REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

	REFUGEE APPEAL NO. 75692
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AT AUCKLAND	
Before:	RPG Haines QC (Chairperson)
	PJ Andrews (Member)
Representing the Appellant:	S Laurent
Date of Hearing:	4, 5 & 6 October 2005
Date of Decision:	3 March 2006

DECISION

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INTRODUCTION

[1] This is a conjoined appeal against the decision of a refugee status officer given on 26 July 2005 declining the grant of refugee status to the appellants who are both citizens of the Republic of Iraq.

[2] The appellants are husband and wife. The facts on which their joint refugee claim are based relate almost exclusively to the male appellant and for convenience he will be referred to in this decision as "the appellant". The female appellant will, unless the context otherwise requires, be referred to as "the appellant's wife" or "the wife".

[3] Procedurally, the only points necessary to record are first, that the appeals were heard jointly, the evidence in the one appeal being treated as evidence in the other. Second, at the conclusion of the hearing the appellants were granted leave to file further evidence and submissions. The evidence and submissions filed on 3 November 2005 have been taken into account in the preparation of this decision. By letter dated 2 February 2006 the Authority invited the appellants to comment on further country information. In response the Authority received submissions dated 8 February 2006. Further evidence was enclosed with a letter dated 10 February 2006. All of this new material has been taken into account by the Authority in reaching its decision.

BACKGROUND

[4] From the late 1960s to the early 1980s, the appellant was a senior official in the Iraqi government dominated by the Arab Ba'ath Socialist Party. He served as a government minister in the late 1970s until the early 1980s at which point he retired on health grounds. He subsequently found other employment in the period 1985 to 1991. He then returned to retirement.

[5] In late 2003 he and his wife first applied to the New Zealand Immigration Service (NZIS) for visitor visas for the purpose of visiting the wife's relative, a former Iraqi national who is a New Zealand citizen. Due to major health problems, that relative is unable to travel. The wife and her relative had not seen each other for nine years. On 26 March 2004 the appellant and his wife were issued with visitor visas valid for entry to 26 June 2004. However, due to complications arising from the United States-led occupation of Iraq, they were unable to travel to New Zealand prior to the expiry of the visas.

[6] In October 2004 they applied again to the NZIS for visitor visas to visit the relative in New Zealand. The applications were once again approved and the visas were issued on 21 December 2004 valid to 17 March 2005. The appellant and his wife arrived in New Zealand lawfully on 12 March 2005 travelling on genuine Iraqi passports and were each granted a visitor's permit valid to 12 September 2005.

[7] It is the misfortune of the appellants that the year 2005 was an election year in New Zealand. Election Day was 17 September 2005. On Friday, 29 April 2005 it was reported that Hon Winston Peters, leader of the political party known as New Zealand First, had claimed that an unnamed former high-ranking minister in Saddam Hussein's government was "hiding in New Zealand seeking refugee status" having "moved to New Zealand about a month ago". The report also stated that it had been said by a spokesman for the (then) Minister of Immigration (Hon Paul Swain) that the Minister had no knowledge of any application of that nature and nor did the NZIS. See "Saddam minister in NZ", *New Zealand Herald*, Friday, April 29, 2005.

[8] On Monday, 2 May 2005 the Minister of Immigration issued a press statement, "Former Iraqi diplomat's visitor's permit revoked". In this document he revealed that the Department of Labour had that day revoked the visitor's permit of an unnamed Iraqi man who had been a **diplomat** in the Saddam Hussein government. According

to the press statement that man and his wife had entered New Zealand in 2004 and had applied for residence. The Minister stated that the revocation followed the allegations made the previous week that a **minister** in the Saddam Hussein government was in New Zealand and had applied for refugee status.

[9] It is plain from the terms of the press statement issued by the Minister of Immigration that the person whose permit was revoked on 2 May 2005 was not the appellant. The political significance of this fact was immediately exploited by Hon Winston Peters who renewed his allegation that a former minister of the Saddam Hussein regime was in New Zealand. He was able to portray the government as backtracking on its earlier denial and as having been forced to disclose the presence in New Zealand of a second person who had held a senior position in the Saddam Hussein government. Substantial publicity was given to this development: Ainsley Thomson, "Security lapses let Saddam man in", *New Zealand Herald,* Tuesday, May 3, 2005, front page. The political exchanges and reportage portrayed the case in terms of border security, New Zealand being a haven "for such people" and an administration which was unable to protect the true interests of New Zealand.

[10] On the following day, Tuesday 3 May 2005, amidst much publicity, Hon Winston Peters named in Parliament the appellant as the member of Saddam Hussein's regime to whom he had earlier been referring. He pressed the point that with the government's admission of the preceding day as to the presence in New Zealand of a second Iraqi (the diplomat whose permit had been revoked), New Zealand's border security was allegedly in tatters. Mr Peters was also reported as saying that the appellant was a security risk. See Ainsley Thomson, "Crackdown follows Iraqi visa blunders", *New Zealand Herald,* Wednesday, May 4, 2005, front page. In the same article it was reported that on the evening of Tuesday, 3 May 2005 the Minister of Immigration had called "a rushed media conference" where he confirmed the presence

of the appellant in New Zealand and acknowledged that he (the Minister) had given orders to begin the process of revoking the appellant's visitor permit.

[11] By notice dated Wednesday, 4 May 2005 the Minister, acting pursuant to s 33 of the Immigration Act 1987, revoked the visitor permits held by the appellant and his wife, permits which were valid to 12 September 2005. The Authority has seen no evidence to suggest that either was interviewed prior to the Minister's decision or given any other opportunity to be heard. The reason for the revocation was stated in the following terms:

> **The reason** for the revocation of your temporary permit is that:-
>
> (a) You were an official of the oppressive Ba'ath regime, which had an extremely poor human rights record. Some members of the regime are facing trial on serious charges. As you were closely associated with that regime, I am not satisfied you are a suitable person to hold a permit to be in New Zealand.
>
> (b) I am not satisfied you are a bona fide visitor to New Zealand.

[12] By the end of the week, in a "pre-election snapshot" published on Sunday 8 May 2005, it was reported by Jonathan Milne in "And the hits just keep on coming", *New Zealand Herald*, Sunday, May 8, 2005, p 3 that:

> ... poll respondents rate [Mr Peters'] honesty and integrity as second only to that of Prime Minister Helen Clark.
>
> The NZ First leader has leapt to 17.7 percent in the preferred Prime Minister stakes after last week exposing an immigration service blunder in admitting two members of Saddam Hussein's brutal regime to New Zealand.

[13] The publicity led to other consequences. On Monday, 9 May 2005 both appellants submitted refugee applications, claiming that the publicity given to their circumstances both in New Zealand and in Iraq meant that it was now unsafe for them to return to Iraq. Through their lawyer, the appellants publicised the making of their refugee applications, explaining that their privacy "had been irreparably compromised by Mr Peters". See NZPA, "Iraqi applies for refugee status", *New Zealand Herald*,

Tuesday, May 10, 2005, p A5. This report was accompanied by a very recent photograph of the appellant.

[14] The appellants say (and the Authority has no reason to doubt them on this point) that they would have left New Zealand prior to the expiry of their visitor permits had they not been victimised for political purposes, thereby forfeiting their privacy. In this sense their refugee claims are *sur place* claims. The UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* at para 94 explains:

> The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee "*sur place*".

[15] The appellants were interviewed by a refugee status officer on 1 June 2005. In a decision published on 26 July 2005 they were advised that their refugee claims had been declined on the grounds that should they return to Iraq there was no real chance of their being persecuted for a Convention reason. In short, they did not satisfy the "well-founded fear" standard required by the Refugee Convention.

[16] Against this background the case for the appellants will be set out followed by the Authority's analysis of that claim.

THE APPELLANTS' CASE

[17] It is not intended to repeat at length the extensive evidence received by the Authority. Only the main features follow.

[18] The appellant, a Sunni Muslim, is in his late 60s and his wife is in her mid-60s. He is in indifferent health, having suffered several strokes since 1980, the most recent being in mid-2005 (after the events set out above), in December 2005 and January 2006. He is described in a report produced to the Authority as having multiple medical problems. They include short-term memory problems and, since the revocation of his temporary permit, general anxiety disorder and depression. The medical opinion submitted to the Authority nonetheless acknowledges that his insight is still intact with adequate judgment. The Authority has taken all these factors into account in assessing the appellant's case and his credibility.

[19] After completing his secondary education the appellant enrolled at college near Baghdad. In July 1958 the monarchy was overthrown in a military coup and Iraq declared a Republic. While studying at the college the appellant in 1960 joined the Ba'ath Party and remained a member until his retirement from government service in 1982.

[20] The appellant graduated from college with a BA and after completing an eighteen month period of compulsory military service started work as a teacher.

[21] On 17 July 1968 there was a successful Ba'athist-led coup. In the same year the appellant successfully applied for a position in a government ministry where he was appointed Acting Deputy Director-General. The appellant rose rapidly through the ranks of the civil service. After four years as Acting Deputy Director-General he was appointed Acting Director-General. In the mid-1970s he was Governor of a province before returning to the government ministry where he then served as Deputy to the relevant Minister.

[22] On 16 July 1979 President Al-Bakr resigned in favour of (then) Vice-President Saddam Hussein. A week after Saddam Hussein took power the appellant was made a

Minister, a position he held until strokes in 1980 and 1981 forced his retirement in 1982.

[23] Having an insufficient retirement income, the appellant in 1985 obtained a position with a Baghdad-based organisation until his final retirement in 1991.

Ba'ath Party membership

[24] The Arab Ba'ath Socialist Party was in power in Iraq from 1968 until 2003. An overview of the power structure in place at the time the appellant was at the peak of his career is provided by the United States Department of State, *Country Reports on Human Rights Practices for 1983: Iraq* (February 1984) at 1268:

> Iraq is ruled by the Arab Ba'ath Socialist Party of Iraq through a Revolutionary Command Council. The Council has both executive and legislative authority and, in effect, rules by decree under the provisional Constitution of 1968. Saddam Hussein holds near absolute power as President of the Republic and Chairman of the Revolutionary Command Council.
>
> Cabinet ministers, with administrative and some legislative responsibilities, and governors of each of the eighteen provinces, who have extensive administrative powers, are appointed by the Council. A National Assembly, elected in 1980, has limited authority and is guided by Ba'ath Party views.
>
> ...
>
> Political rights in Iraq are sharply limited. Effective rule is in the hands of a small elite within the Ba'ath Party, and little dissent from government policies is tolerated....

[25] The role of the Ba'ath Party is more particularly described at *op cit* 1278:

> Iraq is ruled by a small group of officials headed by Saddam Hussein. Most of the members of this group are linked by family roots in the town of Tikrit. This group rules by dominating the Ba'ath Party. The party has a large membership, but only some 10,000 "active members" participate meaningfully in party activities. Political power is concentrated first in the Tikriti group, and then more widely among the Sunni Arabs. Shi'a and Kurds hold important positions, but not the most political powerful ones.
>
> There are two other legal political parties, both Kurdish. They and the Ba'ath Party constitute the Patriotic and Progressive National Front, essentially a vehicle of support for

> the Government. The two non-Ba'ath parties carry on only limited activity. Members of the Iraqi military or security services may engage in political activities only within the Ba'ath Party. Membership in the party is not required for appointment to senior government positions, but normally is necessary to attain political influence....

[26] As mentioned, the appellant joined the Ba'ath Party in 1960 when he was studying at college. He told the Authority that his reason for joining was that he was attracted by the goals of the party which he described as independence, unity, freedom and socialism. There were four stages of membership, starting with the initial stage of supporter and progressing to member and finally to member of a branch. He personally moved through all four stages. He was a supporter from 1960 to 1968, a member from 1968 to 1969 and graduated to membership of a branch in 1969 or 1970. He says he never held a leadership role in the party. His evidence to the refugee status officer was that he retired from the party when he retired as a government minister, but he told the Authority that he continued to attend party general meetings, conferences and lectures until approximately 2000.

[27] The appellant also told the Authority that membership of the Ba'ath Party was a condition to promotion to senior levels in the civil service and that membership was seen as a test of loyalty to the Ba'athist regime.

The appellant's role as member of Cabinet

[28] A brief outline of the relationship between the Revolutionary Command Council and the Cabinet of Ministers is contained in the quote immediately above taken from the Department of State, *Country Reports on Human Rights Practices for 1983: Iraq*. The evidence recorded by the refugee status officer at p 398 of the file was in similar terms:

> Saddam became President of Iraq and appointed a new cabinet of ministers. The individuals whom he appointed to senior positions within Government were high ranking members within the Ba'ath Party. Saddam exercised strict control over the individuals he appointed and exercised his ability to remove them from power when required.

> Under Saddam, the government structure comprised of two bodies: the Revolutionary Command Council ("RCC") and a cabinet of ministers. The RCC led by Saddam had ultimate authority and was responsible for determining all issues of importance, including political matters. Saddam was responsible for appointing members to the RCC, however, [the appellant] did not know how prospective members were chosen.
>
> The cabinet, which comprised of ministers such as [the appellant], was simply there to put matters determined by the RCC into practise and had limited authority. Some of the members of the RCC were also cabinet ministers. [The appellant] was not a member of the RCC.

[29] The appellant's evidence to the Authority was that Saddam Hussein presided over meetings of the cabinet and while he permitted discussion, final decisions were made by him. Cabinet had no responsibility for security matters or defence. This was the province of the Revolutionary Command Council.

Events in New Zealand and their repercussions in Iraq

[30] As the events in New Zealand have been more fully set out under "Background", it is not intended to repeat them here. In summary, the appellant and his wife arrived in New Zealand on 12 March 2005 to visit the wife's relative. On 3 May 2005 he was named in Parliament as a former senior member of the Saddam Hussein regime and (among other things) described as a security risk. Under the full glare of publicity his visitor permit was revoked and a week later the refugee application was lodged.

[31] The appellant has produced evidence which shows that in the period 5 May 2005 to 10 May 2005 Arabic language news sources (radio, television, print, internet) available in Baghdad and presumably in Iraq generally carried reports of events in New Zealand. We do not intend an exhaustive summary of the contents of these largely brief items. An overall reading shows that the appellant is referred to in these reports by name as a person who, while in New Zealand, was identified as a former senior member of the Saddam Hussein regime. The reports repeat the various claims made in New Zealand that he had been involved in the regime's chemical weapons

programme, that he had killed fellow Iraqis, that he was in power when massacres against Kurds in the north occurred, that he had entered New Zealand on a forged passport and had applied for refugee status after attempts had been made by the New Zealand government to expel him.

[32] Similar reports appeared in English language internet-based news services over the same brief period of time in places as diverse as Pakistan, China and Taiwan.

[33] The appellant says that he cannot "prove" every item in which publicity has been given to his case and in which the grave allegations made against him are repeated. He submits that he can, however, show that damaging allegations purportedly linking him to severe human rights abuses, if not crimes against humanity, have stripped him of the obscurity which his many years of retirement from the Saddam Hussein regime in 1982 had given him. At a time when Saddam Hussein and senior members of his government are standing trial in Baghdad for human rights abuses and at a time when old scores are being settled in Iraq, this unwelcome "profile" now places him at risk of serious harm at the hands of anyone who, whether correctly or not, attributes to him blame for any misdeed he or the Saddam Hussein regime committed either during or after his personal tenure in the government of that regime. The fact that he is a former Ba'athist and a Sunni are said to further increase the risk of harm.

[34] In addition to the publication evidence the appellant relies on the following:

(a) At the time when publicity was being given in Iraq to the appellant's problems in New Zealand, a relative who is a teacher in Iraq was harassed by students. No details have been given to the appellant or his wife. The relative has not subsequently experienced any problems, nor has another relative of the appellant who also lives in Iraq. Nor (subject to one possible exception) have any relatives of the appellant or of his wife encountered problems arising from

the appellant's case. No member of the family on either side has reported enquiries being made by known or unknown persons about the appellant's whereabouts.

(b) The possible exception referred to relates to two relatives of the appellant who were kidnapped in approximately June 2005. Their bodies were later found near the border with Iran. It is not known who took them or why they were taken. While it is not known if the incident is related to the appellant's case, the appellant's wife has expressed the belief that there is a connection because there was no demand for money and the relatives had had no contact with the American occupying forces (an acknowledged risk factor, indicating "collaboration"). She has said in her statement dated 14 October 2005:

> 7. Therefore I believe that the kidnappers did this because they learned that my husband had been in Saddam's government. I cannot know for sure, but I think that they wished to get some kind of revenge against him. The kidnappers may have been Shi'a, and it may also have been because our family is Sunni. However, I do not know any of this for certain.

(c) The appellant's relatives have advised him not to return to Iraq as the situation is dangerous for him.

[35] Included in the closing submissions for the appellant were the following points:

(a) First, the appellant has never, prior to the events in New Zealand, advanced a claim that he faced reprisals for Ba'ath Party membership or for his role in government. It is the fact of public exposure in New Zealand that was the catalyst for the refugee application. Nothing in the appellant's own background or personal circumstances has changed.

(b) Second, publicity of his case was sufficiently extensive to have come to the attention of potential agents of persecution in Iraq. His identity and past history

have been brought into contemporary consciousness. While the appellant believes there is a risk of harm from the present Iraqi government and its agents, counsel acknowledges that the evidence in support of that belief is "not compelling". Rather it is submitted that the harm from non-state agents is the more likely source of persecution.

(c) Third, in assessing the well-foundedness requirement of the refugee definition account must be taken of the fact that events in New Zealand and the subsequent publicity in the Iraqi and Middle Eastern media have placed the appellant in a unique category. This requires a more nuanced reading of the country information and the "profile" of persons ordinarily accepted as presently being at risk in contemporary Iraq.

(d) Fourth, that the facts may be summarised as follows:

> 2.4 ...
>
> - The Appellant was a leading member of the Ba'ath Party government of Saddam Hussein, albeit at a relatively distant time in the past;
>
> - Solely by virtue of his position in the senior levels of administration and as a Cabinet Minister, in the minds of at least some of the Iraqi population he could be linked with the tyrannies of that regime. The Authority itself has put to the appellant the [thesis] that he was complicit, by association, with the Kurdish displacement and genocide, which may be a ground for Convention exclusion;
>
> - He has now been explicity and publicly identified with that past role, in the international media and in publications available in Iraq;
>
> - There is objective evidence of the targeting of persons associated with the Saddam Hussein era;
>
> - Such attacks and abuse are not fettered by a fully functioning security system and observance of lawful restraint, so that the perpetrators may act with relative impunity.

(e) Fifth, that it would be dangerous to suppose that the distance of time from May 2005 and the extraordinary level of violence in Iraq mean that the appellant has been forgotten.

(f) Sixth, that the New Zealand parliamentary system facilitated the making of the allegations against the appellant by surrounding those allegations with parliamentary privilege and by providing a focus or platform for media attention, guaranteeing prominent reportage of Mr Peters' allegations:

> 3.2 ...
>
> The veracity of what is said is, in a sense, irrelevant once the statements have been uttered, as even untrue or misleading statements become a vehicle for political jockeying ... It also encourages MPs to leverage facts to the advantage of themselves or their party.

The submission is that the Government of New Zealand owes a higher responsibility than that owed to other refugees "in terms of how conclusions may be drawn about the appellant's fears of harm":

> 3.3 ... If, however, it is unclear on the objective facts that a risk exists or not, the Authority may in fact be obliged to ensure that, in no possible way, it could expose the Appellant to harm which has been precipitated by the same Parliamentary system which granted it such powers.

(g) Seventh, that the Authority is required to exercise an abundance of caution. It is an agency of the New Zealand government and is funded by the Department of Labour "which itself crystalised the Appellants' plight at an early date by cancelling their temporary permits four months before they were due to expire". The submission goes further:

> 3.7 ... Should this Appeal fail on the well-foundedness issue it could justifiably be said that the Appellants have been acted upon at all points by a system which is largely self-referencing, and where a number of conflicts of interest could be identified.

(h) Eighth, that the appellant is not excluded from the Refugee Convention by Article 1F(a). Furthermore, the exclusion issue can only be addressed after the Authority has determined whether the appellant satisfies the inclusion provisions of Article 1A(2).

Roadmap

[36] We will first set out our **general findings of fact** before addressing the various legal issues raised by the case. Thereafter the facts will be returned to.

GENERAL FINDINGS OF FACT

[37] The facts which the Authority accepts may be stated in quite general terms. We accept that the appellant is who he claims to be and that he has followed the career path he has described in his evidence. That is, he was a member of the Ba'ath Party in the period 1960 to 1982. He joined a government ministry in the late 1960s and rose rapidly in the ranks. In the mid-1970s was a Governor for a period. He then returned to the government ministry where he served as Deputy to the Minister. In 1979, on Saddam Hussein taking power, the appellant was appointed Minister. He retired in 1982 on health grounds.

[38] Without concealing any information or practising any deception he openly and lawfully obtained a visa to visit New Zealand with his wife to see an ailing relative from whom they had been separated for almost a decade. After arrival in New Zealand on 12 March 2005 he became the victim of a high profile political campaign, resulting in a number of allegations being made against him in this country, allegations which were both sensational and grave. On the possibly limited information available to the Authority through its own researches, through the appellant and the Refugee Status Branch (the Department of Labour not having sought to be heard by the

Authority), we have seen no evidence to support the reported claims that the appellant entered New Zealand on a forged passport, that he was involved in the chemical weapons programme of the Iraqi regime or that he killed fellow Iraqis. His alleged complicity in human rights abuses would appear to rest largely on the fact that he was at one time a senior official in a brutal, repressive regime. In these circumstances exclusion will not necessarily turn on the mere holding of the positions earlier described. Other requirements prescribed by relevant international norms must be present. See by way of illustration the Canadian cases of *Abbas v Minister of Citizenship and Immigration* (FC Imm - 4688 - 02, January 9, 2004; 2004 FC 17 (FC:TD) and *Imama v Minister of Citizenship and Immigration* (FC Imm - 118 - 01, November 6, 2001; 2001 FCT 1207 (FC:TD). There is also the recent decision of the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] SCC 40; (2005) 254 DLR (4^{th}) 200 (SC:Can). Because distinct issues are raised by exclusion specific credibility findings will be required when the evidence of the appellant on this aspect of the case falls for determination.

[39] What is clear is that the damaging allegations made in New Zealand linking the appellant to severe human rights abuses in Iraq have been repeated in Arabic language news sources (radio, television, print and internet) available in Baghdad and presumably in Iraq generally. Similar reports have appeared in English language internet-based news sources in places as diverse as Pakistan, China and Taiwan. The possible consequences of the publication of these allegations is addressed in a later section of the decision. We accept that a relative who is a teacher in Iraq was harassed to a minor degree by students at the time publicity was given in Iraq to the allegations made in New Zealand. The inference to be drawn from this is a separate issue addressed later in the decision. We accept that two relatives of the appellant were kidnapped and killed. Again, the inference to be drawn from these circumstances is an issue addressed later.

[40] It can be seen from these findings that the general facts are not in dispute. The principal areas in relation to which specific findings have yet to be made are:

(a) Whether the anticipation of harm asserted by the appellant is well-founded or, in the precise language of the Convention, whether there is a well-founded fear of being persecuted for a Convention reason.

(b) Whether, in terms of Article 1F(a) of the Convention there are serious reasons for considering that the appellant has committed a crime against humanity.

[41] The first preliminary point, however, is the question of the Authority's independence.

INDEPENDENCE

[42] The appellant has submitted that should his appeal fail on the well-foundedness issue it could "justifiably be said" that the appellants have been acted upon "at all points by a system which is largely self-referencing, and where a number of conflicts of interest could be identified". The submission adds that the Authority is funded by the Department of Labour, the agency which "crystalized the appellants' plight at an early date by cancelling their temporary permits four months before they were due to expire".

[43] Our first observation is that both legally and in fact the revocation (not cancellation) of the temporary permits held by the appellants was an act of the Minister, not the Department of Labour. See s 33 of the Immigration Act 1987.

[44] Second, it is not clear from the terms of the submission whether the "abundance of caution" urged upon the Authority is because of the asserted risk facing the

appellants should they return to Iraq or whether it is because the Authority is part of a "self-referencing" system in which "a number of conflicts of interest could be identified". If the former, the Authority can understand the appellants' concern that it (the Authority) give anxious consideration to the circumstances of their case. It is a concern which all refugee claimants share. If, on the other hand, the concern is that the Authority is influenced by political considerations and is less than independent, then the submission needs to be addressed.

[45] There is substantial force to the observation made by Hale LJ, as she then was, in *R v Secretary of State for the Home Department; Ex parte Saleem* [2001] 1 WLR 443, 458A-B; [2000] 4 All ER 814, 828e-f (CA) that:

> In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.

[46] It is not clear whether s 27 of the New Zealand Bill of Rights Act 1990 adds anything to the point. The section has not so far been interpreted as providing other than procedural protection and the most recent decision of the Court of Appeal on independence in the context of an administrative tribunal makes no reference to it. See *Claydon v Attorney-General* [2004] NZAR 16 (CA). Note also Rishworth, Huscroft, Optican & Mahoney, *The New Zealand Bill of Rights* (Oxford, 2003) 754-759 and Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2005) paras 25.2.11 & 25.2.15. We therefore approach the issue from the language of the statute and from principle.

[47] When the Authority was first constituted in 1991 it was not a statutory tribunal. It was a creature of the prerogative, operating under Terms of Reference. See *Singh v Refugee Status Appeals Authority* [1994] NZAR 193 (Smellie J) and *Khalon v Attorney-General* [1996] 1 NZLR 458, 461 (Fisher J). However, the Court of Appeal

twice expressed reservations as to the appropriateness of the procedures being extra-statutory: *Butler v Attorney-General* [1999] NZAR 205, 218-220 (Richardson P, Henry, Keith, Tipping & Williams JJ); *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 294 (Henry, Keith & Blanchard JJ). Legislative reform was finally enacted in 1999 in the form of the Immigration Amendment Act 1999. Section 40 of that Act inserted a new Part 6A into the Immigration Act 1987. Section 129N(1) of the principal Act provides that the Authority is "continued" as a body.

[48] While decisions at first instance are made by a refugee status officer employed by the Department of Labour (s 129E) membership of the Authority is restricted to barristers and solicitors of the High Court of New Zealand who have held practising certificates for at least five years or who have other equivalent or appropriate experience (whether in New Zealand or overseas). Appointment to the Authority is by the Governor-General on the advice of the Minister of Immigration. A representative of the United Nations High Commissioner for Refugees is ex officio a member of the Authority. See s 129N(3) and (4).

[49] The Authority is expressly prohibited from making immigration decisions. Section 129W provides:

> **129W. Immigration matters not within functions of refugee status officers and Authority—**
>
> The following are matters for the Minister and any appropriate immigration or visa officer only, and are not within the functions, powers, or jurisdiction of refugee status officers and the Authority:
>
> (a) The grant or issue or giving under this Act of any visa, permit, exemption, or special direction:
>
> (b) The revoking or cancellation under this Act of any visa, permit, exemption, or special direction:
>
> (c) The conditions to be attached to any visa, permit, exemption, or special direction:
>
> (d) The removal or deportation of any person from New Zealand:

(e) Any issue of a humanitarian nature that arises outside the context of a decision relating to the recognition of refugee status in New Zealand.

[50] The jurisdiction of the Authority is confined to making decisions on refugee status only. See ss 129A, 129C, 129D, 129N(2), 129O and 129R.

[51] While the Secretariat of the Authority is staffed by employees of the Department of Labour, those employees cannot concurrently make immigration decisions or be a refugee status officer. Schedule 3C, para 5 of the Immigration Act 1987 stipulates:

5. Staffing—

The Authority is to be serviced by employees of the Department of Labour, not being employees who are also currently employed to consider applications for permits under this Act or employed to administer Part 2 or designated for the purpose of section 129E as refugee status officers, and the Department is to provide such other resources as may be necessary to enable the Authority to carry out its functions under this Act.

[52] Given its separate statutory identity and its statutorily restricted jurisdiction and further given the restriction of its membership (apart from the UNHCR ex officio member) to barristers and solicitors of the High Court, the Authority is in law an institution independent of the Department of Labour. Its independence from immigration decision-making and from the Department of Labour itself is reinforced by the statutory prohibition on the Authority making any immigration decisions. At the administrative level independence is buttressed by the terms of Schedule 3C, para 5 which "ring fence" the Authority's secretariat from Department of Labour functions relating to immigration decision-making. The limited grounds on which the Minister of Immigration may remove a member of the Authority are also not without significance. Schedule 3C, para 1(2) provides:

1. Term of office—

(1) ...

> (2) Any member of the Authority may at any time be removed from office by the Minister for disability affecting the performance of his or her duties, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Minister, or may at any time resign the office by writing addressed to the Minister.
>
> (3) ...

[53] In the circumstances the Authority has difficulty understanding the submission that it is part of a self-referencing system in which a number of conflicts of interest can be identified. Certainly no conflict of interest affecting the Authority has been identified by counsel and nothing specific has been advanced to support the submission that the Authority is less than independent in both law and in fact.

[54] Implicit in the submission made on behalf of the appellants is that the Authority does not have the same independence as that possessed by Courts. But as to that there is a legitimate distinction between Courts and tribunals with regard to the manner in which independence is secured. There are legitimate differing policy views as to the best means of protecting the independence of a tribunal. See *Claydon v Attorney-General* [2004] NZAR 16 (CA) per McGrath J at [96] with whom Keith and Glazebrook JJ at [39] and [112] agreed. Gault P and Blanchard J did not address the issue in their joint judgment.

[55] In the context in which the submission is made the Authority accepts that institutional independence on its own is insufficient. A refugee decision-maker must also be impartial, a point forcefully made by Sir Stephen Sedley at the Fifth World Conference of the International Association of Refugee Law Judges, Wellington, 2002 in his paper "Asylum: Can the Judiciary Maintain its Independence?", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (IARLJ 2002) 319. In this paper he memorably articulated the overt and covert pressures on asylum judges which are capable of affecting the impartiality of their decision-making and which can render their independence fragile. To illustrate the point he pointed out that the critical function of first-instance asylum judges in the majority of the world's

developed jurisdiction is the function of fact-finding. Many, perhaps most, decisions have to be arrived at only after determining whether the refugee claimant is telling the truth and, if not, what the truth is. See *op cit* 323. In *R v Immigration Appeal Tribunal; Ex parte Syeda Khatoom Shah* [1997] Imm AR 145, 153 (approved on appeal in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 (HL) he judicially described this function as:

> "... not a conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose."

[56] It is in the determination whether a refugee claimant is telling the truth that the duty to be impartial is perhaps most acute. But his comments have a much wider resonance and bear repeating in full. After referring in his Wellington paper at *op cit* 324-325 to what he called the "darker hinterland in which judges ... have to do their unaided best to decide whether an account is credible or not", he continued:

> It is in such a situation, where there is frequently so little firm or objective help to be gained from materials before the judge and where so much depends on personal impression and visceral reaction, that the demands of independence and impartiality become acute. I suspect that a truly impartial outcome in a high proportion of asylum cases would be a draw. But that is the one luxury denied to judges. Setting the standard for a successful claim well below truth beyond reasonable doubt and even below a preponderance of probability, and limiting it to the establishment of a real risk, may help the asylum-seeker but does not ultimately help the asylum judge. A possible life-and-death decision extracted from shreds of evidence and subjective impressions still has to be made.
>
> Not only for these substantive reasons but for procedural reasons too, asylum adjudication calls up a very particular version of impartiality. In ordinary civil and criminal contests, impartiality implies no more than not taking sides, at least until one has heard the evidence and the argument. In asylum law, except to the extent that the state takes on itself the role of the asylum-seeker's adversary, there are no such sides. In an exercise which is typically one of testing assertions, not of choosing between two stories, the form which impartiality most typically takes for the judge is abstention from pre-ordained or conditioned reactions to what one is being told. It means not so much knowing others as knowing oneself - perhaps the hardest form of knowledge for anyone to acquire.
>
> I have no simple solutions to offer. Asylum judges are going to have to go on doing the best they can in a jurisdiction which has neither the falsifiability of a science nor the

> completeness of an art. My single conclusion is to return to what I began by discussing: the kinds of articulated and inarticulate pressures, most of them indirect and impersonal but all of them potent, which in the societies to which most asylum-seekers come are part of the air which asylum judges breath. They are capable of exercising a considerable influence, all the greater for operating unconsciously, on the conclusions which judges arrive at upon materials which are themselves inconclusive. They are pressures which are not ordinarily identifiable, except in the long perspective, and so are rarely appealable. But they are in my view the most troubling aspect of adjudication in open societies in which justice no longer pretends to be a cloistered virtue.
>
> We are probably not going to be able to do much better in the twenty-first century than Sir Mathew Hale, a great chief justice of England and Wales, did in the mid-seventeenth. In a memorandum to himself he insisted: "That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions."
>
> The judicial oath in the United Kingdom, replicated - I am certain - in one form or another throughout the world, is to do justice without fear or favour, affection or ill-will. Everyone of those nouns is set in high relief by the asylum judge's functions. The fear of public abuse or political displeasure, even if neither can result in dismissal; the risk of unwittingly favouring individuals who fit stereotypes with which the judge feels an affinity; the risk that affection - sympathy - will skew judgment; the risk that ill-will - prejudice - may do the same: the judicial oath calls out by name these demons which lurk in all systems of adjudication, asylum prominent among them.
>
> I do not suggest that there is any nostrum against these things, though being aware that they exist is an important start. But I believe that the overt and covert pressures on judges which are present in any modern open society are probably heavier and more damaging in the area of asylum adjudication than anywhere else, because asylum judges tend, in the nature of their jurisdiction, to have comparably fewer anchorages in hard fact or rigorous procedure to hold them steady against the tides of public opinion and the winds of hostile comment. Their independence is correspondingly fragile, and politicians and journalists who set out to undermine it may be doing their own societies greater damage than they realise.

[57] If the point of the submission for the appellants is to both challenge the institutional independence of the Authority and to remind the two members of the panel hearing their appeal of the need to be impartial in the sense described by Sir Stephen Sedley, we record that the reminder is unnecessary but we do understand the particular anxiety which the submission reflects.

[58] The second preliminary point is whether the appellant is correct in law in submitting that exclusion may only operate after the inclusion issues have been answered in his favour, that is after a well-founded fear of being persecuted has been established.

WHETHER INCLUSION BEFORE EXCLUSION

[59] It must be remembered that the Inclusion, Cessation and Exclusion provisions of Article 1A(2), 1C, 1D, 1E and 1F are all part of a single definition of who is a refugee. There are both positive and negative components to the definition. The Convention prescribes not only who is but also who is not a refugee. Article 1A(2) commences:

> **A.** For the purposes of the present Convention, the term "refugee" **shall apply** to any person who:
>
> (1) ...
>
> (2) 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....
>
> [emphasis added]

[60] Article 1F, on the other hand, commences:

> **F.** The provisions of this Convention **shall not apply** to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the International Instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations. [emphasis added]

[61] The mandatory terms of Article 1F appear with equal clarity in the equally authentic French text of the Convention:

> **F.** Les dispositions de cette Convention **ne seront pas applicables aux personnes** dont on aura des raisons sérieuses de penser:
>
> (a) ...

(b) ...

(c)

[emphasis added]

[62] As pointed out by James C Hathaway and Colin J Harvey in "Framing Refugee Protection in the New World Disorder" 34 Cornell Int'l L. J. 257 (2001) at 263, the general impetus for Article 1F was a determination to give legal force to Article 14(2) of the Universal Declaration of Human Rights, 1948 which provides that the right to asylum may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Article 14 provides:

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[63] As Hathaway and Harvey observe at *op cit* 263, the fundamental conviction that certain persons are beyond the pale, that is simply not deserving of international protection, led the drafters to craft Article 1F as a mandatory mechanism of exclusion. Although a government may invoke its sovereignty to admit a person described in Article 1F to its territory, it is absolutely barred from granting Convention refugee status to that person. They conclude at *op cit* 264:

Because no asylum seeker described in Article 1(F) can qualify for Convention refugee status, state parties to the Refugee Convention are under no duty to consider the merits of a protection claim made by such a person. Although it may sometimes be more convenient to consider an Article 1(F) exclusion in the course of an asylum hearing, at least where the facts that justify peremptory exclusion are intertwined with those relating to refugee status, there is no legal impediment to addressing Article 1(F) concerns as a preliminary matter.

[64] The opinion of Guy Goodwin-Gill in *The Refugee in International Law* (2nd ed 1996) at 97 is to the same effect:

> Being integral to the refugee definition, if the exclusion applies, the claimant cannot be a Convention refugee, whatever the other merits of his or her claim.

[65] That Article 1F excludes "persons" rather than "refugees" from the benefits of the Convention underlines the point that the question of a well-founded fear of being persecuted (Article 1A(2)) is irrelevant and need not be examined where the circumstances prescribed in Article 1F are present.

[66] The peremptory exclusion mandated by Article 1F has long been recognised in the jurisprudence of the Canadian federal courts which, singular in common law jurisdictions (and possibly also in civil law jurisdictions), have acquired unrivalled experience in the application of Article 1F. In *Canada (Minister of Employment and Immigration) v Mehmet* [1992] 2 FC 598 (FC:CA) both the majority (Marceau and Décary JJ.A) at 606 and 608 and the minority (Desjardins JA) at 615 were in agreement that Article 1F is completely external to the characteristics of a refugee. In *Moreno v Canada (Minister of Employment and Immigration)* [1994] 1 FC 298 (FC:CA) the Court at 326 left open the question whether, as a matter of law, it is possible to determine exclusion prior to addressing the inclusion clause. That issue was, however, directly addressed in *Gonzalez v Canada (Minister of Employment and Immigration)* [1994] 3 FC 646, 657; (1994) 115 DLR (4th) 403, 411; (1994) 24 Imm LR (2d) 229, 238 (FC:CA). In this case the Federal Court of Appeal held that there is no obligation to deal with inclusion if the decision-maker concludes that the claimant is excluded by reason of the commission of crimes against humanity because, if the person is excluded from the definition as a result of the commission of such crimes, then by necessary implication the claimant cannot be found to be a Convention refugee. Hence there is no need to consider whether such a person would be included in the definition.

> The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee.

The Court noted, however, that, from a practical point of view, it would be preferable for the decision-maker to deal with inclusion, so that, if the reviewing court determined that he or she was in error with respect to the findings on exclusion, the Court could then review the conclusions concerning inclusion.

[67] For more recent application in Canada of the principle that if exclusion applies, a claimant simply cannot be a Convention refugee see *Alemu v Canada (Minister of Citizenship & Immigration)* (2004) 38 Imm LR (3d) 250, 265 (FC:TD), *Xie v Canada (Minister of Citizenship and Immigration)* [2005] 1 FC 304; (2004) 37 Imm LR (3d) 163 (FC:CA) at [38] and *Sing v Canada (Minister of Citizenship and Immigration)* [2005] FCA 125 (FC:CA) at [70].

[68] The position in Australia is the same. See *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; 186 ALR 393 at [5], [31], [61] and [85] to [87] (HCA) (Gleeson CJ; Gaudron, McHugh & Kirby JJ). So too in the United Kingdom. See *Gurung v Secretary of State for the Home Department* [2003] Imm AR 115; [2003] INLR 133 at [64] to [91] (IAT) and *KK (Article 1F(c)) Turkey; KK v Secretary of State for the Home Department* [2005] INLR 124 at [47] (IAT).

[69] The mandatory and peremptory exclusion demanded by Article 1F is underlined by the absence of a balancing or proportionality exercise. The decision-maker does not weigh the gravity of the crime or act against the gravity of the possible persecution: *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291, 297-300 (CA) where the relevant Canadian, English and Australian case law is collected and discussed. The decision in *S v Refugee Status Appeals Authority* has subsequently

been approved by the Supreme Court of New Zealand in *Attorney-General v Zaoui* [2005] NZSC 38 at [29]-[42]. For recent Canadian authority to the same effect reference may be made to *Xie v Canada (Minister of Citizenship and Immigration)* [2005] 1 FC 304; (2004) 37 Imm LR (3d) 163 (FC:CA) at [39]. In addition to these judicial decisions there is the cogent analysis by James C Hathaway and Colin J Harvey in "Framing Refugee Protection in the New World Disorder" 34 Cornell Int'l L.J. 257 (2001) at 294-296.

[70] The non-binding UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (HCR/GIP/03/05, 4 September 2003); 15 IJRL 492 (2003) at [24] assert a proportionality test. But the *Guidelines* do not address the textual and contextual impediments to such test and are unpersuasive. Furthermore the *Guidelines* are not supported by the Conclusions reached by the Expert Roundtables convened by the UNHCR in 2001 to examine the topics of exclusion and non-refoulement. See Feller, Türk & Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003) at 178-179; 481. These Roundtable discussions, or more particularly the Conclusions reached by them, preceded all six of the current UNHCR Guidelines. This is the point made in *Attorney-General v Zaoui* at [30], [31] and [33] & [34] (NZSC). The UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* which was published as part of the *Guidelines* on Article 1F and reproduced at 15 IJRL 502 (2003) does little to advance the argument and singularly fails to mention, let alone address the Hathaway and Harvey article.

[71] While UNHCR *Guidelines* serve a limited purpose and may on occasion be of assistance, their provenance is problematical and their terms at times open to trenchant criticism. See for example two of the papers delivered at the 5th World Conference of

the International Association of Refugee Law Judges held at Wellington, New Zealand in October 2002: Hugo Storey, "'From Nowhere to Somewhere': An Evaluation of the UNHCR 2nd Track Global Consultations on International Protection: San Remo 8-10 September 2001 Experts' Roundtable on the IPA/IRA/IFA Alternative", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (October 2002) 359, 365-369 & 389-390; Sharon Pickering, "Gender Persecution: A Response to the UNHCR Guidelines", IARLJ, *Stemming the Tide or Keeping the Balance - the Role of the Judiciary* (October 2002) 347, 349-350.

[72] In our view it is always best to work from the text of the Refugee Convention and the general rule of treaty interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, 1969, most recently discussed by the Authority in *Refugee Appeal No. 74665/03* (7 July 2004); [2005] INLR 68 at [43] to [49]. Compare *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [111] (McGrath J) and [271] (Glazebrook J). The UNHCR should not be recognised as the final arbiter on questions of the interpretation of the Refugee Convention: Rt Hon Lord Justice Dyson, "The Interpretation of the Refugee Convention: Idiosyncrasy v Uniformity", Keynote address given at the IARLJ World Conference, Stockholm, 21 April 2005 at p 10. See also Professor James C Hathaway, "Who Should Watch Over Refugee Law?", IARLJ, *Stemming the Tide or Keeping the Balance - The Role of the Judiciary* (2002) 393, 395-398.

Conclusion

[73] As a matter of law, exclusion under Article 1F of the Refugee Convention is peremptory in the sense that it is both mandatory and devoid of any balancing or proportionality exercise. The operation of Article 1F is in no way dependent on a prior finding that the refugee claimant has satisfied the inclusion requirements of Article 1A(2). As the Canadian Federal Court of Appeal in *Gonzalez* has held, whatever merit

there might otherwise be to the refugee claim, if the exclusion terms apply, the claimant simply cannot be a Convention refugee.

[74] That having been said, however, the experience of the Authority has shown that in practice inclusion and exclusion issues are often inextricably connected. In these circumstances separate inquiry into inclusion and exclusion can be impracticable, artificial and potentially unfair. It is most often the case that it is more fair and more convenient that both issues be addressed at the same hearing. This allows a single investigation, a single credibility finding and a single finding of facts to which the single refugee definition in Article 1 may be applied. This does not mean that all cases must be determined in this way. See for example *Refugee Appeal No. 70405/97* (29 May 1997). Everything depends on the circumstances of the case and the particular demands those circumstances make on the duty of fairness.

[75] Here the inclusion and exclusion issues are closely connected. In addition, given the appellant's health and the substantial stress to which he has been subjected by the politicisation of his case in New Zealand, the hearing conducted by the Authority canvassed both inclusion and exclusion. In this decision we will address inclusion first. Whether exclusion ultimately falls for consideration will depend on our finding in relation to inclusion. If the appellant does not satisfy the requirements of Article 1A(2) it may not be necessary to address exclusion.

WELL-FOUNDED FEAR - THE LEGAL ISSUES

[76] It is the oral and written submission for the appellant that as it is the irresponsible if not reckless actions of a member of the New Zealand Parliament (also the leader of a political party) which have led to the making of this *sur place* claim to refugee status, the appellant's fears of harm are to be assessed differently. See for example the submissions dated 3 November 2005 at para 3.3:

> This raises serious questions about the responsibility which the Government of New Zealand owes to the Appellant. **It is submitted that this responsibility is higher than that owed to other refugees in terms of how conclusions may be drawn about the Appellant's fears of harm**. If there was no chance at all that the Appellant would be harmed on return to Iraq, then the Government's role is immaterial. If, however, it is unclear on the objective facts that a risk exists or not, the Authority may in fact be obliged to ensure that, in no possible way, it could expose the Appellant to harm which has been precipitated by the same Parliamentary system which granted it such powers. [emphasis added].

[77] It is not clear to the Authority whether the reference to drawing conclusions about the appellant's "fears of harm" and the need to assess them differently is a submission that the appellant's subjective state of mind is relevant to the inquiry under Article 1A(2) beyond satisfying the requirement that he be "unable or unwilling" to avail himself of the protection of Iraq.

[78] Given the ambiguity in the submission the Authority must necessarily re-state its interpretation of the "well-founded fear" element of the refugee definition.

[79] Since at least 1996 the Authority has not required refugee claimants to establish a so-called "subjective" fear. The "well-founded fear" element of the Inclusion clause has as its reference not the facts subjectively perceived by the claimant, but the objective facts as found by the decision-maker. See *Refugee Appeal No. 70074/96* [1998] NZAR 252, 260; *Refugee Appeal No. 71404/99* (29 October 1999); *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [132]-[140]. In its decisions the Authority routinely identifies the principal inclusion issues as:

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

2. If the answer is Yes, is there a Convention reason for that risk of being persecuted?

[80] This formulation of the issues focuses exclusively on the actual risk faced by the claimant, the true purpose of the Refugee Convention being to provide a safe haven for only those who are objectively at risk of being persecuted for a Convention reason, not those who are genuinely but mistakenly "in fear". See further paras [3] to [6] of the *Michigan Guidelines on Well-Founded Fear* to which reference will be made shortly.

[81] The Authority's interpretation has recently been vindicated by no less an authority than Professor James C Hathaway who, in an article co-authored with William S Hicks, comprehensively and compellingly demonstrates that the existence of subjective fearfulness in the sense of trepidation is not an element of the refugee definition. See Professor James C Hathaway & William S Hicks, "Is There a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?" (2005) 26 Mich. J. Int'l L 505. Their conclusions are set out at 507:

> In contrast to prevailing views, we take the position that there is no subjective element in the well-founded fear standard. The Convention definition's reference to "fear" was intended simply to mandate an individuated, forward-looking appraisal of actual risk, "not to require an examination of the emotional reaction of the claimant". Rather than predicating access to protection on the existence of "fear" in the sense of trepidation, the Convention refugee definition requires only the demonstration of "fear" in the sense of a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded.
>
> [citations omitted]

[82] The authors convincingly demonstrate that imposing a requirement that refugee claimants establish a so-called "subjective fear" does serious harm to genuinely at risk persons. In their concluding paragraphs at 561-562, the Authority's longstanding interpretation is commented upon approvingly:

> There is, in fact, no textual or principled impediment to adoption of an understanding of "well-founded fear" focussed exclusively on forward-looking apprehension; to the contrary, it is a view that is fully supported by language and by the context, object, and purpose of the Refugee Convention. There is moreover no evidence whatsoever that a move in this direction poses any downside risk for refugees - as practice in New Zealand, which has rejected any duty to show subjective fear or trepidation, and adopted an understanding of "well-founded fear" focussed exclusively on prospective apprehension, makes clear. This result is not surprising, as the interpretation advanced in this Article merely eliminates one of what are now said to be two essential elements of the well-founded fear test, rather than imposing a new or more exacting test.
>
> The challenge, then, is to move beyond routinized deference to tradition in order to eliminate a clear and present danger to the ability of the Refugee Convention to serve its core purpose of protecting at-risk persons from being persecuted. Whether a person is, or is not, subjectively fearful of return to actual risk should be recognised as legally immaterial.
>
> [citation omitted]

[83] In the accompanying footnote 204 at page 561 the authors observe:

> By adopting this test [which disavows the existence of a subjective element], New Zealand courts have effectively simplified the analysis of well-founded fear without sacrificing the ability to personalize the inquiry into risk or take account of particular susceptibilities.

THE MICHIGAN GUIDELINES ON WELL-FOUNDED FEAR

[84] In March and April 2003, while Visiting DeRoy Professor of Law at the Faculty of Law, the University of Michigan, the chairperson of the present panel assisted in the design of a research project into whether there is a subjective element in "well-founded fear". That research project led to the Third Colloquium on Challenges in International Refugee Law convened at the Faculty of Law, University of Michigan in March 2004 (which he chaired). It was on this study that Professor Hathaway and Mr Hicks drew when drafting their article. Participants in the Colloquium included Professor James C Hathaway, Professor of Law and Director of the Programme in Refugee and Asylum Law at the University of Michigan Law School; Jenny Bedlington a former senior official in the Australian civil service and who between 1997 and 2003 led Australia's delegations to international fora on migration and

refugees and who played a substantial role in international discussions on these issues; Professor Ryan Goodman, the J. Sinclair Armstrong Assistant Professor of International Foreign and Comparative Law at Harvard Law School; Dr Kay Hailbronner who has held the position of Chair for Public Law, International and European Law at the University of Constance, served as a judge in the Baden-Württemberg Administrative Appeal Court and since 1994 has been Director of the Centre for International and European Law on immigration and asylum at the University of Constance; Professor Stephen Legomsky who is the Charles F Nagel Professor of International and Comparative Law at Washington University in St Louis; Dr Penelope Mathew who teaches international law, international law of human rights and feminist and critical legal theory at the Australian National University; Gregor Noll, Associate Professor of International Law at the Faculty of Law, Lund University, Sweden; Catherine Phong, Lecturer in Law at the University of Newcastle where she teaches mainly Public International Law, European Law and Human Rights Law. The Colloquium deliberations benefited from the counsel of Mr Christoph Bierwirth, Senior Liaison Officer (Human Rights) within the Protection Policy and Legal Advice Section of the Department of International Protection, Office of the United Nations High Commissioner for Refugees. As the chairperson of the panel of the Authority hearing the present appeal was also a participant in the study and Colloquium, some caution must be exercised in promoting the *Michigan Guidelines on Well-Founded Fear*, a point the Authority has made for similar reasons in respect of the *Michigan Guidelines on the Internal Protection Alternative* and the *Michigan Guidelines on Nexus*. However, as observed also in relation to these earlier studies, the collective wisdom of an otherwise distinguished body of persons cannot be lightly put aside, especially when the principles underlying the *Michigan Guidelines on Well-Founded Fear* are already reflected in the Authority's refugee jurisprudence.

[85] We reproduce the *Michigan Guidelines on Well-Founded Fear* in full.

The Michigan Guidelines on Well-Founded Fear

An individual qualifies as a Convention refugee only if he or she has a "well-founded fear" of being persecuted. While it is generally agreed that the "well-founded fear" requirement limits refugee status to persons who face an actual, forward-looking risk of being persecuted (the "objective element"), linguistic ambiguity has resulted in a divergence of views regarding whether the test also involves assessment of the state of mind of the person seeking recognition of refugee status (the "subjective element").

The view that the assessment of well-founded fear includes consideration of the state of mind of the person seeking recognition of refugee status is usually implemented in one of three ways. The predominant approach defines a showing of "fear" in the sense of trepidation as one of two essential elements of the well-founded fear test. In the result, refugee status may be denied to at-risk applicants who are not in fact subjectively fearful, or whose subjective fear is not identified as such by the decision-maker. A second view does not treat the existence of subjective fear as an essential element, but considers it instead to be a factor capable of overcoming an insufficiency of evidence of actual risk. Under this formulation, persons who are more timid or demonstrative, or who are simply able to articulate their trepidation in ways recognizable as such by the decision-maker, are advantaged relative to others who face the same level of actual risk, but who are more courageous, more reserved, or whose expressions of trepidation are not identified as such. A third understanding of a subjective element neither conditions refugee status on evidence of trepidation, nor advantages claims where such trepidation exists. The requirement to take account of "fear" is instead treated as a general duty to give attention to an applicant's specific circumstances and personal vulnerabilities in the assessment of refugee status.

We have engaged in sustained collaborative study and reflection on the doctrinal and jurisprudential foundations of the well-founded fear standard, and have concluded that continued reference to distinct "subjective" and "objective" elements of the well-founded fear standard risks distortion of the process of refugee status determination. The existence of subjective fearfulness in the sense of trepidation should neither be a condition precedent to recognition of refugee status, nor advantage an applicant who faces an otherwise insufficiently well-established risk. An approach which recognizes a subjective element in order to take account of an applicant's circumstances and vulnerabilities does not pose protection risks of the kind associated with the first understanding of a subjective element, nor raise the unfairness concerns of the second approach. Reliance on a subjective element to particularize the inquiry into well-founded fear is, however, unnecessary, and may result in the devaluation of evidence of real value to the assessment of actual risk of being persecuted.

These Guidelines are intended to promote a shared understanding of a unified approach to the well-founded fear inquiry and related aspects of the Convention refugee definition that both avoids the protection risks increasingly associated with assertions of a "subjective element," and ensures that due regard is accorded all particularized risks faced by an applicant for recognition of refugee status.

Unable or unwilling

[1] An applicant's state of mind is relevant to determining whether he or she "is unable or, owing to such fear, is unwilling to avail himself [or herself]" of the protection of his or her country or countries of citizenship or, in the case of a stateless person, country or

countries of former habitual residence. Specifically, a state party's duty of protection under the Convention is engaged through an expression by or on behalf of an applicant of inability or unwillingness to avail himself or herself of the protection of the relevant country or countries.

[2] The required assertion of inability or unwillingness need not be made in any particular form. In substance, the applicant need only provide information or make claims which may engage the Refugee Convention obligations of the state.

Well-founded fear

[3] In contrast to the question of whether an applicant is unable or unwilling to avail himself or herself of the country of origin's protection, the assessment of well-founded fear does not comprise any evaluation of an applicant's state of mind.

[4] Most critically, the protection of the Refugee Convention is not predicated on the existence of "fear" in the sense of trepidation. It requires instead the demonstration of "fear" understood as a forward-looking expectation of risk. Once fear so conceived is voiced by the act of seeking protection, it falls to the state party assessing refugee status to determine whether that expectation is borne out by the actual circumstances of the case. If it is, then the applicant's fear (that is, his or her expectation) of being persecuted should be adjudged well-founded.

[5] An understanding of "fear" as forward-looking expectation of risk is fully justified by one of the plain meanings of the English text, and is confirmed by dominant interpretations of the equally authoritative French language text ("craignant avec raison"), which do not canvass subjective trepidation. This construction avoids the enormous practical risks inherent in attempting objectively to assess the feelings and emotions of an applicant. It is moreover consistent with the internal structure of the Convention, for example with the principle that refugee status ceases when the actual risk of being persecuted comes to an end, though not on the basis of an absence of trepidation (Art. 1(C)5-6), and with the fact that the core duty of non-refoulement applies where there is a genuine risk of being persecuted, with no account taken of whether a refugee stands in trepidation of that risk (Art. 33). More generally, the human rights context of the Convention requires that protection be equally open to all on the basis of evidence of an actual and relevant form of risk.

[6] The determination of whether an applicant's "fear" – in the sense of forward-looking expectation of risk – is, or is not, "well-founded" is thus purely evidentiary in nature. It requires the state party assessing refugee status to determine whether there is a significant risk that the applicant may be persecuted. While the mere chance or remote possibility of being persecuted is insufficient to establish a well-founded fear, the applicant need not show that there is a clear probability that he or she will be persecuted.

Establishing well-founded fear

[7] To determine whether an applicant faces a significant risk of being persecuted, all material evidence from whatever source must be considered with care, and in context. Equivalent attention must be given to all forms of material evidence, with a decision on the relative weight to be assigned to different forms of evidence made on the basis of the relative veracity and cogency of the evidence adduced.

[8] Evidence unique to the applicant, including evidence of personalized and relevant past persecution, is directly relevant to the determination of well-founded fear, but is not a prerequisite. An applicant who, prior to departure from his or her country of origin, was not subject to persecution, nor directly threatened with persecution, can establish by other evidence a well-founded fear of being persecuted in the foreseeable future.

[9] The assessment of well-founded fear may be based largely, or even primarily, on the applicant's own credible testimony. While the applicant's testimony is not necessarily the best evidence of forward-looking risk, it may well constitute the best evidence of risk, depending on the circumstances of the case.

[10] In light of the shared duty of fact-finding, an applicant must make best efforts to provide the state party assessing refugee status with corroboration of his or her testimony. However, where such corroboration cannot reasonably be secured, an applicant's credible and unrefuted testimony standing alone is sufficient to establish a well-founded fear of being persecuted.

[11] An applicant's testimony may only be deemed not credible on the basis of a specific, cogent concern about its veracity on a significant and substantively relevant point.

[12] Even where there is a finding that an applicant's testimony is not credible, in whole or in part, the decision-maker must nonetheless assess the actual risk faced by an applicant on the basis of other material evidence. In particular, the existence of a well-founded fear may be grounded in evidence that the applicant is a member of a relevant, at-risk group of persons shown by credible country data or the credible testimony of other persons to face a significant risk of being persecuted.

Being persecuted

[13] The particular circumstances of a person seeking recognition of refugee status are not relevant simply to the question of whether he or she can be said to have a well-founded fear. The determination of whether the risk faced is appropriately adjudged to amount to a risk of "being persecuted" also requires careful consideration of matters which may be unique to the individual concerned.

[14] As a general rule, the determination of whether a given risk amounts to a risk of "being persecuted" must enquire into the personal circumstances and characteristics of each applicant, recognizing that by virtue of such circumstances and characteristics some persons will experience different degrees of harm as the result of a common threat or action.

[15] Thus, for example, the psychological vulnerabilities of a specific applicant may be such that the risk of harms which would be insufficiently grave to justify recognition of refugee status for most persons will nonetheless amount to torture, cruel, inhuman or degrading treatment for him or her. Where this is so, the forward-looking risk of such psychological harms may appropriately be regarded as a risk of "being persecuted."

***Michigan Guidelines on Well-Founded Fear* and New Zealand refugee law**

[86] As may be seen, there is little, if any difference between existing New Zealand refugee law and the *Michigan Guidelines on Well-Founded Fear*. The only point to note relates to paras [13] to [15] of the *Guidelines*. The Authority has for some number of years recognised that "being persecuted" is not restricted to "physical" acts. Forms of psychological or mental harm are included in the refugee definition. See *Refugee Appeal No. 71404/99* (29 October 1999) at [73] to [75]. So too are other forms of serious harm arising from the violation of fundamental human rights. See *Refugee Appeal No. 74665/03* [2005] NZAR 60; [2005] INLR 68 at [56] to [79]. For this reason paragraphs [13] to [15] of the *Guidelines* are relevant in the New Zealand context though their precise application remains to be worked out on a case by case basis.

[87] Without repeating what we said about guidelines in *Refugee Appeal No. 71684/99* [2000] INLR 165 at [63] and *Refugee Appeal No. 72635/01* [2003] INLR 629 at [179], we are of the view that the congruence of the New Zealand refugee law on well-founded fear and the *Michigan Guidelines on Well-Founded Fear* means that these guidelines properly identify the principles to be applied in New Zealand when issues of well-foundedness are determined.

[88] It is possible to find decisions of the New Zealand High Court in which there is an unexamined repetition of the mistaken view that there is a subjective element to Article 1A(2) of the Refugee Convention. See for example *K v Refugee Status Appeals Authority* [2005] NZAR 441 at [12] (Gendall J). Invariably, such repetition occurs in preambular paragraphs not strictly relevant to the substantive issue before the court, apparently without the court being made aware of the significance of the point and without the benefit of argument or the opportunity to consider the jurisprudence of the Authority. The substantial hazard which a subjective element represents to

genuine refugee claims does not appear to have been drawn to the attention of the court.

Conclusion

[89] The appellant's subjective fears of harm, while relevant to the question whether he is unable or unwilling to avail himself of the protection of Iraq, are of no relevance to whether his anticipation of being persecuted is well-founded. The Inclusion clause reference to "fear" simply mandates an individuated, forward-looking appraisal of actual risk, not an examination of the reaction of the refugee claimant. That having been said, however, the determination whether the claimant faces a real chance of being persecuted requires that all material evidence from whatever source is considered with care and in context. If there is evidence unique to the claimant, that evidence must receive careful consideration. The recent decision in *A v Chief Executive of the Department of Labour* (High Court, Auckland, CIV2004-404-6314, 19 October 2005, Winkelmann J) at [36] and [58] illustrates the point.

[90] It may be that while not clearly expressed in these terms, the core submission for the appellant is that the manner and form of his exposure in New Zealand have led to a unique situation which requires an entirely different contextual reading of the country information before a decision on the well-foundedness element can be made. As to this two points must be kept in mind:

(a) The well-founded fear standard is an entirely objective one. The trepidation of the appellant, no matter how genuine or intense, does not alter or affect the legal standard. Trepidation is irrelevant to the well-foundedness issue.

(b) Likewise, the degree of the risk of harm which must be established by the appellant to satisfy the well-founded element is not altered by his state of mind

or degree of trepidation. In the Authority's jurisprudence the well-founded standard has been understood as mandating the establishment of a real chance of being persecuted. See for example *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [111] to [154]. Conjecture or surmise has no part to play in determining whether the anticipation of a risk of harm is well-founded. Such anticipation is only well-founded when there is a real substantial basis for it. A substantial basis may exist even though there is far less than a fifty percent chance that persecution will eventuate. But no anticipation of harm can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation. The submission that the Authority is "obliged to ensure that, **in no possible way**, it could expose the Appellant to harm" would require the Authority to abandon the real chance understanding of well-foundedness in favour of a bare possibility formulation. This radical departure from the express stipulation by the Convention that the risk of harm be "well-founded" requires a re-writing of the Convention. The real chance formulation long used by the Authority already sets the risk threshold as low as the language of the Convention permits. The submission is rejected.

[91] We return to the text of the inclusion clause in Article 1A(2) of the Convention:

> ... the term "refugee" shall apply to 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.

The principal issues are:

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

2. If the answer is Yes, is there a Convention reason for that risk of being persecuted?

[92] We turn now to the first issue.

WELL-FOUNDEDNESS - ASSESSMENT OF THE FACTS

Fear of whom?

[93] The appellant has expressed the view that there is a risk of harm from the new Iraqi government and its agents. However, we have seen no evidence to support this contention and counsel for the appellant rather conceded the point. The appellant's case is really based on a fear of being persecuted by non-state agents, being persons who might wish to take revenge for misdeeds, real or imagined, while the appellant was in power. See the closing submissions at para 2.1:

> The Appellant has expressed the view that there is a risk of harm from the new Iraqi government and its agents, and we have commented upon this [at pp 371-368 NZIS file]. However, evidence in support of that contention is not compelling and we have nothing further to add in that regard. Rather it is submitted that harm from non-State agents is the more likely source of persecution, and the previous submissions on this point, with reference to the relevant country information, are relied upon.

[94] It is the asserted risk from non-state actors to which we now turn.

Assessment of the risk

[95] The appellant has never suggested that he or his family were in fear or at risk prior to the political events in New Zealand in May 2005. While he and his wife left Iraq in mid-May 2004 for Jordan, the reason was the poor security situation generally, not a fear of attack after the Saddam Hussein regime fell in April 2003. Nor, prior to

the events in New Zealand in May 2005 has he ever advanced a claim that should he return to Iraq he faces reprisals for Ba'ath Party membership or for his role in the government of Saddam Hussein. See the closing submissions at para 1.2. As the submissions note at para 1.3:

> It is the fact of public exposure that was the catalyst for the present application. Nothing in the Appellant's own background or personal circumstances had changed.

[96] The essence of the submission is that the events in New Zealand (reported in Iraq or in sources accessible in Iraq) have led to public exposure in contemporary Iraq of his membership of the Ba'ath Party and the fact that he was in the government of Saddam Hussein until 1982.

[97] We do not accept that the events in New Zealand, as reported (or accessible) in Iraq have created a real chance of harm by non-state agents should the appellant return to Iraq:

(a) The evidence before the Authority is that the publicity given to the appellant in Arabic language news sources (radio, television, print, internet) available in Baghdad and presumably in Iraq generally was largely confined to the period between 5 May 2005 to 10 May 2005. In addition the items were invariably brief. The same is true of the English language news sources available in Iraq.

(b) The distance in time from the appellant's retirement is now more than twenty years. This factor combined with the very limited nature and degree of the publicity given to the case in Iraq is an almost insuperable obstacle to the claim that he is presently at risk of harm. When one adds to these factors the size of the population of Iraq in 2005 (26.5 million), the political turmoil in that country since the US-led occupation and the staggering if not unbelievable number of attacks, bombings and at times full scale conflict, the reports of

events in New Zealand allegedly leading to the appellants resurrection from obscurity are of such little significance as to be virtually invisible. The contention that there are persons in Iraq who now pose a real risk to the safety of the appellants is no more than speculation or surmise. This falls well below the well-founded fear standard.

(c) It was submitted for the appellant in the closing submissions at para 1.7 that "it should be presumed" that the appellant's identity and past history have been noted by persons with political interests inside Iraq as a result of the breaking news in New Zealand. In the circumstances outlined, the Authority cannot make any such "presumption". The evidence adduced by the appellant is so weak that it does not permit an inference of knowledge to be drawn and in the absence of evidence, the Authority cannot "presume" facts.

(d) It is said that when publicity was given in Iraq to the appellant's problems in New Zealand his relative, a teacher in Iraq, was harassed by students. But as previously noted, no details of the incident are available and the relative has not subsequently experienced any problems. Nor have relatives of either the appellant or his wife encountered problems arising from the appellant's case. The case of the two relatives whose bodies were found near the border with Iran does not assist. It is conceded for the appellants that it is not known who took the relatives or why they were taken. The appellant's wife believes that there is a connection because there was no demand for money and the relatives had had no contact with the American occupying forces. The Authority, however, sees no connection whatever between the death of the relatives and the appellant's case. To hold otherwise would be to engage in speculation or surmise. Even counsel for the appellants was driven to concede that no conclusions could be drawn from what he described as "this scanty evidence".

(e) The country information produced by the appellant at first instance and relied on at the appeal hearing does show that former Ba'athists known to have abused their position are at risk of reprisals. These would mostly be former members of the intelligence services, the security services or Fedayeen Saddam: United Kingdom Home Office, *Iraq Country Report* (April 2005). But there is no general profile of risk. It appears that retribution is not restricted to those known to have abused their position. Yet not all Ba'athists are at risk. Equally, the Authority has received no evidence that former Cabinet ministers or Governors from the 1970s and early 1980s are at risk. The appellant says his case is unique. He is the only such former Cabinet minister and Governor from that period who has, in the post-Saddam era, been exposed and faced with allegations of human rights abuses. As to this he does not claim that he was at risk before he left Iraq. The only question is whether the minimal publicity his case has received in Iraq has been sufficient to create such a risk by bringing his name back into consciousness. We are of the clear view that the answer is that no such risk has been created. We refer here to the factors detailed earlier, including the short time span of the publicity, the brevity of the reports, the near invisibility of the appellant's circumstances in contemporary Iraq, the twenty-three year absence from public life and the absence of any approach or enquiry to members of the family in Iraq since the publicity.

(f) There is also the factor of the growing distance of time between the publication and the date of the Authority's decision. We have great difficulty accepting that the brief publicity has come to the attention of let alone been remembered by any potential agent of persecution. On return to Iraq, the appellant will be in a position little different to that he was in before he left Iraq. He did not believe then that he was in danger of being persecuted and the Authority can see no well-founded basis for him to anticipate being persecuted now.

[98] In our view, given the factors we have identified and the findings we have made, the appellant is not at real risk of harm at the hands of non-state agents seeking reprisals against senior members of the former regime. We are satisfied that the appellant does not face a real chance of being persecuted should he return to Iraq. The submissions made by the appellant as to the benefit of the doubt do not arise for consideration as we are not in doubt as to our finding and the facts on which it is based. Out of an abundance of caution we repeat that there is no evidence that the appellant is at risk of harm at the hands of state agents.

[99] Given that our finding on the first issue is "No" (ie that objectively there is no real chance of the appellant being persecuted if returned to Iraq), the second issue does not fall for consideration.

[100] The finding that the appellant does not have a well-founded fear of being persecuted also means that there is no need for the Authority to determine whether the provisions of Article 1F(a) have application to the appellant.

Generalised Violence

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

selective phenomenon are excluded. Returning to this point at op cit 188 he emphasises again the general proposition that victims of war and violence are not by virtue of that fact alone refugees.

[102] The finding of this Authority is that the appellants have failed by a clear margin to establish to the well-founded standard a risk of being persecuted for a Convention reason. Furthermore, the fluidity of events in Iraq notwithstanding, there is nothing to suggest that the appellants face any risk of harm in Iraq other than a highly speculative and theoretical risk of random harm. In fairness to the appellants they did not submit to the contrary.

CONCLUSION

[103] For the reasons given the Authority finds that the male appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. It follows that the female appellant is likewise not a refugee. Refugee status is declined. The appeals are dismissed.

	.....
	[Rodger Haines QC]
	Chairperson