

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76370

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairman) M L Robins (Member)
<u>Counsel for the Appellant:</u>	C Curtis
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	18 August 2009
<u>Date of Decision:</u>	17 September 2009

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, who is an Iraqi national of the Chaldean Christian faith.

INTRODUCTION

[2] The appellant is in her mid-40s. She is a divorced woman with no children, from a Chaldean Christian family. Her parents and her eldest brother are permanent residents in New Zealand. The appellant arrived in New Zealand on 11 July 2008 on a limited purpose visa for the purpose of visiting her parents. She lodged her application for recognition as a refugee in New Zealand with the RSB on 27 February 2009. She was interviewed by the RSB on 21 April 2009. A decision to decline her recognition was made by the RSB on 12 June 2009. She then appealed to this Authority.

[3] The core of the appellant's claim is that she predicts being persecuted on return to her former home district in Baghdad, Iraq, for reasons of her Chaldean

Christian beliefs and her predicament as a single (divorced) adult woman alone, with no family support.

[4] There is, however, a preliminary issue, discussed below, arising from the fact that she obtained permanent residence in the United States when she moved there in 1997 with her ex-husband. She holds a permanent residence card (green card) for the United States, which expires in 2010. After determining issues related to that permanent residence, and possible exclusion under Article 1E of the Refugee Convention, the essential issues that then remain for determination are whether her claims are credible and, if so, whether her prediction of being persecuted is well-founded for one or more of the Refugee Convention reasons.

THE PRELIMINARY EXCLUSION UNDER ARTICLE 1E ISSUE

[5] The RSB decision excluded the appellant from the protection of the Refugee Convention through the operation of Article 1E. No consideration as to inclusion was undertaken in their determination which was made in June 2009. At that time it was less than one year since the appellant had last legally entered, and then departed, the United States. That was in July 2008.

[6] The preliminary issue that arises is whether the appellant, who did not apply for a re-entry permit to the United States before she left that country, nor during the 12 months until July 2009, is placed in a position where she has lost her US permanent residence status or that her US permanent residence status cannot be reinstated by way of "mere formality". The RSB, determining the matter within the period of 12 months, effectively determined that, as she had not been out of the country for more than 12 months, she could lawfully re-enter and maintain her status as a permanent resident. They also commented the appellant should, in good faith, apply for a permit to re-enter the United States before the 12 month period expired.

[7] The appellant failed to make such an application in the period between the decline of her application for recognition as a refugee by the RSB and the date when the appeal came before the Authority for determination.

[8] At the outset of the appeal hearing, the Authority, having noted the apparent continuing validity of her green card (until 2010) and the relevant law on this issue, stated that after hearing evidence in relation to her claim in which she predicted being persecuted if she was returned to Iraq, the matter was to stand adjourned so that the appellant, with the assistance of her counsel, could apply to the United

States Consulate in New Zealand for the right to re-enter as a permanent resident. The Authority, in its Minute No 1 (19 August 2009), gave directions and granted the adjournment, stating at [7]:

“It was explained to the appellant that the established position in New Zealand in respect of an applicant’s ability to access protection from competent authorities in the country of former nationality or permanent residence requires an applicant to make an application to the competent authorities of the country concerned to ascertain whether or not re-entry will be a mere formality or otherwise. This is explained in *Refugee Appeal Nos 72558/01, 72559/01* (19 November 2002) at [83] and follows overseas jurisprudence in *Tatiana Bouianova v Minister of Employment and Immigration* [1993] FCJ, No 576 (Canada) and *R v Secretary of State for the Home Department, ex parte Bradshaw* [1994] Imm AR 359 (UK). The situation as expressed in these cases is that a refugee claimant cannot elect not to make such an application.”

[9] In a letter from counsel, dated August 2009, the Authority was advised that an application had been made to the US Consulate and a response had been received from them on the same date. That email response stated (verbatim):

“... we can provide the following information which is an extract of 9 Foreign Affairs Manual:

9 FAM 42.1 N1.2 Immigrants Possessing a Permanent Resident Card

9 FAM 42.2 N1.2 Returning Resident Aliens

An unexpired form I-551, *Permanent Resident Card*, may be presented in lieu of a visa provided the alien is returning:

- (1) To an unrelinquished residence in the United States after a temporary absence abroad **not exceeding one year**;

This means that a person applying for re-admission to the U.S. as an LPR must prove to the U S CBP/DHS immigration officer at port of entry that she has maintained her status by returning to an unabandoned residence in the U.S. after a temporary absence abroad of less than one year.

As your client has remained outside the U.S. for over 365 days she will have now lost her U.S. legal permanent residence status.

There is a provision in the law which authorizes a former LPR to apply for “Returning Resident Status” status (SB1 category) at a consular office abroad, by satisfying the adjudicating officer that she has been outside the United States for an extended period, for reasons **beyond her control**. This would usually be for medical reasons or illness of a close family member. The form to use is DS-117 attached. The non-refundable fee for the review of the application would be US\$400 or NZ\$650 (non-refundable) and if approved, the applicant would be processed for an immigrant visa, requiring a medical with a consular panel physician, a formal interview and further Visa fee of US\$400/NZ\$640.

The provisions under which a Returning Resident application is considered under are out outlined also in 9 FAM 42.22 Notes – and are quite stringent.

We trust this information is of assistance.

Immigrant Visa Section”

[10] In the letter from counsel, it was submitted that the appellant does not have compelling reasons beyond her control such as medical or illness of a family

member and thus it would appear, from the response of the US Consulate General, that she would not be granted entry to the United States. The letter also states that they are mindful of the appellant's difficult financial situation and that US\$400 is a considerable sum for her to find. They undertook to apply formally to the Consulate if the Authority "still seeks that this is done".

DECISION ON THE ARTICLE 1E ISSUE

[11] The appellant has, by her own neglect or ignorance, either alone or in concert with her family sponsors, placed herself in a position where it is clearly not a mere formality for her to re-enter the United States and take up permanent residence, even though her green card, on the face of it, is still valid until 2010. It does not appear that she could argue, with any reasonable likelihood of success, to a US adjudicating officer that she had been outside the United States for an extended period for reasons beyond her control. Thus, having been outside the US for over 365 days, she has, *prima facie*, lost her permanent resident status. As the email from the Consulate General sets out, the provisions are "quite stringent".

[12] The Authority is therefore placed in a position of noting that while the conclusions of the RSB, made prior to the expiry of the appellant being outside the USA for less than 365 days, would appear to be correct in terms of the recognised jurisprudence set out above, the appellant's failure to make an application within the required one year period has effectively placed her outside the provisions of Article 1E of the Refugee Convention, which provides:

"This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

[13] The only issue that remains is whether the appellant's failure to make an application, either before her departure or during the one year period, can be considered to amount to an act of bad faith on her part to the extent that she should be refused refugee status in this country. The appellant's explanation for the failure was simply that she did not wish to return to the USA because her former husband lived there and she feared him.

[14] The jurisprudence applicable on the issue of good faith/bad faith in New Zealand, is set out in *Refugee Appeal No 2254/94 Re HB* (21 September 1994) and, more recently, in *Refugee Appeal No 76204* (16 February 2009) at [132] to [139].

[15] In this case, having heard evidence from the appellant and considered the details set out in her file, the Authority is satisfied that there is a real chance that the failure to make the application for re-entry to the United States was a strategy or omission carried out by the appellant and/or her sponsors in an effort to ensure that she was able to present a much stronger refugee claim. The Authority however is also satisfied, after considering all of the evidence, that it is equally likely that the failure to make the application for re-entry was done out of sheer ignorance or neglect or a combination of the two.

[16] The terms of the decision in *Refugee Appeal No 2254/94* emphasised that “the good faith principle must be applied with caution, not zeal”. That decision affirmed that consideration must be given as to whether the action, or in this case inaction, was carried out for the sole purpose of creating a pretext for invoking a fear of persecution, and that each case must be assessed on its own merits. The Authority considers that while there are certainly grounds for cynicism, this is not a case where a zealous approach should be taken and that the benefit of any doubt should be made in favour of the appellant.

[17] Accordingly, the Authority considers that the good faith principle has not been breached in this case and that this appellant does not fall within the provisions for exclusion provided in Article 1E of the Convention.

[18] It is therefore necessary to move on and consider the appellant’s predicament if she were returned to Iraq at this time.

THE APPELLANT’S CASE

[19] What follows is a summary of the evidence given by the appellant before and at the hearing.

[20] The appellant left Iraq for Jordan in 1995 and then, two years later, went to the United States with her husband. She remained in the USA and Canada until she came to New Zealand in 2008. As this case now turns solely on the risks on return to Iraq, it is unnecessary to record problems and details of her life in the United States with her former husband.

[21] An assessment of her case as regards her predicament on return to Iraq is therefore undertaken. The evidence is assessed against an up-to-date bundle of country information which had been prepared by the Refugee Research and

Information Branch of Immigration New Zealand, a copy of which was made available to the appellant's counsel.

[22] The appellant was born in AA, the most northerly governorate of Iraq. Her family are Chaldean. They continue to adhere to that faith. AA is in the Kurdistan region of Iraq (KRI).

[23] In 1975, when political upheavals took place between the Kurds and the Iraqi government, the appellant and her family had to leave their village in the north of Iraq. They went to live in Baghdad. The appellant had no schooling, either in AA or in Baghdad.

[24] The appellant is the fourth of nine children in her family. All of her family, including her parents, now live outside Iraq. There are several siblings in Australia and others in Canada. It is noted that her eldest brother, ZZ, and his own family are permanent residents in New Zealand. They came here from Jordan under the UNHCR mandated refugee programme in approximately 1997. ZZ was joined by his parents at a later date as part of a family reunification programme. The appellant, at the time when her brother was being processed to come to New Zealand, had become engaged and then married to her husband, a US citizen and resident, and thus was ineligible to come to New Zealand at that time with other members of her family. Several of her siblings obtained refugee status in Australia and Canada in the 1980s and 1990s.

[25] The appellant's father ran a restaurant in Baghdad, a job that was organised through an uncle. The family lived in Baghdad and practised their Chaldean Christian religion for the 20 years they were there, regularly attending a Christian church. During that time, they often encountered difficult circumstances with the authorities from the Saddam Hussein regime. However, they were never stopped from going to church. The family were subjected to abuse and religious discrimination, particularly after the first Gulf War and they were criticised and told they were supporters of President George Bush (senior). Two of the appellant's brothers were taken away for military service and were not seen for many years until they were able to reunite after escaping from Iraq.

[26] In 1995, the appellant travelled with her brother, ZZ, to Jordan because of the growing level of risk to them as Christians in Iraq. ZZ and his family applied for recognition as refugees and, after about two years of processing, were able to be resettled into New Zealand.

[27] The appellant did not travel with them as a maternal uncle from Canada had suggested a marriage for the appellant. She agreed to that and, after her husband, YY, came to Jordan and met her, the marriage proceeded. Then after an application to obtain residence in the United States was processed, she moved to join her husband in the USA in 1997.

[28] She was not included in the application for resettlement to New Zealand with her brother's family because of her marital situation. Thus, although ZZ left Jordan for New Zealand prior to the appellant leaving Jordan, she was only remaining there during the processing of her papers for entry to the USA.

[29] At the present time, the appellant advises that she has three relatives living in Iraq. They are a paternal aunt who has two disabled daughters living with her. They live in a village in the AA area. Through contacts made with this aunt by her father, the appellant was advised that life was extremely difficult for these three women. The aunt is now over 80 years of age and has difficulty in continuing to practise her Christian faith. The only news that the family receives from Iraq is through this aunt.

[30] The appellant predicts, as a single, divorced woman with no education or resources and no family support, that if she returned to Baghdad, life would be unsustainable for her and she could well be killed. Her particular risk predicament was enhanced because of her Christian beliefs and because so many Christians had left Baghdad and other parts of Iraq, it would not be possible to obtain support even from a Christian congregation.

[31] In addition, she considers it would not be possible for her to go and live in the AA area, not only because of her general predicament as a single, divorced Christian woman alone, but also because she did not speak the Kurdish language which was used in the AA area and she had never lived independently.

COUNTRY INFORMATION

[32] The Authority has made particular reference to country information relating to risk factors for single (divorced) Chaldean Christian women returning alone with no family or other support available to them to Baghdad.

[33] The background reports the Authority found of particular relevance were:

(a) UK Home Office Border Agency 2009, *Iraq: Country of origin information*

report, 10 July 2009 (the UK Home Office COI report);

- (b) Danish Immigration Service 2009, *Security and Human Rights Issues in the KRI and South/central Iraq*;
- (c) United States Commission on International Religious Freedom 2009, *US CIRF Annual Report 2009 – Countries of particular concern: Iraq*;
- (d) UNHCR 2009 *UNHCR Eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers*, April 2009 (the UNHCR report); and
- (e) Immigration and Refugee Board of Canada, IRQ102990.E – *Iraq: Overview of the situation of Christians; violence against Christians in Baghdad and the North; displacement; government protection; situation of the Christian minority in the Kurdistan region (2003-2008)*, 15 January 2009.

Solo woman returnee

[34] The recent Danish Immigration Service (DIS) report discusses the situation for single women in various parts of the country, noting:

“Female heads of households are among the most vulnerable in Iraq, not only in KRI.” (p57)

[35] The report also looks at the issue of single women returning from abroad, noting that individual circumstances need to be taken into account before saying categorically whether she would be safe or not. Family support is important, as is area of relocation.

[36] The UK Home Office COI report notes:

“The general lack of security in the country and increasingly conservative societal tendencies have a serious negative impact on women.” (p153)

and

“Numerous women, including Christians, reported opting to wear the hijab for security purposes after being harassed for not doing so.” (p156)

[37] The UNHCR report states (p149):

“Women without a breadwinner are increasingly lacking the means to provide for themselves as access to the labour market is generally difficult.”

[38] An International Organisation of Migration (IOM) report *Enhanced and Integrated Approach regarding Information on Return and Reintegration in the*

Countries of Origin - IRRICO II looks at the housing situation and notes:

“It is difficult to find an apartment or house for a single person because of social issues. Indeed, one-person housing scarcely exists.” (p5).

Chaldean Christians

[39] In general terms, the reports state that Chaldean Christians are still subject to attack in various parts of Iraq. Baghdad has seen recent bombings of churches. The UK Home Office COI report at 21.32 states:

“The Minority Rights Group (MRG) report of 2008 stated “Iraq’s Christian minorities, from the ancient communities of Chaldo-Assyrians and Syriac-speaking Orthodox Christians to the Armenians who fled to Iraq from the Ottoman Empire early in the twentieth century [sic], are now all under severe threat.”

[40] Further comments at 21.33 record information from “The Brookings Institute”, published 30 December 2008, which state that there are between 600,000 and 800,000 Christians remaining in Iraq, of whom about two thirds are Chaldeans. It is also estimated that 50% of the country’s Christian population lives in Baghdad.

[41] At 21.34 of the UK COI report, there is reference to a USSD International Religious Freedom report of 2008 detailing kidnappings and assassinations of Christians. It notes the kidnapping of Chaldo-Assyrian Christians throughout Iraq, which resulted in at least 10 assassinations. It also refers to attacks on Christian sites and churches in Mosul and Baghdad.

[42] At 21.36 of the same report, there is a quotation from IOM and their report of 1 November 2008 which notes:

“Christian leaders stated in press reports that 500 families left the Doura District [Baghdad] between April and May 2007, and the United Nations High Commission for Refugees (UNHCR) reportedly counted at least 100 families fleeing Doura. ...

The UNHCR Guidelines of April 2009 stated that ‘Given the Iraqi Government’s commitment to provide protection to Mosul’s Christians and somewhat improved security conditions, a number of displaced Christians decided to return to their homes; however, many are still too fearful to return.’”

[43] The IRB report of 15 January 2009 states:

“According to the Chaldean Culture Society, only Christians with sponsors are able to settle in the Kurdistan region. ... that the KRG has confiscated the property of Christians and that there are allegations of discrimination against non-Muslims.”

[44] A report of 15 July 2009, published by the International Regional Information Networks (IRIN) “Iraq: Christian community faces new wave of violence” states:

“A new wave of violence targeting Iraq’s Christian community has raised questions about the safety of religious minorities amid concerns about Iraqi forces’ ability to maintain security after the 30 June withdrawal of US combat forces from cities to outlying bases.

On 12 July, there were five attacks on churches in Baghdad and one assassination in the north that left five dead and more than 20 injured, according to Iraqi Interior Ministry’s statements.

‘These [systematic] attacks on that specific day mean that there are well-organized militant groups who are still active unleashing violence and terrorism against Iraqis in general and Christians specifically,’ ... a Christian Iraqi MP told IRIN.”

[45] The same report goes on to note:

“Extremist Islamists are systematically aiming at driving out the remaining 100,000 Assyro-Chaldaic Christians from the Iraqi capital.”

[46] This report is from a near-east consultant for the Society for Threatened People and set out in a statement of 13 July 2009. He goes on to state that three quarters of the approximately 400,000 Christians living in Baghdad have fled the city since the 2003 US-led invasions, due to either direct or indirect threats to their community. The same group notes in the IRIN report that these Christians have been displaced both inside Iraq and to neighbouring Jordan and Syria.

[47] An Irish Refugee Documentation Centre report dated 4-6 August 2009: “*Treatment of failed asylum seekers*” notes a report by Refugees International dated April 2009 that refers to returning Iraqis and states:

“Many people will still not return until they feel the root causes of the conflict have been addressed. They need to feel accepted by the community and provided with security guarantees. Baghdad, and indeed the rest of Iraq, resembles a large military base today. Each neighbourhood is sealed off by walls, and people are unable to move freely when they choose.”

THE ISSUES

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

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[49] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant

being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[50] The appellant's evidence, particularly in relation to her time in Iraq and Baghdad particularly, was short and simple and in no way conflicts with the country information. Her credibility in this regard is therefore accepted.

WELL-FOUNDED FEAR

[51] The Authority has for many years interpreted the term "being persecuted" in the refugee determination context as the sustained or systemic violation of basic human rights, demonstrative of the failure of state protection. In other words, the core norms of international human rights law are relied upon to define the forms of serious harm which are within the scope of "being persecuted". This is often referred to as the human rights understanding of "being persecuted" and is fully explained in *Refugee Appeal No 74665/03* [2005] NZAR 60.

[52] The appellant's profile is a fairly simple one in Iraqi terms. She is a single, divorced, middle-aged Iraqi woman of the Chaldean Christian faith who is uneducated and without resources. She would be returning to Baghdad without any family or supporters. The only relatives she appears to have in the whole of Iraq are a very elderly woman and her two disabled daughters, already in a distressed state themselves.

[53] The appellant's predicament upon returning to Baghdad, her former home district in Iraq, would be a difficult one. All of the country information above, both for reasons of her Christianity and as a single adult woman alone with no support available to her, lead to the Authority being satisfied that there is a real chance of this appellant being persecuted on return.

[54] This appellant, given her predicament assessed above, would have no means of support available to her. Based on country evidence, many women in such circumstances are forced into prostitution as possibly the only means of supporting themselves; see p149 and 150 *UNHCR Eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers*, April 2009.

While it would be speculative to assume the appellant would do so, the reality of life for many such women provides a stark backdrop to the level of difficulties she would face.

[55] The Authority finds the appellant faces a real chance of being persecuted on return to her former district in Baghdad. Because of both the physical difficulties and the danger of the appellant travelling as a woman alone, in trying to make her way to her original home district in AA, the Authority has not gone on to assess further whether an internal protection alternative may be available in this appellant's case. It is clearly, on the country evidence, unnecessary for us to do so.

[56] The first issue is therefore answered in the affirmative. The Authority finds that the well-founded fear held by the appellant is, at least in part, for reasons of her religious beliefs.

CONCLUSION

[57] For the reasons set out above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. This appeal is allowed.

"A R Mackey"
A R Mackey
Chairman