

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 74695

AT AUCKLAND

Before: M Robins(Chairperson)
L Tremewan (Member)

Counsel for Appellant: I Chorao

Appearing for NZIS: No Appearance

Date of Hearing: 28 November 2003

Date of Decision: 22 January 2004

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of the Republic of Iraq.

INTRODUCTION

[2] The appellant arrived in New Zealand on 9 April 2003. He applied for refugee status on 11 April, while still held at the airport. The RSB interviewed him on 19 May 2003 and issued a decision declining his application on 13 June 2003. The appellant now appeals against that decision to this Authority.

[3] At the conclusion of the Authority hearing, the Authority advised Ms Chorao that it intended to seek further information from the office of the United Nations High Commissioner for Refugees. That information was received on 8 January 2004 and is referred to later in this decision under "Assessment of the Appellant's Case".

THE APPELLANT'S CASE

[4] There now follows a summary of the appellant's case, after which the Authority will make an assessment of the credibility of his account.

[5] There are essentially two factual issues in this appeal. The first is whether the appellant belongs to a Shi'a Islamic sect called the Kakai or Kakaiyya. If he does, then the second factual issue is whether, as a Kakai, he faces a real chance of persecution if he returns to Iraq. We asked the appellant to explain the difference between the religious practice of Kakais compared with other Shi'a and with Sunni Muslims. He gave numerous examples, many of which were given in response to particular questions asked by the Authority. We list only some of them.

[6] An important difference is that the Kakai believe that Sayyid Ibrahim has appeared six times before and that he will come a seventh time. Shi'a believe he has appeared only once. Kakai people believe Ali is their prophet. Other Shi'a and Sunni believe that Ali is only another Imam. Kakai people do not follow the Quran; they have their own religious books. They do not pray five times a day. They do not fast for the month of Ramadan; they fast for three days at the end of Ramadan. They do not make a pilgrimage to Mecca. Kakai believe in equality of the sexes. They do not have a tradition of arranged marriages. Kakai marriages take place on Mondays and Fridays.

[7] The Kakai regard themselves as related to the Shi'a, but the Shi'a despise the Kakai and regard them as disbelievers who tarnish the Shi'a religion. Under Saddam Hussein's rule, the Kakai endured constant harassment from Shi'a, but the oppression of all Shi'a by the Sunni Ba'ath Party imposed at least some limits on the ability of the Shi'a to torment the Kakai.

[8] The appellant described the Kakai as a small but cohesive and secretive community. They socialise together and regard all Kakai as members of their extended family. They marry only within their community. They keep to themselves and, wherever possible, they blend into their environment and avoid disclosing that they are Kakai.

[9] The appellant's parents married in 1969. Both of his parents (and their

parents and ancestors before them) were Kakais. They lived in a predominantly Kakai area in and near Karbala, a city southwest of Baghdad. The appellant's father graduated in 1973 from the University of Baghdad, with a Petroleum Engineering degree. In 1975, using his qualifications, he obtained employment in the oilfields of Saudi Arabia. His wife and three Iraqi-born children accompanied him to Saudi Arabia where, in the years 1976, 1977, 1980 and 1981, four further children were born, the youngest of whom was the appellant.

[10] In 1986, the appellant's father's employment visa expired. He secured new employment with an oil company in Kuwait. The family moved to Kuwait in 1986, where, in that year, the last of the appellant's parents' eight children was born.

[11] The appellant started primary school in Kuwait in 1986. He was at primary school on 2 August 1990, when Iraq invaded Kuwait. Life became very difficult in Kuwait under the Iraqi occupation. Iraqi forces robbed and killed Kuwaiti citizens. A Kuwaiti resistance force existed. The appellant's parents believed that, as Iraqis, their situation was becoming too dangerous, so they returned to Karbala in October 1990 and rented a house from a local Kakai man.

[12] In February 1991, the allied forces, under the leadership of the United States, started bombing Iraq in an ostensible effort to liberate Kuwait. The Iraqi Shi'a, long oppressed by Saddam Hussein, recognised that the Ba'ath regime was under extreme pressure and, believing that Saddam's difficulty was their opportunity, they started uprisings in the south of Iraq. The Kurds rose up in the north. Saddam Hussein managed quickly to quell the uprisings. He killed and detained many people in the brutal repression that followed the withdrawal of the allied forces.

[13] In 1992, the appellant (now aged 11 years) started school for the first time in Iraq. The Iraqi regime, as part of its oppression of Shi'a, had banned the teaching of the Kakai faith. Despite the ban, the appellant, four days each week, walked to a nearby house in his predominantly Kakai neighbourhood where, in secret, six teachers taught 50 pupils an academic curriculum and the tenets of the Kakai faith.

[14] Non Kakai neighbours may have noticed people coming and going from this house and may even have known it was a school. They did not take any action to

close the school down, but because of the pervasive discrimination against Kakai by other Shi'a, the teachers and students were always vigilant to hide any Kakai books.

[15] The Shi'a continued to harass the Kakai by, for example, breaking into their homes and cars and taunting them in the street. The Kakai were afforded no protection by the Ba'ath Party police, and they learned from bitter experience that they would suffer more severe harassment if they laid a complaint.

[16] In June 1995, the appellant's two oldest brothers deserted the Iraqi Army to avoid being forced to kill Kurds in the north of Iraq. The Kakai's humanitarian and religious principles forbid them from killing because to do so is to destroy a soul. While they were missing, the regime's officials invaded the family home and took the appellant's father and brother, O, away for interrogation on several occasions. After three months in hiding, the deserters were caught and, in September 1995, they were both executed as traitors.

[17] The family continued to live in Karbala. The appellant continued his studies at the Kakai school. The appellant was the only one of his siblings to regularly attend school. His parents kept their two daughters and youngest son at home for fear that they would either be arrested by Ba'ath Party officials or attacked by other Shia. The appellant became aware over the years of many Kakai, including children, who met such a fate.

[18] In September 1999, the Iraqi authorities discovered the Kakai school. The appellant (by now aged 18 years) was arrested with all the teachers and some of the students from the school. They were all taken to a prison in Baghdad. There, the appellant was beaten and subjected to electric shocks. Sometimes he was hung naked on the walls for long hours in an attempt to force him to give evidence about which political party he belonged to. The appellant was held in crowded cells. When other prisoners discovered he was Kakai, they made fun of him, called him a disbeliever and beat him. The guards sometimes transferred the appellant to solitary confinement, for his own safety, but he would eventually "go mad", so they had to return him to the crowded cells.

[19] Although the guards tried to force the appellant to admit that he distributed pamphlets against Saddam Hussein and in favour of the Kakai religion, the

appellant remains, to this day, unsure exactly why he was detained. He did not face a trial. Nor was he brought before a court. He received news about the fate of his teachers and fellow students, either from the guards (who used this information as a threat to him) or from his parents, on the rare occasions they were able to bribe a guard to permit them a visit.

[20] He learned that some of the students and all the teachers were executed. There were other students who, like the appellant, remained in prison. The appellant does not know why he and those other students were not executed. He surmises that they were still regarded as being 'under investigation', and that some of those killed were accused of membership of the Hizb Al-Da' Wa Party (a Shiite party also known as the Dawa Party) that called upon its followers to take up arms against the Ba'athists and which was brutally suppressed by the Iraqi regime. (Iraq's Shiites under Occupation, *Middle East Briefing*, Baghdad/Brussels, 9 September 2003, page 12).

[21] On 20 March 2003, the American-led forces started to bomb Iraq. There was a state of chaos in Baghdad and, with the army busy defending the cities and few prison guards around, prisoners seized the chance to escape. The appellant was one of them. He managed to make the three and a half hour car journey from Baghdad southwest to Karbala. His family were very surprised to see him, after three and a half years imprisonment.

[22] He was frightened to remain in Iraq in case he was re-arrested by the Iraqi authorities and sent back to prison. His family gave him some money and gold. After staying with his family for three days, he escaped illegally across the border into Syria where he found an agent who obtained a Bahraini passport for him. He was aware, when he left Karbala, that his family were also contemplating their escape to Syria. Now that the appellant had been released from prison, the family was free to make their own escape. They would not have left Iraq without him.

[23] As Saddam Hussein's regime disintegrated, the Kakai faced a greater risk of attack by members of the Ba'ath Party and other Shia. Under Saddam's rule, if a person's excuse for killing someone was that the victim was Kakai, the person would be released. After the Coalition invasion, there was no authority to even enquire why a person was killed.

[24] The appellant arrived at Christchurch airport on 9 April 2003 and was subsequently transferred to Auckland airport where he was interviewed, two days later, in relation to his refugee application.

[25] In May 2003, the appellant's brother, O, telephoned him and said that three days previously, their family (parents and siblings) had fled to Syria where they were hiding from the Syrian authorities. In September 2003, O telephoned again and said the family were still hiding in Syria and that the Syrian authorities were forcibly repatriating any Iraqis found living there illegally. O said many Kakai people had escaped from Iraq.

[26] The appellant is frightened to return to Iraq because, in relation to the Shi'a, he believes that now that they have more power in Iraq, they will use that power to kill the Kakai and destroy their faith. He also fears that, as an escaped prisoner and notwithstanding the fall of the Ba'ath regime, he still faces a risk of re-imprisonment.

Legal Submissions

[27] The refugee status officer disbelieved the core of the appellant's account – that he was Kakai and that he was imprisoned after being arrested from a Kakai school. For this reason, Ms Chorao devoted a significant proportion of her legal submissions to the credibility issue. Ms Chorao identified the appellant's persecutors as rival Shia factions and Ba'ath Party loyalists. She argued that although the Ba'ath Party regime had fallen, it had not yet been replaced by a stable government. In regard to the Convention reason, Ms Chorao argued that the appellant feared persecution on the grounds of his religion, imputed political opinion and his social group. Ms Chorao provided a great deal of country information, the most relevant of which was an extract from Moosa, M, *Extremist Shi'ites: The Ghulat Sects*, Syracuse University Press (1987), Ch 15, pp 168-184.

Country Information

[28] In his book *Extremist Shiites* (supra), Professor Moosa identifies two subgroups of a single Ghulat sect, the Sarliyya and the Kakaiyya. He describes their religious practices on pages 175 and 176:

“The Sarliyya-Kakaiyya do not pray five times a day like orthodox Muslims, nor do they hold worship services. Instead, their leaders recite supplications and canticles at sunrise and sunset, at certain ceremonies, and on such occasions as praying for the sick or blessing food. ...

They do not make the pilgrimage to Mecca made by orthodox Muslims. Neither do they make the pilgrimage to the Shiite holy shrines in Karbala, as the Shabak [a different sect of extremist Shiites] do. Instead they visit the graves of some of their prominent leaders (the Sayyids, descendants of the Prophet through his daughter Fatima and her husband Ali), or of the men whom they believe to be the theophany of God.

They do not fast during the Muslim month of Ramadan, although some are reported to fast on the twenty-seventh, twenty-eighth and the twenty-ninth days of that month, holding a festival on the next day...

Their religious ethics forbid them to criticize or inveigh against other faiths or the people who embrace them. Such a principle is perhaps inherent in their faith, with its advocacy of human brotherhood, from which comes their name, Kakais (brothers). They are a peaceful people who expect compassion and understanding from others in return for their own tolerance. This is manifested in their saying, “May the arm of him who casts a stone at us be paralysed.” They also seem to emphasize the group rather than the individual, as demonstrated by their saying, “He who says ‘I’ is not from us”.

[29] In regard to the Quran, Professor Moosa states at page 174:

“The Sarliyya-Kakaiyya maintain that the Quran is the work of Muhammad and was collected by the Caliph Uthman. Therefore, they recite or quote it only to substantiate their own beliefs. In fact, they hold some of their own religious literature, as well as the Khutbat al-Bayan attributed to Ali, in higher esteem than they do the Quran. They do, however, believe that the Prophet Muhammad was great because he acquired his learning from Ali. But they add that Muhammad emphasized the outward meaning of the Quran, while overlooking its more essential inward meaning, because he could not comprehend or fathom its mysteries or the intentions of the Imam Ali.”

[30] At pages 182 and 183, Professor Moosa lists the Kakai Holy Shrines and says of the Sayyid Ibrahim shrine in Baghdad:

“Sayyid Ibrahim...was God’s theophany but Sayyid Ibrahim had six metempsychosis manifestations. The Kakaiyya are still waiting for his seventh appearance. They still venerate him greatly, believing him to be the Mahdi who will appear at the end of time to establish justice and destroy evil.”

[31] In regard to social practices, Professor Moosa states at page 183, et seq:

“Among the Kakaiyya, marriage depends on the personal consent of both the man and the woman intending to marry, regardless of the wishes of the guardian or

relatives. Weddings are usually celebrated on Mondays or Fridays, so these two days are considered holy by the Kakaiyya...

Among the Kakaiyya, divorce must be mutually agreed to by husband and wife; since marriage is contracted with the consent of both parties, it cannot be dissolved without the consent of both...

One of the most remarkable characteristics of these people is the bond of brotherhood among them. The Kakais consider each man of the community to be a brother, and each woman a sister...

The Kakais' most prominent characteristic is their secretiveness in matters relating to their faith. This secretiveness is considered a religious duty. They are so secretive that their neighbors call anyone who keeps a secret a Kakai."

[32] According to *Ahl-e Haqq: an oriental order of mysticism* [internet] <http://www.ahle-haqq.com> (date accessed: 8 August 2003), there are approximately three million adherents of the Kakai faith in Turkey, Iraq and in the western provinces of Iran (where they are known as Ahl-e Haqq or Ahl-e Haq).

[33] Also of interest is the following passage from DIRB Response to Information Request IRN30150.e – *Iran: practices, leadership and special religious celebrations of the Ahl-e Haqq faith...*(October 1998) REFWORLD:

"The Ahl-e Haq practise "taqqiyah", or dissimulation. The practice, used by many religious minorities in the Middle East, consist (sic) of "dissimulating" one's true faith by stating that they are part of the majority's faith. For example, members of Ahl-e Haq would say they are Shi'a in Iran, while saying they are Sunni in Iraq. The members of Ahl-e Haq still use "taqqiyah" in Iran today and it explains why it is so difficult to actually know who they are and where they live. In Iran they are not recognised as a religious group."

[34] "The Kakai reconciliation" *Iraq Report*, Radio Free Europe/Radio Liberty (14 January 2000) <http://www.rferl.org/iraq-report/2000/01/2-140100.html> (accessed 13 May 2003) refers to an article published by the "Kurdish Media" correspondent Said Kakai in which Mr Kakai reports that on 29 December 1999, an agreement was reached between the General Secretary of the Patriotic Union of Kurdistan (PUK) and the Kakais of Halabche city (in northern Iraq), permitting the Kakais to practice their religion openly in a place of worship, for the first time in 1,350 years. The correspondent believes that Jalal Talabani was motivated to make this gesture of reconciliation because he wanted to sway the Kakai voters away from the Kurdish Democratic Party (KDP) towards the PUK.

[35] The *Iraq Report* also states:

“Because Kakais are forbidden from cursing Satan on religious grounds, many Muslims refer to them as devil worshippers, hence the Muslim antagonism toward their beliefs resulting in the repression of the Kakais for more than a millennium...”

[36] In “Low morale among US troops in Iraq: Stars and Stripes” *ABC Online*, (18 October 2003) [internet] <http://www.abc.net.au/am/content/2003/s969838.htm>, Hamish Robertson interviewed Sally Sara, ABC’s correspondent in Iraq, about the latest attacks on Coalition forces. The following extract is particularly relevant in this appeal:

“HAMISH ROBERTSON: There does seem to be a pattern developing Sally, which suggests that the position in Iraq is much more complex than straightforward tension between the occupiers and the occupied. We seem to be getting more evidence of factional conflicts, especially between different parts of the Shia community.

SALLY SARA: That’s right. And this interim period before there’s a clear plan as to exactly how and when the process of democracy will really start rolling here in Iraq, there’s quite a struggle on, not only in a political sense, *but also religious groups such as the rival factions, the rival Shia factions in Karbala becoming involved in disputes over things such as religious sites, but also struggling for political power.*

And those kinds of conflicts have been able to escalate because the level of law and order here in Iraq is still fairly minimal. So disputes which may have been extinguished at an earlier stage in better times are able to escalate very, very quickly because there are only limited resources and there’s quite a deal of tension. So those kinds of conflicts are very important and are being watched very carefully by Coalition officials at the moment.

HAMISH ROBERTSON: And Coalition troops of course are finding themselves increasingly trapped in the midst of this conflict...” (*Emphasis added*)

[37] The Authority sought information from the UNHCR about the risks faced by the Kakai in Iraq and, in particular, in Karbala. We were aware that the UNHCR had withdrawn its staff from Iraq in November 2003 after a bomb killed a number of their staff, but we thought it worthwhile to enquire whether they had any information relevant to this claim. UNHCR’s initial response indicated that Kakai were found only in the northern and Kurdish regions of Iraq. In response to our further request for information, the UNHCR provided a more comprehensive assessment in which they were able to confirm the presence of Kakai in Karbala. The UNHCR noted that there was a recent mosque explosion in the area and said that while the area was thought to be generally stable, tribes in the south were resorting to their own traditional systems to resolve problems and conflicts.

THE ISSUES

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

"... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality 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."

[39] 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

[40] The Authority found this appellant to be an open and honest witness. He did not appear to exaggerate his evidence in any way. He spontaneously volunteered information that was entirely consistent with country information. We have no hesitation in believing that he is a Kakai. We accept his account in its entirety. We now turn to the first issue.

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

[41] The country information makes it clear that the Kakai sect is a distinct and recognisably different faith from its Shi'a "parent". The appellant's evidence that the Kakai in Karbala have been repressed for years by Shi'a and by the Ba'ath Party officials and supporters, is corroborated by the available country information. The ABC report provides independent evidence of serious factional conflict between Shi'a in Karbala as recently as last October. The ABC report also

corroborates the appellant's fear that such conflict would flourish in the power vacuum left after the disintegration of the Ba'ath Party.

[42] We regard it as important that the Kakai sect is regarded as a Shi'a sect. The Shi'a, understandably perhaps, have no desire to have "disbelievers" counted amongst their ranks. We accept that, in the absence of law and order, and as the Shi'a assert their power, they are more likely than before to oppress the Kakai. We also take into account the appellant's evidence that his family, and many other Kakai, have fled Iraq to seek protection elsewhere.

[43] We regard it as unlikely that the appellant would be re-imprisoned if he were to return to Iraq, given that the regime that imprisoned him has now fallen.

[44] The appropriate date at which the well-foundedness of a refugee applicant's fear is to be assessed is the date of determination of the refugee application. The situation in Iraq at the present time is very uncertain. Ba'ath Party loyalists are suspected of launching attacks on Coalition troops and on Iraqis who are perceived as supporting a move towards democracy ("Iraqis Targeting Iraqis", *CBS NEWS.com*, [internet] <http://www.cbsnews.com/stories/2003/02/24/iraq/main541815.shtml>.) There is a real concern that "some Sunni Muslims who were loyal to Saddam felt "disenfranchised" since the US occupation" ("US cites Saddam loyalists as most lethal challenge", *Sydney Morning Herald*, *smh.com.au* [internet] <http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?p.../1068674380296.htm>, 15 November 2003 (accessed 26 November 2003)). These factors combine to produce an atmosphere of real uncertainty and insecurity and it is against this background that Shi'a factions are seeking to position themselves favourably in preparation for the eventual devolvement of power to a new governing authority.

[45] We take into account the UNHCR assessment that the situation is "generally stable" but, on the basis of the appellant's evidence and the other country information, we are not persuaded that the situation is sufficiently stable for the Authority to say, with any justifiable degree of confidence, that there is no real chance that this appellant would face serious harm if he returned to Iraq.

[46] We also take into account that the Kakai are a peaceable group of people. They practise "taqqiyah" or dissimulation. They do not criticise other religions. They are unlikely to stake a claim for themselves. They would not do whatever it

took to assert their rights. We are satisfied that in the inevitable battles for political and religious influence in Iraq, with different groups vying for power, the Kakai may well be a group at a distinct disadvantage. These factors, while not on their own determinative, have informed at least part of the analysis for us.

[47] We have concluded that the situation presently existing in Iraq is volatile and, by extending a benefit of the doubt, we have further concluded that this appellant, because of his Kakai faith, faces a real chance of persecution from other Shi'a Muslims if he is forced to return to Iraq. His fear of being persecuted is well-founded.

[48] The uncertain and fluid situation in Iraq will doubtless continue to change. Every case will have to be determined on its own merits at the particular time.

Convention Reason

[49] The appellant's case clearly comes within the Convention reason of religion and may also, as argued by Ms Chora, come within the grounds of political opinion (real or imputed) or membership of a particular social group.

CONCLUSION

[50] 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 granted. The appeal is allowed.

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M L Robins
Chairperson