DEPARTMENT OF IMMIGRATION AND MULTICULTURAL

AND INDIGENOUS AFFAIRS

Secretary

Mr Steve Karas
Principal Member
Refugee Review Tribunal
Locked Bag 3
SYDNEY SOUTH
NSW 2000

Dear Mr Karas

I am writing to you to submit an information paper to the Tribunal under s423(2) of the *Migration Act 1958* on a number of matters relating to Iraqi asylum seekers, in particular illegal departure, willingness to return and imputed political opinion.

The attached information paper addresses issues which on the basis of our investigations overseas and consultations with UNHCR, appear to be a significant cause of differences in decision outcomes in Australian assessments of Iraqi asylum claims. It draws on advice provided by UNHCR on these issues as well as other authoritative recent country information and case law, and has been prepared in consultation with Special Counsel for the Australian Government Solicitor (Immigration).

The information paper should go a considerable way to resolving the uncertainties among decision-makers concerning Iraqi cases, and address consistency of decision-making at both the primary and review levels.

I would greatly appreciate your assistance in circulating my information paper on these matters to Members of the Tribunal.

Yours sincerely

Ed Killesteyn
Acting Secretary

1 May 2002

ILLEGAL DEPARTURE, VOLUNTARY RETURN AND IMPUTED POLITICAL OPINION IN RELATION TO IRAQ

INFORMATION PAPER

Purpose

The purpose of this information paper is to:

- Provide guidance and country information relevant specifically to the assessment of protection claims by Iraqi nationals;

- Provide legal advice on principles to be followed in assessing protection claims by Iraqi nationals, and of broad relevance to other nationals.

2. The information paper is relevant to DIMIA and RRT decision–makers making refugee status determinations under the Refugees Convention for the purposes of protection visa assessments, and refugee assessments under the Refugees Convention in excised offshore places or declared countries.

Country information on illegal departure and seeking asylum

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.*[1]

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,[2] insofar as it involves exemption from prosecution for illegal departures.

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[1] Letter to DIMIA from UNHCR's Regional Representative for Australia, New Zealand, Papua New Guinea and the South Pacific, 20 March 2002

[2] The text of this Decree, relating to the termination of all legal proceedings against Iraqis who have left illegally, including those who have forged official documents towards this purpose, is obtainable in CISNET document CX36096, of 7 July 1999.

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.[3]

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.[4]

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 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.*[5]

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*

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[3] Report from Fact Finding Mission to Iraq, Danish Immigration Service, April 2001, www.unhcr.ch/cgi-bin/texis/vtx/rsd; (see also CISNET Doc CX54577). Importantly, the information contained in this report has been confirmed by a UN agency in Geneva as consistent with that organisation's own information on conditions in Iraq, including the conditions for Iraqis returning to Iraq after a period of residence abroad.

[4] Ibid, pp 8-10

[5] Ibid, p 8

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.[6]

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.[7]

Access to documents to enable return to Iraq

14. According to an international humanitarian organisation cited in the Danish report,

All Iraqi diplomatic representations have been instructed to facilitate the return journey of any Iraqis who might wish to come back home.[8]

15. This information has been confirmed in the information provided to the Australian Government on a confidential basis by a UN agency, as reported above. The agency added that the instructions extend to assistance even to Iraqi holders of 'humanitarian status', should they decide to give up that status.

16. As also noted above, considerable numbers of Iraqis have returned to Iraq in recent years and there is no evidence to indicate that they have experienced problems with the authorities.

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,[9] and from the Netherlands diplomatic representation in Amman that most Iraqis without a political or security profile should have no fear of return.[10]

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[6] Ibid, p 10. According to a Western diplomatic representation interviewed by the Danish fact-finding mission (ibid, p 9), 'there is to the best of its knowledge no circular, decree or law making it a criminal offence to reside or seek asylum abroad'.
[7] Ibid, p 8
[8] Ibid, p 8
[9] See 'People smuggling and irregular people movements: Visit by DIMA officials to Amman', 28 March 2000, CISNET Doc CX41558; also Country Information Report No 17/97, sourced from ASIO in January 1997, CISNET Doc CX21113
[10] CISNET Doc CX41558, op cit, 28 March 2000

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.*[11]

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'.*[12]

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;[13] 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.[14]

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.

22. 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.[15]

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[11] Voluntary return of Iraqis through Jordan, 1 August 2000, CISNET Doc CX43673

[12] Iraq Question and Answer Period, Information Seminar for Refugee Status Determination Authorities, 24 February 2000, CISNET Doc CX41119

[13] See, for example, CISNET Docs CX41169 and CX43673 relating to the Passports Law of 12 October 1999

[14] John Packer, 'Iraq Question and Answer Period, Information Seminar for Refugee Status Determination Authorities', CISNET Doc CX41119.

[15] Where disproportionately heavy penalties do exist, it is appropriate nevertheless that they are taken into account by decision-makers when considering whether persecution instead of prosecution could be involved in relevant circumstances. However, alternative explanations

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].*[16]

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.[17] Other mechanisms have been put in place by the Government to ensure that these obligations are considered by Government, as appropriate.[18]

Legal advice on voluntary return

25. As noted above, the UNHCR has advised that, in the absence of other factors, the decisive element to assess whether a returning individual would be put at risk at the hands of the Iraqi authorities would be the voluntary nature of the return, rather than the legal or illegal nature of their departure from Iraq.

26. According to legal advice received by DIMIA, (Australian Government Solicitor, 22 March 2002), the proper interpretation of Article 1A of the Refugees Convention is that a person's unwillingness to avail themselves of the protection of their country of nationality or habitual residence must relate

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such as State concerns about particular types of criminal behaviour, or a tendency for a particular State generally to apply harsh criminal punishments, need also to be considered.

[16] Ibid

[17] Although notions contained in these instruments can be relevant to assessments of 'persecution'.

[18] For example, onshore through provisions relating to Ministerial intervention powers under s417, or s48B, or offshore through matters that are considered during the review process of negative decisions or the possibility of a new assessment against Convention criteria.

to a Convention ground(s) if it is to be a relevant factor for a refugee status determination.[19]

27. When undertaking a refugee assessment, the proper construction of Article 1A of the Convention is to assess whether a person is a refugee now or in the reasonably foreseeable future. In making that assessment, decision-makers are entitled to assume that a person who does not have a well-founded fear of persecution for a Convention reason will return voluntarily.

28. In other words, a person's refusal for non-Convention reasons to avail themselves of the protection of their country of origin cannot in itself generate a protection claim under the Convention, where there is otherwise no basis for such a claim. Such people are neither 'unable' to avail themselves of the protection of their country of nationality (assuming they can obtain travel documents), nor can they be considered 'unwilling' owing to a well-founded Convention-based fear.

29. Importantly, for the purpose of concluding that a person is not owed protection obligations under the Convention, it is sufficient to know that if the applicant did return voluntarily they would not have a well-founded fear of persecution for a Convention reason. According to the UNHCR Handbook in its discussion of the term 'unwilling',

> *Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.*[20]

30. Case law in Australia supports the view that a mere reluctance on the part of an applicant to return to their country of origin (and relocate if necessary) is not sufficient to convert into a refugee a person who would not be otherwise entitled to international protection. As stated by the Full Federal Court in *Abdi,*[21]

> *It follows, in our view, from what was said in Randhawa, and from a proper understanding of the terms of the Convention definition, that unwillingness to return (not based on well-founded fear of persecution for a Convention reason) cannot of itself (nor can consequences that follow entirely from unwillingness) convert into a refugee an applicant who would not otherwise be entitled to international protection. That is simply an application of the well established principle that third countries are obliged to give international protection only in circumstances where national protection is not available.*

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[19] This may be contrasted with a person's inability to avail themselves of the protection of their country of nationality or habitual residence, which is sufficient by itself to bring a person who otherwise satisfies the definition of a refugee (ie who meets the first limb of the definition of having a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion') within that definition. That is, the inability does not itself necessarily need to be based on a Convention reason.

[20] Para 100

[21] *Abdi v MIMA* [2000] FCA 242 at 13

31. Similarly, in *Siaw,* the court held,[22]

> *Having found that he could access effective State protection and accordingly did not have a well-founded fear of persecution, the existence of any subjective fear was no longer material.*

32. Importantly, there will be cases where events subsequent to the refugee decision may demonstrate that voluntary return is not ultimately possible. For example, it may emerge that travel documents cannot be obtained by or for the individual. This is an important issue. However it is an issue for consideration by Government at that later time, when addressing its options and the implications of those options (including those which may arise relating to the individual's protection claims). As noted earlier, there are mechanisms in place, such as the s48B provisions for onshore refugee status assessments and the ability to commission fresh refugee status assessments offshore, to address these issues should they arise. However, the initial refugee status determination should be undertaken on the assumption that voluntary return will occur.

Issues relating to 'onus of proof' and 'benefit of the doubt' in assessing well-founded fear

33. In Australia, the courts have indicated that the concept of the 'onus of proof' is not appropriate to administrative decision making.[23] However, there is an evidentiary onus on the applicant, whereby he or she must provide sufficient information upon which the decision-maker can base a decision. Such information may typically also allow the decision-maker to make further inquiries to resolve relevant issues, consistent with the inquisitorial nature of Australia's approach to refugee status determination. Where an applicant fails to satisfy the decision-maker in regard to relevant matters, the decision-maker is clearly not required to make a case for them.[24]

34. The UNHCR has recommended the following procedures relating to the 'onus of proof',

> *(k) The asylum-seeker has a responsibility to co-operate with the authorities in the country of asylum. The burden of proof is shared between the individual and the State in acknowledgment of the vulnerable situation of the asylum-seeker. The procedures should reflect both of these factors ..* [25]

35. Decision-makers have the right to expect that applicants will be forthcoming, cooperative and truthful in presenting an account of their situation. Particular care is needed where applicants have engaged in actions which have the effect, regardless of claimed motive, of rendering the

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[22] *Siaw v MIMA* [2001] FCA 953 at 12

[23] *Yao-Jing Li v MIMA* (1997) 74 FCR 275 at 288.

[24] See for example, *MIEA v Guo* (1997) 144 ALR 567 at 596; *Prasad v MIEA* (1985) 6 FCR 155 at 169-170; *Luu v Renevier* (1989) 91 ALR 39 at 45; *Randhawa v MILGEA* (1994) ALR 265 at 20-24.

[25] Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, a paper prepared for the Global Consultations on International Protection, Track 3 Meeting on 28-29 June 2001, UNHCR, Geneva.

assessment process more difficult; for example through the disposal of travel documents that, if produced, may help to substantiate claims of illegal departure or identity. Circumstances in which decision-makers may draw an inference unfavourable to an applicant are outlined in s91V and s91W of the Migration Act.

36. With respect to the principle of the 'benefit of the doubt', it is important to note that no such principle exists in the Refugees Convention. Rather, it is a common-sense, practical approach recommended by UNHCR in its Handbook, to be extended only where all other elements of a case are credible. According to UNHCR,

> *The benefit of the doubt should ... only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.*[26]

37. Clearly, decision-makers must balance concerns about the evidence with the concern to ensure that bona fide refugees are identified and that none are *refouled*. However, decision-makers are not required to accept uncritically any or all of the claims that a refugee applicant may make.[27] Nor is it appropriate to apply the 'benefit of the doubt' principle to overcome credibility concerns; that is, where claims are incoherent or implausible (eg where they run counter to generally known facts), giving rise, for example, to a positive state of disbelief.

38. Therefore, where an applicant's credibility has been called into question – for example, where doubts exist about the motive in having disposed of travel documents, or there are internal inconsistencies in their claims, or between their claims and country information, such as that detailed above – the decision-maker may decline to extend the benefit of the doubt to that applicant.

39. In addition, it is important to emphasise that, as noted by the High Court in *Guo*,

> *A fear is "well-founded" when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution [for a Convention reason]. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.*[28]

40. Particular care is needed when dealing with claims for which no substantiating country information can be identified. The onus does not transfer to the decision-maker to accept claims merely because there is an absence of contradictory country information. An absence of country

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[26] Handbook, para 204

[27] See for example, *Randhawa v MILGEA* (1994) 52 FCR 437 at 451.

[28] *MIEA v Guo Wei Rong & Anor*, 13 June 1997, per the majority (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, and Gummow JJ).

information on a particular issue does not equate to confirmation that a claimed event may occur on return.

Onshore Protection Branch
Refugee & Humanitarian Division
24 April 2002

(This information paper has been prepared by Onshore Protection Branch in consultation with Special Counsel - Immigration (Australian Government Solicitor) and Legal Policy Section, Parliamentary & Legal Division)

AUSTRALIA

Refugee Review Tribunal

9 JUL 2002

08 JUL

SEEN BY EXECUTIVE ASSISTANT

Mr W J Farmer
Secretary
Department of Immigration and Multicultural and Indigenous Affairs
PO Box 25
BELCONNEN ACT 2616

Dear Mr Farmer

I refer to your letter of 20 June 2002 in which you provided a submission under s423(2) of the Migration Act in relation to refugee review applications relating to Afghanistan.

I have provided a copy of your submission to members of the Tribunal as requested.

Yours faithfully

Steve Karas
Principal Member
Refugee Review Tribunal

5 July 2002

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