

1102515 [2011] RRTA 487 (17 June 2011)

DECISION RECORD

RRT CASE NUMBER: 1102515

DIAC REFERENCE(S): CLF2010/117708 TE420

COUNTRY OF REFERENCE: Iraq

TRIBUNAL MEMBER: Jennifer Beard

DATE: 17 June 2011

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Iraq, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2010 and applied to the Department of Immigration and Citizenship for the visa [in] September 2010. The delegate decided to refuse to grant the visa [in] March 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] March 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Regulations.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any 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.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of

former habitual residence. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.
19. The fundamental enquiry for the Tribunal under s.36(2)(a) of the Act is whether the applicant is a person “to whom Australia has protection obligations under the Convention. However s.36(2)(a) is qualified by subsections (3) to (5) which set out circumstances in which Australia is taken not to have protection obligations. These provisions call for consideration of whether an applicant has access to protection in any country apart from Australia. The Tribunal notes in this regard that the applicant has been residing in the UAE since 1998.
20. Subsections 36(3), (4) and (5) of the Act effectively provide that Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country where they do not have a well-founded fear of being persecuted for a Convention reason or of being returned to another country where they will be persecuted for a Convention reason. Accordingly, an applicant may be found not to be a person to whom Australia has protection obligations, even if they might satisfy the Convention definition of “refugee”, because of the availability of protection in another country.
21. They provide as follows:
 - (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
 - (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
 - (5) Also, if the non-citizen has a well-founded fear that:
 - (a) a country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;subsection (3) does not apply in relation to the first-mentioned country.

CLAIMS AND EVIDENCE

22. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The application before the Department

23. The applicant applied for a Protection Visa [in] September 2010. In his application form, the applicant claims that he was born on [date deleted: s.431(2)] in Al-Najaf, Iraq. He claims to speak, read and write Arabic, as well as speak, read and write limited English. The applicant claims to be an Arab, Muslim, Iraqi citizen. He states that he does not hold any other citizenship or nationality and that he has no right to enter or reside in any other country other than Iraq.
24. The applicant states that he travelled to Australia on a Subclass 420 Entertainment Visa, arriving [in] August 2010. He travelled on an Iraqi passport issued in Baghdad [in] July 2007, which expires [in] July 2015. A copy of the applicant's Iraqi passport is on the Departmental file (D1, folios 73-79).
25. In terms of education, the applicant claims to have studied at [College 1] in [district deleted: s.431(2)] of Baghdad from September 1982 to July 1987. He claims to have graduated with a [diploma deleted: s.431(2)] in 1987. Thereafter from July 1987 to March 1998 he was a self-employed musician in Baghdad.
26. In his application form, the applicant claims that he was a temporary resident of the United Arab Emirates and that he departed from the UAE [in] August 2010. He claims he travelled there on a Temporary Working Visa [in] March 1998. From March 1998 to August 2010 he claims to have worked as a [musician] in [employer deleted: s.431(2)] in Dubai, UAE. From February 2008 to June 2010 he also worked as an agent with [Employer A], in Sharjah, UAE. From August 2010 he claims to be unemployed.
27. The applicant claims that he was married [in] October 2003 in Kerbala, Iraq.
28. Attached to the applicant's application form is a statement in response to questions 42 to 46. A copy of that statement is attached.

I am ..., an Iraqi citizen born in the ... of the Najaf province on I am married to ... the Iraqi citizen born also in ... on We have two children. They are:...

In fact I passed through severe hardships during the reign of the Baath Party. I was a [musician]. I was among the distinguished Iraqi artists as a graduate holding the diploma degree of [College 1] in the academic year 1986 / 1987 holding.

As an artist, I was obliged to attend the parties and functions of Odai Saddam Hussain in addition to the parties of his father. Those evenings and functions became a room for sarcasm, derision and fum-making wherein we watch the leader Saddam Hussain and his son Odai in binge saucy and extravagant parties. We were obliged to demonstrate blind obedience.

I was also obliged to attend the evenings and functions of the Baath Party and its leaders including the brothers of the president of the republic Barazan and Watban and Taha Al Jazrawi the vice president of the republic. The vehicles of the

security and the intelligence used to surprise me by coming to pick me at any time even in the late night and force me to go and participate in these occasions.

Despite the fact that I was a Baathist and a member of the party for many years, it is worthy of mention that I joined the party for patriotic reasons and for the cause of the Arab unity. I did not join to be treated as a tool for entertainment or tyranny and the fiddling with the fate of the country.

Faced with this daily farce, I headed to the United Arab Emirates in 1998 to work there as an artist and [musician] in the [performance]. I also worked in all the studios of the UAE and with all the Arab and foreign singers.

After the downfall of the regime of Saddam Hussein, I felt very comfortable and wished to enjoy my human and artistic rights and practise my daily life without harassment or terrorism. I returned to Iraq in October 2003. There I celebrated with my co-citizens the end of the dictatorial era.

On [date] I married and soon I accompanied my wife in my return journey to the UAE because I felt that Iraq is not stable. The religious and sectarian bigotry started to destroy the infra structure of our Iraqi people. I noted that masses of human waves are returning from Iran holding fanatic slogans demanding the establishment of an Islamic state on the model of the Iranian Republic. I noted that the ceremonial rituals of commemorating the deaths of the personalities of the Islamic nations like Imam Ali Ibn Abi Taleb and Imam Al Hussain Ibn Ali Ibn Abi Taleb started to take a new shape and turn wherein chains and machetes are used to inflict some harm on the self as a means for pleading the clemency of those Imams.

Praise be to Allah that I forgot my Baathist background. The patriotic spirit of Iraq and the conceptions of the coalition states that came over to lay down the bases of democracy and the supremacy of the law became my main preoccupation. I told my family that I am going to return to Iraq once the situation is fully stable.

But soon the situation deteriorated. The Islamic powers and their militias started to kill on the bases of the identity. The intelligence of Iran and Saudi Arabia and perhaps the USA started to look for and chase the ex Baathists in addition to the artists, singers and music players. They considered them unbelievers and whoremongers that should be eradicated and killed. Soon my friend the dean of the artists [name] was killed. Several other artists fell victims to abduction, beating, theft and murder. Therefore, I decided to enjoy what Allah graced me of smooth living in the UAE.

In 2008 I struck an agreement with a UAE trade company to export [machinery] and spare parts to Iraq as I have some relatives and friends working in this sector. I made short visits away of lights and keeping a low profile. I refrained from going to the place of my residence in Baghdad and Karbalaa and Al Mishkhab of Al are of the fact that there are organised intelligence mg on personal bases. Some of these persons recognised me while I was at [Hotel 1]. They started to ask me about my relations with the Baath Party and its pillars claiming that they watched me many times on the TV channels.

In fact, I paid no attention to these solicitations. I did not expect that security was involved and arrest stage could not be excluded. But I have already left Iraq on [date]05.2010 after one-week visit. I signed an agreement with groups of the spare parts and tires market. According to the agreement, I would send them several urgent consignments of spare parts and [machinery]. I headed to the airport on [date]05.2010

and returned to the UAE on the promise of returning after few days carrying other new offers.

I returned back on the evening of [date].05.2010. To my surprise, I heard from a friend working in Al Najaf airport that an arrest order has been issued by the Ministry of Interior based on the report related to the eradication of the Baath Party. The report refers that I am one of the Baathist artists who worked in the artistic choir related to the presidency. He warned me that I should immediately return to where I came from because any interception and identification of me would expose me to harm and revengeful acts including arrest and other similar operations that are rampant in Iraq.

Heeding this warning, I left Iraq without the slightest delay and returned on [date]06.2010 noon after spending the night with a relative who works in the military command of Al Najaf province and who undertook to protect me for a day till I complete my mission. Thus, I quickly returned to the UAE. But I pledged with God being my witness not to touch the soil of the land that trampled upon the freedom of its citizens. I was about to be arrested, imprisoned and perhaps also killed,

I soon arrived in the UAE in a state of panic. I told the Company of what happened to me in Iraq. The Company then terminated my contract and service. I found myself cornered in a very difficult situation because the UAE is heading towards an austere economic situation and is pressing the Iraqis especially of the Shiite sect to leave the country.

Faced with this situation, I accompanied my family ... and went to Damascus. I remained there for a period of seven days. I tried to get a residence visa especially as I have a Baathist background and high qualification in the field of art. This would help in offering Iraqi and Arab activities in that country. But after one week of relentless effort, I found myself compelled to leave Syria because the residence permit granted is temporary and for a maximum period of two months. I need to travel to the Syrian Iraqi borders every time for renewal. I also need to go to the office of the United Nations for the refugees. This needs a lot of time and great effort.

Therefore, I was compelled to leave Syria leaving behind my father and mother in a difficult situation struggling with the United Nations to recognise them as refugees and also struggling with the Syrian authorities to obtain residence.

Upon my return to the United Arab Emirates, I found myself facing difficult circumstances. My sponsor cancelled my contract and as a result I forfeited my right to residence which is conditioned by continued work. Thus I should leave the country to any place where I can get residence.

In these circumstances, I declare that I am living genuine fear and terror over what would happen to me in Iraq in case of return. The government failed in securing the safety of the citizens. It is hiding in the Green Zone under the battalions of the American and Iraqi forces and their militias.

We the artists of Iraq find no one to protect us and ward off the dangers looming over us. We are not demanding a solution because the states are in perpetual struggle for ruling and securing the seats of the governing. Acts of murder, torture and explosions are continuing unabated.

Therefore, I am finding myself obliged to lodge this application for protection and maintaining my safety and allow me to be a future national under the permanent protection visa 866.

...

29. Also attached to the application form are copies of the bio-data pages of the passports belonging to his wife, son and daughter.
30. The following certified translations of documents were also attached to his application:
- Letter from [Employer B] dated [in] August 2010, informing the applicant that “Due to obliging circumstances” the company in Dubai has decided to cancel his contract and consequently its sponsorship of his work visa is also cancelled. The applicant is therefore advised that his visa would expire [in] March 2011 (D1, folios 8-9).
 - Document headed “Directorate of Baghdad Al Jadeeda Police Centre of Baghdad Al Jadeeda” dated [in] May 2010 addressed to an “[official]” The documents states that an unsuccessful attempt to arrest and interrogate the applicant had been made regarding his political activities and his involvement with the organisations of the dissolved Ba’ath Party. That document is signed on behalf of the [official deleted: s.431(2)], Directorate of the Police Centre of Baghdad Al Jadeeda (D1, folios 6-7).
 - A letter addressed “To Whom It May Concern” signed by the [official deleted: s.431(2)] of [Employer A], certifying that the applicant was employed by its company for the period February 2008 to June 2010. The letter confirms that the applicant worked as a commission agent for trade with Iraq in the export of [machinery] and spare parts. It states that due to the deteriorated commercial and trade situation in the UAE and the fall of sales to Iraq and other states, the applicant stopped working in that field (D1, folios 4-5).
 - Document headed Ministry of Education General Directorate of Preparing Teacher and Supervision Education from the “[College 1]” dated [in] October 2007, certifying that the applicant passed his examinations in the years 1986/87 (D1, folios 2-3).
 - A translation of a letter from [lawyers deleted: s.431(2)] dated [in] September 2010 to the applicant, advising him that in their capacity as his legal consultants [Employer B] have terminated his services and already started the formalities of cancelling his residence and work card issued by the Department of Nationality and Residence, Ministry of Labour, and that the company does not owe him any payments (D1, folios 102-103).
31. [In] December 2010, the applicant was invited to attend an interview with an Arabic-speaking interpreter [in] January 2011 (D1, folio 114). The applicant attended the interview. During the interview, the applicant showed the Departmental delegate his passport, a copy of which was taken by the Departmental delegate (D1, folios 116-123). During the interview, the applicant made the following claims:
- All the claims that he made in his application form for a Protection Visa are true and correct;
 - The delegate noted that in his previous passport the name of the applicant is different and shorter than the name given in his current passport. The applicant explained that under Hussein’s regime in Iraq it was only required to provide the father’s and grandfather’s name. When the regime changed, the format changed and passport

holders were required to include the mother's name. The applicant said that the name "[family name]" is a tribal name which is located in [village deleted: s.431(2)], Iraq.

- The applicant was asked to explain why his passport was cancelled and taken by the passport office. The applicant stated that every time a person applies for a new passport, the old passport is taken and destroyed. The applicant said that the passport was taken from him in the United Arab Emirates at the time he was given his new passport.
- The delegate asked the applicant the details of how he came to have a Moroccan visa in his passport. The applicant said that a famous Iraqi singer was giving a concert in Morocco but added that he himself did not travel to Morocco.
- The delegate asked the applicant why he did not perform military service in Iraq. The applicant answered that he did serve military service in the army for three years. He said that he undertook the basic service for around six months in "Mosal" before he was transferred to Al Sanawa in the south of Iraq. He then went to a third location. The applicant said he was [age deleted: s.431(2)] when he entered the service. The applicant informed the delegate that he was a [rank deleted: s.431(2)] but graduated as a [rank deleted: s.431(2)]. He was in three units in the three respective locations. Each unit was an infantry unit.
- The delegate referred the applicant to his written statement and the claim that the "Dean of the Artist [name] was killed". The delegate asked the applicant to provide further details. The applicant reported that the Dean was a Ba'athist. After the change of regime, religious groups entered the government and deemed people such as the Dean as "unbelievers". The applicant stated that not only musicians but other artists were targeted. The applicant also explained that the "Dean" was the head of the [association deleted: s.431(2)]. The applicant claimed that people broke into the Dean's house using a motorcycle and they killed him and his family at the beginning of the fall of the old regime in around 2003 in the [district deleted: s.431(2)] in Baghdad. The applicant said that he believed that a group of religious people from Iran killed the Dean.
- The delegate asked the applicant who sponsored him to travel to the UAE. The delegate answered it was [Employer B]. He said that he entered the UAE to work as a musician on a visa that was renewable every three years. The applicant stated that he renewed his visa approximately four times. He said his last residence permit was granted from [a date in] April 2008 until [a date in] March 2011.
- The applicant claimed that he worked as [performer] and musician. He stated the company owned recording studios and organised concerts and parties. The applicant said that he would be available for hire as a musician by various companies associated with [Employer B], as well as accompany singers.
- The delegate asked whether the trading company was associated at all to his visa. The applicant answered no.
- The delegate referred the applicant to his statement and the claim that when he worked for the trade company he went to Iraq and stayed at [Hotel 1]. The delegate asked the applicant where that hotel is. The applicant said that it is in the centre of

Baghdad. The applicant said that he travelled to Iraq around seven times over a period beginning in 2008. The applicant claimed that people recognised him at the hotel and began asking him about his relationship to the Ba'ath Party. The applicant said that his picture appears on the Internet. Therefore people knew that he had participated in parties in the UAE and that during the old regime he was known as a Ba'athist. The applicant claimed there were particular people looking for Ba'athists in Iraq. In answer to these questions, the applicant said that nobody dared to state that they were a Ba'athist. At that point, the applicant said no people asked him about whether or not he was a Ba'athist; they just knew it. The delegate referred the applicant to his statements in the statement at page 3. The applicant said he was monitored. The applicant said that the groups monitoring him were nameless groups who hate the Ba'athists.

- The delegate asked the applicant to explain the details of his claim in his written statement that when he returned to Iraq [in] May 2010 he heard from a friend that an arrest order had been issued against him. The applicant provided the name of his friend (37:49), who is the head of security at Al-Najaf Airport. The applicant said he entered the airport [in] May 2010 and he then left Iraq [in] June 2010 because of the arrest warrant. He had intended to stay for a month because he had a container of [spare parts] to trade, but when he heard about the arrest warrant against him he left as quickly as possible without even seeing his family. The applicant said the warrant had been distributed to all airports. The applicant said his friend arranged for him to be the last to arrive at the airport and the last person on the flight. He produced his passport to the officer who stamped it and he got through the airport. The delegate asked the applicant how his friend informed him of these things. The applicant said he was informed by phone. The applicant said he was with relatives at the time. The applicant said the friend is also a distant relative of his mother. The delegate asked him how he was given the arrest warrant. The applicant said that he was given the document by his friend at the airport. The applicant then said he was sent the warrant by fax and then by mail. The applicant stated that he was charged with being a Ba'athist.
- The applicant claimed his father was also a Ba'athist and that his family is Ba'athist.
- The applicant said his brother lives in Kerballa in Iraq and travels back and forth between Syria.
- The applicant claimed his parents are in Syria living in miserable conditions as they apply for refugee status.
- The applicant claims that his father was a member of the Ba'athist Party. He claims he was also a member. He states he is of a lower rank than his father. He states his brother is also a member at a rank somewhere between the applicant and his father.
- The applicant said that to be a member of the Ba'athist Party is now unlawful. He claims that the punishment for being a member of the Ba'athist Party is execution without trial by the militia.
- The delegate referred the applicant to the translation of the arrest warrant at D1, folio 7. The applicant stated that the document refers to his home where he and his wife reside. The applicant said there is only a bridge between the hotel and his house. He

said that he has never lived in the house but stays in the hotel. The delegate put to the applicant that he did not understand why the arrest warrant would refer to his home when his statement says that people were asking him questions when he was at the hotel. The applicant answered that he used to live in the house but from [a date in] May to [a date in] June there was no time to go to the house. The delegate asked the applicant what identity documents he was required to show when he registered at the hotel. The applicant answered that one might have to.

- The delegate asked the applicant how long he stayed in Iraq when he returned there in 2003 for his wedding. He answered one month.
- The delegate asked him what authorities he met when he went to Iraq in 2003. The applicant said they were mostly American soldiers as there was no Iraqi government at the time. He said he entered through the Al-Najaf Airport and departed from that airport as well.
- The applicant claimed that he feared being harmed by militia or because of the lack of stability and security, hired assassins.
- The delegate asked that although there is a warrant out for his arrest the people he fears are private militia. The applicant said no he also feared the State. For example, the police because it is a State without law. He stated whoever commits a crime could get away with it very easily.
- The delegate asked the applicant if his details were registered with the UNHCR in Syria. He stated that he was not registered but that his parents were. He said he was not registered because he had the chance to come to Australia.
- The delegate asked if the applicant still feared those people who killed the Dean of Artists and harmed and killed other artists and musicians. The applicant said that if the delegate looked at the Internet site for [College 1] he would see that the institutions and theatres have been shut down and artists and musicians prevented from performing even if they are or have not been Ba'athists. He said all of these people are considered unbelievers and atheists. The applicant said even now these people and institutions are being condemned.
- The applicant said he has been a well-known musician in the UAE and Iraq, as well as a Ba'athist. He wishes to live a normal life with his family in a secure environment. The applicant added that he was known very well in Iraq and that those parties who are looking for people such as artists and Ba'athists are probably Bedouin forces and other groups and militia. He added that groups belonging to Al Qaeda are probably also involved. He said also involved are governmental groups and those who control the police and the army. He said there is no security in Iraq. He said in the hotel he was never directly asked if he was Ba'athist. He explained that he had been approached by people he had known and he had inferred that he was "kind of wanted" He said life in Iraq is now strongly influenced by fanatic Islamic practises. Music and singing is no longer allowed. The applicant claimed if it were not for his friend at the airport he would not be at the interview. The applicant also handed the delegate a copy of an article downloaded from ABC News regarding a suicide bombing in Iraq dated 18 January 2011 (D1, folio 125). The applicant also handed the delegate coloured photocopies of Iraqi documents, untranslated (D1, folio 126), as well as

photocopies of flyers advertising various music events, untranslated (D1, folios 127-129).

32. [In] February 2011, the applicant submitted to the Department a copy of the police clearance certificate with respect to the applicant issued by the General Department of Criminal Investigation in Dubai, UAE. The certificate is dated [in] January 2011 (D1, folio 131).
33. [In] March 2011, the delegate of the Department decided that he was not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees' Convention for the purpose of Section 36 of the Migration Act and that he therefore does not meet a prescribed criterion under Clause 866.221 of the Migration Regulations for the grant of a Protection Visa. He therefore refused to grant the visa.
34. In making his decision, the delegate was satisfied that the applicant is a citizen of Iraq; that he does not have a right to enter or reside in any other country. He found that the harm feared by the applicant is for a Convention reason, namely his political opinion and his membership of a particular social group, and that the harm the applicant fears is sufficiently serious to amount to persecution. However the delegate found there was no real chance of persecution occurring if the applicant returned to Iraq and that his fear of persecution was therefore not well-founded. The delegate made this finding on the basis of his interpretation of independent country information. On the basis of country information, the delegate found that effective state protection is available to the applicant against non-state agents and that it would be reasonable and not unduly harsh to expect the applicant to relocate to a neighbourhood in which his connection with the Ba'ath Party is not known, or if known is not resented.

The application on review

35. [In] March 2011, the applicant applied for review of the delegate's decision. Attached to his application for review is a copy of the delegate's decision (T1, folios 2-25).
36. [In] April 2011, the application was constituted to a Member of the Tribunal. [In] April 2011, the applicant was invited to appear before the Tribunal to give evidence and present arguments in relation to the decision under review.
37. [In] May 2010, the Tribunal received written submissions in support of the applicant's application. In those submissions, the applicant's agent submits that there is overwhelming country information indicating that the Iraqi government is unable to cope with the growing security challenges in Iraq. He also submits that the applicant is a reputed musician who has played for figures in the Ba'athist Regime before he escaped to the UAE in 1998. Therefore, the agent claims that the applicant is at serious risk if he returns to Iraq of harm by Islamic fundamentalists as both a Ba'athist and a Kafir musician, an infidel entertainer. The agent claims that under the Sharia law of Islam a Kafir musician is an enemy of Islam who can be put to death by any true Muslim.
38. In the submissions the agent submits that the applicant is a:
... [age] Iraqi born Shi'ite Muslim musician who has been in Australia on an entertainment contract, who has had his residence in Dubai cancelled and can only return to Iraq where he faces continuing threats. This is why he has become a refugee *sur place*. There is now no third country to which he can go. ... [the applicant made] two attempts to go back to Iraq to see if he could re-establish himself in a car

dealership business with UAE backing. [Those visits] were in May 2010 in Najaf. On his arrival on his second visit at the end of the month his friends alerted him to the fact that his name was on a wanted list as a known Ba'athist. 'Without waiting for any confirmation or seeking any proof, he fled back to the UAE.

Tribunal hearing

39. The applicant appeared before the Tribunal [in] May 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
40. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
41. The visa applicant confirmed his name, age and place of birth. He informed the Tribunal that when he was a young infant his family moved to [suburb deleted: s.431(1)] where he attended both primary school and secondary school. After he graduated from secondary school, the applicant said that he studied fine arts at [College 1] in Baghdad.
42. The applicant gave the Tribunal details of the classes he took in his first year of study at [College 1]. The review applicant was asked to [activity deleted: s.431(1)]. he informed the Tribunal that he is also able to play classical Middle Eastern music.
43. The review applicant told the Tribunal that he studied music for 5 years. He said that he was considered one of the best [musicians] at [College 1] and that he was required to play in the orchestra for television and at public meetings. He explained that these events were organised by various public agencies such as the Federation of Women within the of the Ba'athist structure of government. He reported that that the role of these organisations was to organise public events including programmes on television and radio. He said he often performed at national celebrations that were attended by the army.
44. The applicant gave evidence that he joined the Ba'athist Party in 1979 when he was [age deleted: s.431(2)] and he remained an active member until he departed Iraq. He said that it had been his father's decision for him to join as his father had also been a Ba'athist. He said that he had played with many popular, Iraqi singers such as [names deleted: s.431(2)].
45. The applicant also gave evidence that after graduating from the [college], he undertook compulsory military service over a period of 3 years finishing in 1990. During that time he said he not given the chance to play in concerts except occasionally during the holidays when he would be invited to play in a band for a week or so.
46. During the year 1990, after finishing his military service, the applicant reported that he went back to work as a musician on radio and television as an employee of the radio and television companies. He confirmed that he was paid a monthly wage. He stated that he continued living this life from 1990 until 1998
47. In 1998 he said he departed Iraq for the UAE. He told the Tribunal he had wanted to leave Iraq because in his final year in Iraq under the regime of Saddam Hussein he would be invited to play at parties, which were usually held at night. He said that the parties were "a disaster" Sometimes he was required to compose music to lyrics of political songs for which he would not be paid. He said the people attending the parties were all corrupt and drunk. He

said there were women at the parties and that the guest would often shoot their guns. He stated that he became sick of being treated in that way and he left the country as a result.

48. The applicant confirmed that he was not required to leave the country secretly. He said that travel was open to him in 1998; and that although he was a well-known musician, he did not encounter any difficulties leaving Iraq. He gave evidence that the situation in Iraq was “alright” and the relationship with UAE was good. He said the Emirati people loved the Iraqis at that time.
49. The Tribunal asked the applicant if he is referred to on any internet sites. He answered that he has tried to find references to him on the internet but has not been able to do so. He mentioned a festival called [name deleted: s.431(2)] where he had played in Iraq and suggested that a CD of that concert might be available somewhere; and added that in 1998 when he left Iraq, the internet was not used there.
50. The applicant gave evidence that in Dubai he worked with a singer called [name deleted: s.431(2)], a name he wrote down in Arabic for the Tribunal. He said that he and this singer recorded a CD, which was published on the internet. He said he also accompanied other singers including an Iraqi singer living in the UAE. He said there are currently no CDs for sale in Iraq of his music; and any internet references to him would be closed down. The applicant told the Tribunal that he is well-known in Syria and the UAE. The Tribunal asked him if he had a Facebook following and he gave the Tribunal the details of his Facebook account.
51. Before moving to UAE in 1998, he stated that he arranged an employment contract with a named person in Iraq, who was visiting Iraq from the UAE. He said the named person was a conductor, who brought together 5 or 6 [performers deleted: s.431(2)] together with others to form an orchestra in the UAE. He said the conductor heard the musicians play at the [name deleted: s.431(2)] festival. The applicant stated that this man arranged the visas for the musicians to travel to Iraq. He explained that the musicians were sponsored by a named company. He said that he stayed with that company for a year and a half. When the first company was dissolved, he moved to another named company where he stayed until he left the UAE. The applicant said that he preferred working in the second company because the first company had not been managed by a musician whereas the second company was run by known artists.
52. The applicant confirmed that he returned to Iraq in 2003 and then 2008.
53. The applicant gave evidence that in 2003 he returned to Iraq to get married. He said he had no problems getting back into Iraq because at that time there was no government or Islamic militias. He said he had been very happy to return home. He gave evidence that he did not perform as a musician when he was there because people were confused and no one knew what would happen. He confirmed he had no difficulties with Iraqi authorities; and he did not fear being harmed by private persons as his family and relatives had advised him that there was no reason to fear anyone.
54. He stated that when he returned to the UAE, he lived as before. He added that his wife followed him to the UAE around 2 or 3 months after his arrival. He said that she enjoyed living in Dubai.

55. The applicant gave evidence that he returned to Iraq in 2008 but he could not remember the month. He said it was cold and he remembered he was wearing heavy clothes. He said he returned in 2008 because his employment situation in the UAE had changed after divisions arose between Sunni and Shi'ite Muslims in the country. He said that working as a musician had become difficult because of conflicts between people and because he was being offered less and less work. As an example, he said that when his company was offered work in the studio, it was given to the Sunni Muslims. He said that he went for a period of 5 or 6 months without any employment. As a result he found a job through a friend trading in spare parts.
56. The applicant said that he did not experience the same prejudice in the spare parts trading company because the business was run by his friends, who had offered him the job. The applicant was able to describe in detail how the company operated and what his role in the business was. He was also able to describe the various ports where the parts were imported into Iraq and the kinds of parts that would be imported where and why. He stated that during his employment with that company he entered Bagdad airport once or twice; and Najif airport around three times. The applicant said that he did not have any difficulty entering or departing from these airports until [a date in] May when he was told by a friend and relative on his mother's side, who is a security officer, that he was wanted by Iraqi authorities.
57. The applicant described the events leading up to the time when he was told by the security officer that he was wanted by the authorities. He said that he arrived at the airport and that he had had no difficulty in getting the parts out of the airport. He then went to a friend's place in Najif but intended to continue on to [suburb deleted: s.431(2)] or Bagdad. He said that was when he received a call from the officer, who told him that the authorities were after him. When asked why his friend knew about the warrant but the authorities at airport had not, the applicant stated that the information must have been received after he had arrived. The applicant said that when his friend called him he was initially confused. He had thought he was wanted because of the importation of the spare parts and he did not understand what had gone wrong. He thought there must have been something wrong with the consignment or the taxes. The applicant reported that his friend told him that authorities had been to his home in Baghdad looking for him. When asked why he thought it had taken this long for authorities to issue a warrant against him, the applicant stated that he believed he was reported by people he had spoken to at [Hotel 1] [in] May, 2010. He stated that when he had been at the hotel, two people had approached him and asked him what he was doing in Iraq when he was a Baathist. The applicant said that he ignored them and did not take what they had said seriously. However, he guessed that after he returned to the UAE, these people must have reported him the Iraqi authorities.
58. The Tribunal asked the applicant if he ever saw the arrest warrant. The applicant answered that he did not see the warrant in Iraq but said they emailed it to him in the UAE after he left Iraq. The Tribunal asked the applicant if he has a copy of the email with the warrant attached. He told the Tribunal that he has deleted it. The Tribunal expressed its surprise that he had deleted such an important email and he responded by saying that every now and then he deletes old emails.
59. The hearing was adjourned for around 15 minutes.
60. The Tribunal referred the applicant to a copy of the original Arabic statement that had been translated into English and attached to the applicant's application form. The applicant confirmed that he wrote the statement with the assistance of his agent, who helped him to formulate his statement in legal terms. The applicant confirmed that he had reviewed the

statement the day before the hearing and that there was nothing in it that he wanted to change. He also confirmed that although he has limited English, he has not tried to read the English translation.

61. The Tribunal referred the applicant to his earlier evidence that the arrest warrant had been emailed to him. The Tribunal asked the applicant if the copy of the warrant he had given to the Department was the copy that had been attached to the email. He answered that after he left Iraq and arrived in the UAE he received an email with a copy of the warrant attached; and that is the copy that is before the Tribunal. The applicant then confirmed that he had not received the warrant from any other person.
62. The Tribunal then explained to the applicant the procedures set out in section 424AA of the Act. Pursuant to those procedures, the Tribunal then put to the applicant that in the interview conducted by the Departmental delegate, he had stated that he had been provided a copy of the warrant when he was still in Iraq. The Tribunal told the applicant that its transcript of the interview recorded the applicant saying that after he had left the airport his friend had faxed him a copy of the warrant. The Tribunal also advised the applicant that he had said that the security officer had mailed the warrant to him on his request. The Tribunal pointed out to the applicant that what he had said in the Departmental interview was inconsistent with what he had told the Tribunal earlier in the hearing.
63. The Tribunal explained to the applicant the relevance and possible consequences of such an inconsistency in its decision making process. The Tribunal offered the applicant an adjournment to consider how he wished to respond to or comment on the adverse information put to him. The applicant asked for a ten minute adjournment, which was granted.
64. After the adjournment, the applicant told the Tribunal that he did not see any importance in this subject. He said he received the warrant either by facsimile or email. At this point, the applicant became somewhat distressed and made comments about his lawful arrival and the fact that his application for protection had to do with music and that he is a musician. He repeated his claim that he received the warrant either by email or by facsimile and that the application is about his future. He stated that his wife, children and parents are in Syria. He claimed that his son, who is [age deleted: s.431(2)], has not been able to start school and the situation in Syria is becoming worse. He said if they could have returned safely to Iraq he would have told them to go back. Similarly, if it was safe for him to return to Iraq, he would have returned and settled there with his family. He asked rhetorically,

How did the paper come? I don't know but I got it. I don't whether it was by mail or fax or email. It is the same thing. You can verify the authenticity of it by telephoning and making sure it is authentic. Now I remember. I got it by fax. And it was not clear. The chief of security of the airport, his name is ... in the delegate's decision at page 7. All I can say is that all of the documents are true and correct I could not remember how I got them but all the documentation that has been presented is authentic.
65. The applicant then proceeded to point out some mistakes in the transcription by the delegate in his decision record of what the applicant had said in the interview. The Tribunal stated that it had already picked up the mistakes and asked the applicant to continue with his response to the adverse information. The applicant concluded his response by saying that all the documents are all "true and right" He said he cannot remember how they were sent to him but all of the documentation that was presented to the delegate is authentic. The Tribunal assured the applicant that if it has concerns about the authenticity of the documents it would pursue the issue with the Australian post in Iraq.

66. The Tribunal also advised the applicant that how a person arrives in Australia is not generally relevant to whether or not that person meets the criteria of the visa they are applying for. The Tribunal also put to the applicant that the evidence suggested that he had intentionally made arrangements to ensure that his right to return to the UAE was cancelled.
67. Pursuant to the procedures set out in section 424AA of the Act, the Tribunal then explained to the applicant that there are inconsistencies in the information before it that could be adverse to his application. The Tribunal advised the applicant that it has a recording of the interview conducted by a Departmental delegate [in] January 2011. In that interview, he was asked who contacted him in [Hotel 1] in Iraq. The Tribunal noted that the delegate had referred the applicant to page 3 of the written statement attached to his application form. The Tribunal read out the relevant part of the applicant's written statement regarding the events in [Hotel 1] that the applicant had written and noted that the delegate had asked him a number of questions about what happened at the hotel and the fact that the applicant had been unable to give him a clear answer. The Tribunal then noted that earlier at the hearing, he had been able to clearly tell the Member about what he was doing at [Hotel 1] when two people approached him and what had been said. The Tribunal said that the inconsistency in his ability to answer questions about the same event raised the issue of credibility and explained the consequences that would arise if the Tribunal relied on the adverse nature of the information. The Tribunal offered the applicant an adjournment.
68. The applicant responded by stating that the Departmental delegate asked him the same question. He said the delegate had asked him whether people had approached him and asked, "Are you Ba'athist?" The applicant explained that if you admit to being a Baathist in Iraq, you will be shot. He said that the delegate then asked him if there is anything in his original statement in Arabic about that. The applicant said that he answered "no, I did not write about that". The applicant also commented that after the interview, he had taken a short break. After the break, the delegate had given him the opportunity to raise any outstanding issues, and during that time, the applicant stated that he had told the delegate that he had discussed the matter with his representative and that he wished to confirm that there is nothing in what he had written that talked about people approaching him and asking him "Are you Baathist?" He said that he explained to the delegate that two men had approached him and asked him how he had entered Iraq as he is black listed. The applicant told the Tribunal that it could check the recording. He added that he thought these men must have belonged to the secret service.
69. The Tribunal asked the applicant whether he could relocate to an area in Iraq where he would be safe. The applicant answered that it is a well-known fact that Iran controls the South of Iraq from Bagdad down. He added that the northern territories fall under an independent government and for him to travel there he would need a visa and be interviewed by Kurdish officials. He explained that as there is an arrest warrant against him, he would be immediately arrested as soon as he approached any border. He said if had been able to he would have told his family to go to the North of Iraq.
70. The Tribunal asked the applicant what the situation would be for him if there were no arrest warrant against him. The applicant answered that there are certain groups that have been appointed to find and kill all Baathist Party members. He stated that there is a Minister in the government responsible for looking for all Baath Party Members. The applicant stated that there are people in Iraq who think that art and music is a corrupt activity produced by devils. In terms of finding a safe location to live in Iraq, the applicant stated that as he is a musician who belonged to the Baath Party, he is wanted by the current government and by militia groups led by Muqtaa Al Sarda and the Badr Brigade.

71. The Tribunal referred to the flyers regarding music recordings and/or concerts and the CD covers in Arabic on the Departmental file at folios 127-129. The applicant answered that his name appears on all of the publications and that his name is highlighted.
72. At the end of the hearing, the applicant's agent made a number of submissions. The agent pointed out in particular, that the applicant has had a long, recognised career in Iraq and the UAE and he is now working in Australia in the Arabic community. The agent submitted that the applicant had returned to Iraq with a clear conscience only to find that there was an outstanding warrant for his arrest. The agent submitted further that if he returns to Iraq he will therefore be arrested. The agent added that the airports in Iraq are patrolled by militia. He stated that if the applicant returns to Iraq he will be spotted by the militia. The agent drew the Tribunal's attention to the fact that taxi drivers are employed by the militia and the government to report certain people to them. The agent also referred the Tribunal to relevant country information on Iraq.

Country Advice

73. Country Advice obtained by the Tribunal indicates that since the fall of the Hussein regime, and in particular since the Shi'ite rise to political power in the 2005 elections, people affiliated or associated with the former government of Iraq, either through membership in the Ba'ath party or as a result of their functions or profession, have been subject to systematic attacks, mainly by Shi'ite militias.¹ While the UK Home Office believes members of the former Ba'ath Party and regime are no longer systematically targeted, "they may still fall victim in individual cases, for example as a result of personal revenge of former victims or their families against perpetrators of detention, torture or other violations of human rights".²
74. According to a 2010 article by *Stratfor* chairman and CEO George Friedman, prior to the US invasion in 2003, the Shi'ite community was anti-Ba'athist and heavily influenced by Iranian intelligence. With the fall of the Ba'athist regime, Sunnis faced a hostile American army and an equally hostile Shi'ite community backed by Iran, and accepting support from foreign *jihadists*, launched an insurgency against both the Americans and the Shi'a.³ In October 2010, *Al-Jazeera* reported Iran was heavily involved in equipping and aiding militant Shi'a groups in Iraq, who targeted Sunni politicians in addition to attempting to undermine confidence in the Iraqi government.⁴
75. According to the *Asia Times*, Iran has traditionally played a constant role in nurturing and supporting anti-Saddam forces to catch the dictator off guard. Iran's strategy in post-Saddam Iraq has reportedly been driven in part by the desire to avoid becoming the "next victim of President George W Bush's doctrine of "regime change"...[t]his, more than anything else, would have driven Iran either to exploit the Iraqi chaos to its advantage, or to make its own contribution to worsen it".⁵
76. According to *IRIN*, in 2007 militants in southern areas of Iraq were reportedly targeting former members of the Ba'ath Party "in a bid to exterminate them", with at least 200

¹ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section VIII.G.

² UK Home Office 2010, *Operational Guidance Note – Iraq*, 1 October, Section 3.9

³ Friedman, G. 2010, 'Iran's headlock on the US over Iraq', Mercator.net, source: *Stratfor*, 17 August http://www.mercatornet.com/articles/view/irans_headlock_on_the_us_over_iraq/ – Accessed 20 April 2011

⁴ 'Iran's involvement – Secret Iraq Files' 2010, *Al-Jazeera*, 25 October <http://english.aljazeera.net/secretiraqfiles/2010/10/20101022163128812181.html> – Accessed 20 April 2011

⁵ 'Saudi Arabia and Iran in Iraq fix' 2006, *Asia Times*, 20 December http://www.atimes.com/atimes/Middle_East/HL20Ak01.html – Accessed 20 April 2011

members of the party killed, and hundreds of families forced to flee their homes. A spokesperson for local NGO Iraqi Brothers Relief said that militias were conducting a campaign to exterminate over 4,000 members of the Ba'ath Party, despite the fact that many people were obliged to join the party. Shi'a group-affiliated militants said their intention was to cleanse the remnants of the previous regime in order to prevent Saddam's followers from returning to power. It is thought the increase in Shi'a violence against former Ba'ath Party members was due to a change in government policy, allowing some former Ba'ath Party members to be reinstated to their government jobs.⁶

77. The UK Home Office noted that since the fall of the Saddam regime, the Badr Brigade – a Shi'ite militia organisation set up by Mohammed Bakr Al-Hakim during his exile in Iran – has been accused of killing numbers of former Ba'ath Party officials, in addition to members of the former security and intelligence services. It was reported that following the Shi'ite electoral victory in January 2005, attacks against former Ba'athists increased.⁷
78. Further, according to the United Nations High Commissioner for Refugees (UNHCR), individuals who are perceived to be supporters of the former regime and/or the ongoing insurgency, including Sunni Arabs, have been subjected to physical violence and other forms of intimidation and harassment. Sunni Arabs are often blamed for the human rights abuses that took place under the former government, in addition to being broadly considered to be supporters of the insurgency. As such, they have been targeted by Shi'ite death squads and elements of the Iraqi Security Forces (ISF). While members and associates of the Ba'ath Party have been similarly targeted, the degree to which they are at risk depends on the extent to which they are identified with Ba'athist ideology and human rights abuses, the rank or position held, and public recognition. It is worth noting that many low-level Ba'ath officials have also been targeted at the community level, and personal revenge killings against perpetrators of detention, torture or other human rights violations have occurred.⁸
79. In 2008, the Iraqi Government issued the *Justice and Accountability Law*, partly reversing the *De-Ba'athification Law* under which an estimated 150,000 former Ba'athists were excluded from government employment and pensions on the basis of their previous party membership.⁹ According to the UK Home Office, members of the former Ba'ath Party may face further discrimination on the basis of their affiliation with the former regime. There have been reports that the Shi'ite dominated government is discriminating against former Ba'athists in public sector employment, and it cannot be ruled out that Ba'ath Party affiliation may increase the risk to a detainee of being subjected to unfair treatment or abuse if held in a Shi'ite dominated detention facility.¹⁰
80. According to a May 2010 interview on non-profit US radio network NPR, efforts to purge the Iraqi government of Saddam loyalists have enjoyed ongoing support among the country's long-oppressed Shi'ite majority. However, many Sunnis, along with US officials and some Shi'ites, have argued that former Ba'ath Party members who joined solely to get government jobs should not be punished along with those who were involved in the killing of Shi'ites, Kurds and other Iraqis. Critics have argued that the Justice and Accountability Commission

⁶ 'Families in south displaced as former Baathists targeted' 2007, *IRIN*, 30 July <http://www.irinnews.org/Report.aspx?ReportId=73485> – Accessed 20 April 2011

⁷ UK Home Office 2009, *Country of Origin Report – Iraq*, 10 December, Annex D

⁸ United Nations High Commissioner for Refugees 2007, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section B.2

⁹ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section VIII.G

¹⁰ UK Home Office 2010, *Operational Guidance Note – Iraq*, 1 October, Section 3.9

(aka the De-Ba'athification Commission) has been politicised, and despite US calls for the commission to be scaled back, commission leaders have denied they are being muzzled, and say their work is far from finished.¹¹

81. In March 2010, the Institute for War & Peace Reporting (IWPR) reported that government officials linked to the banned Ba'ath Party could face punishment in an extension of a purge in the lead up to the 7 March elections. The Justice and Accountability Commission, charged with eradicating Ba'athist influence, was reportedly being pressured by Shi'a parties to investigate regional officers suspected of Ba'athist sympathies. Shi'a officials rejected claims that the purge of alleged Ba'athists was an attempt to undermine election rivals, and insisted their actions were necessary and lawful.¹²
82. According to *BBC News*, however, in February 2010 Iraq reportedly repealed a ban on nearly 500 candidates who had been prevented from running in the March elections for alleged links to the Ba'ath Party. The ban was lifted by an appeals panel of the Justice and Accountability Committee, on recommendation of Iraqi President Jalal Talibani, who believed the commission's initial decision may not have been legal as it had not been approved by parliament. Successful candidates, however, would not be able to assume office until the appeals panel had given a final ruling on their individual cases.¹³
83. In November 2009, *The Hindu* reported that Iraqi Prime Minister Nouri al-Maliki had vowed to do everything in his power to stop Ba'ath Party loyalists from running in the parliamentary election, warning of a plot by members of the Ba'ath Party to return to power. The Prime Minister reportedly also insisted that Ba'athists – a term widely understood to refer to Sunni Arabs – worked with al-Qa'ida to carry out suicide bombings targeting government buildings in Baghdad that killed at least 255 people on 19 August and 25 October 2009.¹⁴
84. In March 2011, National Reconciliation Minister Amir al-Khuzaei announced that the government was in the process of clearing five groups of reformed militants for political roles. However, according to a Muqtada al-Sadr-linked Member of Parliament, some of the militants were tied to the Ba'ath Party, and his party was intending to call in the Reconciliation Minister for questioning.¹⁵
85. No information was found specifically relating to the provision or availability of state protection for those imputed to be former Ba'ath Party members.
86. According to the UNHCR circa 2007, “[s]tate protection from those perpetrating acts of violence is generally not available...[t]he dismantling and slow reconstitution of Iraqi security forces have left a security vacuum in the country...[a]cts of violence are thus increasingly committed in a climate of impunity”.¹⁶ The UNHCR report states that given the “pervasive and extreme forms of violence and human rights violations in Central and Southern Iraq, the fear of harm claimed by Iraqi asylum-seekers from these parts of the

¹¹ 'Iraq's Baath Party Members Still Political Targets' 2010, *NPR News*, 11 May <http://www.npr.org/templates/story/story.php?storyId=126720060> – Accessed 20 April 2011

¹² 'Anti-Baathist Purge Spreads Across Iraq' 2010, Institute for War & Peace Reporting, 3 March <http://iwpr.net/report-news/anti-baathist-purge-spreads-across-iraq> – Accessed 20 April 2011

¹³ 'Iraq lifts election ban on suspected Baathists' 2010, *BBC News*, 3 February <http://news.bbc.co.uk/2/hi/8496169.stm> – Accessed 20 April 2011

¹⁴ 'Iraq PM ramps up attacks on Baathists before vote' 2009, *The Hindu*, source: *AP*, 23 November <http://www.thehindu.com/news/international/article53412.ece> – Accessed 20 April 2011

¹⁵ 'Iraq divided over role of ex-militants' 2011, *UPI*, 25 March http://www.upi.com/Top_News/Special/2011/03/25/Iraq-divided-over-role-of-ex-militants/UPI-24341301066183/ – Accessed 20 April 2011

¹⁶ United Nations High Commissioner for Refugees 2007, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section A

country should normally be considered to be well-founded”. Further, “[t]o the extent that the harm feared is from non-State actors, State protection is on the whole not available in Central and Southern Iraq”. As state agents themselves are accused of carrying out violence and other forms of human rights transgressions, an asylum-seeker should not be expected to seek the protection of authorities.¹⁷

87. The 2009 UNHCR report, however, notes that the security situation in Iraq has evolved, with important improvements in the overall security situation in many parts of the country.¹⁸ However, despite improvement in parts of the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Sala Al-Din, there is still a “prevalence of instability, violence and human rights violation by various actors, and the overall situation is such that there is likelihood of serious harm”.¹⁹ The UNHCR noted that the security situation in the Southern Governorates had largely stabilised following military operations in 2008, although concerns remain regarding the sustainability of these security improvements as they are largely based on fragile or temporary security arrangements.²⁰ In the three northern governorates, there is greater religious and ethnic tolerance, and non-Muslims and members of non-Kurdish ethnic groups are generally respected. There are, however, reports of arbitrary detention and ill-treatment of suspected political opponents by authorities.²¹
88. With regard to risk of harm from non-state actors, the Central Governorates are prone to weak government structures and infiltration of government security forces by radical elements from militia groups. As such, according to UNHCR, protection from State authorities would, in almost all cases, be unavailable.²²
89. In terms of any areas in Iraq where a former Ba’ath Party member may be able to relocate to without fear of attack, the Tribunal notes its Country Advice that no information was found specifically relating to the provision or availability of internal flight or internal relocation alternatives for those imputed to be former Ba’ath Party members.
90. According to UNHCR, many areas of Iraq – including the Central Governorates – remain highly unstable and insecure; travel is fraught with risks, and there are difficulties in accessing basic services and in ensuring basic economic survival in a situation of displacement. As such, an internal flight or relocation alternative would be largely unavailable. With regard to the Northern Governorates, UNHCR considers there are limited possibilities for an internal flight alternative, though individuals with certain profiles are not admitted there.²³
91. With regard to the Central and Southern Governorates of Iraq, UNHCR believes that an internal flight alternative is not available for persons fleeing harm by the state, as the agent of harm would be able to pursue the individual throughout the country. With regard to non-state

¹⁷ United Nations High Commissioner for Refugees 2007, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section C.2

¹⁸ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Introduction

¹⁹ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

²⁰ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

²¹ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

²² United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

²³ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

actors, no internal flight alternative would generally be available due to: the ability of non-state actors to perpetrate acts of violence with impunity; the ongoing levels of violence in the Central Governorates; access and residency restrictions; and the hardship faced in ensuring basic survival in areas of relocation.²⁴

92. The Tribunal has also gathered country information related to the issue of whether artists or musicians, well-known or otherwise, are targeted by non-state actors such as extremist groups. Country information clearly indicates that artists in Iraq, including musicians, are targeted by non-state actors, particularly extremist groups.
93. According to the UNHCR, targeted attacks and assassinations against certain professions increased throughout Central and Southern Iraq in 2007. Those targeted included academics, journalists, artists, doctors, judges, lawyers and athletes. Individuals were singled out by Shi'ite and Sunni extremists for reasons such as "public status, (perceived) political views, sectarian identity, engagement in "Western" activities or other alleged "un-Islamic" behaviour, and perceived wealth".²⁵ Artists, actors and singers in particular have been targeted by extremists who accuse them of engaging in "un-Islamic" activities and encouraging immoral behaviour. Many artists reportedly stopped performing after receiving threats, or for fear of being targeted.²⁶
94. It is noteworthy that the 2007 UNHCR report stated that artists known to have been serving the former government of Saddam Hussein were subject to attack.²⁷ According to the report, artists – along with other persons affiliated or associated with the former government – have been subjected to attacks, and continued to face serious risk of human rights violations.²⁸ That being said, according to the latest UNHCR report from 2009, recent security developments in some areas of Iraq have resulted in the "re-establishment of a certain amount of freedom for the civil population and strict Islamic rules appear to have been eased".²⁹ It is worth noting that while the 2007 UNHCR report included 'Artists' as a sub-category of 'Certain Professions' at risk of harm, no such category exists in the subsequent 2009 report.
95. In April 2011, the murders of an Iraqi surgeon and a university researcher indicated that insurgents were renewing their *modus operandi* of targeting professionals in the country. According an article from *AINA*, a dozen Iraqi academics, journalists, scientists and other prominent professionals have been murdered in recent months, suggesting that the Iraqi government "doesn't appear to be able to provide security" Hikamt Jalal, head of the International Society of Iraqi Scientists, believes that "[a] government that cannot protect its people does not deserve to be a government" The article noted that between 2004 and 2008, hundreds of scientists, doctors, scholars, university lecturers, artists, lawyers and others fled Iraq amid "the systematic slaughter of the country's leading intellectuals by killer gangs, including Islamist fanatics, who appeared determined to kill them or drive them into exile".³⁰

²⁴ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.C.1

²⁵ United Nations High Commissioner for Refugees 2007, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section B.2

²⁶ United Nations High Commissioner for Refugees 2007, *UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section IV.G.3

²⁷ United Nations High Commissioner for Refugees 2007, *UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section IV.G.3

²⁸ United Nations High Commissioner for Refugees 2007, *UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section IV.C.2

²⁹ United Nations High Commissioner for Refugees 2009, *UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section VIII.L

³⁰ 'Killer's Target Iraq's Ravaged Elite Again' 2011, *Assyrian International News Agency*, source: UPI, 12 April <http://www.aina.org/news/20110411205635.htm> – Accessed 20 April 2011

96. In December 2009, an article published in the *Scotland Herald* reported that after the fall of Saddam Hussein in 2003, Shi'a militias advocating fundamentalist Islam grew powerful in areas such as Nasiriya, in south-eastern Iraq. Extremist clerics treated musicians who strayed from religious themes with disdain, with several being attacked and beaten, while stores selling records were burnt down. The article claimed that in the past, politicians attempted to harness Nasiriya's music, while at the time of publication, militiamen harassed the town's musicians. According to a local Nasiriya musician, "[t]he Ba'ath regime wanted us to glorify Saddam Hussein...[w]e do not know what the current authorities want from us...[w]e are terrified if we sing". Sheikh Hakim al-Salihi, an ally of Shi'a cleric Muqtada al-Sadr, suggested that singing "is the devil's pipe and ruins the soul of prayer", while unaffiliated Shi'a cleric Tahsin al-Baqaa said that although singing was regarded as *haram* (forbidden), it did not necessitate killing. Instead, according to al-Baqaa, persuasion and guidance should be used to convert singers who defied religious doctrine. According to the head of Nasiriya's journalists' syndicate, there was little point raising the issue of protecting artists "through a security apparatus that was unable to impose the rule of law in the first place".³¹
97. In 2008, *The Guardian* reported that Iraqi singers, actors and artists were fleeing Iraq after dozens were "killed by Islamic radicals determined to eradicate all culture associated with the West".³² The report cited the Iraqi Artists' Association, which claimed that at least 115 singers and 65 actors had been killed since the invasion of Iraq. According to a Baghdad-based singer, the government was not providing artists with any protection. The singer had reportedly witnessed two friends being killed by Shi'a extremists for singing western songs at weddings; the extremists shouted that that was the price they had to pay for singing "the devil's words".³³
98. According to a 2007 report by NGO Free Muse, people in Baghdad have stopped listening to music in public in fear of attracting the attention of Islamic extremists who regard pop music as a source of corruption and shameful decadence. The report gave the example of a 20-year-old singer whose decapitated body was found with a note saying that "this was the destiny of those who sing American words".³⁴
99. There are, however, a number of reports suggesting that the situation in Iraq for artists and musicians – while at times dire – is not without hope. In 2008, Karim Wasfi, co-conductor of the Iraqi National Symphony Orchestra, said that many of Iraq's most skilled musicians had fled to neighbouring countries during the "chaos of recent years" Wasfi said that prior to a recent concert in the city of Babylon – which was attended by thousands of members of the religious Dawa Party – he obtained a *fatwa* stating that classical music was not *haram*.³⁵ According to *Middle East Online*, a 2008 exhibition in London was due to show works produced by 21 Iraqi artists since the 2003 invasion of their country. The exhibition "saluted the courage" of the artists, who had been forced to establish "a secret web to overcome threats posed by occupation forces, vicious militia groups, corrupt police and criminals".³⁶

³¹ 'Musicians silenced following attacks by Iraq's Shia militia ask: 'Why is everything forbidden?'' 2009, *Herald Scotland*, 7 December <http://www.heraldscotland.com/news/world-news/musicians-silenced-following-attacks-by-iraq-s-shia-militia-ask-why-is-everything-forbidden-1.990512> – Accessed 19 April 2011

³² 'Iraqi artists and singers flee amid crackdown on forbidden culture' 2008, *The Guardian*, 11 May <http://www.guardian.co.uk/world/2008/may/11/iraq> – Accessed 21 April 2011

³³ 'Iraqi artists and singers flee amid crackdown on forbidden culture' 2008, *The Guardian*, 11 May <http://www.guardian.co.uk/world/2008/may/11/iraq> – Accessed 21 April 2011

³⁴ 'Musicians and music listeners get killed' 2007, Free Muse website, 20 March <http://www.freemuse.org/sw18142.asp> – Accessed 19 April 2011

³⁵ 'The Cellist of Baghdad' 2008, *Forbes*, 11 September http://www.forbes.com/2008/09/10/iraq-symphony-orchestra-oped-cx_am_0911marlowe.html – Accessed 20 April 2011

³⁶ 'London exhibition shows Iraqi artists persevering' 2008, *Middle East Online*, 20 September <http://www.middle-east->

100. In 2008, *Reuters* reported that despite being looted in 2003, subjected to arson in 2004, and facing decreasing student numbers, Iraq's Music and Ballet School continued to operate in Baghdad. According to the report, some members of the National Symphony Orchestra – many of whom attended the school – have been kidnapped or killed in sectarian violence, while others have received death threats. Pupils and teachers fear being attacked by religious militants, who do not believe that music and dancing should be taught in schools, and the threat of violence has persuaded many parents to move their children to conventional schools. The school, however, continues to provide instruments, ballet costumes and musical scores to students, and according to a 17-year-old cellist, “[m]y most joyful time is at school....we forget the problems on the street, the war, the Americans...[w]e forget everything until we go home”.³⁷
101. Furthermore, no information was located to suggest that the treatment of secular musicians was any different to that of traditional musicians.
102. Finally, the Tribunal was unable to locate any information available on a musician ([specialty deleted: s.431(2)]) with the applicant's name, or variations thereof, who may have worked in Iraq or the UAE. A number of Dubai business directories listed [Employer B], the company the applicant claimed to work for as a musician in the United Arab Emirates (UAE), though only basic contact information for the company was found.³⁸

FINDINGS AND REASONS

The applicant's nationality and location

103. The Tribunal has had regard to a copy of the bio data pages of the applicant's passport. The Tribunal has no reason to doubt the authenticity of the details in the passport or the passport itself. The Tribunal finds that the applicant is an Iraqi citizen outside of his country.
104. The Tribunal has also taken into account evidence in the applicant's Iraqi passport that he has had rights of residence in the UAE. Further, the Tribunal has noted the contents of the letter from [Employer B] dated [in] August 2010, informing the applicant that “Due to obliging circumstances” the company in Dubai has decided to cancel his contract and consequently its sponsorship of his work visa is also cancelled. The applicant is therefore advised that his visa would expire [in] March 2011 (D1, folios 8-9). In any event, the visa stamp in the applicant's passport expired [in] March 2011. A translation of a letter from [lawyers deleted: s.431(2)] dated [in] September 2010 to the applicant advises the applicant that in their capacity as his legal consultants [Employer B] have terminated his services and already started the formalities of cancelling his residence and work card issued by the Department of Nationality and Residence, Ministry of Labour, and that the company does not owe him any payments. The Tribunal has taken into account the fact that the letter, apparently prepared by lawyers, does not make any reference to when the applicant's residency rights would expire or under the provision of which law.
105. The Tribunal has also taken into account a letter addressed “To Whom It May Concern” signed by the [official deleted: s.431(2)] of [Employer A], certifying that the applicant was employed by its company for the period February 2008 to June 2010. The letter confirms

online.com/ENGLISH/?id=27980 – Accessed 20 April 2011

³⁷ ‘Iraqi music school battles violence, persecution’ 2008, *Reuters*, 2 June <http://www.reuters.com/article/2008/06/02/us-iraq-school-idUSL1118868820080602?sp=true> – Accessed 20 April 2011

³⁸ ‘Aghani Art Production and Distribution – Free UAE Directory’ 2011, Free UAE Directory website <http://www.freeuaedirectory.com/Pages/Companies/CompanyDetails.aspx?Id=174179&t1=130&t2=13> – Accessed 20 April 2011

that the applicant worked as a commission agent for trade with Iraq in the export of [machinery] and spare parts. It states that due to the deteriorated commercial and trade situation in the UAE and the fall of sales to Iraq and other states, the applicant stopped working in that field.

106. The Tribunal has doubts that the applicant's employment and consequential right to reside in the UAE was terminated suddenly without the applicant's knowledge, given the fact that his residency there had been renewed without difficulty for a number of years. The Tribunal acknowledges that despite his apparent popularity as a musician, the applicant has given evidence that he was being discriminated against by the company toward the end of his time there. The fact remains, however, that the Tribunal is satisfied on the evidence before it, that the applicant no longer has a right to reside temporarily or permanently in the UAE and it is irrelevant whether this was brought about by actions of the applicant for the purpose of strengthening his claim for protection in Australia. Section 91R(3) does not apply here as this issue of third country protection is not relevant to Article 1A(2). Current authority indicates only that the right referred to in s.36(3) must be an existing right, and not a past or lapsed right, or a potential right or an expectancy.

107. In terms of whether the right in s.36(3) could be a lapsed right arose for consideration in *Suntharajah v MIMA* [2001] FCA 1391 (Gray J, 2 October 2001). In that case, the applicant held a valid UK student visa at the time of the Tribunal's decision, but claimed the visa would be cancelled on arrival in the UK because he had abandoned his course of study. The Court held that the Tribunal erred in law in failing to resolve that question. Justice Gray stated (at [17]-[19]):

In my view, before it is possible to be satisfied that a person has a right to enter and reside in another country, where the possession of a current visa is the right asserted, it is necessary to examine the nature of that visa, the circumstances in which it was granted and whether the factors warranting its revocation exist. A visa cannot be said to afford a right to enter and reside in a country if it is bound to be revoked as soon as its holder attempts to make use of it by entering the country.

...

If, on arrival, [the applicant's] visa was bound to be cancelled, it could not be said that the visa constituted a right to enter and reside. Before it could come to the conclusion that the applicant had a right to enter and reside in the UK, the Tribunal was bound to resolve that question.

108. The Tribunal observes that the proposition that the right to enter and reside cannot be a lapsed right is consistent with Australia's obligations under the Convention, and with Parliament's intention as reflected in Senator Patterson's 2nd reading speech (Hansard, Senate, 25 November 1999, p 10669).

109. Furthermore, as the relevant right must be legally enforceable, it is not enough that the applicant could make some arrangement to re-enter a country using the contacts he may have made over the years he lived in the UAE, where there is no present right to enter and reside there. In "*N1045/00A*" v *MIMA* [2001] FCA 1546 (Lee J, 2 November 2001), Lee J held that the Tribunal had erred in applying s.36(3) on the basis that the applicant, an Iraqi national, would be able to make some arrangement to re-enter Syria, with the assistance of an invitation from friends, and not on the basis that he had an enforceable right to enter Syria. His Honour held that s.36(3) did not operate upon a conclusion that an applicant for a

protection visa may take steps to seek re-entry to a third country. Rather, there had to be a conclusion that the applicant has a present right to enter that country and reside there. His Honour stated (at [30]-[32]) that the “right” in s.36(3) is more than an opportunity to seek the favourable exercise of a discretion. It must mean, at least, a degree of certainty in an applicant’s circumstances that arises out of an entitlement exercisable by the applicant.

110. With the above case law in mind, and having carefully considered the evidence overall, the Tribunal is satisfied that the applicant does not have a right to enter and reside in any other country, including the UAE, whether permanently or temporarily. The Tribunal finds he is therefore not excluded from Australia’s protection obligations by virtue of s.36(3).

The Tribunal’s consideration of issues concerning the applicant’s credibility

111. On the basis of the claims and evidence before the Tribunal, the Tribunal finds that the applicant is in general a witness of credit. The only issue, in addition to the applicant’s claims regarding how the expiry of his right of residency in the UAE came about, that raises some doubt in the Tribunal’s mind concerns the questions of if and how the applicant was made aware of the arrest warrant against him. However, the Tribunal is aware of the importance of adopting a reasonable approach to the finding of credibility. In *Minister for Immigration and Ethnic Affairs and McIllhatton v Guo Wei Rong and Pan Run Juan* (1996) 40 ALD 445, the Full Federal Court made comments on determining credibility. The Tribunal has had particular regard to the reasoning of Foster J (at 4820 that:

...care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.

112. In the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, the High Court also made comments on the correct approach to determining findings on credibility. Kirby J said at 39:

First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is not desirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the “real chance” of persecution required by *Chan*.

113. Alert to the Courts’ guidance in these cases, the Tribunal has taken into account the applicant’s response to the inconsistencies in his evidence that were put to him following the procedure set out in section 424AA of the Act. The Tribunal has given careful consideration to the applicant’s inability to explain clearly when he first saw the arrest warrant or how it was sent to him. The Tribunal has had regard to the fact that if the applicant’s claims are true, he would have been sent the warrant around the beginning of June last year. The Tribunal is of the view that his memory of the event would not have been clouded by the elapse of time; and that he ought to have remembered picking the document up from wherever it had been faxed to; or printing it out from a computer somewhere; or receiving the document in a letter through the post. The Tribunal has considered that the applicant’s inability to clearly state how he received the arrest warrant may be explained by the fact that his claims regarding his departure from the UAE also lack credibility.

114. Nonetheless, assessing whether an applicant has a well-founded fear of being persecuted for one of the Convention reasons obviously involves questions of degree. The High Court in *MIEA v Guo* (1997) 191 CLR 559; and in *Abebe v The Commonwealth* (1999) 197 CLR 611 explained the way the real chance test should be applied to the facts as found. The Court in *Guo* explained that in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant. Thus, for example, if the Tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a well-founded fear of future persecution (at 576, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ). This is commonly known as the “what if I am wrong?” approach to the real chance test: *MIEA v Wu Shan Liang* (1996) 185 CLR 259, per Kirby J at 293. The “what if I’m wrong” test was further explained by the Full Federal Court in *MIMA v Rajalingam* (1999) 93 FCR 220, Justice Sackville (North J agreeing) held (at 239) that it followed from *Guo* and *Abebe* that there may be circumstances in which the decision maker must take into account the possibility that alleged past events occurred even though it finds that those events probably did not occur. The Court held (at 240):

When the RRT is uncertain as to whether an alleged event occurred, or finds that, although the probabilities are against it, the event might have occurred, it may be necessary to take into account the possibility that the event took place in considering the ultimate question. Depending on the significance of the alleged event to the ultimate question, a failure to consider the possibility that it occurred might constitute a failure to undertake the required reasonable speculation in deciding whether there is a “real substantial basis” for the applicant’s claimed fear of persecution.

115. In this case, given the country information available, the significance of the alleged way in which the applicant discovered that he was the subject of an arrest warrant in Iraq to the ultimate question of whether or not he faces a real risk of persecution should he return to Iraq is small. Even if the Tribunal were to make a positive finding that there is no arrest warrant issued against the applicant, for the reasons that follow, the Tribunal finds that the applicant does face a real chance of being persecuted now and in the reasonably foreseeable future if he returns to Iraq.

The Convention grounds

116. The Tribunal finds that the applicant is a Sunni male from Iraq.

117. Further, the Tribunal is satisfied from the evidence of the applicant’s involvement in the music industry in the UAE and from his ability to play his [instrument] at the hearing, that he is a professional [musician] and that the information concerning his past career in his application forms for an Entertainment Visa as well as the Protection visa is true and credible. The Tribunal notes that no country information was available in the public domain, at least in English, specifically referring to the applicant. Nonetheless, the Tribunal is satisfied that since the applicant has in the past performed in Arabic countries, it is not unreasonable that his name does not appear in English language sources. The Tribunal is satisfied that the flyers and CD covers on the Departmental file referencing the applicant as a musician are authentic and demonstrate that he is a recognised artist in the Middle East.

118. The Tribunal also finds that the applicant is a former member of the Ba’ath party, and accepts his claim to have only joined the party to support Arab unity and that he did not endorse the

regime of Saddam Hussein. Further, the Tribunal finds that during the reign of Hussein, the applicant was forced to entertain high ranking members of the regime including at parties held by Hussein and his sons. The Tribunal is satisfied that in order to avoid the humiliation and abuse the applicant endured at these parties, he moved to the UAE in 1998 where he worked as a musician, appearing on television and working with Arab and foreign singers.

119. On the basis of these findings, the Tribunal finds that the applicant's Sunni religion and his political opinion are intertwined essential and significant reasons for the relevant harm feared for the purposes of s 91R(1)(a). Also intertwined with those reasons, but an even more significant reason for the relevant harm feared, is the applicant's membership of the particular social group of Iraqi musicians considered infidels by Islamists in Iraq.

120. In *Morato v MILGEA* (1992) 39 FCR 401 Lockhart J said (at 416):

The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. ...

In my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression.

121. *Applicant S v MIMA* (2004) 217 CLR 387 remains the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of "particular social group" in this way at [36]:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand.

122. In this case, the group is recognised by their musicianship and the fact that their music is considered by fundamentalist Islamists in Iraq to be opposed to the teachings of Islam. The group is not defined by a shared fear of persecution; their musicianship and its associated, ostensible offence to Islam is what distinguishes the group from society at large.

The applicants fear of persecution

123. The Tribunal has taken into account the stamps in the applicant's Iraqi passport. These stamps corroborate the applicant's claim that following the fall of the Hussein regime, he returned to Iraq in October 2003.

124. The applicant claims the situation in Iraq deteriorated after 2003 when Islamic groups and militias started to attack people on the bases of identity. In particular, the applicant claims that intelligence agencies of foreign countries (including Saudi Arabia, Iran and the US) operating in Iraq targeted former Ba'athists as well as artists, singers and musicians; and that artists were abducted, beaten, stolen from, and killed. The applicant also claims that his friend, who was a dean of artists, was killed.
125. The Tribunal accepts these claims noting country information set out above that since the fall of the Hussein regime, and in particular since the Shi'ite rise to political power in the 2005 elections, people affiliated or associated with the former government of Iraq, either through membership in the Ba'ath party or as a result of their functions or profession, have been subject to systematic attacks, mainly by Shi'ite militias: see United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section VIII.G.
126. In 2008, the applicant claims that he started work with a UAE export company and tried to maintain a low profile. Despite this, he claims that he was identified by two men as a former Ba'ath party member on one of his business trips. In consequence, when he returned to Iraq in 2010, he was informed by a friend that a warrant for his arrest had been issued against him. In his written statement, the applicant states that after he returned to the UAE he informed the company he was working with what had happened to him in Iraq and his employment with them was terminated. The documents themselves suggest that his employment was terminated as a result of the economic downturn in the global economy.
127. As discussed above, the Tribunal has doubts about how the applicant became aware of the arrest warrant; and about his claims as to why or how his employment, and consequently, his right to reside in the UAE were terminated. However, for the reasons given above, in terms of assessing the applicant's claims against his country of nationality, Iraq, the Tribunal notes that there is sufficient country information to support a finding that the applicant would face a serious risk of persecution in the reasonably foreseeable future if he returns to Iraq regardless of his claims about how he obtained the copy of the arrest warrant; if there is a warrant at all; or the reasons why his employment in the UAE was terminated.
128. In terms of the applicant's fear of persecution in the foreseeable future, the applicant claims that if he returns to Iraq, he fears he will be targeted for arrest and questioning by Iraqi authorities about his involvement in the Ba'ath party. He also claims he will face abduction, humiliation, imprisonment and murder by non-state actors including militias like the Al Sadr groups and Badr forces, Al Qaeda, and hired assassins targeting former Ba'athists. He claims he will not only be targeted because he is a former member of the Ba'ath party, but also because he is a well-known musician and therefore considered an unbeliever.

The applicant's claims in the light of country information

129. These claims find support from the country information that is before the Tribunal and set out above.
130. In terms of the applicant's claims to fear persecution on the basis that he is a former Ba'athist and a Sunni Muslim, the Tribunal notes that the UK Home Office reported in 2010 that by April 2009, former Ba'ath party members were not being 'systematically targeted', but individuals are still victims to 'personal revenge attacks'. The *UK Home Office* also reports that the Shi'ite dominated government is discriminating against former Ba'athists in public sector

employment, and it cannot be ruled out that Ba'ath Party affiliation may increase the risk to a detainee of being subjected to unfair treatment or abuse if held in a Shi'ite dominated detention facility.

131. The less recent 2007 *UNHCR Guidelines* reports that Sunni Arabs have been targeted by Shi'ite death squads and elements of the Iraqi Security Forces (ISF). While members and associates of the Ba'ath Party have been similarly targeted, the degree to which they are at risk depends on the extent to which they are identified with Ba'athist ideology and human rights abuses, the rank or position held, and public recognition. Further, the Tribunal notes that many low-level Ba'ath officials have also been targeted at the community level, and personal revenge killings against perpetrators of detention, torture or other human rights violations have occurred (United Nations High Commissioner for Refugees 2007, *UNHCR Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August)
132. *NPR News* reported in 2010 that critics have argued that the Justice and Accountability Commission (a.k.a. the De-Ba'athification Commission) has been politicised, and despite US calls for the commission to be scaled back, commission leaders have denied they are being muzzled, and say their work is far from finished ('Iraq's Baath Party Members Still Political Targets' 2010, *NPR News*, 11 May <http://www.npr.org/templates/story/story.php?storyId=126720060> – Accessed 20 April 2011). Further, the *Institute for War and Peace Reporting*, has stated that government officials linked to the banned Ba'ath Party could face punishment in an extension of a purge in the lead up to the 7 March elections. It reports that the Justice and Accountability Commission, charged with eradicating Ba'athist influence, was reportedly being pressured by Shi'a parties to investigate regional officers suspected of Ba'athist sympathies. Shi'a officials rejected claims that the purge of alleged Ba'athists was an attempt to undermine election rivals, and insisted their actions were necessary and lawful ('Anti-Baathist Purge Spreads Across Iraq' 2010, Institute for War & Peace Reporting, 3 March <http://iwpr.net/report-news/anti-baathist-purge-spreads-across-iraq> – Accessed 20 April 2011).
133. In particular, the Tribunal notes the *Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* and the statement in "Part III. Conclusion" that:

The situation in Iraq is still evolving. UNHCR will continue to monitor developments in the country and will update the April 2009 UNHCR Guidelines once it judges that the situation is sufficiently changed. In the interim, UNHCR advises those involved in the adjudication of international protection claims lodged by asylum-seekers from Iraq and those responsible for establishing government policy in relation to this population continue to rely on the April 2009 UNHCR Guidelines. Accordingly, the current UNHCR position on returns to Iraq also remains unchanged.
134. As discussed above, the 2009 UNHCR report notes that the security situation in Iraq has evolved, with important improvements in the overall security situation in many parts of the country. However, despite improvement in parts of the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Sala Al-Din, there is still a "prevalence of instability, violence and human rights violation by various actors, and the overall situation is such that there is likelihood of serious harm" The UNHCR noted that the security situation in the Southern Governorates had largely stabilised following military operations in 2008, although concerns remain regarding the sustainability of these security improvements as they are largely based

on fragile or temporary security arrangements.³⁹ In the three northern governorates, there is greater religious and ethnic tolerance, and non-Muslims and members of non-Kurdish ethnic groups are generally respected. There are, however, reports of arbitrary detention and ill-treatment of suspected political opponents by authorities.⁴⁰

135. On the basis of the above country information, the Tribunal acknowledges that since the applicant was not politically active in the Ba’ath Party, he is less likely to be targeted on the basis of his political opinion by state and non-state actors than a person with a record of political involvement in the former regime, particularly someone suspected of human rights abuses. On the other hand, the Tribunal acknowledges that the applicant is a recognised musician and a Sunni Muslim, who could easily be perceived as someone who supported the regime in public ceremonies and events.
136. More importantly, the Tribunal notes the country information referred to above demonstrates that the applicant is at risk of persecution in Iraq simply because he is a musician (see in particular, United Nations High Commissioner for Refugees 2007, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, August, Section B.2; ‘Iraqi artists and singers flee amid crackdown on forbidden culture’ 2008, *The Guardian*, 11 May <http://www.guardian.co.uk/world/2008/may/11/iraq> – Accessed 21 April 2011). The Tribunal has had regard to recent reports refer to the murders of surgeons, academics, scientists and journalists, which indicates insurgents are renewing their *modus operandi* of targeting intellectuals and professionals and that there is no indication that they would not include musicians and artists in their sights. (‘Killer’s Target Iraq’s Ravaged Elite Again’ 2011, *Assyrian International News Agency*, source: *UPI*, 12 April <http://www.aina.org/news/20110411205635.htm> – Accessed 20 April 2011). The *Herald Scotland* reports that Nasiriya musicians in particular have been forced underground due to harassment and threats by militia (<http://www.heraldscotland.com/news/world-news/musicians-silenced-following-attacks-by-iraq-s-shia-militia-ask-why-is-everything-forbidden-1.990512> – Accessed 19 April 2011) but acknowledges that Nasiriya is about 370 km southeast of Baghdad and that the applicant is from Al-Najaf, Iraq another city south of Bagdad.

Does the applicant face a real chance of being persecuted?

137. In its review of the country information and the facts of this case, the Tribunal has borne in mind a fear of being persecuted is well-founded if there is a “real chance” of being persecuted. A “real chance” is a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance. According to Mason CJ in *Chan v MIEA*, the expression “a real chance” (at 389):

... clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring. ... If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a fifty per cent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.

³⁹ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

⁴⁰ United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section IV.A.1

138. In the same case Dawson J stated (at 397-398):

.. a fear can be well-founded without any certainty, or even probability, that it will be realized. ... A real chance is one that is not remote, regardless of whether it is less or more than 50 per cent.

139. Justice Toohey stated (at 407):

A 'real chance' ... does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial.

140. Similarly, according to McHugh J (at 429):

[A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. ... an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be ... persecuted. Obviously, a far-fetched possibility of persecution must be excluded.

141. Thus, as the High Court confirmed in *MIEA v Guo, Chan* establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent: *MIEA v Guo* (1997) 191 CLR 559 at 572. Importantly, the Tribunal notes that "unlikely" is not the correct test and that a fear may be well-founded for the purpose of the Convention even though persecution is unlikely to occur: *Chan v MIEA* (1989) 169 CLR 379 at 429 (see also *MIEA v Guo* (1997) 191 CLR 559 at 573, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow JJ. IN that regard, the Tribunal has followed the joint decision of Jenkinson, Spender & Lee JJ in *MILGEEA v Che Guang Xiang* (unreported, Federal Court of Australia, 12 August 1994) where the Court stated (at 17): "The delegate may have thought it was unlikely that [the applicant's] fears would be realised but the question to be answered was whether the prospect of persecution was so remote as to demonstrate the fear to be groundless".

142. Therefore, applying the above principles of case law, and on the basis of the evidence overall, including country information, the Tribunal finds that the applicant faces a real risk of harm now and in the foreseeable future if he returns to Iraq.

Section 91R

143. Further, the Tribunal accepts from independent country information that the relevant harm feared involves systematic and discriminatory conduct for the purposes of s 91R(1)(c), noting that the information makes clear that former members of the Ba'ath Party and Sunni Muslims have been targeted by the Iraqi authorities for discrimination in public office and employment. Moreover, the fear of being arrested, and or killed by state and non-state actors for reasons of his religion, political opinion or because as a musician in Iraq he is a member of a particular social group, amounts to 'serious harm' for the purposes of s 91R(1)(b) of the Act. In resolving that question, the Tribunal has had regard to the examples of serious harm enumerated in s 91R(2) of the Act, which include: a threat to the person's life or liberty; significant physical harassment of the person.

State protection

144. In terms of state protection, the Tribunal notes the country advice cited above that according to the United Nations High Commissioner for Refugees (UNHCR), Shi'ite-dominated Iraqi Security Forces (ISF) and militias – often wearing police or Special Forces uniforms –

regularly target members of the Sunni population, as well as former members of the Ba'ath Party and security services. The fact that Shi'ite militias have infiltrated or collaborated with the ISF blurs the line between state and non-state actors (United Nations High Commissioner for Refugees 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April, Section III.C.2). It is noteworthy that the term Ba'athist is widely understood to refer to Sunni Arabs in general. Moreover, given the level of insecurity and instability in Iraq, the Tribunal finds that the state is unable to protect the applicant from non-state actors targeting musicians on the basis of religion. The Tribunal is therefore satisfied that state protection against the feared persecution in accordance with international standards would not be available to the applicant in Iraq.

Conclusions

145. Weighing all of the above matters together, and noting the interrelated reasons of the applicant's imputed political opinion, his religion and his membership of the particular social group of musicians in Iraq, the Tribunal accepts that the applicant faces a real chance of serious harm for reasons of his political opinion, his religion and/or his membership of a particular social group if returned to Iraq now or in the reasonably foreseeable future. The Tribunal also accepts that the feared harm constitutes persecution and that the essential and significant reasons for that persecution are the fact that he is a musician in Iraq and therefore a member of a particular social group and that as a musician he would also be targeted because of religion. Furthermore, the Tribunal finds that he would be persecuted for the political opinions that would be imputed to him as a former member of the Ba'ath Party and because he is a Sunni Muslim. It follows that the Tribunal accepts that the applicant has a well-founded fear of persecution for more than one Convention reason should he return to Iraq now or in the reasonably foreseeable future.

Internal relocation

146. On the basis of country information available to the Tribunal, particularly the 2009 and 2010 UNHCR Guidelines, the Tribunal finds that musicians face discrimination and mistreatment throughout Iraq to varying degrees; and that Sunni Muslims, particularly those associated with the former Ba'ath Party face discrimination and are also being targeted throughout Iraq. In particular, the Tribunal notes that many areas of Iraq – including the Central Governorates – remain highly unstable and insecure; travel is fraught with risks, and there are difficulties in accessing basic services and in ensuring basic economic survival in a situation of displacement. As such, an internal flight or relocation alternative would be unreasonable. With regard to non-state actors, no internal flight alternative would generally be available due to: the ability of non-state actors to perpetrate acts of violence with impunity; the ongoing levels of violence in the Central Governorates; access and residency restrictions; and the hardship faced in ensuring basic survival in areas of relocation.
147. In terms of the applicant's own personal circumstances, the Tribunal notes that as a musician, he would be required to maintain a national and public presence in Iraq for his livelihood. It is also likely that he would be required to travel. The Tribunal accepts that internal relocation to another part of Iraq is not reasonable in all the circumstances.

CONCLUSIONS

148. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

149. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.