THE HIGH COURT

[2010 No. 502 JR]

Between

MAZHAR ALI AHMED

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Birmingham delivered the 24th day of March 2011

1. The applicant claims to be a twenty-four old national of Iraq. He describes his ethnic origin as Iraqi Kurd. He arrived in Ireland on the 24th March 2005 and submitted an application for asylum which failed at first instance before the Refugee Applications Commissioner (ORAC) and on appeal before the Refugee Appeals Tribunal (RAT). In the course of the questionnaire that he completed as part of the application process he stated that he had last lived at Kirkuk, Kurdistan, Iraq., that he had lived there more than three years working with an uncle selling fruit and vegetables and that he had previously lived in Jalawla Kurdistan Iraq. Jalawla Diala, Iraq was quoted as his address in his home country. While he had stated when completing the documentation that Jalawla, Iraq was his place of birth, what purports to be an Iraqi national certificate produced by him records Kerkook, 1986 as his place and date of birth (spelling as in the translated document).

2. The basis of the claim that was advanced for asylum is that he is at threat from the activities of the members of an unnamed armed Islamic group in Iraq which he alleged wanted to kill him because they suspected that his brother had caused the arrest of friends or associates of theirs' previously. It may be noted that the applicant's brother had previously sought and obtained refugee status in Ireland on the basis that he was wanted in Iraq by the Sadam Hussein regime because of his involvement in a Kurdish opposition party.

3. Having failed in his claim for asylum and having been informed of the options available to him, the applicant on or about the 13th February 2006 submitted a so-called "humanitarian leave to remain application" in accordance with the provisions of s. 3 of the Immigration Act 1999, as amended. Later, in response to an invitation to submit an application for subsidiary protection, such an application was made on the 10th August, 2007. For reasons that have not been explained the consideration of both the leave to remain application and the application for subsidiary protection was the subject of a long delay. By letter dated the 3rd March 2010, solicitors for the applicant wrote to the Repatriation Unit of the Department of Justice, Equality and Law Reform protesting about the length of the delay and threatening Judicial Review proceedings if decisions were not received within twenty-one days. It was explained that the letter was a submission by way of an update on the application for Leave to Remain and for Subsidiary Protection which was necessitated by reason of the long delay in determining the application and that it was being submitted for the purpose of up-dating the client's file. On the 24th March 2010 a decision was made refusing the application for Subsidiary Protection, and on the following day a decision was made to make a deportation order. It is these two decisions of the 24th March and 25th March 2010, which are at issue in the present proceedings.

4. In so far as the challenge to the deportation order is concerned, it is clearly one to which s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 applies and accordingly if the applicant is to secure leave it is necessary for him to establish that there are substantial grounds for contending that the decision was invalid or ought to be quashed.

5. The position in relation to the refusal of Subsidiary Protection is less clear cut. Decisions in relation to Subsidiary Protection are not listed as the subject of specific provision in s. 5 of the Illegal Immigrants (Trafficking Act) or any subsequent amending legislation. In these circumstances the applicant contends that there is no obligation to meet the "substantial grounds" threshold but that all he must do is meet the threshold provided for in *G. v. Director of Public Prosecutions* [1994] I IR 374. Ms. Siobhan Stack, Barrister at Law on behalf of the respondents says that this would lead to an anomalous situation. She says that the position that clearly emerges from O.4(4) of the European Communities (Eligibility for Protection) Regulations 2006 (hereinafter the "Regulations") is that where there is a determination that an applicant is eligible for Subsidiary Protection, the Minister is obliged to grant him permission to remain in the State and if doing that, he does so under s. 3 of the Immigration Act, 1999. If the decision is that the applicant is not a person eligible for Subsidiary Protection, the Minister is required to proceed to consider whether a deportation order should be made having regard to the matters referred to in s. 3(6) of the Immigration Act, 1999. She contends that decisions in relation to Subsidiary Protection are encompassed by the s.3 framework, she uses the phrase that Subsidiary Protection is "parachuted into s. 3" and that accordingly the same standard should be applied to both decisions. She comments that it would be a strange situation if the Court found that there were no grounds to challenge the deportation order and so one was left with a valid deportation order but the view was taken that there were sufficient grounds to challenge the refusal of Subsidiary Protection. The point that she makes is an interesting one and one that clearly is not entirely without merit. However, one must remember that at this stage both applications are applications for leave. In that context it seems to me that at the very least, it must be the case that there are substantial grounds for contending that the applicant has to meet only the lower threshold in *G.* Such an approach is consistent with the view taken by the Supreme Court in the case of *D.C. v. The Director of Public Prosecutions*, a decision of the 21st November 2005 and it also accords with the approach that has been taken consistently in the High Court. Accordingly, this is the threshold which I will apply. Therefore, the applicant will obtain leave in relation to the deportation order only if substantial grounds are established but he will be granted leave in relation to the subsidiary protection order if he can establish an arguable ground. I would simply observe that in a situation where all issues are fully argued that the distinction between the two issues may not be as great as might first appear. A point that might appear arguable and perhaps even more than that in the context of a limited examination in an ex-parte list may when subject to scrutiny in the course of an inter-partes hearing be exposed as a bagatelle.

6. I turn then to the substance of the challenge to the two decisions. They are challenged on a number of grounds. The ground on which most attention has focussed is a complaint about the procedures followed prior to the taking of the decisions which are impugned. It is said that there has been a breach of the principle of *audi alteram partem* and in consequence a failure to adhere to the principles of natural and constitutional justice. In conjunction with this argument but also as a freestanding ground it is argued that the procedures followed meant that the provisions of Council Directive 2004/83/EC have not been complied with. In the course of oral argument counsel for the applicant indicated that he would, if necessary contend that the European Communities (Eligibility For Protection) Regulations 2006 had failed to implement the directive. Counsel for the respondent, protests that there was no reference to this alleged ground in the statement grounding the application for judicial review or in the notice of motion bringing the matter before the court. In my view the objections taken by the respondents are well founded and I do not propose to permit this issue to be argued as a separate ground. However, I do propose to address the arguments advanced in relation to the directive in the context of the wider criticisms of the procedures that were actually followed. The applicant also criticises the substantive conclusions

reached by the decision maker. In particular it is said that the decision of the Minister cannot stand because of the fundamentally flawed approach taken by the officials who prepared the submissions for the Minister on the question of the possibility of internal relocation within Iraq and on the extent of the dangers posed to the applicant by return to Iraq, including in particular the conclusion reached as to whether the applicant was at serious threat of serious harm by reason of indiscriminate violence in a situation of international or internal armed conflict.

7. Mr. Diarmuid Rossa Phelan, S.C. Counsel on behalf of the applicant says there is a considerable overlap between the procedural and substantive legs of the challenge in that conclusions reached were arrived at because of the unfair and unsatisfactory procedures that were followed, and, when looked at from the other angle that the unsatisfactory procedures followed has as their natural consequence flawed and unwarranted conclusions.

8. The two decisions that are challenged are each lengthy, detailed and comprehensive. The subsidiary protection decision runs to thirty-nine typed pages and the leave to remain decision runs to thirty pages. Much common ground is covered by both decisions. However, there is one respect in which they diverge significantly, which is that in the submission prepared by officials leading to the decision to make a deportation order, Sulaymaniyah, one of the three Northern Governorates in Iraqi Kurdistan which together comprise the Kurdistan Regional Government (KRG) was identified as a possible site for relocation and potential means of access to it was the subject of discussion. It may be noted that both submissions were prepared by the same official.

9. The criticisms that are made of the procedure that was followed, and, in particular, the allegation that there was a failure to adhere to the principles of *audi alteram partem* relate to the consideration given to the situation on the ground in Iraq and more particularly to the treatment of the issue of internal relocation. The question of internal relocation was not an issue that was considered in the body of the recommendation of the Refugee Applications Commissioner (RAC) or in the decision of the Refugee Appeals Tribunal (RAT), both of which were based on conclusions that the applicant's account was not regarded as credible. However, the application which was submitted seeking Subsidiary Protection did deal with the question of relocation within Iraq. At one point in the application it is stated that the applicant would not be safe in Northern Iraq because his father had been a member of the Ba'ath party. At another point it is stated that the applicant "fears that he would not be safe in any other part of Iraq". Under the heading "Internal Protection" there is a specific statement that the applicant would not be able to avail of internal protection in Iraq, as he would be exposed to serious harm throughout Iraq. The UNHCR is quoted as authority for the proposition that relocation would neither be safe or practical by reason of security risks, lack of adequate basic services and because of logistical constraints.

10. The letter of the 3rd March, 2010, to which I have already referred and which updated the application for Leave to Remain and Subsidiary Protection, dealt in considerable detail with the ability of the applicant to relocate within Iraq dealing specifically with the situation in the three Northern Governorates of Sulaymaniyah, Ebril and Dahuk. Something over five pages of extracts from country of origin information are incorporated in the update. The extracts are taken from the UNHCR's eligibility guidelines for assessing the International Protection Needs of Iraqi Asylum Seekers of August 2007 and an addendum of December 2007. Portions of the extracted material have been underlined by way of emphasis. It may be noted, in passing, that this underlining is not particularly helpful. Some of the extracts underlined deals specifically with the position of asylum seekers from Central and Southern Iraq, which is not where the applicant is from. Overall the highlighted material does not reflect accurately the tone of the entirety of the material that was extracted. The sourced document deals in turn with the position of Iraqi asylum seekers from Central and Southern Iraq and then addresses the position of Iraqi asylum seekers from the three Northern Governorates.

11. As submitted to the department the quotation was in this form:-

> "With regard to Iraqi asylum-seekers from Central and Southern Iraq;
>
> • UNHCR considers Iraqi asylum-seekers from Central and Southern Iraq to be in need of international protection.
>
> • Iraqi asylum-seekers from Central and Southern Iraq should be considered as refugees based on the 1951 Convention criteria.
>
> • Where such asylum-seekers are not recognised under the 1951 Convention refugee criteria, international protection should be afforded through the application of an extended refugee definition, or otherwise through a complementary form of protection.
>
> • UNHCR considers that an internal flight or relocation alternative (IFA/IRA) in Central and Southern Iraq is on the whole not available. When, however, the availability of the internal flight or relocation alternative must be assessed in a national procedure, it should be examined cautiously, taking into account the particular circumstances of the applicant. The question of the availability of an IFA/IRA in the three Northern Governorates for individuals from Central and Southern Iraq must be carefully assessed on a case by case basis, taking into consideration, in particular, the relevance and reasonableness analysis in the eligibility guidelines.
>
> As concerns Iraqi asylum-seekers from the three Northern Governorates; – the international protection needs of asylum-seekers from the three Northern Governorates should be individually assessed based on the 1951 Convention refugee definition. In cases where an asylum-seeker is not recognised as a refugee under the 1951 Convention but nevertheless demonstrates protection needs for which complementary forms of protection may be appropriate, the case should be assessed accordingly.
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> • UNHCR considers that there is no IFA/IRA available for asylum-seekers from the three Northern Governorates in Central and Southern Iraq. Whether an IFA/IRA may be available for them within the three Northern Governorates themselves must be examined carefully on a case by case basis. Special attention should be paid to the categories of individuals highlighted in the eligibility guidelines who clearly would not be able to find an IFA/IRA in the three Northern Governorates.
>
> In all cases due attention should be paid to possible grounds for exclusion, in accordance with Article 1(f) of the 1951 Convention."

12. In summary the 2007 guidelines as quoted set their faces firmly against the return of asylum seekers to Central and Southern Iraq but display greater flexibility in the case of asylum seekers from the three Northern Governorates, applications from whom it is indicated require careful consideration on a case by case basis.

13. It might be thought that in a case which is concerned with an assessment of the security situation in a volatile area that the submission of extracts from a document almost three years old is of limited value. The situation might be different if information was being provided in relation to societal attitudes or tribal custom which may evolve slowly. However it is notoriously the case that the security situation in a particular country may change very rapidly indeed. I have no doubt that if a decision maker in such a case was to base conclusions on documentation so out of date that would be the subject of criticism and challenge and properly so. However, it is also the case that when parties are putting documentation before a decision maker that they need to consider whether what is being submitted represents the most up-to-date information available.

14. The official charged with preparing the submission in both cases did not confine herself to the 2007 document which had been referred to on behalf of the applicant in the updating memorandum of the 3rd March 2010. Instead, the submissions contain extensive extracts from the United Kingdom Home Office, Country of Origin Information Report – Iraq of the 10th December 2009 and a Home Office, County of Origin Information Report – Kurdistan Regional Government Area of Iraq, 16th September, 2009. The fact that the decision maker intended to access these reports was not brought to the attention of the applicant. The compliant is made that the failure to do so amounts to an unfair procedure.

15. Both the decisions contain very extensive extracts from Country of Origin Information. In that regard there is a very significant overlap between the two decisions although the Leave to Remain Decision, included material dealing with the treatment of returned failed asylum seekers and with the position of human rights institutions, organisations and activists which is not included in the subsidiary protection document. On the other hand the extracts relating to the security situation quoted in the subsidiary protection decision are somewhat fuller than those that found their way into the leave to remain.

16. The two Home Office documents to which reference was made, comprise a collation of material assembled from other sources. So for example the report on Iraq includes quotations from United Nations Security Council Reports, Amnesty International Reports, Kurdistan Regional Government Fact Sheets, UNHCR reports, Foreign and Commonwealth Office Reports, Iraq Fact Finding Mission Reports, US Department of Defence reports, International Organisation for Migration Reports, extracts from BBC news, Reuters and the Herald Tribune to mention but some. Almost all of the sourced documents that are referred to are themselves available on the internet, and the few that are not, are, according to the preface, to the documents available on request from the COI service of the Home Office.

17. In considering whether it is appropriate to access such documentation without informing the applicant that this was happening it is necessary to bear in mind that the question of whether the applicant would be safe or at serious risk throughout Iraq or in individual areas of Iraq was always going to be central to both decisions that were required to be taken. When the decision maker is dealing with the political or security situation within a country, it would seem highly desirable that the most up-to-date information possible should be accessed. If, as Harold Wilson once said a week is a long time in politics, then two years in the history of a country emerging from the effects of war and invasion is an age.

18. In my view there is no general obligation on a decision maker to return to an applicant and inform him or her what documents have been sourced. The applicant is aware of the task facing the decision maker and must expect that he or she will prepare themselves by making sure that they are fully up-to-date. However, I would emphasise that while that may be the general position, one can certainly envisage that there may be particular cases where a document sourced late in the procedure has the capacity to alter radically the entire basis of the application, which would require that contact be made with the applicant. Again one could imagine that if it were the situation that a decision maker had access to a stream of information which was not publicly available but was in conflict with publicly available material then different considerations might arise. However, nothing of the sort is in issue here. The question of whether the applicant could safely locate in any part of Iraq was always going to be an issue and indeed that that was so, was anticipated by the applicant. The documents accessed by the official are publicly available and form part of a series of country reports that are referred to constantly, in the course of asylum cases and related cases. It is noteworthy that the documents that were accessed contain extensive quotations from the UNHCR eligibility guidelines for assessing the international protection needs of Iraqi asylum seekers of April 2009 – the 2009 addition of the guidelines, the 2007 edition of which was submitted by the applicant in March 2010.

19. The updated guidelines which were exhibited by the applicant in his grounding affidavit, note that in view of changes since December 2007 with important improvements in the overall security situation in many parts of the country, the UNHCR is required to revise and update its position. The UNHCR 2009 guidelines is a lengthy document running to some 250 pages. It may be convenient to quote that opening three paragraphs:

"Introduction

> 1. This paper replaces UNHCR's position regarding the international protection needs of asylum seekers from Iraq, set out originally in the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers (Eligibility Guideline) and it addendum to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers (Addendum)* issued in August and December 2007 respectively. While these documents may still be consulted for archival purposes, they are all hereby superseded accordingly
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> 2. In the papers mentioned above, UNHCR took the position that all asylum seekers from the Central and Southern parts of Iraq were in need of international protection and should thus be considered as refugees under the 1951 Convention criteria. For those asylum seekers from the Central and Southern Governorates, whose evident need for protection might not be determined within the scope of the 1951 Convention refugee criteria, UNHCR recommended that they be recognised under the extended refugee definition, where applicable, or otherwise granted some form of complimentary protection. This position was based on UNHCR's assessment that all asylum seekers from Central and Southern Iraq were in need of internal protection due to the pervasive extreme violence, serious human rights violations, and a general lack of law and order. As for the International Protection Needs of Person from the three Northern Governorates of Dahuk, Erbil and Sulaymaniyah UNHCR recommended that their asylum claims to individually assessed based on the 1951 Convention definition. In cases where an asylum seeker was not recognised as a refugee under the 1951 Convention but nevertheless demonstrated protection needs for which complimentary forms of protection may be appropriate, it was recommended to assess the case accordingly.
>
> 3. The *addendum* to the eligibility guidelines of December 2007 described developments in Iraq that started to re-shape the political and security landscapes at the end of 2007 and resulted in a reduction of civilian casualties and new displacements. Since then, the situation in Iraq has further evolved, with important improvements in the overall security situation in many parts of the country. In view of the totality of all these changes, a revision and up-date of UNHCR's position as summarized in the preceding paragraph has become necessary to reflect the situation at present.

20. It is also convenient to quote footnote 3:

> "Note that these documents, along with UNHCR's Country of Origin Information of Iraq (3rd October, 2005) HTTP; /www.unhcr.org/refworld/dod435637914.html can be consulted for additional country of origin information on *inter alia*, political, security and human developments in Iraq, as well as detailed information on the profile of groups at risks. However, with regard to UNHCR's policy concerning the International Protection Needs of Iraqi Asylum Seekers as well as its return policy, only the current document is applicable.

21. The arguments now advanced in relation to the suggested obligation on the part of the decision maker to inform an applicant that additional country of origin information is being sourced and to furnish a copy for comment, closely mirror arguments that were firmly rejected by Charleton J. in the case of *F.N. and Others v. The Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88. At p. 122 he commented as follows:-

> "54 . . . Here, the decision maker is the respondent. It was argued for the applicants that a fair consideration of the country of origin information material would have required the respondent Minister in each of these cases to issue a letter as regards deportation and subsidiary protection and then to receive and, secondly, consider fairly a submission, in that regard. That submission is correct and accords with the practice of the respondent and with the facts in this case. Then there is the third stage, where a decision is made, as it was made in this case. It was argued that other stages should follow. If the respondent is to look at other country of origin information then it is contended that there must be, fourthly, a stage where this other material is furnished to the applicant who would then be asked whether any submissions were to be offered either in general, or it might be argued, as to particular parts, of the country of origin information. At the fifth stage a further submission would be received from the applicant which then, at a sixth stage, would be analysed for the purpose of coming to a rational decision whereby one type or set of country of origin information is preferred from another. Finally, the seventh would involve a reasoned decision being made by the respondent as to why one set of country of origin information, or one aspect of country of origin information, is to be preferred in contrast to another. This was to be set out in writing as a reasoned decision and would be the subject of applications for judicial review.
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> 55. The procedure argued for presupposes a complete lack of trust being properly exercised by the respondent through his officials. The relevant Directives, and the case law which I have cited in this judgment, emphasise the necessity for the decision maker to obtain up to date country of origin information. That process may be assisted by submissions on behalf of the applicant. Neither under European or national law do they control the process. Once a submission is made, it is not necessary either under European or national law, to return to an applicant with queries or questions unless, in the opinion of the Minister, such query or question may be of assistance to him in discharging his function in determining the true state of the applicant's country of origin."

22. With those views expressed by Charleton J. I find myself in respectful agreement.

23. A further argument was advanced to the effect that the subsidiary protection application was not arrived at in accordance with the procedures mandated by EU Directive 2004/83/EC (the Qualification Directive implemented or purportedly implemented into Irish Law by the European Communities (Eligibility For Protection) Regulations 2006.

24. Article 4.1 of the Qualification Directive is in these terms:

> "Member States may consider it, the duty to submit as soon as possible all elements needed to substantiate the application for international protection. In co-operation with the applicant, it is the duty of the Member State to assess the relevant elements of the application."

25. The applicant places particular emphasis on the phrase "in co-operation with the applicant" and says that the procedure that was followed here, meant that there was no co-operation between the applicant and the respondent. A co-operative approach it is contended would require the respondent to update the applicant on the information that was becoming available and invite his response.

26. In my view the argument advanced ignores the fact that an application for subsidiary protection is not made in isolation but is ordinarily made, and this was the situation in the present case by someone who has applied for asylum, has had that application considered and been refused refugee status.

27. Even before the stage of submitting an application for subsidiary protection is reached, there has already been a considerable degree of interaction between an applicant and the authorities. This has involved questionnaires being issued and completed, interviews arranged and attended the submission of a notice of appeal and the convening of an appeal hearing.

28. In summary, I cannot see that that was anything objectionable in the respondent considering up-to-date information and I cannot see any basis why he ought to have been confined to considering the report submitted by the applicant, the authors of which have specifically stated that it has been superseded and maybe consulted for archival purposes and is not applicable to the UNHCR's current policy concerning the international protection needs of Iraqi asylum seekers as well as its return policy. The procedure followed by the official was an acceptable one and the conclusion arrived at was one that was open to the decision maker and not one that can be categorized as unreasonable or irrational or disproportionate.

29. On the point of the stage of the proceedings at which a decision is made in relation to subsidiary protection, the applicant protests that in the particular circumstances of the present case that it was unreasonable and irrational to allow the decision on subsidiary protection be influenced by the procedures at the RAT stage and in particular by the conclusions reached there in relation to credibility. It is said that the identity of the member of the RAT who conducted the appeal, who was somebody who subsequently found himself the subject of controversy because of the high number of appeals conducted by him which were unsuccessful, leading to his resignation from the Tribunal, meant that no attention should have been paid to what happened at that stage. In my view the criticism of the RAT decision at this late stage, based on the identity of the Tribunal member who conducted the appeal is misplaced and inappropriate. It was never sought to challenge the decision of the RAT. The central conclusion of the RAT decision which was that the account that the applicant gave that he was able to avoid being killed or captured because he kept a low profile and lived in different houses in Kirkuk, was inconsistent with the fact that he was working openly in his uncle's shop for a period of over two years selling fruit and vegetables seems to me one that is unimpeachable.

30. There is a further point, the reference at Article 4(1) to co-operation is in the context of the duty of the Member State to assess the relevant element of the application. The elements there referred to are defined in Article 4(2) as follows:-

> "The elements referred to in para. 1 consists of the applicant's statements and all documentation at the applicant's disposal in regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies) country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection".

31. It seems to me that there is no basis for interpreting Article 4.1 as requiring co-operation in respect of matters other than those elements listed in Article 4(2). For that reason, I can see no basis for the suggestion that the article requires a dialogue in relation to country of origin information.

32. The applicant has submitted for consideration a report from the European Commission to the European Parliament and Council. However, I do not see that report as offering any assistance to the applicant. What emerges from it is that there are considerable divergences of approach between Member States. However, there is nothing in the report to indicate that the Commission was of the view that there had been any failure on the part of Ireland to transpose the relevant provisions or to comply with its obligations.

33. In the course of oral argument, counsel for the applicant has canvassed the possibility of a reference to the European Court of Justice. I am not at all persuaded that this is an appropriate case for a reference, at least not at this stage. In declining to refer the matter to the European Court of Justice I am very conscious that the subsidiary protection decision is, in my view, not one that is covered by s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 with its provision for a restricted right of appeal.

34. In addition to complaining about the procedure involved in accessing the up-to-date country of origin information, the respondent is also criticised for the use made of the information and it is said that conclusions were arrived at that were not reasonably and rationally open to the respondent on foot of the material. I have carefully considered material that was extracted from the source documents and quoted in the body of the decision to see whether the decisions arrived at could reasonably be based on the material. As already noted, a copy of the United Kingdom Border Agency Country of Origin Information Report of 10th December 2009, has been exhibited and I have considered whether the respondent decision maker acted reasonably in making the selection that she did for citation. In considering the selection, I have tried to bear in mind the essential criticism that the applicant makes of the decision maker which is that she has confused what is hoped for or aspired to with what has actually been achieved to date. Before going on to consider the updated material to which the decision maker had access, it is worth pausing to observe that even the 2007 material that was quoted by the applicant is in fact more nuanced than might have appeared from the submissions in relation to it that were made on behalf of the applicant.

35. The structure of a Home Office, Country of Origin report comprises a cluster of unconnected quotations from many sources. This structure makes it difficult to judge whether the extracts selected are representative. With regard to the particular report relied upon of the 10th December 2009, if one excludes the sections of the report that deal with issues unconnected with the present case such as the position of women, children, people of homosexual orientation, religious minorities and so on, it seems to me that it would be hard to criticise the selection made. No doubt others asked to make a selection might have chosen differently but that is simply the nature of the material. Given what the applicant now has to say about the fate that befell his father, whom he now says was killed by "Kurdish", because of his membership of the Ba'ath Party there would have been advantages in including the section dealing with perceived collaborators and "soft targets". However, in that regard it may also be noted that the applicant made no mention of his father's situation when applying for asylum. He failed to do so, notwithstanding that when completing the questionnaire, the specific question was asked:

> "Have any members of your close family ever been arrested, detained or imprisoned in your country of origin? Yes_____ No _____, if yes, please state by whom and how long they were detained".

The applicant responded by ticking the yes box and saying that in Jalawa "the Ba'ath Government arrested my brother "Fuid and put him in jail for a month. Although he was tortured very badly he did not confess anything and he was released". While the question focussing on arrest and detention, one might have thought that the question would have provoked the applicant to refer to his father's death.

36. It is the case that the applicant is particularly critical of the way in which his claim about what happened to his father is dealt with. However, it seems to me that the quoted country of origin extracts justify the conclusion by the official that members of the former Ba'ath Party and regime are no longer systematically targeted and that many former Ba'athists have found a new identity. The observation that the country of origin information does not state that there is any threat of serious harm in relation to the family members of former Ba'ath party members is simply a statement of fact. It is true that the material does not deal with the specific situation of someone who was a family member of an individual who was both a Kurd and a Ba'athist but the conclusion drawn by the official is one that seems quite justified on the basis of the material that was available.

37. As one would expect, given the policy of those compiling the 2010 document to include quotations on the same subject from different sources which are not to the same effect, a policy specifically referred to in the preface, there are divergences and differences of emphasis between the quotations, meaning that it is difficult to summarize such a diffuse document. However, it seems to me that what emerges is that the security situation in Iraq has been very difficult. It also emerges that there has been a measurable improvement in the situation across Iraq and that there is a very marked difference indeed between the security situation, and associated with that the quality of life available for people in the area of the Kurdistan Regional Government and the rest of Iraq. So far as the area of Iraq outside the territory of the KRG is concerned it is clear that the situation is particularly difficult in the areas referred to as the "disputed areas", the ethnic fault line between Arab and Kurdish areas. The disputed area includes the city of Kirkuk where the applicant says that he worked with his uncle, having moved there from Jalawa. In the course of the subsidiary protection document, the official preparing the submission summarises the extracted material as follows:-

> "As highlighted above, Kirkuk is currently unstable and it could be dangerous for the applicant to return there. However, as has been highlighted above, the situation in Kirkuk is an exception. The general security situation is improving in Iraq, which is being helped by a combination of political and military efforts. The security forces of the Iraqi Government and the Coalition Forces are contributing to the continual improvement of the security situation in Iraq. There could also be the possibility for the applicant, as a Kurd, to return to the relatively more stable Kurdistan Regional Government area. The information above has highlighted that this is the most prosperous and stable area of Iraq."

38. It seems to me that each of the specific conclusions that form part of this summary; that Kirkuk is unstable; that Kirkuk is an exception; that the general situation is improving; that the Security Forces and Coalition Forces are contributing to continuing improvement of the security situation; that the Kurdistan Regional Government Area is relatively more stable and indeed is the most prosperous and stable area of Iraq, are all conclusions that are fully warranted on an examination of the extracted material. At one point the official comments:

> "Clearly, although the human rights situation is not yet ideal, there have been significant improvements more recently."

This observation is the subject of specific criticism and the applicant says that it borders on perverse. That there have been significant improvement, seems beyond dispute. However, to refer to the Human Rights situation as "not yet ideal" represents a markedly optimistic choice of language. One suspects that the time when the Human Rights situation in Iraq could be described as "ideal" is still a long way off. In a section of the subsidiary protection decision headed "internal situation" the official comments as follows:-

> "Country of Origin Information from the U.K. Home Office report, December 2009 shows that there have been marked improvements in the security situation in Iraq and a virtual halt of "Sunni-Shi'ite" violence. Provincial elections were held in January 2009 which were largely violence free. In recent months, Iraq witnesses gradual stabilisation and further improvements in security conditions. *As security improves, Iraq has continued to emerge as a functioning democracy, with diverse political representation and a respect for Human Rights enshrined in its constitution. Iraqi's are arguably freer now than at any time in the country's history. Real advances have been made in reducing violence across Iraq with the lowest levels for extremist attacks since 2003 being recorded in 2008, down 85% from 2007. Significantly this is being achieved largely by Iraq's own security authorities, with coalition help and support. While no Government can be expected to guarantee the safety of all its citizens, the situation in Iraq has been relatively stable during 2009, despite sporadic bomb attacks by insurgence in recent months*"

It must be said that the italicised portion of this comment is remarkably sanguine. While there have undoubtedly been real improvements I could not see myself striking such an optimistic tone.

39. The approach taken in the submissions as to whether the applicant could access the territory of the KRG and how this could be achieved has been criticised. I do not believe that the criticisms that are advanced in this regard are well-founded. It is clear that this was an issue to which the official preparing the submissions was fully alive. So, in the course of the subsidiary protection decision the official comments:-

> "As was highlighted above, the applicant, as a Kurd would not have problems returning to Iraq, in particular the KRG on account of his ethnicity.
>
> However, the applicant could encounter difficulties if he was to attempt to gain access to the KRG by crossing the border from Iraq. The country of origin information below highlights that there are a number of requirements which must be fulfilled in order to access the KRG on a long term basis. The applicant could have difficulties fulfilling some of these requirements."

A number of extracts are then set out. In broad terms two issues are dealt with, namely the methods by which physical access to the KRG can be achieved and the question of restriction on access to the territory of the KRG by the Administrative Authorities.

40. So far as the question of physical access is concerned, it emerges that travel by road from Baghdad north is unsafe as there are daily roadside bombings. The road from Kirkuk to Erbil and Sulaymaniyah are considered safe because they are guarded by Kurdish military forces but it must be remembered that Kirkuk is not regarded as safe. Air transport is identified as an option with reference to internal flights from Baghdad and also options of accessing Erbil or Sulaymaniyah from Austria, Turkey or Jordan.

41. In terms of restriction on access it emerges from the documentation that the KRG maintains an effective border (the green line) between the KR and the rest of Iraq and controls entry into the KR. It appears that they are motivated to do this with a view to keeping insurgent and terrorist elements out. In particular there is concern that the conflict prevailing in the other parts of the country, in particular in neighbouring Kirkuk, Ninewa and Diyala governorates where the Sunni insurgency has not been defeated might spill over and as a result local authorities employ strict security measures in relation to the admission of persons not originating from the area. The applicant's national certificate raises some doubts as to whether he does originate from the area of the KRG, as he had indicated in the course of his application, but it would seem that he would have obvious links and affinities to the area.

42. It does seem that significant numbers of internally displaced persons from other parts of Iraq have succeeded in relocating in the KR. However, it seems that there are quite a number of formalities involved in that people have to register to secure legal residence, and if they have no prior connection up to now they needed a sponsor, though the Iraqi government is pressing for this requirement to be dropped. A further issue is that persons from disputed areas such as Kirkuk which have been arabized are generally denied entry for political and demographic reasons. The official preparing the submission in the course of the s. 3 consideration, having reviewed the available material took the view that the applicant might have difficulty fulfilling some of the requirements to enter the KRG through the border but went on to note that persons arriving in Sulaymaniyah by plane do not face entry restrictions and if the applicant was to be returned to Kurdistan, that he could access the KRG through the airport. It seems to me that approaches of the decision maker was a careful one and balanced one.

43. At the conclusion of the hearing it occurred to me that it was likely that the officials in the Department who were required to deal with the issues that arose in this case, whom I have been referring to as the decision makers, were unlikely to have been the first to find themselves considering such issues and in those circumstances I enquired of counsel on both sides whether they were aware what attitude was taken by other EU States to the question of returning failed Iraqi asylum seekers to their homeland. The response to this query was that junior counsel for the applicant very diligently and quickly sourced a number of documents, comprising newspaper extracts, UNHCR briefing notes, an Amnesty International press statement and an Irish Refugee Council briefing note. Because this documentation was emerging so late in the proceedings, I indicated that I would give counsel on both sides an opportunity to consider whether they wished to make any further submissions as a result of this new documentation and both counsel did, at a later stage, avail of this opportunity. What seems to emerge from the documentation is that a number of European Governments have returned individuals to the territory of the Kurdistan Regional Government for several years. Moreover, in recent months, particular Governments on the basis of a perceived decrease in levels of violence decided to return individuals to Baghdad. Amnesty International records, that in September 2010, Dutch, Swedish, Norwegian and U.K. Authorities, removed 150 people to Baghdad. This prompted the UNHCR in July 2010 to confirm that their April 2009 guidelines remained valid, which precluded the return of asylum seekers who are from the five central governorates of Baghdad, Diyla, Kirkuk, Ninewa and Salah Al-Din.

44. The practice in Britain when dealing with asylum cases is that from to time cases are clustered together and then dealt with so as to offer country guidance. One such was the cases of *H.M. and Others v. Home Secretary* and UNHCR (Intervener) (Article 15(c)), Iraq CG [2010] U.K.U.T. 331 (IAC), a decision to which reference was made in the sourced documentation sourced late in the proceedings, to which I have referred. There the situation in Iraq was considered in great detail against the background of applications for subsidiary protection from four young men from three different parts of Iraq. The effect of this was to consider the

situation of young men from Kirkuk, Baqupah and Baghdad. The Immigration and Asylum Chamber presided over by Blake J. held, after a detailed consideration, that even in circumstances where immigration judges had concluded that for one or more of the applicants there was a real risk in their home areas of serious harm as defined by Article 15(c) of the Qualification Direction; internal flight alternatives were available.

45. The relevance of the decision which was delivered on 5th November 2010 and so, post-dates by several months, the subsidiary protection and leave to remain decisions, is that it does show that an independent and objective assessment on a forensic basis of all the available information can result in a conclusion similar to that arrived at by the official who prepared the submissions in the present case. Indeed, the present submissions are more favourable to an applicant in that in these cases, the official was of the view that Kirkuk was unstable and that it would be dangerous for the applicant to return there. In contrast the exercised engaged in by the Immigration Tribunal reached the conclusion, a return to Kirkuk was indeed possible. In passing, it may be noted that the UKUT decision at paragraph 150 states that according to the UNHCR, between April 2009 and March 2010, there were 34,700 refugee returns, and that the countries listed as the previous countries of asylum included the Netherlands, Germany, UK, Denmark, Australia, Canada and Norway. In my view, this is a further indication that the decisions reached in the present cases were ones that were clearly open. To interfere with them would be to usurp the role of the decision maker and to set the court up as a court of appeal. That is something that simply cannot be done. In all the circumstances, I must refuse leave being of the view that in neither case has the threshold for the granting of leave been achieved.