

AT AUCKLAND

Appellant:	AC (Iraq)
Before:	C M Treadwell (Member)
Counsel for the Appellant:	D Mansouri Rad
Counsel for the Respondent:	No Appearance
Date of Hearing:	19 December 2011
Date of Decision:	21 December 2011

DECISION

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining to grant refugee status and/or protected person status to the appellant, a citizen of Iraq.

[2] The appellant says that he is at risk of serious harm at the hands of the Mahdi militia in Iraq, for having distributed secularist materials, some critical of its leader, the cleric Muqtada Al Sadr, to the public. The central issue is the credibility of the appellant's account.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[5] The appellant, now aged 39 years, was born into a Shi'a family in Baghdad. His parents are deceased. His two siblings continue to live in Iraq.

[6] After completing military service in the early 1990s, the appellant found manual work until, having married in 2004, he set up a small shop in that year, selling music CDs and DVD movies. The fall of the Ba'athist regime the previous year had opened up such opportunities in Iraq. The shop was one of a block of small shops about 15 minutes walk from the appellant's home.

[7] The business was reasonably successful. Most of the music the appellant sold was middle eastern and so did not attract any adverse attention. As to the movies, he sold both religious and foreign films. The latter comprised 'action' and 'martial arts' films which he ensured did not court controversy.

[8] Nothing remarkable happened until mid 2010. At that time, the appellant learned from a friend, AA, of a secularist group known as *Duaat Al-Ulmaniya*. AA had been a customer of the appellant for some years and they shared a common view of the damage which religion had done to Iraq's progress towards democracy and stability since 2003. AA told the appellant that the group comprised like-minded intellectuals, led by a BB who lived in Sadr City in the east of Baghdad.

[9] The appellant became interested in joining the group and went with AA to the next meeting. Approximately a dozen people attended.

[10] To that point, the group had been publicising its views through posters and pamphlets. The appellant suggested that he could assist with the making of CDs of material in his shop. Another man present had the technical skills to produce master CDs of material and it was agreed that the appellant would make copies from these.

[11] For the next six or seven months, the appellant attended meetings of the group approximately every 10 days. In all, he was given roughly 30 master CDs. They varied in length, with some as short as 15 minutes. One, in particular, lampooned the powerful Shi'a cleric Muqtada Al Sadr, leader of the Mahdi Army.

[12] The appellant had a disc copier in his shop. He used it to make 200-300 copies of each master CD. The copying took many hours but was not difficult because the machine simply ran while he attended to other tasks in the shop. His assistant, CC, helped with the copying. The appellant had a photocopier at the shop and also made flyers for the group when he was asked.

[13] The appellant kept some of the CDs to distribute himself, while giving the rest to BB, who spread them among the other members of the group. The appellant distributed his own copies by walking round the streets in the early morning or early evening and, when the way was clear, slipping them into letter boxes or under doors. Sometimes, he simply left copies in the street for people to find.

[14] Towards the end of 2010, the appellant heard that Muqtada Al Sadr had issued a decree (*fatwa*) denouncing the *Duaat Al-Ulmaniya* and ordering people not to view their CDs. The makers and distributors of the CDs were to be killed if discovered. The appellant heard rumours that people had been questioned and mistreated by the Al Mahdi Army.

[15] In January 2011, a series of protests began in Iraq, following the “Arab Spring” protests in Tunisia, Egypt, Bahrain and elsewhere. The focus of the Iraqi protests was the economy and government corruption.

[16] Early on 18 February 2011, the appellant heard of a protest planned in Al Tahrir Square that day. He made approximately 100 copies of a master CD he had on hand and went to the square to distribute them.

[17] At the square, the appellant loitered near the Freedom Statue for some time, handing out CDs. As the crowd grew, later in the morning, it began surging towards Al Jumariyah Bridge, over the Tigris. Security forces prevented the crowd from crossing the bridge. The appellant returned with the crowd to the square, where he remained, handing out CDs until he left at about 5pm.

[18] From the square, the appellant went directly to BB’s house, where there was a scheduled meeting of the group. He told the others that he had been to the protest and had handed out approximately 100 CDs. There was consternation that he had done so in public.

[19] While the meeting was in progress, the appellant received a telephone call from his neighbour, warning him that a group of armed militia had just been to the appellant’s house, looking for him.

[20] The appellant hurried home and, after checking that his house was not being watched, he went in. He found that his wife had been assaulted and there was much property damage.

[21] The appellant took his wife and their two young children to the house of a friend, DD, in another suburb of Baghdad. There, the appellant received a further telephone call, this time from the man who owned the shop adjacent to his own. The man told him that militia had just been to his shop, had wrecked everything inside and had departed, taking materials, his copying machines and also his employee CC. As they left, they set fire to the shop.

[22] The appellant did not report either attack to the police. In fear, he and his family stayed in hiding with DD for several days. The appellant then had DD escort his wife and children to the house of one of her relatives, in a village near Najaf, where they were able to stay.

[23] A week later, needing money, the appellant took a taxi to a distant suburb of Baghdad to collect the rent from a tenant of premises he owned. On arrival, he was greeted at the door by the tenant. As they stood there talking, a shot was fired at them from a car in the street, striking the tenant in the leg. The appellant ran down the side of the house and into a street at the back, where he eventually found a taxi.

[24] Fearing that he had been the intended target of the shooting, the appellant telephoned BB and asked for his help to get out of Iraq. BB told the appellant that he would make enquiries.

[25] Some days later, BB called the appellant and told him that he had found a smuggler who, for US\$20,000, would provide a false UAE passport, and tickets for New Zealand. The appellant could put together only \$15,000 but BB offered to pay the balance.

[26] A month later, in mid-March 2011, the appellant was taken to meet the agent at Basra airport. He found that three other Iraqi men were also being smuggled. The group travelled with the agent via Dubai and Malaysia to Brunei, where the agent put them on a flight to New Zealand. The agent retained the passports and tickets, leaving the men to board with only their boarding passes.

[27] On arrival in New Zealand on 15 April 2011, the appellant sought refugee status at the airport. He was interviewed by the Refugee Status Branch on 19 May 2011. His application was declined on 30 August 2011, leading to the present appeal.

Material and Submissions Received

[28] Counsel has provided written submissions dated 15 December 2011, supplemented by oral submissions at the hearing.

[29] Counsel has also provided:

- (a) Statement (translated) by EE, the appellant's brother-in-law, who confirms he knew of the *fatwa* against the appellant's group even before he learned that the appellant was a member, that he had been reluctant to get involved because of the risks but that, on his sister's plea, he had been to an Al-Sadr office in another town and had obtained a copy on the pretence of wanting to enforce it. He also went to the office of BB to get a statement from him but he has left the area and his office is abandoned. A copy of the *fatwa* is attached to the statement.
- (b) Statement (translated) by FF, the landlord of the appellant's shop, confirming that the appellant had rented it since 2004 and that eyewitnesses had told him that, in February 2011, it was attacked and burned with the equipment and the employee taken away.
- (c) Statement (translated) by GG, the appellant's tenant, confirming that he was shot in the thigh while talking to the appellant in his doorway. He describes the appellant as a shy man, who had often foregone the rent in times of difficulty. He believes the appellant was the target of the shooting because there has been no further attack on the deponent.
- (d) Statement (translated) by HH, the owner of the shop adjacent to that of the appellant, describing the attack on the appellant's shop by eight armed men and confirming that he had been the one to telephone the appellant.

[30] Each of the four statements has attached to it a copy of the writer's Iraqi identity papers.

[31] Since the hearing, counsel has also provided copies of emails he received from the statements' writers, to confirm that they were sent directly to him, rather than the appellant.

ASSESSMENT

[32] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees (“the Refugee Convention”) (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[33] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[34] The Tribunal has reservations about aspects of the appellant’s account. Many were raised by the Refugee Status Branch in its decision, including the suspicious fact that the appellant had created an email account as early as 2009, into which he had put an email with scans of his whole family’s identity documents, which he was then, fortuitously, able to retrieve in New Zealand. His explanation (that he had simply thought it a good idea at the time) is not strong but, ultimately, the creation of the email account in 2009 points only to the likelihood that the appellant was thinking of the possibility of leaving Iraq at that time. It does not, of itself, establish that his account of later being compelled to do so is untrue.

[35] The Refugee Status Branch also had concern that the appellant had described the 18 February protest as comprising over 1,000 protesters. It found country information which suggested numbers ranging from “dozens” to “roughly 200”. The appellant’s explanation is that there was indeed a small number of people in the morning (when the media began reporting on it) but it swelled during the day to a large number in the afternoon. There is also the reality that the assessment of numbers in a crowd is inherently difficult and frequently misjudged by people.

[36] Other concerns that the Refugee Status Branch held must be viewed in the light of the statements which have since come to hand from persons in Iraq. While the makers of the statements are not available to be questioned, the statements are credible and are accompanied by identity documents.

[37] Ultimately, the Tribunal finds that it cannot say that the appellant's account is untrue. He has been unwavering in its presentation and care must be taken not to pin too much solely on scattered points of implausibility. The appellant is entitled to the benefit of the doubt. His account is accepted.

The Refugee Convention

[38] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[39] 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."

[40] In terms of *Refugee Appeal No 70074* (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 Claim to Refugee Status

[41] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[42] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

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

[43] Country information establishes that the security situation in Iraq (in Baghdad, in particular) remains tense, although insurgent activity has diminished considerably since the peak of 2005-2007. The United Kingdom Home Office’s *Country Of Origin Information Report: Iraq* (25 March 2011) quotes the United States Department of Defence Report, *Measuring Stability and Security in Iraq* (June 2010), in relation to Baghdad:

8.46 “... AQI and Shi’a extremist elements remain responsible for most violent activity within the Baghdad Security Districts”. The UNSC Report July 2010, dated 29 July 2010, covering events since 14 May 2010 further explained that:

“Baghdad has seen a consistent rotation of different methods of attack since April [2010]; armed opposition groups continue to modify and reemploy tried and tested tactics against targets who include Shi’a civilians, government employees and senior ranking officers of the Iraqi security forces. Attacks by indirect fire still continue to periodically occur in the Baghdad International Zone and at the Baghdad International Airport complex ...”

8.47 The subsequent UNSC Report November 2010, published 26 November 2010, covering events since 29 July 2010 similarly remarked: “... armed opposition groups continue to demonstrate the ability to conduct operations such as the series of bombings on 3 November [2010] in Baghdad, which left 91 dead and over 380 injured”. The Danish FFM Report on Security and Human Rights in South / Central Iraq conducted February – April 2010, published 10 September 2010, citing an interview with a reliable source in Iraq commented that:

“... law enforcement and military forces in Iraq are unable to control the situation and protect the people from the security incidents that may occur. There are areas that even law enforcement authorities and military forces are unable to go... Baghdad ... has areas that authorities will not go into. In such areas there may be a presence of Al Qaeda in Iraq (AQI) or insurgent groups that in fact have control and are harassing and targeting the local population.”

[44] Secular groups also appear to be targeted, consistent with the appellant’s claim. The United States Department of State’s *International Religious Freedom Report 2010* (17 November 2010) noted:

“Many individuals from various religious groups were targeted because of their religious identity or secular leanings.”

[45] The appellant was involved in the production and distribution of material which was critical of the cleric Muqtada Al Sadr, among other religious leaders.

The publication of a *fatwa* against the *Duaat Al-Ulmaniya* group is both indicative of the adverse view taken of the group's activities and consistent with the degree of violence exhibited towards the appellant.

[46] It is not overlooked that the Mahdi Army has been considerably constrained in its attacks on the Iraqi government in recent years, following a ceasefire ordered by Al Sadr. As the Home Office report notes:

"12.14 ... Since mid-2007, Sadr has sought to re-centralise and politicise his disparate movement by keeping Jaish al-Mahdi on ceasefire, but his success has been patchy. The movement's hard core anti-occupation and anti-Sunni elements will likely lay low and return... with their basic proclivities unchanged. Across the nine southern provinces, Sadrist and SIIC forces contend violently for local control ... [Following Iraqi government offensives against Jaish al-Mahdi in Basra and Baghdad in 2008 which undermined much of its local control]... Sadrist militiamen have suffered defeats and evictions in Baghdad (including Sadr City) and in Maysan province, from which many of the Sadrist tribes tend to originate. As of 2010, the Jaish al-Mahdi has maintained its ceasefire."

[47] Notwithstanding this, it is clear from the country information that the Mahdi Army remains a significant presence in the south and in Baghdad where, as the Home Office notes, it promotes and enforces "Islamic values".

[48] It is unclear whether the attacks on the appellant's home and shop were prompted by his identification at the protest on 18 February 2011, or whether his involvement in the production of the CDs and other literature was discovered by other means. Ultimately, the question is moot. The Tribunal has accepted that his home and shop were ransacked that night, the latter set on fire and CDs and other literature seized. It follows that there is a real chance of the appellant being apprehended by members of the Mahdi Army and suffering serious harm.

[49] Also taken into account is the fact that the incidents which caused the appellant to flee Iraq occurred less than a year ago and the likelihood of the appellant being recognised is commensurately high.

[50] Consideration has been given to whether the appellant could obtain state protection elsewhere in Iraq but that question must be answered in the negative. The Mahdi Army remains active in the Shi'a-dominated south and the north and west are dominated by the Kurds and Sunnis respectively. The inability of the appellant to obtain work and/or accommodation in either the north or west is such that he would be likely to be driven to return to either Baghdad or the south.

[51] The Tribunal finds that the appellant has a well-founded fear of being persecuted if he were to return to Iraq.

Is there a Convention reason for the persecution?

[52] The reason (or a contributing reason) for the harm anticipated by the appellant is political opinion. Other reasons, such as religion, may play a part but it is not necessary to determine the issue.

Conclusion on Claim to Refugee Status

[53] The appellant being found to have a well-founded fear of being persecuted for a Convention reason, he is entitled to recognition as a refugee.

The Convention Against Torture

[54] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Assessment of the Claim under Convention Against Torture

[55] The appellant is recognised as a refugee. In accordance with New Zealand's obligations under the Refugee Convention, he cannot be deported from New Zealand by virtue of section 129 (2) of the Act (the exceptions to which do not apply here). Accordingly, the question whether there are substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand must be answered in the negative. He is not a person requiring protection under the Convention Against Torture and is thus not a protected person within the meaning of section 130(1) of the Act.

The ICCPR

[56] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

Assessment of the Claim under the ICCPR

[57] For the reasons already given, the appellant cannot be deported from New Zealand. Accordingly, the question whether there are substantial grounds for

believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand must be answered in the negative. He is not a person requiring protection under the ICCPR and is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[58] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) Is a refugee within the meaning of the Refugee Convention;
- (b) Is not a protected person within the meaning of the Convention Against Torture;
- (c) Is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[59] The appeal is allowed.

"C. M. Treadwell"
C M Treadwell
Member

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