arrangements for the readmission and reception of the persons concerned.

[47] There are strong policy reasons why individuals recognised as refugees in Australia should not be permitted to re-submit their refugee claims in New Zealand, and vice-versa. Those who have refugee status have no right to divert scarce resources from those still waiting to have their refugee claims determined for the first time. Abuses of this kind must be identified and addressed at the earliest opportunity. The present case is not the only one

heard by the Authority in recent times where the individual has already been recognised as a refugee in Australia. As will be seen from the decision in *Refugee Appeal No. 74691/03* (15 October 2003) the investigation of these claims is at times a complex task. In that case the hearing before the Authority occupied five days and preparation on the part of the two-person panel was substantial. It too failed on credibility grounds. Both that appellant and the present appellant would have been far better off had they remained in Australia where they at least had the right to live and to work. Now, a determination having been made by this Authority that they are not in fact refugees, their return to Iraq will not be in breach of the Refugee Convention.

[48] In the circumstances, the Authority suggests that early consideration be given to New Zealand and Australia negotiating an agreement whereby it is accepted that the one country will be entitled to return to the other (the first country) an individual recognised in the first country as a refugee and who does not have a justifiable claim to a well-founded fear of being persecuted in that first country. The negotiation of such an agreement would be entirely consistent with *Excom Conclusion No. 58* and with the 'Convention Plus' initiative of the UNHCR. It would also be consistent with the initiatives presently being taken both by New Zealand and Australia in the context of the regional Bali process.

[49] Also deserving of consideration is the strengthening of s 129L(1)(e) of the Immigration Act 1987 by making explicit that a refugee claim cannot be considered if the claimant has been recognised as a Convention refugee by a country other than New Zealand and can be sent or returned to that country, provided there is no justifiable refugee claim against that country. The recently in force Immigration and Refugee Protection Act 2001 (Can) provides a useful precedent. Section 101(1)(d) provides:

> **101. (1) Ineligibility** - A claim is ineligible to be referred to the Refugee Protection Division if: ...
>
> (d) The claimant has been recognised as a Convention refugee by a country other than Canada and can be sent or returned to that country.
>
> ...

[50] Given the earlier finding of this Authority that the appellant's refugee claim fails on credibility and other grounds it is not necessary for the Authority to make a specific finding on the application of s 129L(1)(e). In the circumstances, the Authority's observations on s 129L(1)(e) have no material bearing on the outcome of this refugee claim.

CONCLUSION

[51] Having rejected the claims made by the appellant in support of his refugee application, the Authority finds that he is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. The two issues earlier identified are answered in the negative. Refugee status is declined. The appeal is dismissed.

.....
[Rodger Haines QC]
Member