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INEQUITY BETWEEN THE PROCESSING OF THE IRAQI CASELOAD ONSHORE AND THOSE PROCESSED ON NAURU:

A critique of the Country of Origin Information used to process Iraqi Applicants on Nauru – particularly the use of the Danish Immigration Service Report of March 2001 and Onshore Protection’s internally produced paper on “Illegal Departure and Imputed political Opinion” (May 2002)¹

INTRODUCTION:

If the Iraqi applicants on Nauru had been rejected by a DIMIA Case Officer working on Australian soil in late 2001 or early 2002, it is quite possible that the same COI (The Danish Report and the IPO) being used on Nauru would have been used to reject them here. However, **if the applicants were being processed onshore**, they would have had access to qualified legal advisors and perhaps many applicants would not have been in the state of “blind panic” that many suffered from on Nauru. The Nauru caseload had been reduced to following the “migration advice” of people smugglers and other similarly ill-informed people.

For example, many applicants made several admissions during the course of their early processing – one applicant admitted:

“I made mistake – I said I exit by walking – I said ppt from Amman – unfortunately I lied about things – in Indon(esia) told me this Bogar Camp – so many people rejected were in NZ – they said not to say I used ppt “say you fled by walking – I kept that in my mind – as I mentioned – I think it was the fear that everything would be sent back to Iraq - ... I didn’t intend to come - I had no option at that time ...”²

ON-SHORE REVIEW BY THE RRT (2001-2002):

A search of RRT Decisions being made in Australia during that time period, looking at cases where the Tribunal members overturned DIMIA rejections that were based on the opinion that illegal departure and return after failing an asylum claim overseas would NOT cause an Iraqi applicant to be at risk due to imputed political opinion, is illuminating reading.

¹ This document combines material from three submissions prepared on behalf of three different applicants.

² Folio 87 of one Iraqi applicant’s file.

In particular, the vast range of COI used by the RRT members to inform their decisions casts the limited use of COI to inform the decisions on Nauru into a very poor light.

For example: a simple search of the Refugee Review Tribunal Database using the key-words “Iraq – 2002 - illegal departure – imputed political opinion – failed asylum seeker” resulted in **thirty-five** links to RRT Hearings.

Of the thirty-five links, **twenty-eight** related to cases where Iraq was the country of nationality and the issues of illegal departure and imputed political opinion were considered in depth as part of the decision making process. Each Member included comprehensive lists of all the Country of Origin Information available about imputed political opinion and illegal departure. The Danish Report of March 2001 (and for the cases decided after 24/4/02), the Departmental IPO Paper, were included in these lists, but none of the RRT Members gave primacy to those two sources above all others.

RRT RESULTS:

Thirteen RRT Members presided over twenty-eight cases; all but one of the RRT Members overturned the DIMIA case officer’s rejection decisions and found the applicants to be refugees. ³

NAURU DIMA IRAQI PROCESSING 2001 - 2002:

The Iraqi applicants on Nauru were interviewed in late 2001 and early 2002.

The primary decision makers were instructed via emails to State Directors by Wendel Parrinder in Central Office, “to sign but not date their decisions” until the document prepared by Onshore Protection called “*Illegal Departure, Voluntary Return and imputed political opinion in Iraq*” had been “circulated to State Directors and others.” ⁴

As at 1/5/02, Mr Parrinder’s email notes that there are 64 remaining Iraq cases on Manus Island and Nauru that were awaiting decisions because of “the IPO issue.”

When I became involved in the processing of Iraqis on Nauru two years later, more than half of those 64 cases remained rejected. Once I had received the files for the remaining Iraqis under FOI in January 2005, I was able to examine the decision making process and compare it to Iraqi cases being decided onshore in a similar time period.

I submit that the March 2001 Danish Report and the April 2002 Departmental paper, the IPO, predominated adversely in the decision making process on Nauru where there was no access for the applicants to independent review of the DIMIA decisions. In comparison, those cases reviewed in RRT Hearings onshore in Australia were almost without exception found to be refugees.

³ The RRT Hearing that did not find the claimant to be a refugee was in August 2002, quite late in the year.

⁴ Folio 48-49 MAS File

OFF-SHORE PROCESSING OF IRAQI ASYLUM SEEKERS:

A DIMIA Case Officer who was a primary decision maker for an Iraqi applicant stated in a file note dated 29/4/02 that:

*"I was advised on 3 April 2002 that cases covered by the issues of illegal departure, voluntary return, and imputed political opinion in relation to Iraq needed to be reconsidered in light of the new advice. ... I have now commenced considering the case in the light of this new advice, particularly as consolidated in the information paper "**Illegal departure, voluntary return and imputed political opinion in relation to Iraq**" prepared by Onshore Protection Branch on 24 April 2002 and will be making a new decision based on this new advice."*⁵

Several of the Primary Decision Makers and the Review Decision Makers working on the Nauru cases appeared to rely inordinately heavily on the above IPO Paper and on **very selective extracts** from a 2001 report on Iraq produced by the Danish Immigration Service.

There are a number of issues I think are important to raise about the selective use of both the IPO Paper and the 2001 Danish Report.

I submit that the narrow range of country information relied upon by the decision makers gives a totally inaccurate assessment of the risks an Iraqi applicant would face if they were returned to Iraq in 2002.

I submit that if the broader context of international discourse about Iraq in mid-2002 had been properly included in the range of country information used to inform the decision, it is possible that many more of the Iraqi applicants on Nauru would have been accepted.

The following Human Rights Report titled "*Iraq: Systematic Torture of political prisoners*" was published by Amnesty International on 15th August 2001. The Report gives a sobering glimpse into the kind of treatment prisoners in Iraqi jails suffered and it is clear that many of the Iraqi applicants on Nauru feared this treatment. Fear of being arrest and torture was reportedly the catalyst for many of the Iraqi applicants' decisions to flee Iraq.

IRAQ Systematic torture of political prisoners

1 INTRODUCTION

Torture is used systematically against political detainees in Iraqi prisons and detention centres. The scale and severity of torture in Iraq can only result from the acceptance of its use at the highest level. There are no attempts to curtail or prevent such violations or punish those responsible. This total disregard for a basic human right, the right not to be tortured or ill-treated, grossly violates international human rights law which prohibits torture in all circumstances. The International Covenant on Civil and Political Rights (ICCPR), which Iraq ratified in 1971, states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"(Article 7).

⁵ Folio 44 (of one Iraqi applicant's file) - This paper will be referred to from now on as the IPO Paper.

Amnesty International has over the years received numerous reports of torture and interviewed hundreds of torture victims. The organization has also published many reports documenting a wide range of human rights violations in the country, including torture and ill-treatment. Victims of torture in Iraq have been subjected to a wide range of forms of torture. The bodies of many of those executed had evident signs of torture, including the gouging out of the eyes, marks of severe beatings and electric shocks to various parts of the body, when returned to their families. Some detainees died as a result of torture. Many torture victims now live with permanent physical or psychological damage.

*Torture is used both to extract information or confessions from detainees and as a punishment. Political detainees are tortured immediately following arrest and **their torture generally takes place in the headquarters of the General Security Directorate in Baghdad** or in its branches in Baghdad and in the governorates. Torture also takes place in the headquarters of the General Intelligence (al-Mukhabarat al-'Amma) in al-Hakimiya in Baghdad, its branches elsewhere, as well as in police stations and detention centres such as al-Radhvaniya. Detainees in these places are held incommunicado for months or even years without access to any lawyers or family visits.*

*... Victims of torture have included suspected government opponents who range from army, security and intelligence officers suspected of having contacts with the Iraqi opposition abroad or accused of plotting against the government, to followers of leading Shi'a Muslim religious personalities. Torture has also been used against women suspected of having links with Shi'a Islamist groups in the country or simply because of family links. **In many cases relatives of those active in the Iraqi opposition abroad have been tortured or ill-treated as a way of putting pressure on those opposition leaders to cease their activities.**⁶*

Instead of referring to the broad range of country information available, especially the sources which focussed on the routine gross human rights violations against Iraqis that fell foul of the regime, the 2002 DIMIA Case Officers predominantly cited Country of Origin Information constructed by either the Danish Immigration Service and by the Onshore Protection Branch (ie: the IPO).

I submit both of those documents were unrepresentative of the broad range of information about Iraq that was available at that time.

In addition, I submit that both papers were primarily constructed to enable Decision Makers to reject Iraqi claims at a time when the political climate in Denmark and Australia was swinging against the acceptance of large numbers of asylum seekers from that region.

For example, the Danish Immigration Service's March 2001 Report was released at a time when the Danish Government was focussing on reducing the rate of acceptance of asylum seekers seeking protection in Denmark. In mid-January of the following year, under pressure from The Danish Peoples Party (DDP) - an extreme right populist party - a number of broad changes to the Danish Aliens Act were proposed.

The news report "*Denmark: Hard times for asylum seekers and refugees*" encapsulates the political context within which the 2001 Report was created and also details the consequences to asylum seekers of the popularity of "*xenophobic*" political groups within Denmark.

⁶ <http://web.amnesty.org/library/Index/ENGMDE140082001?open&of=ENG-IRQ>

Despite the Danish Report's strong bias against Iraqi asylum seekers, 2002 Case Officers still had to use **very selective portions** of the text from the Danish Report in order to conclude that "*illegal departure by itself or applying for asylum abroad is not necessarily considered by Iraqi officials as showing negative political opinion by the client.*"⁷

I submit that the 2002 Decision Makers could **not** conclude, on the basis of the Danish Report, that an Iraqi applicant's fear of being targeted because of illegal departure was unfounded. For example, even though the Danish Report does not name its sources, the organizations interviewed acknowledge that **in terms of asylum seekers who return to Iraq they have no way to be sure that the asylum seekers remain unharmed.**

For example one un-named organisation stated:

*"It had no grounds for suspecting that Iraqis who are forcibly returned to Iraq after being refused asylum ... are persecuted when they return to Iraq ... (then it later qualifies that statement by acknowledging that) ... As an agreement could not be reached with the Iraqi authorities on monitoring the Iraqi's reintegration into Iraqi society, it was impossible to speak with certainty about the situation of the returning Iraqis."*⁸ (my emphasis)

The extraordinary thing is that several sentences included in the large quotes used by DIMIA Case Officers to dismiss many of the Iraqi applicant's claims **could as easily have been used to support their claims.** Later on in the Danish Report, the researchers again acknowledged **the need to be cautious** when making assessments about failed asylum seekers being returned to the country (as opposed to ordinary Iraqis who were returning to the country). For example:

*It was difficult to comment on the reaction pattern of the Iraqi authorities generally and each individual case had to be evaluated separately. It was impossible to give any guarantee regarding the behaviour of the Iraqi authorities, which appeared somewhat arbitrary. It was not possible to generally exclude the possibility that an ex-asylum seeker would not incur the authorities' wrath. If the returning asylum seeker had left Iraq due to opposition political activities or had been involved in such activities outside Iraq, there is no doubt that Iraqi authorities would react with reprisals ..."*⁹

Despite these warnings, many DIMIA Decision Makers stated that "*the Iraq authorities are relatively tolerant of the endeavours of Iraqi citizens to escape from (bad) economic conditions and sanctions*" by claiming asylum in the West.

There is a portion of the 2001 Danish Report which cited an Iraqi diplomat from Iraq's Ministry of Foreign Affairs stating that:

*" ... He was aware that a large number of Iraqis who had travelled to Europe and elsewhere in recent years are seeking asylum. He considered that the policy of sanctions is the reason why so many Iraqis are leaving the country, and expressed sympathy for their views. He considered the fact that it may be necessary to seek asylum in order to establish grounds for residence to be a formality as the real reason is the tense humanitarian situation in Iraq."*¹⁰

⁷ Folio 38 of one Iraqi applicant's file.

⁸ CX54577 Folios 40

⁹ Report from fact-finding mission to Iraq; The Danish Immigration Service; 8 March 2001

¹⁰ Folio 60 of one Iraqi applicant's file.

The perspective of this diplomat was to focus entirely on humanitarian issues arising out of the policies of the international community and to ignore the possibility that Iraq's domestic policies could contribute to Iraqi citizens leaving the country. As such, the value of his analysis is limited.

Many of the 2002 Case Officers used the 2001 Danish Report and the IPO Paper to conclude that the applicants would not face persecution for leaving Iraq illegally and attempting to claim asylum overseas.

Other country information sources indicate that the US Government, the UNHCR, the European Union and international organisations like Amnesty International and Human Rights Watch had a different position on illegal exit and forced return to the Danish Report and the IPO Paper.

Had the 2002 Case Officers referred to a broader range of sources in determining whether the Iraqi asylum seekers, who returned to Iraq after leaving illegally, would still face persecution, they would have found many of the Iraqi applicants DID have a well-founded fear of persecution.

For example, the *US Citizenship and Immigration Services – Queries about illegal exit and re-entry to Iraq, 28/6/2000* examines the consequences of illegal departure from Iraq the year before the applicant fled Iraq.

... "One expert stated that **"the return of the Chaldean (Christians) to Iraq if they have left illegally would no doubt be a death sentence, or worse, if possible,"** though he also noted that **not all** returnees (Chaldean or otherwise) who left the country without permission have been executed (Journalist 17, 19 May 2000). (my emphasis)

... Another expert said that "to return to Iraq without a promise of asylum [or amnesty from the Iraqi government] would be foolish, but **a promise of asylum is no guarantee of protection from retribution**" (INSS Senior Fellow 20 April 2000). For instance, despite the Iraqi government's promise of safe return, Saddam Hussein's two sons-in-law were executed in 1996 within 36 hours of their return to Iraq after having defected to Jordan in 1995 (INSS Senior Fellow 20 April 2000).

... Hussein Kamel and Saddam Kamel...were executed by the Government in February 1996... **Although the Government announced amnesties for both men, they and over 40 relatives, including women and children, were killed in what the official Iraqi press described as the spontaneous administration of tribal justice.** The Special Rapporteur, Max van der Stoep, noted in his November report that **"the killings occurred without any legal process and with total impunity."** He also cited continued reports of the frequent use of the death penalty for such offences as "insulting" the President or the Baath Party and the pervasive fear of death for any act or expression of dissent (UK Immigration & Nationality Directorate Sept. 1999).(my emphasis)

... **Two experts consulted stated that punishment by imprisonment would result from attempting to return to Iraq after having departed illegally, and that torture generally seems to accompany most imprisonment in the country** (Professor of History 7 April 2000; INSS Senior Fellow 20 April 2000). (my emphasis)

... In June 1999, the Revolutionary Command Council [Iraqi government] declared a general amnesty for citizens who had left the country illegally or who had been exiled and failed to return to the country after expiration of the period of exile (USDOS 25 Feb. 2000). As quoted from a report by the UK Immigration & Nationality Directorate, the law applied to:

1. All Iraqis who left illegally.
2. Those Iraqis who left Iraq on official mission but did not return after completion of the mission. This includes those who managed to do so through illegal departures, forgery (of official documents used for this purpose),
3. All the Iraqis who fall under the above-mentioned categories and who had been sentenced, are now exempted, they shall be free, released unless they had been sentenced with other crimes (in addition to the above) (Sept. 1999).

The US Department of State has recently reported, however, that **there are no officially known instances in which Iraqis returned to the country based on the amnesty**, and that "an estimated 1 to 2 million self-exiled citizens are fearful of returning to Iraq" (25 Feb. 2000).

According to one expert, "Saddam's penchant for executing some of the returnees has had a dampening effect on others," discouraging them from returning (Journalist 17 May 2000)¹¹. (my emphasis)

The UNHCR also had reservations about whether the 1999 amnesty would guarantee the safety of returning Iraqi exiles. For example the UNHCR stated that:

"UNHCR did not promote these repatriations, however, telling would-be returnees that the agency could not monitor or guarantee their safety upon return. Although UNHCR reported a breakthrough in negotiations with the Iraqi government at the end of 2001 whereby the government agreed to allow the agency to monitor repatriations, the safety of returning Iraqi refugees – and by extension the prudence of promoting returns – remained in doubt at year's end. In 2001 and past years, USCR has received several reports of arrests, disappearances, deaths under mysterious circumstances of some returnees, although these reports could not be independently confirmed. (my emphasis)

In the course of USCR's and ECRE's field research in the Middle East, UNHCR and others reported that the Syrian and Jordanian governments generally refrain from deporting recognised refugees and asylum seekers with claims pending to government-controlled Iraq in recognition of the possibility that they could face persecution upon return.

... Most European diplomats in Amman and Damascus interviewed by USCR and ECRE reported their government's serious reservations about returning rejected Iraqi asylum seekers out of concern that the mere act of having applied for asylum in Europe may lead to persecution in Iraq upon return."¹² (my emphasis)

The following US report was not released until 2003, but it relates to the situation in Iraq in 2002. It contains the following comments about the high rates of executions in Iraq and the supposed safety of Iraqis returning after departing illegally:

"... In keeping with its long and established record of executing perceived or alleged political opponents, the regime committed numerous political and other extrajudicial killings throughout the reporting period. The U.N. Special Rapporteur repeatedly criticized the regime for the "sheer number of executions" taking place in the country, the number of "extrajudicial executions on political grounds," and "the absence of a due process of the law."

*"... In recent years the regime made several efforts to improve its standing with human rights groups and the U.N. Special Rapporteur by declaring prisoner, deserter, and exile amnesties, most recently in October (see Section 1.c.). In June 1999, in another example, the regime announced a general amnesty for citizens who had left the country illegally or were exiled officially for a specified period of time but failed to return after the period of exile expired (see Section 2.d.). **No citizens were known to have returned to the country based upon this***

¹¹ <http://uscis.gov/graphics/services/asylum/ric/documentation/IRQ00002.htm>

¹² <http://www.ecre.org/publications>

amnesty, and an estimated 2 to 3 million self-exiled citizens reportedly remained fearful of returning to the country. (my emphasis)

*For the most part, these declared amnesties have been dismissed as public relations gestures and merely corroborated allegations that the regime arbitrarily arrested and detained many citizens. Past reporting also indicated that it was very difficult or expensive for prisoners to obtain release once incarcerated. In May 2001, the press reported that the authorities released 3,000 prisoners who paid bribes to prison officials to have their prison terms cut. One former prisoner said his family paid approximately \$3,125 (5 million Iraqi dinars) for him to be released after serving 7 years of his original 15-year sentence".*¹³ (my emphasis)

The following extracts from a Human Rights Watch Country Report on Iraq published in 2003 reinforces the position that it is not appropriate to be putting Iraqi asylum seekers under pressure to return to their country.¹⁴

"... The Iraqi government continued to commit widespread and gross human rights violations, including the extensive use of the death penalty and the extrajudicial execution of prisoners, the forced expulsion of ethnic minorities from government-controlled areas in the oil-rich region of Kirkuk and elsewhere, the arbitrary arrest of suspected political opponents and members of their families, and the torture and ill-treatment of detainees. (my emphasis)

United Nations

*... In a resolution adopted on **December 19, 2001**, the UN General Assembly condemned systematic and widespread human rights violations perpetrated in Iraq, and called upon the government to cooperate with U.N. human rights mechanisms, in particular by giving the special rapporteur access to the country. ... In an April 19 resolution, the Commission on Human Rights ... condemned continuing violations saying, "[T]here has been no improvement in the situation of human rights in the country."*

European Union

... On May 16, (2202) the European Parliament adopted a resolution on the human rights and humanitarian situation in Iraq, as well as issues relating to regional security and disarmament. **The resolution condemned the "regime of terror against all levels of society" and the continued perpetration of gross human rights violations ...**

United States

... In its *Country Reports on Human Rights Practices for 2001*, released in March 2002, the State Department said that the Iraqi government "**committed numerous political and other extrajudicial executions**" of suspected political opponents. It said that Iraq's human rights record "**remained extremely poor**" and that the authorities "**continued to deny citizens the basic right to due process.**"

... In its *Annual Report on International Religious Freedom for 2002*, released in October, the State Department said that the government "**continued its systematic and vicious policies against the Shi'as,**" severely restricting their religious practices and perpetrating "**a brutal campaign of murder, summary execution, arbitrary arrest, and protracted detention against Shi'a religious leaders and adherents.**"¹⁵

¹³ 2002 Country Reports on Human Rights Practices – Released by the Bureau of Democracy, Human Rights, and Labour, March 31, 2003. <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>

¹⁴ Although published in 2003, the report documents the situation in late 2002, the very time period when the DIMIA Review Officers were rejecting Iraqi applicant's claims for the second time.

¹⁵ <http://www.hrw.org/wr2k3/mideast4.html>

The extracts from the Human Rights Watch Report above indicate that the UNHCR, the United States of America and the European Union were all critical of the human rights violations being perpetrated in Iraq during 2002. The US was in fact taking the first steps towards the invasion of Iraq that took place in early 2003.

Nowhere in this US Report was there any suggestion that Iraqi asylum seekers would now be safe to return to Iraq. In fact, close analysis of the international focus on Iraq in 2002, reveals an increasing level of concern about the continuing targeting of the Shi'a population and of ethnic minorities for gross human rights violations. Such considerations are **virtually invisible** in the country of origin information being used by the DIMIA to decide the Iraqi cases on Nauru in 2002.

April 2002 advice from DFAT noted that the fact that the Iraqi Government does not cooperate with international organisations like IOM or UNHCR and allow them to access to returned asylum seekers means there is no way that the treatment of the few asylum seekers who do chose to return to Iraq can be monitored. Therefore it is "difficult to give any guarantee as to the treatment of asylum seekers could expect from the government on their return to Iraq."¹⁶

In May 2002 Amnesty International voiced its serious concerns about Lebanon returning Iraqi asylum seekers to areas where they would not receive protection and may even be forcibly repatriated to Iraq.

*. Amnesty International is also concerned about the systematic removal of asylum-seekers and refugees to countries where they would not have protection against forcible return to countries where they may risk human rights abuses. ... Amnesty International is concerned about reports that, during April 2002, at least one Iraqi recognized by UNHCR as a refugee, was removed to northern Iraq where he is at risk of refoulement (forcible removal of a person to a country where he or she may face human rights abuses). According to reports this man was forced, under torture, to sign papers allowing for his removal from Lebanon ...*¹⁷

In contrast to the Amnesty concerns of April/May 2002, in the very same time-period, Onshore Protection's IPO paper on Iraq was minimising the risks facing any Iraqi asylum seeker who had been denied asylum by Australia.

As such, the focus of the IPO paper was totally out of step with the wider debate raging internationally about whether it was safe to retrun Iraqi asylum seekers to the region.

By the end of 2002 Human Rights abuses in Iraq had become a major plank in the United Kingdom's push towards the war in Iraq. As the lead up to war gained momentum, human rights abuses continued to feature as a central theme justifying military intervention. Amnesty International's response to this perspective was as follows:

The human rights situation in Iraq remains grave. Amnesty International continues to campaign against systematic and widespread human rights violations including suppression of freedom of expression and association; extrajudicial killings, "disappearances", torture, arbitrary arrests, unfair trials and the use of the death penalty and other cruel, inhuman and degrading punishments. Victims have included officers suspected of plotting against the government and

¹⁶ DFAT Cable CX64137 – Return to Iraq, 22 April, 2002.

¹⁷ <http://web.amnesty.org/library/print/ENGMDE180052002>

other suspected political opponents; their relatives, as well as relatives of opponents residing abroad; and members of religious and ethnic groups, particularly Kurds and Shi'a Muslims. (my emphasis)

*The General Assembly, in its latest resolution 57/232 of December 2002, has strongly condemned the suppression of freedom of expression and association; the harassment and intimidation of Iraqi opponents and their families; the widespread use of the death penalty; summary and arbitrary executions; "disappearances"; arbitrary arrests and detentions; consistent and routine failure to respect the rule of law; and widespread, systematic torture combined with decrees that prescribe cruel and inhuman punishment as penalty."*¹⁸ (my emphasis)

The US invaded Iraq in March 2003 and coinciding with the invasion, they released their *Country Report on Human Rights Practices in Iraq, 2002* (already mentioned above). Even bearing in mind that the US might have a vested interest in emphasising the scope of human rights violations in Iraq, **there is no denying that the body of evidence the US presented about human rights abuses in 2002 was considerable.**

The same information would have also been accessible (from the web) to the DIMIA Case Officers making Iraqi decisions on Nauru in 2002.

Instead of using a wide range of sources to inform their decisions, however, many Case Officers who rejected Iraqi applicants in 2002 used a very narrow sample of the available source documents. If the following extracts from the US report had been referred to in 2002, many of the Iraqi applicants would have had little difficulty establishing their need for protection:

... The U.N. Special Rapporteur on the situation of human rights in the country issued a report in March detailing ongoing, grievous violations of human rights by the regime. The U.N. Commission on Human Rights and the U.N. General Assembly passed a resolution in November criticizing the regime's suppression of these freedoms. In April the European Parliament published a report condemning the regime's human rights abuses. (my emphasis)

The list of offences legally requiring a mandatory death penalty has grown substantially in past years and includes anything that could be characterized as "sabotaging the national economy." This includes offences such as forgery, as well as smuggling cars, spare parts, heavy equipment, and machinery. More significantly, the Special Rapporteur noted that mere membership in certain political parties was punishable by death, and that there was a pervasive fear of death for any act or expression of dissent. There were recurrent reports of the use of the death penalty for such offences as "insulting" the President or the Ba'ath Party. The Special Rapporteur also noted that even the "suggestion that someone is not a supporter of the President carries the prospect of the death penalty." (my emphasis)

... Regime agents publicly targeted family members of defectors and dissidents for torture and killing (see Section 1.f.). This continued an alleged pattern of torture of relatives of dissidents. For example, in 2001 the regime reportedly tortured to death the mother of three Iraqi defectors for her children's opposition activities. In 2000 regime agents reportedly killed Safiyah Hassan, who allegedly publicly criticized the regime for killing her husband and two sons, Hussein and Saddam Kamal. Her husband and sons had been senior regime officials; however, the brothers defected to Jordan in 1996. The regime offered the men immunity if they returned to the country; however, upon their return, regime agents killed them and their father. (my emphasis)

¹⁸ <http://web.amnesty.org/library/Index/engMDE140122003?OpenDocument&of=COUNTRIES%5CIRAQ>

... In 2001 AI reported that the regime has the world's worst record for numbers of persons who disappeared and remained unaccounted for. Numerous credible reports alleged the existence of special prison wards that held individuals whose whereabouts, status, and fate was not disclosed (see Section 1.c.). ... **The report concluded that few victims became targets of the regime because of any crime they had committed; rather, they were arrested and held as hostages in order to force a relative, who may have escaped abroad, to surrender. Others were arrested because of their family's link to a political opponent or simply because of their ethnic origin** (see Sections 1.d. and 1.f.). (my emphasis)

... *It was difficult to estimate the number of political prisoners, because the regime rarely acknowledged arrests or imprisonments, and families were afraid to talk about arrests. Many of the tens of thousands of persons who disappeared or were killed in the past few years originally were held as political prisoners.* (my emphasis)

... **The authorities continued to detain, abuse, and kill family members and close associates of alleged regime opponents** (see Sections 1.a., 1.b., and 1.f.).¹⁹

The core of many of the Iraqi applicant's claims was fear of arbitrary imprisonment and torture if they were forced to return. That the Iraqi regime also had a policy of targeting family members of dissidents is borne out by the above report (dated 2002). The UN Special Rapporteur raised the issue several times and confirmed that the family members of known dissidents (or perceived enemies of the Iraqi state) were at risk of arbitrary arrest, disappearance, torture and death due to the activities of other members of their family.

Despite the evidence of the targeting of the family members, many of the DIMIA Case Officers assessing applicants on Nauru in 2002 rejected applicants with almost **no reference** to the human rights situation in Iraq in 2002.

The only mention of the human rights situation made by many of the DIMIA Officer were under **Part C – CAT – ICCPR – CROC -Humanitarian Consideration**. In this section of the decision DIMIA Officers occasionally made statements like:

"A pattern of mass violations of human rights clearly exists in Iraq. Country information that suggests illegal departure from Iraq and seeking asylum are not, in themselves enough to place someone at risk of Convention based persecution.

However UNHCR do not consider involuntary return to be an option in Iraq. Forcing someone to return to that country might place them at significant risk. I am not aware of other states returning people involuntarily to Iraq.

If returned involuntarily to Iraq, it is possible an applicant would be in danger of imprisonment and torture.²⁰

The two statements above contradict each other and I think that contradiction is emblematic of the problems inherent in the processing of the Iraqi applicants on Nauru at that time. The problems arose because the decision makers were using two very narrow and internally inconsistent sources in order to assess the applicants' claims.

¹⁹ <http://us.politinfo.com> (Full Report)

²⁰ Unfortunately these referrals under CAT were simply a recording mechanism to be noted if and when the DIMIA attempted deportations!

Some of the Iraqi applicants expressed concerns about the over-reliance on the Danish Report to their Case Officers. In one set of interview notes a DIMIA Review Officer recorded that an applicant stated “*I was surprised that interviewer relied on the Danish organisation – he said they said ‘no fear for Iraqis.’*”²¹

The Review Decision acknowledged that the applicant “*expressed surprise at the content of the Danish Report, believing the information in it to be incorrect.*” Based on first-hand knowledge of life in Iraq, that applicant asserted that the Danish Report was “*incorrect.*”²² In response, the Review Officer stated categorically in the Decision that she would ***give weight to the Departmental information paper “Illegal Departure, Voluntary return and Imputed Political Opinion in relation to Iraq.” (The IPO)***²³

The UNHCR Handbook’s section on *Sur Place* claims instructs decision makers that a refugee assessment must take into consideration any changes to an applicant’s profile since they fled their country and how they would be treated upon return, not only the person’s circumstances when they departed.²⁴

In order to judge whether that Iraqi applicant’s fear of returning to Iraq was well-founded, the 2002 Decision Makers should have taken into consideration **all** the available country information, especially anything that challenged the assertions of the Danish Report and the IPO. Despite the applicant’s concerns, however, the Decision Makers relied only on the two narrow sources, to the exclusion of all other dissenting views.

It was simply inappropriate for a DIMIA Review Officer to assert that the Danish Report of March 2001 was “*one of the most comprehensive, recent documents available on this matter*” without acknowledging that there were a myriad of updated Country Reports on Iraq which contradicted the position of the Danish Report and the IPO.

The fact that an applicant personally challenged the use of the Danish Report, should have lead to the Review Officer doing wider COI searches.

The only conclusion I can draw from the fact that in 2002 DIMIA Case Officers rejected so many Iraqi applicants without citing the full range of COI available on Iraq, such that they could compare and contrast the different positions, is that they were content to use a prefabricated formulaic document instead of doing their own research.

The release of the Nauru Iraqi files has brought some transparency into this process, and as the legal advisor to many of the rejected Iraqi applicants, I am very disappointed that more care was not taken in the processing of their claims in 2002.

²¹ Folio 56 of one Iraqi applicant’s file

²² Folio 82 of one Iraqi applicant’s file

²³ Folio 83 – as you can see the applicants were placed in a no-win situation – even if they complained, the DIMIA Case Officers still gave weight to their own “hand-picked sources.

²⁴ UNHCR Hand book paragraphs 95-96.

A research team from the United Kingdom recently produced an excellent critique of the UK Immigration Department's use of country information in deciding refugee claims. The Report was titled "*IAS Country Guideline Case: benign or practical?*" The Report concluded that there were a number of deep flaws in how Tribunal decision makers in the UK were using country information. The UK Report particularly criticised how the Tribunals were using "*incomplete country information, with important and up to date evidence either not considered or ignored.*"²⁵

I submit that the same criticism could also be made about how country information was used to determine the Iraqi caseload in Nauru in 2002. For example, the UNHCR Handbook stipulates:

*"Adjudicators, like other fact-finders in the asylum system, are subject to the double obligation expressed in 203-4 of the UNHCR Handbook; by 203, they must be prepared to give the claimant the benefit of the doubt (and particularly on his individual history) where no evidence is available after a genuine effort to obtain it; but by 204, they should only do so, not only when satisfied of his general credibility, but after obtaining and checking all available evidence."*²⁶

The Report goes on to note that the decision makers have "*a responsibility to consider all materials that might reasonably be expected to be obtained.*" The IAS Report gives a quintessential example of how selectivity in quoting country information can lead to flawed decisions. A Tribunal Member made a finding that "*prison conditions in Northern Iraq would not amount to a breach of Article 3 of the ECHR on the 'totality' of the evidence.*"²⁷

The researchers then exposed that the "*totality of the evidence*" actually consisted of only two paragraphs from a certain report, which "*in turn quoted – selectively – from two sources.*" Despite the selectivity of the quoting and the minimal amount of sources involved, the Tribunal's flawed decision had been elevated into the position of setting a precedent for other Iraqi cases! The researcher stated that the "*selectivity of (the Tribunal's) approach was astonishing.*"

The Tribunal had stated:

If he were to receive a custodial sentence, although we accept that prison conditions are poor, the objective evidence also suggests that prison conditions have improved over recent years owing to the intervention of the ICRC ... Therefore, on the totality of the evidence, we find that were the appellant to be returned to Iraq, there are no reasonable grounds for believing he would suffer ill-treatment in breach of Article 3 of the ECHR. Accordingly, his appeal is dismissed."

The IAS Researchers go on to refer to the paragraphs directly before and after the paragraph selected as evidence. Directly before the selected paragraph are the following statements:

²⁵ Page 3 IAS Report

²⁶ Page 96 IAS Report

²⁷ Page 70 IAS Report.

“Conditions in prisons in Northern Iraq do not meet international requirements as laid down in 1955 United Nations minimum standards for the treatment of prisoners. Human rights violations do occur upon arrest and detention. Condition of hygiene in prisons leave much to be desired.”²⁸

The paragraph following the one chosen by the Tribunal to provide evidence of the improvements in prisons due to ICRC interventions, actually states:

Both the PUK and the KDP (in Northern Iraq) reportedly maintain private, undeclared prisons and both groups reportedly deny access to ICRC officials. There were reports that authorities of both PUK and KDP tortured detainees and prisoners.”

It is clear from this exposure, that the Tribunal selected quotes that supported the Tribunal’s position and omitted the parts of the source, which contradicted the finding. The same can be said of the way limited and selectively quoted country information was used to reject many of the Iraqi applicants on Nauru.

I submit that if a comprehensive research product were to be undertaken on the robustness of the decision making process on Nauru in 2002, the final analysis would make many of the same criticisms that were made in the UK report in 2005.

The UK researchers stated:

“First instance decision-making in the UK has been proved to be shockingly poor ... Of most concern is the repeated failure to give equal scrutiny to all material produced and to consider the evidence relating to country information ‘in the round.’

Whilst on occasions it does seem that this is the result of preconceived ideas, in the majority of cases it appears to reflect a lack of the necessary enhanced diligence and application and lack of research and evaluation skills. An over-reliance on the material produced by the Secretary of State frequently leads to findings of fact on a country situation which do not take into account the most recent and most relevant evidence.”²⁹ (my emphasis)

The rejection decisions of many of the Iraqi applicant’s in 2002 focussed primarily on the issue of whether someone who left Iraq illegally would be persecuted upon his return. Not surprisingly, this was also a major focus of the two sources most relied upon, the Danish Report and the IPO.

I have already pointed out several contradictions within the quotes used from these two sources to support the finding that the applicant would **not** be at risk for a convention reason if he were to return to Iraq.³⁰

There was a vast body of country information available in 2002, which indicated that Iraqi asylum seekers should not be sent back to Iraq. Unfortunately, the 2002 DIMA case officers did not use this country information in their analysis.

²⁸ Page 71, IAS Report.

²⁹ Pages 72 and 73, IAS Report.

³⁰ Pages 17 of this submission.

CONCLUSION:

I trust that the extracts from the four RRT Hearings included below illustrate that Iraqi cases heard by the RRT in 2002 were subjected to a decision making process informed by Country of Origin Information that was much more academically robust than was afforded to equivalent applicants who were processed as part of the (so-called) “Pacific Solution.”

RRT Reference: N01/41207 (13 March 2002)

... CONSEQUENCES OF RETURN TO **IRAQ**

36. Relevantly to the claims and facts in this matter are two situations in which a person may be able to raise a *sur place* claim to refugee status, on the basis of events which post-date the person's **departure from Iraq**. Those two situations are where that person applies for **asylum** in the country of destination, and where the person does not have valid Iraqi travel documents with which to return to **Iraq**. The applicant claims never to have had Iraqi-issued travel documents as a result of his expulsion as a child from **Iraq**. The information which follows is directed to the more commonly encountered situation where an Iraqi national left **Iraq** either illegally or having destroyed their valid Iraqi documents after **departure**. On the facts claimed by the applicant, the situation is more complicated because he is unlikely to be recognised by **Iraq** as eligible to hold Iraqi travel documents on the basis that **Iraq** considers Faili Kurds expelled in the 1980s as not having Iraqi nationality. Nevertheless, the information is revealing in terms of *sur place* claims generally, which on the applicant's claims are undocumented **departure from Iraq** and an unsuccessful application for **asylum**.

37. In order to return to **Iraq** a person in the situation claimed by the applicant, that is, someone who does not have valid travel documents from **Iraq**, replacement travel documents must be obtained from the Iraqi Consulate. This would be a single journey *laissez passer* for which the person must provide documentary evidence of their Iraqi citizenship such as an identity card, military service papers, birth certificate and the like, and sign, or provide a thumbprint on, the application form for the *laissez passer*. To return to **Iraq** without a validly issued travel document and exit visa immediately raises the suspicion that the person previously departed **Iraq** illegally.

38. Much of the information which argues that it is relatively safe to return **failed asylum seekers who left Iraq** illegally or return without valid travel documents focuses on the availability of safe haven in Kurdish northern **Iraq**, where the Iraqi regime has devolved a level of autonomy and the UN has imposed a no-fly zone to protect that rather precarious autonomy from **Iraq** airforce incursions. The applicant has no ties to Kurdish northern **Iraq** and accordingly this information is of little use in this matter.

39. By contrast, the overwhelming majority of **opinion** on the return, to any area of **Iraq under the control of the Iraqi government, of failed asylum seekers** who left illegally or who return without valid travel documents is that it is impossible to be confident that such a person would not be subjected to serious harm in the form of interrogation, detention, torture and possibly worse. Because of the volume of persons who depart from **Iraq** (illegally or otherwise), the majority of such unsuccessful **asylum** applications are considered by the Iraqi authorities to be for personal or economic, rather than **political**, reasons.

However if such a case became known to the authorities then interrogation on return would be routine, that is, all such persons are questioned on return. This is hardly surprising because according to the independent information **illegal departure** is a crime.

40. That interrogation will focus on the reason why such a person returns without valid travel documents and on the reason for the travel. If, during such interrogation, it becomes clear that the person sought, even unsuccessfully, **asylum while outside Iraq**, the interrogation may focus on whether that person made any claims which criticised the regime or, more seriously, Saddam Hussein

Criticism of Saddam Hussein is a crime and is punishable by death.

41. Further, the level of interest, and consequently of punishment or of extra-judicial mistreatment, will depend on the individual circumstances of that person and particularly on the existence of other "risk factors" in the person's background. On the information which I have set out above, being a Faili Kurd, being a Shi'a Muslim and being a formerly expelled person all constitute serious "risk factors".

42. The independent information is unanimous that interrogation in **Iraq** can easily involve torture, given that the security forces are exempt from the criminal law in the performance of their duties, and that arbitrary and capricious physical harm including torture of detainees is rife in **Iraq**.

43. To summarise the independent information which I have considered, the recognised risk factors for a returnee are, relevantly to the claims made by the applicant: involuntary return; making **asylum undocumented departure**, or the suspicion of **illegal departure** due to returning without valid travel documents; Kurdish ethnicity; Shi'a Muslim belief; and previous adverse interest by the authorities (that is, having been expelled from **Iraq**) which might lead to the imputation of a **political opinion** in opposition to the regime. The independent information is unanimous that a person who manifests a sufficient accumulation of such risk factors faces a real chance of serious harm if returned to **Iraq**.

44. The sources of information which I have considered in relation to the consequences of **illegal departure and asylum** claims are, in addition to the material set out above concerning expelled Failsi Kurds, as follows: Office of Recognition of Refugee Status, Nuremberg, Germany, *The Return of Iraqi Asylum Seekers*, 21 October 1997; International Organisation for Migration, "Return of unsuccessful **asylum seekers to Algeria and Iraq**", 27 May 1998 [CX29911]; Campaign Against Repression and for Democratic Rights in **Iraq** (CARDRI) advice to Tribunal on 28 June 1995; UNHCR Background Paper on Iraqi Refugees and **Asylum Seekers**, Geneva, September 1996; Report of the UN Special Rapporteur on the situation of human rights in **Iraq** E/CN.4/1997/57; letter from Amnesty International dated 28 May 1997; DFAT Country Information Report 458/97 "**Iraq** - treatment of returnees", 16 September 1997 [CX25544]; DFAT Country Information Report "**Iraq** - refugee applicants: Information Requests", 25 July 1994 [CX7498]; Country Information Report 17/97 (sourced from an Australian government agency) "Country Information Service Request IRQ3976, IRQ4022 & IRQ4045, 13 January 1997 [CX21329]; DFAT cable "Information Request: Iraqi humanitarian claims", 6 February 1995 [CX7501]; DFAT Country Information Report 387/99 "Refugee claims relating to the treatment of Iraqis", 3 November 1999 [CX38491]; DFAT Country Information Report 464/98 "Procedures for issue of replacement Iraqi travel documents", 21 December 1998 [CX33077]; "**Iraq** question and answer period", **Iraq** and Afghanistan: Information Seminar for Refugee Status Determination Authorities, 24 February 2000 [CX41119]; Parker, John "The Situation in **Iraq**", presentation notes, UNHCR/DIMA Information Seminar: **Iraq** Today – Current topics of interest for refugee determination authorities, 24 February 2000 [CX40431].

RRT Reference: N02/41562 (27 March 2002)

*The applicant decided to leave **Iraq** because of the experiences of his family members. As I understood the applicant's claims, as he was getting older there were concerns that pressure would mount on him and he too might become a target for adverse attention by the authorities.*

... I discussed information with the applicant derived from a March 2001 report by the Danish Immigration Service titled "Report from fact-finding mission to **Iraq**" (which is set out later in this decision) that bribery is commonly employed in **Iraq** in order to get a passport quickly.

... The applicant fears arrest and imprisonment if he returns to **Iraq**. He points to his irregular **departure from Iraq**, and in particular that he left without properly informing the authorities and by using false papers. Because he has not done his military service he fears that the authorities will be more suspicious towards him. He also refers to his conduct in seeking **asylum** and fleeing to a western country. Apart from those matters referred to above no further claims were made by or on behalf of the applicant.

Independent evidence

... Issue of passports

In March 2001 a delegation from the Danish Foreign Service travelled to **Iraq** with the aim of **obtaining relevant information in the assessment of asylum** claims from Iraqi citizens. This report represents the most comprehensive and recent information on a number of issues including **departure from Iraq** and the act of applying for refugee status.

The delegation spoke to a number of western diplomatic representations and international humanitarian organisations in Baghdad. The delegation also met with Iraqi authorities, and included information from them in as far as it is confirmed information obtained from other sources or where it

dealt with purely technical details. The sources spoken to in **Iraq** requested that they be referred to in the report as "western diplomatic representation" and as "international humanitarian organisation". The request for anonymity was directly related to their permission to work in **Iraq** and to enable continued cooperation from the Iraqi authorities. In the report, each source has been numbered so that it is possible to get an idea of the number of sources that the delegation spoke to about the various matters. The Foreign Ministry has given a summary of its report to a UN organisation in Geneva. That organisation has confirmed that the report corresponds with the information that it has about the conditions in **Iraq** and about what returning Iraqis can expect when they re-enter **Iraq** after a sojourn abroad.

The following information as to the issue of a passport and **departure** from **Iraq** is drawn from the "**Report from fact-finding mission to Iraq**": The Danish Immigration Service, CX54577.

"When an Iraqi citizen wishes to have a national passport issued he must personally visit one of the passport directorate's offices and fill out an application form. None of the sources spoken to could confirm that in connection with the application the applicant had to state his overseas destination and travel duration. All sources spoken to said that the passport directorate was an arm of the Ministry for Interior Affairs and was totally controlled by the security service. The sources agreed that no Iraqi citizen who was in a conflict situation with the authorities would be able to have a national passport issued. The criminal records and other relevant registers would be closely scrutinised in connection with the passport application...

...The application for exit visa is often combined with the application for national passport. It is, however, also possible to apply for exit visa after the passport has been issued, which would be the case when the person in question is leaving **Iraq** several times. The application for exit visa is likewise lodged with one of the passport directorate's offices. All sources contacted said that the exit visa fee is 400,000 dinars, which is equivalent to approx. \$US 230. If the application for exit visa is not lodged together with the passport application there will, according to the same sources, still be a complete check-up with the various registers to ensure that no conflict situation with the authorities is prevalent. A diplomatic representation (2) added that the Iraqi security service has informers located in residential blocks and preparation for emigration such as selling of property and furniture, household articles etc is immediately reported to the authorities. All the sources spoken to agreed that no Iraqi citizen that have something to settle with the authorities would legally be issued with an exit visa...

...The same source said that the exit visa is a piece of paper that is stapled onto the passport.

A western diplomatic representation (1) and an international humanitarian organisation (4) said that it could appear to be a random matter to whom the authorities granted exit visas. It was difficult for outsiders to grasp why some were granted exit visas while others were rejected. It was often necessary to pay bribes in order to have an exit visa granted, even if you had everything in order with the authorities.

The sources we spoke to agreed that corruption is widespread in **Iraq**. It is thus quite common to pay bribes to public servants in connection with obtaining service. A UN organisation in Amman (Jordan) that is working with refugees added that it could take up to 12 months to have a passport issued in **Iraq**. If bribes were paid the processing time could be considerably reduced...

...A humanitarian organisation (2) and two western diplomatic representations (3+5) held it improbable but not necessary impossible that persons who had a serious conflict with the authorities would apply for passport and exit visa. In such a case, however, the size of the bribe would have to be bigger since the official involved was risking serious reprisals if it had been detected that he had issued a passport to a wanted person. An international humanitarian organisation (5) added that the official in such a case must be a high ranking one in the passport directorate.

Departure from **Iraq**

...Evidence before me indicates that illegally departed persons cannot return to **Iraq** legally. The consequences to such individuals depends on several things with minority membership being an exacerbating element. The commission of an **illegal** act and public/lawful return would invite

scrutiny and therefore unknown consequences: see John Packer, 'The Situation in Iraq', **Presentation Notes for a UNHCR/DIMA Seminar on Iraq** in Sydney, 24 February 2000.

In relation to the situation of an Iraqi who left Iraq on their own passport but who no longer possesses that passport, evidence before me suggests that it is possible to obtain a replacement passport from the Iraqi Embassy in Canberra but that this would be a document valid for a one way trip to Iraq: see DFAT Country Information Report No. 464/98, dated 28 February 1997, CX33077.

The act of seeking asylum

Various opinions have been expressed as to whether the act of seeking asylum of itself would be seriously punished. However, the effect of more recent opinions referred to in the "Report from fact-finding mission to Iraq", from the Danish Immigration Service, is to draw a clear distinction in the consequences which flow to those who departed Iraq legally as compared to those who departed illegally.

DFAT has stated that it was highly improbable that seeking asylum would of itself be punished by execution or life imprisonment: see DFAT Country Information Report No. 387/99, dated 3 November 1999, CX38491, paragraph 2. Dutch and Swiss presenters at a workshop held in Ankara in July 1999 took the view that, having regard to the numbers of Iraqis seeking asylum overseas and the fact that claiming asylum was virtually the only means by which Iraqis were able to obtain residence in foreign countries, it was unlikely that claiming asylum would, of itself, be a cause for persecution: see DFAT Country Information Report No. 374/99, dated 23 September 1999, CX38185. DFAT had also previously stated that the consequences for a failed asylum seeker on return to Iraq would depend very much on the actual history of the person concerned. A known asylum seeker might expect to be questioned on return but this was a fairly routine matter in Iraq: see DFAT cable AM2439, dated 4 March 1998, CX29669.

However other evidence before me, including that of DFAT, concedes that the Iraqi regime is suspicious and arbitrary in its treatment of suspect individuals. The actual treatment of a returnee is likely to be determined by the authorities' overall assessment of the case of the individual concerned. Factors such as seeking asylum while abroad, past involvement in even minor opposition activities, and membership of a minority group could increase the possibility of the individual concerned being viewed as an opponent of the regime and receiving harsh punishment. There is a paucity of knowledge of individual cases of those who have departed illegally who have actually been returned to Iraq: see Country Information Report 517/97 dated 26 October 1997, CX26057; DFAT Country Information Report No. 387/99, dated 3 November 1999, CX38491 paragraphs at paragraphs 1 and 2; and John Packer, 'The Situation in Iraq', **Presentation Notes for a UNHCR/DIMA Seminar on Iraq** in Sydney, 24 February 2000.

UNHCR has expressed the opinion that if the Iraqi authorities had information that an Iraqi national returning to Iraq has sought asylum in a western country then, she or he will be interrogated and punished: see Country Information Report 517/97 dated 26 October 1997, CX26057.

In contrast the "Report from fact-finding mission to Iraq" at [section 5](#), "Travelling from and into Iraq", CX54577 draws a clear distinction between those who have left Iraq legally and those who left illegally in the assessment of consequences which might befall a person who has applied for asylum. This report suggests that the Iraqi authorities are well aware of the fact that Iraqis seek asylum overseas. This is seen by the authorities as a consequence of the difficulties which citizens are experiencing arising from the sanctions imposed on Iraq. Where a person has left Iraq legally the authorities do not necessarily see their conduct in subsequently applying for asylum as an expression of political opinion, but rather as a means of obtaining residency permit arising from the sanctions.

However, this opinion is qualified in those cases where the person concerned has been involved in, or attributed with, the expression of past or current political opposition. The report reinforces the view that it is difficult to comment on the reaction pattern of the Iraqi authorities generally and each individual case should be evaluated separately. It is impossible to give any guarantee regarding the behaviour of the Iraqi authorities because it is arbitrary. It is not possible to generally exclude the

possibility that an ex-**asylum seeker** would not incur the authorities' wrath. It was stated that "If a returning Iraqi had left **Iraq due to opposition political** activities or had been involved in such activities outside **Iraq** there is no doubt that Iraqi authorities would react with reprisals".

FINDINGS AND REASONS

... The applicant's case is that he fears persecution from the Iraqi authorities because of the adverse interest they displayed in members of his family in the form of questioning after the arrest and detention of his father, the circumstances surrounding his **departure, his conduct in applying for asylum** and his flight to a western country. In relation to his **departure from Iraq** he specifically claims that it was **illegal** and points to his use of a bribe and forged documents to obtain his passport.

In a submission the applicant's adviser contends that if the applicant were returned to **Iraq** he will be questioned by the authorities about his absence and the fact that he has applied for refugee status will be discovered. It is submitted that the applicant's conduct will lead the authorities to impute an adverse **political opinion** to him that he is opposed to the regime. In the light of the arbitrariness of the authorities the applicant faces a real chance of mistreatment.

In broad terms the applicant's claims to protection have been consistent throughout the processing of his application including information given by him soon after his arrival in Australia. These claims largely revolved around the arrest of his father on two occasions, and the related visits to his home by the security authorities as well as the questioning and short term detention of his older sibling and mother.

I accept the applicant's evidence about the arrest and detention of his father and the subsequent adverse interest displayed by the security authorities in his mother and sibling. However, I am unable on the evidence before me to make a finding as to the exact circumstances surrounding or reasons for his father's arrest and detention, or the reasons for the questioning of his mother and sibling.

I accept that the applicant left **Iraq** in the way he has described. In view of the prevalence of corruption in **Iraq** it is not entirely clear whether the applicant's **departure would be seen by the authorities as legal or illegal**. His evidence is to the effect that he obtained a passport issued to him in his own name, and in a relatively short period of time. In my view it is likely that the bribe which the applicant paid was for the speedy issue of his passport and that the payment of a bribe in these circumstances would not necessarily lead the authorities to perceive his **departure as illegal**.

Independent evidence before me, which I accept, indicates that illegally departed persons cannot return to **Iraq legally**. **The commission of an illegal** act and public/lawful return would invite scrutiny and therefore unknown consequences. In my view it is reasonable to infer that the commission of "an **illegal** act" includes submitting forged documents. Further, the independent evidence is to the effect that the arbitrary nature of the justice system in **Iraq** is such that the punishment which might be imposed on an unsuccessful **asylum seeker** cannot be anticipated with any degree of certainty and an individual's particular circumstances needs to be closely scrutinised.

The independent evidence before me, which is set out at pp.10-11 of this decision indicates that the actual treatment of a returnee is likely to be determined by the authorities' overall assessment of the case of the individual concerned. Factors such as seeking **asylum** while abroad, past involvement in even minor opposition activities, and membership of a minority group could increase the possibility of the individual concerned being viewed as an opponent of the regime and receiving harsh punishment.

If the applicant were to be returned to **Iraq** it is likely that the Iraqi authorities would correctly assume that he had made an application for a protection visa. In the circumstances of this case the past adverse dealings which members of the applicant's immediate family have had with the authorities, the overall circumstances around his **departure** including his use of bribery and forged documents are all exacerbating factors which could lead the authorities to view him as a person opposed to the regime. In my view when these factors are considered cumulatively they expose him to a real chance of serious harm.

Given the totality of the independent evidence before me, and the applicant's particular circumstances, I am satisfied that there is a real and substantial risk that he would be seriously mistreated if he were

to return to **Iraq** now or in the reasonably foreseeable future. I am satisfied from the evidence before me that he will be punished in a way amounting to persecution for reasons of **imputed political opinion**, namely opposition to the current regime in **Iraq**.

Accordingly I find that the applicant's fear of Convention persecution at the hands of the Iraqi authorities is well-founded.

RRT Reference: N02/41445 (10 May 2002)

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file, which includes a record of interview with an immigration inspector on the applicant's arrival in Australia, the protection visa application, written submissions in support of the application, and record of interview with an officer of the Department. The Tribunal also has before it written submissions in support of the application for review. The applicant gave oral evidence to the Tribunal.

Departmental decision

... The applicant claims that if he were to return to **Iraq** he would be detained and executed by the Iraqi authorities. The applicant claims that his brother's supposed involvement with the Al Da'wa Party and his family's subsequent arrest means that he has been **imputed with an anti-government political opinion**. He claims because he left the country illegally and applied for **asylum** in Australia, this anti-government **political opinion** will be further exacerbated.

Country information

Return of failed asylum seekers

General Information With Respect To Return To **Iraq** (Including The Return Of **Failed Asylum Seekers**)

As to the consequences on returning to **Iraq for a failed** refugee applicant, an Australian Government agency (CIR 17/97, 13 January 1997, CX21329) indicated that if refugee status applicants have not been involved in genuine dissident activity in **Iraq or with a major opposition group outside Iraq**, then they should be able to return to **Iraq** without fear of death or harsh retaliation.

...DFAT advised in late 1997 (CIR 458/97, 16 September 1997, CX25544) that returnees who departed **Iraq** unlawfully would be likely to face harsh treatment. They assessed that such treatment is likely to include detention and questioning and that depending on the circumstances and the detainee's answers, torture could not be ruled out as a possibility.

DFAT (Cable AM2244, 26 October 1997, CX26100) subsequently reported that discussions with sources in Amman revealed that refugee decisions were being made on the basis of the knowledge that many Iraqis face disproportionate punishment if they were to return to **Iraq**. That information is consistent with the assessment of Amnesty International (28, May 1997) and that of the Campaign Against Repression and for Democratic Rights in **Iraq** (CARDRI, 1 September 1997), which according to the Australia High Commission in London (Country Information Report 57/98, 4 February 1998, CX27575) is a "respectable organisation doing work like Amnesty and Middle East Watch.

... In UNHCR's **opinion, asylum seekers having applied for asylum** abroad will be endangered in case of their return. They claim that if the Iraqi authorities have got the information that any Iraqi national returning to **Iraq** has sought **asylum** in a western foreign country in particular, he will be interrogated and punished. They further claim that people accused of having infringed the passport act by leaving illegally would be sentenced by law to 5 to 15 years imprisonment and may have their property confiscated but warn that the sanctions which the Iraqi authorities will impose on a returning **asylum seeker** cannot be anticipated. (DIMA, CIR 517/97, 22 October 1997, CX26057).

In May 1998, DFAT advised that they could not confirm the allegation that the Iraqi regime regards refugee and **asylum applicants as political** traitors but advised that they were not aware of any actual cases of **asylum seekers** returned to **Iraq** (CIR 195/98, Source Doc: Cables CE783324 of 17/02/98 and AM2439 of 04/03/98, 18 May 1998, CX29669).

They indicated that, in practice, the consequences for a **failed asylum seeker on return to Iraq** might depend very much on the actual history of the person concerned and the profile that his case had received in the country in which **asylum** was sought. They indicated that a known **asylum seeker**

on return might expect, at a minimum, to be questioned, but explained that this was a fairly routine matter in Iraq anyway.

... DFAT subsequently advised (CIR No.387/99, Report 0260, 3 November 1999, CX38491) that: "The Iraqi security authorities are suspicious and arbitrary in their treatment of suspect individuals. Interrogations are routine, and the security authorities are not bound by statute law. Punishments, even as provided under statute law, are harsh. Without access to cases of actual returnees, there is very little that can be said with any degree of certainty in relation to the possible treatment of different categories of returnees.

Actual treatment of a returnee would likely be determined by the authorities' overall assessment of the case of the individual concerned. Seeking asylum, draft evasion, minor opposition activities in the past, relation to an opposition activist or refusal to join the Baath party might all be factors that would add to the Iraqi authorities' negative view of an individual, and in an arbitrary system the punishment might then be more than the sum of the punishments for each transgression.

On the other hand, after years of war and sanctions, the Iraqi security and law enforcement authorities' capacities have been stretched. The security of the regime is its first priority, but the security and law enforcement authorities must in turn prioritise their activities. It is accepted that bribery and corruption are endemic and that many people have left Iraq in search of a better life. There is no reason to believe that individuals who have committed minor non-political offences might be of interest to Iraqi and law enforcement authorities."

... They did indicate that "it is widely considered that relatives of opponents of the regime are under threat of detention, however, opposition involvement in the late 1970s or 1980s would seem too remote for relatives to be under threat of imprisonment or execution, but it would depend on the nature of the opposition". They went on to say that a returnee with relatives prominent in opposition outside the country would certainly be interrogated on return and would have a reasonable chance of being imprisoned.

Directly to Iraq

DFAT considers that "[R]eturn through Baghdad airport is not an option, if for no other reason than that UN sanctions prohibit international flights into Baghdad" (CIS, 1999(c), Country Information Report No 158/99 - Iraq: Relocation options for returning nationals who fear persecution in their home country and alternative gateways by which safe areas may be accessed - CIS Request No IRQ-AC763, (sourced from DFAT advice of 13 May 1999), 18 May (CX34979)).

In discussions with DIMA on the practical consequences of returning Iraqi nationals to Iraq, UNHCR was of the view that any return programme would need to be voluntary together with a full monitoring programme (CIS, 1999(a), Country Information Report No 450/99 - Report of DIMA visit to Iraq, (sourced to DIMA 14 December 1999), 22 December (CX39044))

In September 1999, it advised that no precedents were identified for involuntary returns of failed asylum seekers (CIS 1999(e) CIS, 1999(e), Country Information Report No 374/99 - Iraq refugee issues: Ankara Workshop, (sourced from DFAT advice of 23 September 1999), 21 October (CX38185). The Tribunal considered the Danish fact finding mission (CX54577) "Report from fact-finding mission to Iraq", The Danish Immigration Service website <http://www.udlst.dk/sjle6/irak01/heldok.html> English translation by AIML Sydney, Document Date: 8 MAR 2001.

Acting Secretary's Submission

The Tribunal received a submission from the Acting Secretary of DIMIA under 423(2)

3. The most recent country information obtained from several authoritative sources complements previous objective reporting on the consequences of illegal departure from Iraq and seeking and obtaining asylum in other countries.

4. Advice received from UNHCR in March 2002 states that,

According to information available to UNHCR, in the absence of other factors, the decisive element to assess whether the returned individual would be put at risk at the hands of the Iraqi authorities would be the voluntary nature of the return. This is the key factor rather than whether he/she departed from Iraq legally or illegally.

5. The Australian Government has also obtained information from a UN agency, dated January 2002, which confirms that there are numerous Iraqis who have both legally or illegally departed from Iraq returning safely to the Government-controlled area. According to this information, since August 1999 approximately 5,700 Iraqis of Arab origin who are considered as having departed illegally from Iraq have returned to Iraq voluntarily from Iran. Unsuccessful asylum-seekers have also returned from Jordan to Iraq throughout the 1990s. In this respect the agency advises that, since its promulgation on 28 June 1999, the Iraqi Government has explicitly applied its Decree No 110, insofar as it involves exemption from prosecution for illegal departures.

6. Additional authoritative information relating to the treatment of returnees who left Iraq legally or who applied for asylum overseas, is provided by various authoritative sources – international humanitarian organisations and diplomatic representatives – which are cited in a report by the Danish Immigration Service, following a fact-finding mission to Iraq in March 2001.

7. These sources indicate that questioning by authorities about the stay abroad can generally be anticipated. However, they report that there has been no indication of persecution or harassment on account of a person's stay abroad or any application for asylum made in the country visited.

8. The general consensus among these organisations appears to be that such returnees, whether possessing Iraqi or foreign travel documents, will not have problems with the authorities unless they had left Iraq due to opposition to political activities or had been involved in such activities outside Iraq.

9. Indeed, while noting that it was difficult to generalise about Iraqi authorities' patterns of reaction, and that an individual assessment therefore had to be made in each specific case, one international humanitarian organisation is reported as saying,

... it had no grounds for suspecting that Iraqis who are forcibly returned to Iraq after being refused asylum in Jordan are persecuted when they return to Iraq. The organisation has been unable to discern any differentiation in the Iraqi authorities' treatment of Iraqi asylum seekers returning to Iraq from Jordan or Europe/the USA respectively ... [In addition] ... Around 3,900 Iraqis who had resided in Iran for a considerable period of time returned to Iraq in 1999 and 2000 with the organisation's assistance. As an agreement could not be reached with the Iraqi authorities on monitoring the Iraqi's reintegration into Iraqi society, it was impossible to speak with certainty about the situation for returning Iraqis.

10. Importantly, the evidence suggests that, by itself, having departed illegally or applying for asylum abroad is not necessarily viewed by the Iraqi authorities as expressing a 'negative' or dissident opinion by the Iraqi national involved. Rather, there appears a widespread perception that such actions can simply be a means for avoiding the effects of the UN sanctions and the dire social and economic conditions currently prevailing in Iraq.

11. For example, following an interview with the Director of the legal service at Iraq's Ministry of Foreign Affairs, the Danish fact-finding mission reported that,

[He] was aware that a large number of the Iraqis who had travelled to Europe and elsewhere in recent years are seeking asylum. He considered that the policy of sanctions is the reason why so many Iraqis are leaving the country, and expressed sympathy for their views. He considered the fact that it may be necessary to seek asylum in order to establish grounds for residence to be a formality as the real reason is the tense humanitarian situation in Iraq.

12. This general approach was confirmed by an international humanitarian organisation, which said that,

The authorities are currently very aware of the fact that Iraqis are travelling abroad and seeking residence permits. Insofar as a person's departure from the country is due to the poor economic conditions in Iraq, which the Iraqi authorities attribute to the policy of sanctions, any application

for **asylum** made in the country visited will not affect the Iraqi authorities' reaction to the returning individual.

....Earlier country information

17. The above information supports information previously obtained from authoritative sources that there has been no negative feedback about the situation of returnees to **Iraq**, and from the Netherlands diplomatic representation in Amman that most Iraqis without a **political** or security profile should have no fear of return.

18. It has been noted by DFAT, that

His [the Netherlands diplomatic representation comment above] was a general observation ... The vexing question for decision makers is whether individual Iraqis would or would not have such a profile in the eyes of the Iraqi authorities.

19. Professor Amin Saikal, head of the Centre for Arab and Islamic Studies at the Australian National University, seems to express the general view of authoritative sources when he said that,

[The Iraqi authorities] are not concerned with people that don't pose a threat to them. The people that Saddam Hussein's regime is concerned with are those whom are suspected of either potential capacity or actual capacity to either threaten the regime or undermine the regime'.

Non-Convention grounds for harm

20. The Iraqi regime is capable of harsh and arbitrary actions. Caution is therefore clearly appropriate when considering the potential situation of returnees, especially those who are forcibly returned:

*The country information indicates that a range of criminal sanctions can potentially be applied to people involved in **illegal departure** and fraudulently obtaining and using travel documents, despite the provisions of Decree 110; and*

*According to personal advice from one commentator, a former Assistant to the UN Special Rapporteur on the situation of human rights in **Iraq**, serious consequences may arise from these other **illegal** activities relating to departing **Iraq**, for example crimes relating to currency and corruption.*

21. However, States often institute controls and criminal sanctions for such types of behaviour, and the existence of such offences and evidence of the application of related sanctions does not per se indicate the presence of a Convention reason for their application. Specifically, in accordance with [s91R\(1\)\(a\) of the Migration Act 1958](#), a Convention reason must be the essential and significant reason for the harm feared, if it is to be relevant to the refugee assessment.

2. Furthermore, even disproportionately heavy penalties do not of themselves either substitute for, or establish the existence of a Convention reason(s) for the harm flowing from such criminal sanctions.

23. It is important to note that concerns such as those expressed above about the disproportionate punishments which may flow from breaches of Iraqi law relating to **illegal departure, illegal** return or overstaying exit visas are not necessarily Convention related. It is clearly apparent that the former Assistant to the UN Special Rapporteur on the situation of human rights in **Iraq** recognises this distinction when his comments are considered in their full context (emphasis added):

*[I]n the process of leaving the country the practicalities of departing, of overstaying even a lawfully acquired set of documentation and so forth probably bribing, putting relatives at risk who are guarantors of return, [possessing and trading money, etc] ... [will result if you return] ... in interrogation. I mean for **illegal departure, for illegal** return and so forth. This systematic form of interrogation entails (at a minimum) mistreatment and detention and often torture and may entail your*

death. It's just the nature of the regime. Now I don't know what the Refugees Convention says about this ...

But I might draw your attention to Article 3 of the Convention Against Torture, which states that ... you may not refouler persons to a country in which there is a risk, and I think there is beyond doubt a risk of commission of acts amounting to torture or to torture for such persons upon return ... So I would say at least under Article 3 of the CAT in these circumstances you cannot refouler a person, even if they don't have at origin, on the basis of their claim, a valid claim [under the Refugees Convention].

24. Possible obligations under the Convention Against Torture (CAT) or the International Covenant on Civil and **Political** Rights, and general humanitarian issues relating to **asylum** applicants, are of critical importance to the Government. However, these obligations are not relevant to refugee status determinations and are not to be given weight in refugee assessments by decision-makers either onshore or in excised offshore places or declared countries. Other mechanisms have been put in place by the Government to ensure that these obligations are considered by Government, as appropriate.

FINDINGS AND REASONS

The applicant was not a good witness. The Tribunal had major problems about his account of all the major incidents that he mentioned in **Iraq**. There were major inconsistencies between his evidence to the Department his statutory declaration and his evidence to the Tribunal. These inconsistencies were not adequately explained by his response to the 424A letter sent to the applicant and his adviser after the hearing.

... Sur place claims

The only issue that remains is the issue of sur place claims that he has been in the West and the possibility that the authorities would become aware that he has applied for protection.

The Department's recent submission under s423(2) of the Act comments on this issue. The Tribunal has fully considered that submission.

The Tribunal has also had regard to the comments by a Senior Member in another decision which concerned an Iraqi applicant in a similar plight without a passport now in Australia without previous significant problems with the authorities concerning his exit but who had applied for protection. She argued:

However, the applicant is now in Australia and has applied for protection. In addition, the Tribunal accepts that he does not have a passport as smugglers either advise their clients to destroy their passports or require them to surrender their passport. Whether someone in these circumstances, even if they were not of interest to the authorities before they left, can return to **Iraq** is open to conjecture as country information about the reaction of the Iraqi government to returnees varies Some information indicates that refugee applicants who have not been involved in genuine dissident activity in **Iraq**, or with major opposition groups outside **Iraq**, should be able to return without fear of harsh treatment and that the actual treatment of a returnee would depend on the overall assessment of the case of the individual concerned by the Iraqi authorities.

However, other information indicates that an **asylum seeker** will be endangered in case of their return, that bringing an **asylum** claim breaches a number of decrees which carry sentences including the death penalty and that contacting an international organisation is enough to cause a serious problem for the person concerned in the eyes of the Iraqi authorities.

The country information also indicates that it is not possible to predict the behaviour towards returnees on the part of the Iraqi authorities, that the regime is arbitrary in its treatment of people and that returnees may suffer disproportionate punishment if they were to be targeted. The information also indicates that returnees will undergo questioning and that the regime would deal harshly with those that it considers dissidents. Commentators were reluctant to provide conclusive comments as to the consequences that a returnee might face and indicated that they were not aware of actual cases of **asylum seekers** and returnees returning to **Iraq**.

There appears to be only a handful of people known to have returned to **Iraq** in the last few years but all of them were voluntary returnees. There is no information as to their profile or as to their

situation upon return to Iraq. The Tribunal also notes advice from DFAT from less than a year ago ... that comments made in the past suggesting that people without security or political profile should have no fear of return are “little more than observation of an off-the-cuff variety” without substantiation.

The concerns about the arbitrariness of the regime, its suspicious nature and its unpredictability are consistent with general information about the regime That information indicates that suspicion and extreme repression persists in Iraq, where opposition of any kind is not tolerated and where there is a disregard for the rule of law. Hence, according to that information, perceived opposition or dissidence may attract arbitrary and harsh punishment and that gross mistreatment that may include extrajudicial execution.

The picture that emerges is that the treatment of returnees to Iraq is unpredictable, that there is little on which to base a conclusion as to the precise treatment that individuals may face and that there remain overwhelming concerns about the Iraqi regime.

The Tribunal agrees with her analysis and finds that there is a very high probability that the applicant will be questioned upon return about his extended absence from the country and that the authorities will either be aware that he has been in Australia or will learn from the applicant of his having applied for protection in Australia. The Tribunal is still mindful of the cautious comments by DFAT in (CIR No.387/99, Report 0260, 3 November 1999, CX38491) and still very evident in their comments in (CX43673, “Voluntary return of Iraqis through Jordan” Country Information Report, DFAT, CIR No.411/00, Reply to CIS Request No.IRQ1018 1 August 2000.)

Therefore, the Tribunal can not rule out as a real possibility that the applicant may suffer serious harm for reasons of imputed political opinion if he were to return to Iraq, and is therefore satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution in respect of Iraq, within the meaning of the Convention. There is a real chance that the applicant would be considered a person of suspicious alliances and would be imputed with a political opinion.

The Tribunal is satisfied that when the Iraqi immigration authorities resort to thuggery and possibly torture –which reportedly occurs not infrequently - that they are frequently motivated by an understanding that they are acting in the interests of Saddam Hussein’s regime. With reference to paragraph 23 of the Department’s submission, the Tribunal notes the view therein expressed by the former Assistant to Special Rapporteur that such actions would be in breach of Article 3 of the Convention Against Torture.

That is not an issue for this Tribunal. However, the Tribunal is not satisfied that the former Assistant to the UN Special Rapporteur was there giving a considered view of his understanding of the Refugee Convention at the Conference. Particularly when one considers that at the same seminar he stated that, Most far-reaching in its implications is RCC Decree No. 840 of 4 November 1986 which prescribes severe sanctions including the death penalty for anyone who insults the President, the National Assembly, the Government or any institutions thereof.I have no information how deported persons from Australia are received; I imagine such deportation is neither currently practised nor, indeed, possible directly to Iraq.

However, deportation would surely raise enormous questions and place the individual directly in the hands of authorities. Since impugning the Iraqi state is a capital offence, the consequences could be death. No doubt, there would be a lengthy and probably harsh interrogation. There would be no guarantees of safety upon deportation. Indeed, since the current regime is one of arbitrariness and cruel, unusual treatment and punishments, I would suggest Article 3 of the Convention against Torture would preclude refoulement to Iraq...

Second of all if you bring an asylum claim as I pointed out this morning under specific decrees you necessarily will have contravened the decree prohibiting anyone from impugning the state or parts of the state and that decree entails you being subject to lengthy periods of imprisonment, I think it is 7 to 15 years and the death penalty, up to the death penalty. (Iraq Today: Current Developments of Interest for Refugee Status Determination Authorities, Sydney, 24 February 2000, CX40431 and UNHCR/Department of Immigration and Multicultural Affairs Information Seminar, Iraq and

Afghanistan: Information Seminar for Refugee Status Determination Authorities, Sydney, 24 February 2000, CX41119

)
The Tribunal is satisfied that the acts amounting to torture by the migration authorities are motivated in significant part at least by a Convention related ground- that is of protection Saddam Hussein's regime against unreliable elements in their society or perceived that the applicant had been involved in "impugning the Iraqi regime".

The applicant would be at serious risk of being considered against the regime and a traitor to Saddam Hussein having been in Australia- particular at this time where there is a heightened risk of American intervention in **Iraq** 'The Wrong Time to Fight **Iraq**' 2001, The New York Times, 26 November) and the possibility of Australia's support for any such action by the United States.

The applicant is also Shia and the Saddam Hussein's regime predominantly Sunni. In **Iraq**, Islam is the official religion and the majority of the population is Shi'i. It is estimated that 54-65% of the Iraqi population is Shi'i and 32-42% are Sunni (SBS World Guide 2001, Hardie Grant Books, South Yarra, pp.364-365. Nevertheless this might be another issue that would count against him upon return.

RRT Reference: N02/42271 (24 September 2002)

Independent Information Regarding **Illegal/Irregular Departure and Monitoring of Iraqis outside Iraq.**

The Tribunal has a range of independent information concerning the monitoring of Iraqi emigres and the consequences of **illegal departure**.

In regard to determining whether or not the Iraqi authorities would be aware of an **asylum seekers** application or activities in Australia cable AM2244 26 October 1997 states:

...It is generally agreed that monitoring of individuals and communities does take place, perhaps even via the refugee assessment agencies in Amman. It is our understanding that monitoring is undertaken in Australia.

Country Information Report 517/97 of 26 October 1997 at CX26057 of the departmental database, Cisnet states:

UNHCR is of the **opinion that asylum seekers having applied for asylum** abroad will be endangered in case of their return. If the Iraqi authorities have got the information that any Iraqi national returning to **Iraq has sought asylum** in a western country in particular, he will be interrogated and punished. This is also the view of the International Organisation for Migration (IOM) (See: Cisnet document CX29911 of 27 May 1998)

In a recent report on a discussion with IOM it was reported that IOM had facilitated five voluntary unmonitored returns of Iraqis without documentation through Jordan. No details of these matters were provided. (See: Country Information Report No.180/00 of 28 March 2000 at CX41558)

Advice to the Tribunal from Campaign Against Repression and for Democratic Rights in **Iraq** (CARDRI) in correspondence to the Tribunal advises that, "all Iraqis who return to the country, other than those who have recently left for officially sanctioned trips, will be interrogated." CARDRI response to the RRT of 28-6-95.

The CARDRI advice above further states:

There is no sense in which **Iraq** can be said to be operating under the rule of law. A person who was absent from the country without explanation would, without any doubt on the part of those with whom I have discussed this matter, be suspected of sympathy if not activity within the opposition. It has been a capital offence to be a member of any party other than Ba'th for 15 years.

The US State Department Country Reports on Human Rights Practices (**Iraq**) for 2001 advised:

A November 1999 law provides for additional penalties for citizens who attempt to leave the country illegally. Under the law, a prison term of up to 10 years and "confiscation of movable and immovable property" is to be imposed on anyone who attempts to leave illegally. Similar penalties face anyone found to encourage or assist persons banned from travel, including health care professionals, engineers, and university professors.

In 2000 the director of the Real Estate Registration Department stated that pursuant to the decree, the Government confiscated the property of a number of persons.

DFAT Cable AM2244 of 26 October 1997 in regard to refugee determination and return to **Iraq** states:

...even those conditioned to the stories of Iraqi refugees, tend to make their decisions on the basis of a broader interpretation of the term "refugee" and in the knowledge that many Iraqis faced what is defined as "**disproportionate punishment on return**". (emphasis added)

The cable refers to an **opinion** from a Christian interlocutor in cable AT501241 of 17 October 1997 that "Iraqis who have migrated and taken out citizenship of their new country, can return" as long as their documentation identifies them as a foreigner.

The cable acknowledges that advice. "appears to conflict with a story common to many Iraqi refugees- that through the very act of applying for refugee status or citizenship of another country, the Iraqi regime regards them as **political** traitors and they face the death penalty on return."

Cable AM2244 also states:

Those Iraqis who undertake officially-sanctioned travel (having satisfied all the documentary requirements, whether under their own name or an alias), are required to report to the Iraqi Embassy/consulate in their country of destination upon arrival to register their names and addresses. All Iraqis residing abroad are required to register every six months; if their address changes; and when they leave the country, These requirements are detailed in all Iraqi passports...

...Revolutionary Command Council Resolution 100 of July 1994 decrees that Iraqis who have left the country for over two years and have not returned in that time, will have their properties rented on behalf of the Iraqi Ministry of Finance, with the proceeds placed in a special fund for allocation to special beneficiaries.

A Reuters article held at CX36095 on the department's Cisnet database states:

BAGHDAD, July 4 1999 (Reuters) - **Iraq** has granted an amnesty to people who left the country illegally, a decree by the country's highest legislative authority, The Revolutionary Command Council said.

The decree, issued last week and distributed to reporters on Sunday, said those already in jail for the offence will be released. "Legal measures against Iraqis who left **Iraq** illegally shall be stopped," the decree said.

No official figures on **illegal** emigration are available but the media have reported that U.N. economic sanctions imposed for the 1990 invasion of Kuwait have forced many ordinary Iraqis and intellectuals to leave the country and seek jobs elsewhere.

Iraq has already said it will amnesty all university professors who left illegally, in an attempt to rectify a shortage of teaching staff. of 24 February 2000

However, this is contrary to advice given in a seminar, of 24 February 2000, sponsored by the UNHCR where Mr. John Packer, Senior Legal Advisor to the OSCE High Commissioner on National Minorities, the Hague; and former Assistant to UN Special Rapporteur on the Situation of Human Rights in **Iraq** stated as follows:

Most far-reaching in its implications is RCC Decree No. 840 of 4 November 1986 which prescribes severe sanctions including the death penalty for anyone who insults the President, the National Assembly, the Government or any institutions thereof. Insofar as the country is subject to strict controls on all means of communication and permeated by a variety of overlapping security services, in addition to systems of informers for those services and the Baath Party, there is no freedom of thought

or expression either in public or in private. Furthermore, **the frequent imposition of sanctions against family members (even extended family), on the basis of speculations of guilt by association or for purposes of collective punishment, make fear rife...**

He related this to questions regarding the consequence for Iraqi **asylum seekers** who had made application for protection visas and said:

... if you [an Iraqi **Asylum seeker**] **bring an asylum** claim as I pointed out this morning under specific decrees you necessarily will have contravened the decree prohibiting anyone from impugning the state or parts of the state and that decree entails you being subject to lengthy periods of imprisonment, I think it is 7 to 15 years and the death penalty, up to the death penalty.

Moreover you are subject to that kind of imposition not through a judicial means but also potentially through Baath Party members simply at their own discretion deciding you did something nasty they didn't like and they can kill you and they have a decree giving them impunity.

So I would suggest to you, would you go back in that situation, because I wouldn't and I would not dare to subject anyone to have to forcibly go back with that kind of lawful regime that places them subject to that kind of arbitrariness or formal process which could take their life.

Further information regarding amnesties is found in Cisnet Document CX38185 of 23 September 1999: Just prior to the workshop (an international workshop on Iraqi **asylum seekers**) the Iraqi government announced an amnesty for people that had departed the country illegally. Presenters who were asked about this commented that, given the patchy (at best) implementation of previous amnesties it would be expected that some individuals could face problems should they return.

This would be most likely to occur where there was some other adverse factor involved - such as membership of an opposition group or desertion from the army, for example. Given the extreme economic hardship faced by government employees in **Iraq**, it is possible that individual officers may take the opportunity to extract a bribe or other benefit from returnees.

The department prepared a paper on **illegal departure, voluntary return and imputed political opinion** in relation to **Iraq dated May 2002** and held at Cisnet CX64862.

That paper refers to the return of **asylum seekers** from Iran and Jordan and also at para 20 advises The Iraqi regime is capable of harsh and arbitrary actions. Caution is therefore clearly appropriate when considering the potential situation of returnees, especially those who are forcibly returned. It cites advice that, "I mean for **illegal departure, for illegal** return and so forth. This systematic form of interrogation entails (at a minimum) mistreatment and detention and often torture and may entail your death. It's just the nature of the regime."

The advice continues to the effect that these consequences may not be for a Convention ground. The paper also refers to a report of a Danish mission which reports that people who have left **Iraq and who have applied for asylum** overseas have returned without facing serious adverse consequences and that the Iraqis will allow and facilitate the return of such people and who need documentation.

In regard to whether the Iraqi authorities would regard irregular acts such as **illegal departure are political, at a Seminar on Iraq** of 24 February 2000, referred to above, Mr. John Packer, former Assistant to UN Special Rapporteur on the Situation of Human Rights in **Iraq** was asked:

Can I just explain, the reason why I am asking this question. There may very well be a well-founded fear of persecution for anyone who goes back to **Iraq**, but the question for us is the reason why it is happening, what's motivating it and that's why I just wanted to get some clarity on whether it was because of **political opinion being imputed** to that, to those individuals or whether the regime is just brutal to everybody?

He replied:

*I think that is relatively easy to answer. Under the regime and even according to the Provisional Constitution and the laws, "If you're not with us, you are against us." It is very simple and the assumption and ascription of being against us is broad and frequently applied to the extent of loss of life. They don't have to prove that you are a member of an opposition group or that you are affiliated or associated they simply ascribe sympathies, whatever that means, now sympathy maybe manifested in numerable forms. You walk down the street in Basra, speaking with someone who once was related to someone, who, you know a deserter, uh! you are sympathetic, therefore you are against us. **So what's political? It is all political.** (emphasis added).*

Independent Information Regarding Illegal/Irregular Departure and Monitoring of Iraqis outside Iraq.

*The Tribunal has a range of independent information concerning the monitoring of **Iraqi emigres and the consequences of illegal departure***

*In regard to determining whether or not the **Iraqi** authorities would be aware of an asylum seekers application or activities in Australia cable AM2244 26 October 1997 states:*

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Moreover you are subject to that kind of imposition not through a judicial means but also potentially through Baath Party members simply at their own discretion deciding you did something nasty they didn't like and they can kill you and they have a decree giving them impunity. So I would suggest to you, would you go back in that situation, because I wouldn't and I would not dare to subject anyone to have to forcibly go back with that kind of lawful regime that places them subject to that kind of arbitrariness or formal process which could take their life.

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It cites advice that, "I mean for **illegal departure, for illegal return** and so forth. This systematic form of interrogation entails (at a minimum) mistreatment and detention and often torture and may entail your death. It's just the nature of the regime."

The advice continues to the effect that these consequences may not be for a Convention ground. The paper also refers to a report of a Danish mission which reports that people who have left Iraq and who have applied for asylum overseas have returned without facing serious adverse consequences and that the **Iraqis** will allow and facilitate the **return** of such people and who need documentation.

In regard to whether the **Iraqi** authorities would regard irregular acts such as **illegal departure** are political, at a Seminar on Iraq of 24 February 2000, referred to above, Mr. John Packer, former Assistant to UN Special Rapporteur on the Situation of Human Rights in Iraq was asked:

Can I just explain, the reason why I am asking this question. There may very well be a well-founded fear of persecution for anyone who goes back to Iraq, but the question for us is the reason why it is happening, what's motivating it and that's why I just wanted to get some clarity on whether it was because of political opinion being imputed to that, to those individuals or whether the regime is just brutal to everybody?

He replied:

I think that is relatively easy to answer. Under the regime and even according to the Provisional Constitution and the laws, "If you're not with us, you are against us." It is very simple and the assumption and ascription of being against us is broad and frequently applied to the extent of loss of life. They don't have to prove that you are a member of an opposition group or that you are affiliated or associated they simply ascribe sympathies, whatever that means, now sympathy maybe manifested in numerable forms. You walk down the street in Basra, speaking with someone who once was related to someone, who, you know a deserter, uh! you are sympathetic, therefore you are against us. **So what's political? It is all political. (emphasis added).**

The Risk of Harm

*The evidence cited above leads me to find that the Applicant's face a "real chance" of serious harm as a consequence of leaving Iraq illegally. Material in the departmental paper at CX64862 states that people in this category could face **prolonged** sentences in prison and even death.*

The paper also advises that, unless this was for a Convention reason the harm, albeit severe would not bring the matter within the ambit of the Convention.

The question, therefore arises as to whether or not the harm would be for a Convention reason.

Convention Reason

The departmental paper acknowledges that the regime is capable of harsh and arbitrary actions. I note that the country is controlled by a single party system and [Section 1](#) a of the US State Department Country Reports on Human Rights Practices 2001 advises:

The Special Rapporteur has noted that membership in certain political parties is punishable by death, that there is a pervasive fear of death for any act or expression of dissent, and that there are recurrent reports of the use of the death penalty for such offences as "insulting" the President or the Ba'th Party.

"The mere suggestion that someone is not a supporter of the President carries the prospect of the death penalty," (emphasis added)

This is supported by the comments of Mr. J Packer who advises that every act of defiance or being opposed to the regime is "political".

The acts the Applicant's claim to have undertaken are, not significant acts of opposition to the regime. However, when taken cumulatively, the failure to support the regime, the act of running away from it and then leaving the country illegally taking account of the arbitrariness of the regime could be regarded as political.

Accordingly, there is a real chance that the Applicants could face harm amounting to persecution for reasons of their political opinion.

Therefore any fear they may hold in this regard is well founded."

CONCLUSION:

The extracts included above from four representative RRT Hearings in Australia illustrate that the RRT in 2002, conducted the on-shore decision-making processing of Iraqi asylum-seekers in a more academically robust manner than that of DIMIA delegates processing and reviewing the Iraqi applicants as part of the (so-called) Pacific Solution.