

**REFUGEE STATUS APPEALS AUTHORITY  
NEW ZEALAND**

**REFUGEE APPEAL NO. 74691**

**AT AUCKLAND**

**Before:** RPG Haines QC (Chairperson)  
B Burson (Member)

**Representing the Appellant:** C Curtis

**Date of Hearing:** 3, 4, 5 & 11 September 2003

**Date of Decision:** 15 October 2003

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**DECISION**

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**INTRODUCTION**

[1] This is an appeal against the decision of a refugee status officer given on 10 June 2003 to decline the grant of refugee status to the appellant, a citizen of Iraq.

[2] The facts are unusual. The appellant left Iraq in June 2001 and after arriving in Indonesia was one of approximately three hundred and sixty individuals who sailed from Indonesia towards Australia. After being intercepted by the Australian authorities in early August 2001, all those on board were taken to Christmas Island. Approximately one week later the appellant and others were transferred to Port Hedland on the northwest coast of Australia. There the appellant was detained at the Port Hedland Immigration Reception and Processing Centre. On 9 September 2001 he lodged a formal claim to refugee status in Australia. After a period in detention he was recognised as a refugee and a Temporary Protection Visa (TPV) granted on 3

April 2002. It permitted the appellant to remain in, but not to re-enter, Australia for a period of three years. As explained in the Department of Immigration and Multicultural and Indigenous Affairs *Fact Sheet No. 64 - Temporary Protection Visas*, TPV holders who believe that they are still in need of protection are entitled to apply for a further Protection Visa at any time. Temporary Protection Visa holders are, in the meantime, provided with access to services consistent with the temporary nature of their stay. These include work entitlements, eligibility for social welfare benefits and access to Medicare benefits. They are also able to apply for a Permanent Protection Visa. However, TPV holders are **not** able to sponsor family members to Australia. The Australian federal authorities point to the fact that the Refugee Convention does not incorporate the principle of family unity in the definition of the term refugee. See for example the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 183.

[3] The appellant is a married man. He married his wife on 1 February 1999. She was a widow and has two children from her first marriage, a daughter aged seventeen and a son aged fifteen. The wife and her children have at all times remained living in Iraq. As the holder of a TPV the appellant was statutorily ineligible to bring his wife and her children to Australia. He was also unable to make alternative arrangements to meet with them as he was unable to leave Australia without forfeiting his immigration status in that country.

[4] New Zealand has so far resisted duplicating the Australian model of temporary protection visas and of preventing those recognised as refugees from being reunited with their immediate families.

[5] Believing that his fortunes would be improved were he to obtain refugee status in New Zealand, the appellant first tried to leave Australia by air for New Zealand in August 2002 travelling on a false passport. He was unsuccessful. However, his second attempt in February 2003 was successful and he arrived in New Zealand on 7 February 2003 travelling on a false Australian passport. At Auckland International Airport he claimed refugee status. The account of his circumstances in Iraq as given at the airport differed substantially from the account earlier given to the Australian authorities in September 2001. Furthermore the appellant deliberately concealed his true identity and that of his wife in order to prevent the New Zealand authorities from discovering his true identity and that he had been living in Australia as a Convention refugee. On 16 February 2003 he submitted a detailed written statement enlarging

on the account given at Auckland Airport but still concealing his true identity and the fact that he had been recognised as a refugee in Australia. His deception was later discovered and after being interviewed by the New Zealand police, the appellant acknowledged that the account he had given in support of his refugee claim in New Zealand was a false account. He reverted to the account originally given to the authorities in Australia.

[6] The appellant's interview with a refugee status officer was first scheduled for 10 March 2003 but while the appellant and his then solicitor met with the refugee status officer on that date, the interview was brief and confined largely to the consequences of the appellant having, on 7 March 2003, been interviewed by the police and having at that interview admitted to his true identity and to the fact that he had been granted refugee status in Australia. The refugee interview was rescheduled for 17 March 2003. Following the appellant's interview on that date and following further correspondence in which the appellant responded to the refugee status officer's request for further information, the refugee claim was declined in a decision published on 10 June 2003. The decline decision is a lengthy one but in essence the refugee claim failed on credibility grounds, the officer rejecting the appellant's claim to be an imam of a mosque in al Zubayr and his claim that he is at risk of harm as a result of his status and profile as an imam.

[7] Subsequent to the filing of his appeal the appellant instructed his present solicitor who sought an adjournment of the appeal hearing originally set down for 21 and 22 July 2003 as further time was required to prepare. That application was granted.

[8] It should be noted at this stage that when the appellant arrived in New Zealand on 7 February 2003 at Auckland International Airport he was refused a permit and detained under the provisions of the Immigration Act 1987. He has remained in custody down to the present time and is currently at the Mangere Detention Centre. The appellant being in custody the hearing of his appeal was given priority though for the reasons given, the earlier fixture scheduled for July 2003 was vacated at his request.

[9] It is also to be noted that subsequent to the appellant's departure from Iraq in July 2001 and indeed subsequent to his arrival in New Zealand there have been substantial changes in Iraq. In March 2003 Coalition Forces entered Iraq and by early May 2003 the President of the United States of America, George Bush,

declared the Coalition's victory over the regime of Saddam Hussein. The appellant has provided the Authority with a considerable volume of information on Iraq under occupation and the reasons why he continues to believe that should he be returned to post-Ba'athist Iraq he continues to face a real chance of being persecuted.

[10] The appellant's narrative refers to various Iraqi personalities. A brief description of some of them might assist the following of his narrative. The information has been abstracted from the voluminous information tendered by the appellant and from the country information referred to by the refugee status officer.

## **Profiles**

[11] The appellant's account refers frequently to both Mohammed Baqir al Sadr (Baqir al Sadr) and to his son Mohammed Sadeq al Sadr (Sadeq al Sadr). Baqir al Sadr was an Iraqi Shi'i intellectual and political leader who authored books on philosophy, Quranic interpretation, logic, education, constitutional law and economics as well as more traditional works on jurisprudence, compilations of devotional rites and commentaries on prayers. He criticised both capitalism and communism in favour of an Islamic alternative. His influence among Iraq's Shi'ias combined with suspected Iranian influence led to his arrest and execution by the Ba'athist regime in 1980.

[12] Sadeq al Sadr was a prominent Shi'ia cleric whose political strength and explicit criticism of the Ba'athist regime led to his assassination in February 1999. Two of his sons were also killed in the attack. A surviving son, thirty-year-old Muqtada al Sadr has assumed considerable political prominence in post-Ba'athist Iraq largely by using his family name. It is said that his power base lies among the poorest Shi'ite communities, especially in Sadr City, the slum in eastern Baghdad which has been named after his father. It is from the youth of the slums that he is recruiting his private army, the Jaish-e-Mahdi, named after a historical Shi'ite leader who disappeared in the ninth century and will, the devout believe, return one day to restore justice. He has said his soldiers will be "armed with faith" only, but al Sadr supporters say he is recruiting regiments made up entirely of former military men, who are being issued weapons and ammunition. His bodyguards have been accused of knifing to death the moderate cleric Abdul Majid al-Khoei who had just returned from exile in London. In April al Sadr supporters surrounded the home of Grand Ayatollah Ali Sistani, supreme religious leader of Iraqi Shi'ites, and demanded

that he leave the country. Sistani was saved by American troops: Aparisim Ghosh, "Terror at a Shrine" *Time* September 8, 2003, 22-23.

[13] Mohammad Bakr al-Hakim was the religious leader of the Supreme Council for the Islamic Revolution in Iraq (SCIRI), an opposition group that was based in Iran during the rule of Saddam Hussein. He commanded a well-armed militia, the Badr Brigade that is subsidised by Iran. His party, SCIRI, has a seat on Iraq's Governing Council formed in July 2003. Bakr al-Hakim was assassinated when a car bomb exploded outside the shrine of Imam Ali in Najaf on Friday 29 August 2003.

[14] Ali al Sistani is the official religious leader of Iraqi Shi'ites and is said to be the most respected scholar in the holy city of Najaf. But because he believes that religion and politics should not mix, he does not manage a political power base like Muqtada al Sadr or Mohammad al-Hakim or (now) his surviving brother, Abdel Aziz al-Hakim. Nevertheless, it is said that many imams throughout Iraq, especially the more moderate ones, are considered loyal to al Sistani.

[15] Finally, there is Kadham al-Husseini al-Haeri who is an Iraqi-born mullah who has resided in the holy Iranian city of Qum since 1973. Muqtada al Sadr claims he looks to al-Haeri for guidance. Al-Haeri advocates a restrictive, Iranian-style religious government in Iraq.

### **THE APPELLANT'S CASE**

[16] The evidence of the appellant in support of his refugee claim is to be found in the documents he provided to the Australian authorities, including the written statement he made at Port Hedland on 9 September 2001, in his refugee application completed at Auckland International Airport on 7 February 2003, in his detailed written statement dated 16 February 2003, in the evidence he gave at the lengthy interview with the refugee status officer on 17 March 2003 and in his evidence before the Authority, including his supplementary statements. He has also produced a number of documents, press clippings, two video tapes, photographs and papers sourced from the internet. It is not practicable to provide a detailed account of all of this evidence. It is proposed to provide a summary only of the principal elements of his case as presented at significant stages of his refugee claim both in Australia and

in New Zealand. The Authority's assessment of that case and of the appellant's credibility follows in a later section of this decision.

### **The written statement made at Port Hedland on 9 September 2001**

[17] In the written statement made at Port Hedland on 9 September 2001 the case presented by the appellant was that his date of birth was 1 July 1969, that he was a student and, as an authorised agent of Sadeq al Sadr, he was also an imam of a mosque in al Zubayr. After the assassination of Sadeq al Sadr the appellant was a person in whom the authorities became interested due to the fact that he was an authorised agent of Sadeq al Sadr. He was arrested by the security forces but relatives were able to secure his release on payment of bribes. Thereafter he stayed in hiding for about three months until the situation stabilised and in 1999 he went to Najaf to pursue his studies. He would return to the mosque in al Zubayr three days a week. On these visits he was questioned by the authorities and placed under pressure to cooperate with them. When he refused the authorities engaged in "defamation" of his reputation by inviting him to parties held by the Ba'ath Party and by visiting his home. On 19 February 2001, after the second anniversary of the assassination of Sadeq al Sadr, the authorities began arresting a large number of the deceased's followers in the al Zubayr area, including those who attended the appellant's mosque. Some of those arrested were executed. The appellant went into hiding for three months. He was warned by members of his family that if he returned home he too would be arrested and executed. He accordingly left Iraq in fear of being executed by the Ba'ath Party. He first travelled to Jordan by bus travelling on a false passport and after transiting Thailand, Malaysia and Indonesia, arrived in Australia by sea. His wife and step-children were said to be still living in Iraq.

### **The claim made on arrival in New Zealand on 7 February 2003**

[18] The appellant arrived in New Zealand on 7 February 2003 without identity documents. He said that his name was [AA] and that he was born on 1 July 1970. He claimed that his occupation was owner or operator of a shop trading in spare parts for used motor vehicles. He was a follower of Sadeq al Sadr and after a three day uprising in Basra following the assassination of al Sadr, he was accused of being anti-regime. In April 1999 he was arrested and detained for one and half years, being released from prison in September 2000. After his release he continued to be

threatened and was prevented from practising his Shi'ia religion. The mayor of al Zubayr promised to kill him unless he stopped performing Shi'ia rituals and ceremonies. Members of the intelligence force falsely accused him of trading in stolen vehicle parts. He had two wives. The first left him while he was in prison as he was unable to support her. While in prison he became engaged to his second wife and they married after his release. Because he continued to be harassed by the authorities he left Iraq, arriving in New Zealand after transiting through Jordan, Egypt, Thailand and Australia (one day). He also claimed to have marks on his body evidencing torture. It was said that his back and shoulders had scars from electric shock treatment.

[19] This account was subsequently expanded upon in a twenty page statement.

### **The written statement made at Auckland on 16 February 2003**

[20] By letter dated 6 March 2003 the appellant's then solicitor submitted to the refugee status officer a detailed written statement by the appellant in Arabic dated 16 February 2003 together with a twenty page English translation. Also submitted was a medical report by Dr L Beltowski dated 26 February 2003. The medical report will be returned to.

[21] In summary, the written statement gave the appellant's name as [ABMA] and his date of birth as 1 July 1970. He claimed to have two wives. As to his family members, the appellant said that an uncle who used to live in the appellant's family home had been executed and the appellant's father had also been arrested due to his friendship with Baqir al Sadr. The latter had had "a lot of trust in my father" because the father used to collect donations and money intended for distribution to the poor and needy. The father had been detained for one year. Thereafter the security forces had called frequently at the family home in search of the father who was regularly detained. Although exempt from military service the father was pressured by the local mayor to join the army but the father resisted and was forced to absent himself from the family home on frequent occasions to avoid searches by the security forces. At school the appellant suffered discrimination and humiliation at the hands of teachers who were members of the Ba'ath Party. The authorities placed a red "X" sign on the front door of the home. After leaving school the appellant was conscripted into the Iraqi army. The statement details the difficulties he had as a result of not being a supporter of the Ba'ath Party and because of his

family background. He was forced to serve for five years instead of the usual period of three years. After leaving the army he took over his father's business. Due to problems encountered with other shopkeepers in the neighbourhood he used to go to Baghdad to purchase supplies and this placed him at a disadvantage. However, on these trips to Baghdad he used to visit Najaf, specifically the office of Sadeq al Sadr. The appellant mentioned his father's relationship with Baqir al Sadr. The appellant's friendly relationship with Sadeq al Sadr progressed to the point where the appellant was received by the latter "with respect" and he used to ask the appellant to sit beside him and they spoke about conditions and personalities in the appellant's area. One day Sadeq al Sadr asked the appellant to help his deputies in Basra to encourage younger persons to attend Friday prayers and to follow his instructions (ie those of Sadeq al Sadr). The appellant was also asked to assist in the collection of donations and their distribution to the poor and to conduct a weekly gathering at his home to perform religious ceremonies, condolences and the like. He was to give advice to young people and to preach to them. Acting on these instructions the appellant converted a big warehouse beside his house into a Hussaineya where the gatherings could be held and video tapes shown of speeches given by Sadeq al Sadr. Over a period of time the appellant achieved a high status and became close to Sadeq al Sadr. Youngsters began to frequent the Hussaineya.

[22] The appellant's activities came to the attention of both the mayor and of Ba'ath Party members in al Zubayr and the appellant was questioned frequently at the security department where he would be detained for one to two days before being released on payment of a bribe. A contest of wills ensued in that the appellant pressed on with his religious activities while the Ba'ath Party used the police to harass him in his business and in his private life. On 2 February 1998 the appellant married [BE] who was the widow of a man executed in 1986. She had two sons from him. The mayor and Ba'ath Party members were infuriated by this, fearing that the appellant would have a son. One of his stepchildren was expelled from school and joined the appellant in his business.

[23] The appellant happened to be in Najaf when in February 1999 Sadeq al Sadr was assassinated. Fearing arrest he went to Baghdad and was absent from Basra during the short uprising in that city in April 1999. After the uprising was suppressed the appellant returned to Basra. Near al Zubayr he was detained at a checkpoint and taken to Basra Emergency Prison where he was detained for one year and six months. During this period he was subjected to "the most severe torture". This



included being beaten with a cable and being given electric shocks by the use of a military telephone. The torturer was a sadist who would spray prisoners with water during winter and beat them according to a weekly timetable. Prisoners would also be suspended from the ceiling with weights tied to their bodies. They would be beaten in the area of their testicles and would also be given laxative tablets in their food. From visits by members of his family the appellant learnt that five of his closest friends had been executed and the Hussaineya demolished. Any food and clothing brought by relatives for the prisoners was confiscated. His first wife was also threatened that her sons would suffer consequences if she maintained her relationship with the appellant. She then disappeared. A fellow prisoner then offered the appellant the opportunity of marrying the fellow prisoner's sister, [ES].

[24] As mentioned, after one year and six months in detention the appellant was released on payment of a bribe. The appellant did not return home. Instead he went to live with an uncle at al Omara, where the appellant arrived on 20 September 2000. It was there that the appellant married his second wife. He worked on a poultry farm from 5am until 9pm but the mayor of the new area insisted that the appellant volunteer to join the Jerusalem army and began asking the appellant for official identity, including the official marriage contract and his food ration card. Because of this pressure the appellant and his wife moved to a different area but within a short time fell under the suspicion of local officials. At about this time he learnt that Ba'ath Party officials were trying to confiscate his business in al Zubayr. He returned home to reestablish his claim to the shop and was only able to escape arrest with the help of his neighbours.

[25] The appellant then went to stay in a remote area but within a few days inquiries were being made by officials and the appellant moved to live with relatives of his wife's cousin. He resolved to leave Iraq and after obtaining a false passport left Iraq for Jordan on 20 November 2002, crossing into Jordan over the land border. In Jordan he learnt from his mother that the security forces had told her that they knew that he was in Jordan and the house was placed "under custody". The appellant decided to leave Jordan as soon as possible and with the assistance of an agent travelled to New Zealand. On the last leg of his voyage he transited through Australia for one day.

[26] As mentioned, this statement of 16 February 2003 was tendered to the refugee status officer together with a report from Dr Beltowski dated 26 February

2003. It records that the medical practitioner examined the appellant on 24 February 2003 and goes on to say:

He also gives a history of being suspended by his arms and beaten with thick electrical cable. He also had two heavy bags of sand placed on both shoulders for 5-6 hours while being suspended by his arms. He was also tortured by electric shocks to his abdomen and testicles.

The report then details scarring and pigmentation observed by Dr Beltowski, including old thin transverse linear scars on both sides of his back which the doctor concluded was evidence of "a severe beating". The report concludes with the following paragraph:

In my professional opinion the marks noted on [the appellant's] shoulders would be consistent with healed pressure areas while the marks on his back would be consistent with a severe whipping or flogging. The marks on his right abdomen and left scrotum would similarly be consistent with old electrical burns inflicted as stated.

### **Retraction of the accounts given in New Zealand in February 2003**

[27] On 7 March 2003 the appellant was interviewed by the New Zealand police at the Wiri Police Station.

[28] When the appellant was interviewed by the refugee status officer on 10 March 2003 the appellant admitted that on his arrival in New Zealand he had given a false name and false account of his problems in Iraq. His explanation was that he feared that if his real name and personal history were revealed, he would be returned to Australia. He said that his real name was not [AA], but [SBM-AAA] and his real date of birth was 1 July 1969, not 1 July 1970 (file p 175). He said that his confirmation of claim form and written statement should be disregarded. It was agreed that the interview would have to be rescheduled and that he would have to provide a new written statement setting out the true basis of his refugee claim.

[29] The file records (file p 181) that in place of a new written statement, the appellant simply submitted a faxed copy of the signed, written statement he had used in Australia when making his successful application for a TPV. The appellant also submitted a copy of his completed Protection Visa application form which was also part of his refugee application in Australia.

### **The account given to the refugee status officer at Auckland on 17 March 2003**

[30] An abbreviated account of the appellant's evidence at the interview with the refugee status officer on 17 March 2003 follows. It has been taken from the interview report.

[31] The appellant's father held a clerical position in the archives of the court at al Zubayr. After completing his schooling the appellant did four years of military service and did not experience any particular problems during this time. In 1993, following his discharge from the army, the appellant became the imam at the [X] mosque in al Zubayr. He had been considered to be of sufficiently good character for the role and was committed to furthering his education in Islam in order to serve the Shi'a community. He also enrolled at the al Hawza Almia school for religious studies in Najaf which was under the supervision of Sadeq al Sadr. During the approximately six years of his religious studies at the Hawza the appellant received a regular allowance which enabled him to meet his living and study costs. His time would be split between Najaf and al Zubayr. In 1996 the appellant was granted permission to act as one of Sadeq al Sadr's representatives and this allowed him to perform a wider range of functions and duties as imam of the mosque in al Zubayr. The appellant did not, however, have a direct student-teacher relationship with Sadeq al Sadr. On 1 February 1999 the appellant married his wife, [W] in al Zubayr. His wife was a widow who had two children from her first marriage, being a seventeen-year-old daughter and a fifteen-year-old son.

[32] The day after the assassination of Sadeq al Sadr the appellant was arrested in al Zubayr and detained for three days. During these three days he was severely beaten and in other ways physically mistreated. He was released on the payment of bribes by his family.

[33] The appellant continued his studies, but now under the supervision of an Afghani man called Mohammed Asak al Faiad.

[34] On 19 February 2000, on the first anniversary of the death of Sadeq al Sadr, the appellant was arrested and placed in detention for several days. He was released unharmed. During the following twelve months he was arrested and held in temporary detention approximately four times, for several days each time. In December 2000 he was arrested and detained for the sixth and final time,

interrogated and physically mistreated. The officer noted that the appellant's evidence as to his episodes of detention in al Zubayr was confusing and contradictory.

[35] In February 2001 there were again events to commemorate the death of Sadeq al Sadr. A number of people "disappeared". Fearing for his own safety the appellant went into hiding in the home of one of his uncles. After learning that an imam had been executed the appellant decided to leave Iraq. After three months in hiding he left Iraq travelling on his cousin's Iraqi passport and crossed into Jordan by bus. Following his arrival in Australia and after he had been released from custody he learnt from a cousin that a warrant of arrest had been issued in Iraq one month after his departure. He had also learnt that his wife had been placed under pressure and had returned to live with her parents.

[36] He told the refugee status officer that even though he (the appellant) had the right to live in Australia for three years he was unhappy with the conditions of his stay in Australia. In particular he was not able to bring family members from Iraq nor was he entitled to enrol in subsidised English language courses. He had also heard that some holders of temporary protection visas had not been given residence status, leaving open the possibility that they could one day be returned to Iraq. Although he had never had any problems with the Australian police or other authorities, the appellant felt imprisoned in Australia and unable to settle. He therefore turned his attention to New Zealand. In August 2002 he attempted to leave Australia from Sydney but was detected. A second attempt on 7 February 2003 at Brisbane Airport was successful. He said that he feared the Iraqi security service, the local branch of the ruling Arab Ba'ath Party and the mayor of al Zubayr. He feared that he could be killed for being a supporter and follower of Sadeq al Sadr.

[37] Following the interview the appellant was asked to address a number of issues which were of concern to the refugee status officer. Relevantly, for this decision the following points may be noted.

[38] First, the officer drew attention to the fact that nowhere in the appellant's refugee claim as presented in Australia is there any mention of torture. As to this, the appellant responded in writing (file p 259) that he had not told the truth in Australia on this issue. He had not mentioned physical mistreatment and torture to the Australian authorities because he believed that once he claimed to have been tortured, he

would be required to undergo a medical assessment. That would delay the processing of his case, particularly given that there were no resident doctors at the detention camp and visits by medical assessors were infrequent. He did not want to remain detained in the Australian desert and so concealed the torture. Second, addressing his reasons for coming to New Zealand, he said (file p 257) that he was denied the right to bring his family to Australia and further denied the right to leave Australia in order to meet his family. He therefore decided to come to New Zealand where refugees are accepted and allowed to bring and meet their families.

[39] Third, asked to provide detail about any episodes of questioning and/or physical mistreatment to which he may have been subjected, the appellant replied (through his then solicitor) in the following terms:

1. The first detention was on 20 February 1999 at the security department in al Zubayr. Two security members handcuffed the appellant, pushed him to the corner of the room and made him sit facing the wall. He was then whipped on his upper and lower back with a thick plastic hose. After he had been beaten he was taken into another room and interrogated about activities in his mosque and in the Hawza of Sadeq al Sadr. He was then beaten further until he lost consciousness. On the fourth day he was released.
2. The second detention was on 19 February 2000, again at the security department in al Zubayr. The period was three days but the appellant was not ill-treated.
3. In February 2000 or early March 2000 the appellant was detained at the Ba'ath Party offices and verbally abused.
4. In October 2000 he was detained for two days at the security department and subjected to verbal abuse. He was not physically mistreated.
5. In November 2000 he was detained at the security department and released on the third day. Again he was not physically mistreated.
6. In December 2000 he was detained for two days at the Ba'ath Party offices in al Zubayr and released on the third day. He was not ill-treated.

## **The decline at first instance**

[40] As previously mentioned, the decline decision dated 10 June 2003 was largely based on a finding by the refugee status officer that the appellant did not believe central aspects of the appellant's claim. In particular, the officer did not accept that the appellant was the imam of the mosque in al Zubayr and both a student and representative of Sadeq al Sadr. Nor did the officer accept that the appellant had been arrested, detained, interrogated and mistreated in Iraq by the police, security officials or Ba'ath Party members.

## **Appellant's case on appeal**

[41] On appeal the appellant adopted the account of his case as set out in the decision of the refugee status officer as supplemented by the statement made by him in Australia and by the further responses he had given to the refugee status officer following the interview. The primary focus of his case on appeal was to challenge the finding that he was not an imam of the mosque in al Zubayr. Seven witness statements were tendered together with a further statement by the appellant himself. As to the latter, the Authority was initially provided with a further statement dated 16 August 2003 but the appellant later described this as a draft and it was replaced by an even further statement dated 29 August 2003.

[42] Addressing the seven witness statements, their essential purpose is to establish that the appellant is who he claims to be, namely an imam at the [X] mosque in al Zubayr. The statements fall into two broad categories. Some speak to the appellant's knowledge of religion which, in the opinion of the authors of the statements, establishes that he has studied in a Hawza as claimed. But two witnesses in particular (a husband and wife) state that they too once lived in al Zubayr and personally know the appellant and his wife from that time. In fact the husband attended the appellant's wedding. The wife of the witness was a friend of the appellant's wife and although she did not attend the marriage confirms the appellant's identity and that he is imam of the [X] mosque in al Zubayr.

[43] In his revised appeal statement (the one dated 29 August 2003) the appellant addresses a number of topics including the issue whether he is an imam, his reasons for leaving Australia and the reasons why he cannot return to Iraq even though there

has been a regime change since the lodging of his refugee claim in New Zealand. As to his reasons for leaving Australia, his statement discloses, for the first time, that after his release from Port Hedland, he learnt that two of his wife's brothers live in Australia and have Australian citizenship. He had previously been led to believe by his father-in-law that they were in a refugee camp in Saudi Arabia. In Sydney a messenger from the brothers arrived and asked the appellant to divorce his wife as it was impossible for him to be united with her in Australia. The appellant's response was that he would try to go to New Zealand to claim refugee status there and thereafter bring his wife over to be with him. He says that this made the brothers complain to the Australian authorities that the appellant had a false passport and that explains why he was intercepted on his first attempt to leave Australia for New Zealand. After he arrived in New Zealand the brothers telephoned his parents in Iraq and told them that wherever the appellant was, they would not allow him to be reunited with his wife. Furthermore, if he now returns to Iraq the brothers will cause him problems and place him and his wife at risk. He says that this background is "an important reason" why he left Australia namely, so that he can live together in safety with his wife.

[44] As to his reasons for being unable to return to Iraq, he refers to the formation by Muqtada al Sadr of the Mahdi army. His statement goes on to say:

All Shi'ites must join the Almahdy army. If I do not join, I will be killed. If I do join, I must kill Americans. I had such a prominent position as an Imam in Iraq and I have to make a stand and take a position. I will be forced to kill Americans or lose my own life.

He also goes on to say that he will be at risk from members of the Ba'ath Party.

### **The medical evidence**

[45] As mentioned, there is a medical report from Dr Beltowski dated 26 February 2003. The appellant continues to rely on that report and indeed has produced a supplementary report from Dr Beltowski dated 10 September 2003 which confirms that the appellant does have a scrotal injury. In addition there is a report dated 22 August 2003 from a psychologist at the Auckland Refugees as Survivors Centre. It records that the appellant has attended seventeen sessions of psychotherapy and sixteen sessions of Body Therapy at the Centre. The appellant has reportedly spent a large portion of his psychotherapy sessions:

... ruminating about the consequences of his separation from his wife; particularly the effects on his marriage, his wife's child-bearing opportunities and the family in general.

The report goes on to record that the appellant is currently taking medication to assist him with alleviation from the symptoms of anxiety and depression. It concludes by stating that it has been apparent from the time he has spent in psychotherapy "that a history of torture and trauma, seeking asylum in New Zealand and being separated from his family has increased his levels of anxiety and concurrent depression".

## **THE ISSUES**

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

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

[47] In terms of *Refugee Appeal No. 70074/96 Re ELLM* (17 September 1996) the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is Yes, is there a Convention reason for that persecution?

## **ASSESSMENT OF THE APPELLANT'S CASE**

[48] Before the identified issues can be addressed an assessment must be made of the of the appellant's credibility . In making this assessment the Authority has taken into account the report dated 22 August 2003 from the psychologist at the Auckland Refugees as Survivors Centre that the appellant is on medication for symptoms of anxiety and depression. The reports from Dr Beltowski will be addressed later.



[49] For the reasons which follow it will be seen that the Authority has concluded that the appellant is not a credible witness and that his refugee claim is not based on the truth, the whole truth and nothing but the truth in terms of the affirmation he took prior to his giving evidence. Instead, the Authority has been presented with a carefully crafted claim to refugee status which is basically untrue, but which does contain a few elements which are truthful. These latter elements fall into the particular and the general. As to the particular, the evidence received by the Authority in statement form (albeit unsworn) from the various witnesses does show that the appellant was the imam at the [X] mosque in al Zubayr and has undergone religious training in Najaf. As to the general, the al Sadr family certainly exists and independent information certainly establishes that Bakir al Sadr was executed in 1980, Sadeq al Sadr assassinated in 1999 and that Muqtada al Sadr is a significant player in the current political kaleidoscope in Iraq. But after closely interviewing the appellant over a number of days, the Authority is of the view that he has skilfully interwoven a few strands of truth (that he is the imam of a mosque in al Zubayr and has studied religion in Najaf) into a refugee claim which has been manufactured (and that term is intentionally used in the pejorative sense) with the sole aim of allowing the appellant to be reunited in this country with his wife. His claim that he is at risk of being persecuted in Iraq is, in summary, based on evidence which the Authority does not believe. All that the Authority accepts is that he is a Shi'ia imam at the [X] mosque in al Zubayr who has studied religion in Najaf. Our reasons for these conclusions follow.

### **Very different accounts have been given**

[50] The refugee claim as presented to the Australian authorities in the statement given at Port Hedland on 9 September 2001 bears no resemblance to the claim advanced by the appellant on his arrival in New Zealand on 7 February 2003 and his twenty page statement made on 16 February 2003. The claims made in New Zealand in February 2003 were made by a man who had already obtained refugee status in Australia and who was thereby protected from refoulement to Iraq. At the time he made his claims in February 2003 he well knew the meaning of the term "refugee" and of his obligation to tell the truth. He is also an imam and presumably aware of the nature of that obligation (ie to tell the truth). Yet he elected to present an elaborate deception which was first sketched at the airport and later amplified substantially in his lengthy written statement. It was that account which he gave to Dr Beltowski when he (the appellant) was examined by the doctor on 24 February

2003. The appellant then instructed his then solicitor to tender to the refugee status officer a statement which he knew to be completely false but which now had the comforting support of a forensic medical report. The appellant was quite determined to pursue his account and to conceal from the New Zealand authorities his true identity and the fact that he had been living in Australia as a recognised refugee holding a Temporary Protection Visa. He only confessed to the falsity of the claims made at the airport and in his February statement after being confronted at the police interview held on 7 March 2003, just three days before the scheduled interview with the refugee status officer (file pp 326 & 327). His confession was not due to pangs of conscience. In summary, his own actions demonstrate that he is a devious and calculating individual who has shown no hesitation in manipulating the refugee system to suit his purposes. The fact that he is an imam and has studied religion for some number of years has clearly failed to instil in him any degree of moral rectitude or appreciation of what the obligation to tell the truth means.

[51] Having been caught out the appellant found it expedient to revert to the claims made in support of his refugee application in Australia. But even this document presents him with a substantial difficulty. It makes no mention of torture yet the appellant maintains that he was severely whipped on his back, suspended by his arms while heavy weights were placed on his shoulders and was also subjected to electric shocks. None of this is mentioned in the Port Hedland statement. The appellant told the refugee status officer (file p 259) that he did not tell the truth in Australia and he maintained that position at the appeal hearing. His explanation is that he concealed the information to speed the processing of his refugee claim. As will be seen, the Authority does not believe this explanation.

[52] The appellant therefore presents as a person who, only after being caught out, has confessed that the claims he made in New Zealand in February 2003 are not true and that the earlier claims made in Australia in September 2001 concealed highly relevant information. He asserts that the evidence he gave to the Authority on appeal is, however, the unvarnished truth. Faced with a refugee claimant who has admitted to telling lies and concealing information the Authority reminds itself that lies can be told for many reasons and the fact of a lie does not of itself indicate that a refugee claimant is not telling the truth in relation to the central aspects of the refugee claim. See for example *Refugee Appeal No. 19/94 Re SA* (17 February 1992) 6 and *Refugee Appeal No. 70100/96* (28 November 1997) 28. Contrast *R v Toia* [1982] 1 NZLR 555, 559 (CA) and *R v Manapouri* [1995] 2 NZLR 407, 413 (CA). In this case,

however, we do not accept the explanations given by the appellant for his lies. Our assessment of him is that he will say anything which might assist him to obtain residence in Australia or in New Zealand and if this requires him to advance a false claim to refugee status in one or both countries, he will do so to the best of his considerable ability. Put quite simply, the Authority does not accept the appellant's invitation to "cherry pick" the allegedly true pieces of evidence from his Australian and New Zealand refugee claims and from that selected evidence to find that he is a refugee. The Authority does not see this case as one in which there is a choice between a "true" statement and an untrue statement. The Authority is of the view that nothing the appellant says can be believed unless clearly verified by an independent source, and even then, considerable caution is required.

[53] It is now intended to examine further the appellant's evidence on the torture issue as that evidence reinforces the conclusions reached as to the appellant's credibility.

#### **The torture claims are untrue**

[54] The appellant is very clear that at no time during his refugee claim in Australia did he claim to have been tortured. He did not want to suffer the delay which would follow from the need for a medical examination. However, on arrival in New Zealand on 7 February 2003 he immediately and without now caring about potential delay, claimed that in the period April 1999 through to September 2000 he was in custody and during this one and a half year period was tortured. He said he had scars on the back of his shoulders and scars from electric shocks. Some ten days later, on 16 February 2003 he signed a handwritten statement in Arabic giving graphic details of the appalling conditions in which he and others were routinely subjected to torture by a sadistic individual who had gone to the extreme of drawing up a timetable for the torture sessions. It is in this statement that the appellant describes being beaten with a cable, being subjected to electric shocks and to being suspended by his arms and having weights tied to his body. The appellant was asked by the Authority whether the account given to Dr Beltowski on 24 February 2003 was the account set out in the handwritten (Arabic) statement. He replied that it was. In the result, Dr Beltowski's report is based on a story from which the appellant has resiled and which he now frankly admits to be a false statement. In the circumstances, no weight can be attached to the doctor's report. As the Authority has observed on numerous occasions, a medical practitioner cannot say more than that the injuries observed by

him or her are consistent or inconsistent with the account given as to their cause or origin. The medical practitioner cannot say that the injuries were in fact suffered in the way claimed, unless, of course, the practitioner witnessed the incident or incidents personally. Where the account given by a refugee claimant is not credible, the weight to be given to the medical opinion is limited. The injuries could have been caused in circumstances other than those described by the appellant. See further *Refugee Appeal No. 71729/99* [2001] NZAR 183 at [50] - [54].

[55] At the rescheduled interview with the refugee status officer on 17 March 2003 the appellant's evidence as to his episodes of detention was regarded as confusing and contradictory. This explains why the officer's handwritten notes record that the appellant was "hit severely and mistreated". No further detail is recorded in the officer's handwritten notes or in the subsequent interview report which is silent on the question of ill-treatment on 20 February 1999. However, after the interview the officer did specifically ask (file p 173) that the appellant provide detail of any episodes of questioning and/or physical mistreatment. In response the appellant's then solicitor sent a detailed letter which refers only to the appellant being whipped on his lower and upper back (file p 283). There is no mention of suspension, weights or electric shocks. Yet the appellant at the appeal hearing insisted that there had been not only whipping, but also suspension with weights and electric shocks.

[56] Confronted by the Authority with the fact that neither in the refugee status officer's interview report nor in his then solicitor's submissions was there any mention of shocks and suspension the appellant said that at the interview with the refugee status officer he had definitely and without doubt described the beating, the hanging and the electric shocks. The officer, however, appeared to disbelieve him and was not making notes. The report from Dr Beltowski was on the table but seemed to be of no interest to the refugee status officer. However, he said that his then solicitor was taking full notes of the proceedings. Confronted with the fact that his then solicitor in her post-interview written submissions referred to whipping but not to suspension and shocks, the appellant said that his then solicitor had made a number of errors and mistakes in the presentation of his case and that is why he had instructed a new solicitor for the appeal hearing. He also blamed the interpreter through whom his former solicitor had taken instructions on the points which had been raised by the refugee status officer in the interview report.

[57] Accordingly, the appellant claims that both the refugee status officer and his own lawyer were told at the 17 March 2003 interview in explicit terms of the hanging, the beating and the electric shocks. The two most important people to whom his torture evidence was given somehow both failed to record what he said. He also says that the interpreter who later came to see him at the Mangere Detention Centre to obtain full details of physical mistreatment was told in explicit terms about the suspensions, beatings and electric shocks. Yet somehow this information was not recorded, transferred to his then solicitor and passed on to the refugee status officer. In summary, the total absence of any reference to suspension and shocks post the withdrawal of his February statement is, he claims, the result of the joint and several failures of the refugee status officer, his then solicitor and the interpreter. We do not accept the appellant's protestations. The chance of both the interviewing officer and of the appellant's then lawyer not recording an allegedly clear and specific description of all three forms of torture is so remote as to be fanciful. The further chance of the interpreter failing to communicate the appellant's post-interview evidence to the then solicitor, or of that solicitor failing to mention the suspensions and shocks in her letter is equally remote.

[58] It is also curious that while the appellant withheld the torture allegations from the allegedly true statement given to the Australian authorities, those allegations are mentioned in the admittedly false statement made in New Zealand at the airport and in the subsequent written statement of February 2003. There is therefore some irony to the fact that the appellant seeks to salvage from his admittedly false account the "truth" of having been tortured (while asking the Authority to ignore the associated claim that the torture occurred during an eighteen month detention in appalling conditions) and to simultaneously undermine the supposedly true Port Hedland statement (which does not mention torture). Furthermore, if he truly believed in Australia that he did not need to mention the torture because his case would inevitably succeed on the basis of his being an imam associated with Sadeq al Sadr, surely the same would apply in New Zealand. And it is to be borne in mind that the false statement given in February 2003 dwells at considerable length on the appellant's alleged relationship with Sadeq al Sadr and his Hawza, detail from which the appellant has resiled. We refer in particular to the claims of being "received with respect" by Sadeq al Sadr, to being asked to sit beside him and to having discussed matters on a fairly intimate basis. In short the appellant's evidence is a series of untruths.

## **The account relating to the brothers-in-law in Australia is an invention**

[59] Prior to the appeal hearing the appellant had made no mention of brothers-in-law in Australia. At no time during the interview with the refugee status officer did the appellant even so much as suggest that should he return to Iraq brothers-in-law in Australia would arrange for him to be assassinated in Iraq. Indeed, when asked by the officer whether he had any family or relatives in Australia, Canada or Europe, the appellant replied no to all three questions. He let pass a clear opportunity to disclose that his wife's brothers lived in Australia (file p 103). A further opportunity to disclose the alleged difficulties with the wife's brothers in Australia came at file 107 during the following exchange with the refugee status officer:

Q Did you ever have any problems w Austr. police or other authorities?

A No.

Q Did you have any other reason to leave?

A These are the main, impt reasons. We feared that the Min of Imm would return us to IQ.

[60] Against this background it was surprising to find the following account in the appeal statement dated 16 August 2003 under the heading "Reasons why I left Australia":

41. Many of my wife's relatives left Iraq in 1991. They are in Australia and are citizens there. My wife and I married in 1999. She is older than me and from a different social group.
42. When I asked to marry my wife I had to ask her father and uncles. When we got engaged they said they had brothers in refugee camps in Saudi Arabia and they asked to wait until the brothers had given their approval.
43. I was told they had given their approval and my wife and I married. We were together for two years. I went to Australia and then learned that the brothers were in Australia and they had Australian citizenship and that they did not ever accept my marriage to my wife from the beginning.
44. When I left the refugee camp in Australia, a messenger who knew me came to see me and asked me to divorce my wife. He said you are here and can not get permanent residence or bring your wife here to be united and so you

must divorce her. I said I would try to go to New Zealand to claim refugee status and bring my wife over to be with me. This made the brothers complain to the Australian Authorities and they said I had a false passport. This is why they caught me at the airport.

45. I then went to New Zealand and when the brothers found out, they called my parents and told them wherever I was, and they would not allow me to be reunited with my wife forever. This is an important reason why I left Australia so that I can live together with my wife. Australia has not given me that right and there was the pressure from the brothers.
46. My wife's brothers and relatives appear now to be very aggressive towards me, and I believe that if I return back to Iraq they can cause me problem that it will put me and my wife at risk.
47. The brothers follow Mohammed Bakur al-Hakim. He follows the Iranian path, which is a different path for Iraqi Shi'i.

[61] When this statement of 16 August 2003 was withdrawn it was replaced by one dated 29 August 2003. The new statement deleted para 47 which asserts that the brothers are followers of al-Hakim.

[62] At the appeal hearing the appellant was questioned at some length as to the reasons why he left Australia and the degree to which his decision to come to New Zealand had been linked to the alleged difficulties with his wife's brothers. He said that eighty percent of his reasons for coming to New Zealand were attributable to the problems with the brothers and twenty percent was due to his desire to be reunited with his wife. If this is true, it is surprising, to say the least, that no mention was made of the wife's brothers at the airport, in his first statement and finally, at the interview with the refugee status officer.

[63] The difficulties with the appellant's evidence concerning the wife's brothers does not stop there:

- (a) On the first day of the appeal hearing he referred to receiving only one visit by the "messenger" sent by the brothers.
- (b) On the second day of the appeal hearing he said that there were two visits. The first was almost immediately after his arrival in Sydney. The second was after his unsuccessful attempt to leave Sydney Airport for New Zealand.

- (c) The number of visits is significant because it is demonstrative of the evolutionary nature of the appellant's evidence and his ability to embellish and embroider his case
- (d) The appellant's claim that he is at risk from the brothers because of doctrinal differences (they support al-Hakim, he supports al Sadr) has also been an evolving one:
  - (i) On the first day of the hearing he said he knew of their support for al-Hakim because he had learnt that they had a picture of him in their home.
  - (ii) On the second day of the hearing, when adding the new element of the second visit by the messenger, he said that the *middleman* told him that the brothers, deep inside, were completely against the appellant because they regard him as a traitor for following al Sadr and for the fact that in Iraq, the appellant had said that al-Hakim was an Iranian spy.

[64] It was pointed out to the appellant that the omission from the final version of his appeal statement of the alleged support given by the brothers to al-Hakim seemed strange given the evolving emphasis at the appeal hearing on the alleged doctrinal differences between the appellant and his wife's brothers. To this the appellant said that he took out from the draft the reference to the brothers' support of al-Hakim because he knew that the Authority would ask him about this at the appeal hearing and the statement was intended as a summary only. As to this, the Authority found the answer glib, suggesting that the appellant had a crystal ball and knew what questions the Authority would ask. Furthermore, logically it made much of the appeal statement superfluous because by the same reasoning, the Authority would be asking about all the other topics covered in the statement.

[65] The Authority enquired of the appellant that if his decision to leave Australia was influenced to the degree of eighty percent by the danger posed by the wife's brothers, why he did not mention this danger to the refugee status officer. To this he said that it was because he was not sure that the threats were real threats. It was



not until he heard from his family and also learnt from his wife's friend in New Zealand of the long-term opposition of the brothers that over time he began to feel in danger from them. In short, the reason why he did not mention to the refugee status officer the problems with the brothers was because the danger was not an imminent one. It was put to him that if the threat was not imminent, why, did he leave Australia? He said that he did not have a future in Australia. He added that his wife is forty years of age and he has a dream of having a baby. The Authority put to him that whereas he had earlier said that eighty percent of the reason for leaving Australia was the brothers, he was now saying that they were not an imminent threat and that the real reason for leaving Australia was to find a way to get his wife out of Iraq. Addressing this issue the appellant was elusive and evasive. As the circumstance required, he would either maintain the eighty/twenty divide or increase the "wife" element substantially or conversely emphasise the threat from the Australian brothers-in-law. His evidence shifted constantly according to the convenience of the question he was answering.

[66] Overall, the appellant having introduced at the eleventh hour a wholly new element to his claim (the threat from his wife's brothers), his evidence on this element was characterised by inconsistency and evasion.

### **Evasion relating to the wife**

[67] The appellant made much at the hearing of the fact that the refugee system in Australia deprived him of the ability to live in that country with human dignity. He was denied his human rights and was effectively living in a prison. The primary reason for his dissatisfaction in Australia was that he was not allowed to bring his wife to that country or to obtain a travel document so that he could visit her. He also said that in Australia he had had to work on construction sites after being unable to find other employment and so he did not live his life "as a normal human being". By way of contrast in New Zealand he had been offered a position as a cook at the Mangere Detention Centre.

[68] His professed concern with human dignity and the denial of human rights is to be contrasted with his own concern about his wife.

[69] He told the Authority that before his departure for Australia he was "in hiding" for about three months. At about this time he and his wife had had a disagreement

over financial matters and she had returned to live with her parents. However, before the appellant left Iraq his cousin (who provided the false passport) had visited the appellant and had said that he (the cousin) had spoken to the wife and mended fences and gave the appellant a photograph of the wife. The appellant left Iraq on the assumption that he and his wife were on good terms. In short, the circumstances of his departure from Iraq were not the happiest as far as the relationship with the wife was concerned.

[70] The Authority accordingly asked the appellant what information he had received about his wife since his departure from Iraq. He said that while in Australia there had been three telephone contacts with his family (not his wife) in Iraq. In the first of the three telephone contacts he had learnt (in December 2002) from his mother that his wife and her children had left the appellant's parents' home and were now living with the wife's parents. He was asked whether he had asked his mother or any relative to find out the circumstances surrounding his wife's move. He said that he had not. Asked why not, his first answer was that the telephone conversation had been short. It was put to him that it would not take much time to ask for this information. He then changed his evidence, saying that he had asked his mother but she had said that the appellant was not to ask and she was quite angry. Because of the shortness of the phone call he did not want to have an argument with his mother. In none of the later two contacts had he asked for information concerning his wife. His excuse is that on the second and third contacts he was told of the death of his father and he forgot to ask about anything else. Since his arrival in New Zealand there have been two telephone contacts. In neither of them did he ask for information about his wife. Asked what information he had about his wife and her children, he answered that there was none.

[71] Yet the appellant told the refugee status officer that his wife was "under pressure". Asked by the Authority who was placing pressure on his wife, the appellant said that he did not know. It could be her parents, the appellant's parents or the government.

[72] Given the appellant's professed concern for the welfare of his wife he appears to know remarkably little about her and has failed to take advantage of clear opportunity to obtain meaningful information about her circumstances. Our assessment of the appellant is that as with just about every other aspect of his refugee claim, he has not told the truth as to his wife's circumstances or what he

knows of those circumstances. Instead he has attempted to explain his coming to New Zealand by adopting the moral high ground and by criticising Australia's refugee policy, describing his living conditions there as inhumane. The Authority is of the view that this is nothing more than a smokescreen to further obfuscate the true (and yet undisclosed) reasons for the appellant having first left Iraq and subsequently, Australia.

### **No obligation to follow Muqtada al Sadr**

[73] In his appeal statement dated 29 August 2003, addressing the reasons why he cannot return to Iraq, the appellant stated:

39. I am still at risk of persecution if I am returned to Iraq. There are increasing fears of a Holy war against the USA. The Almahdy army is being formed by Mukkada Al-Sadyr. The Army is against the 25 people who have come from exile to form a government that is not supported by the Iraqi people.
40. All Shi'ites must join the Almahdy army. If I do not join, I will be killed. If I do join, I must kill Americans. I had such a prominent position as an Imam in Iraq and I have to make a stand and take a position. I will be forced to kill Americans or lose my own life.
41. Iraq is full of Ba'ath Party people who are scattered throughout the population. Their memories have not ended because Saddam Hussein is not in power. These militants are part of the guerilla groups who are killing Americans and those people who opposed Saddam Hussein in the past.

[74] This part of the decision focuses on the appellant's claim that he must, as an imam with an authority from Sadeq al Sadr, take a position in respect of Muqtada al Sadr. Thus he must, against his will, join the Mahdi army formed by Muqtada al Sadr or risk being killed by him. Although couched in various and different terms during his appeal evidence, the appellant's claim is that he will be obliged to join the Mahdi army against his will for three reasons:

- (a) As an appointed representative of Sadeq al Sadr, he will be obliged to follow the son, Muqtada al Sadr if for no other reason than that the followers of Sadeq al Sadr are now falling in behind the son. If he does not also fall in he could be regarded as an agent of the Americans and assassinated.
- (b) Sadeq al Sadr allegedly said that after his death people should follow Kadham al-Husseini al-Haeri. As al-Haeri is effectively the person to whom Muqtada al

Sadr looks to for advice and guidance, anything Muqtada al Sadr requires will be binding on the appellant.

- (c) Holding authority from Sadeq al Sadr means that on his return to Iraq the appellant would be obliged to continue to be an imam.

[75] As to the appellant's claim to be a person who holds an authority from Sadeq al Sadr, while acknowledging that this has been a claim made in various statements made by the appellant, the Authority finds that this too, as with almost every other aspect of the appellant's case, is not a claim the Authority accepts. First, as already mentioned, the false statement given in February 2003 dwells at considerable length on the appellant's alleged relationship with Sadeq al Sadr and his Hawza. He claims to have been "received with respect" by Sadeq al Sadr, to having been asked to sit beside him and to have discussed matters on a fairly intimate basis. This suggests a relationship of respect, confidence and trust. But the appellant has resiled from this statement. In his evidence before the Authority, the appellant down-played his relationship with Sadeq al Sadr to the point where he said that he never received any teaching from him directly whatsoever. The appellant's willingness to fabricate a position of such closeness to one of the most venerated Shi'i spiritual leaders is demonstrative of the lengths to which he will go to create the false impression of importance and significance. Given all the other difficulties with the appellant's evidence we place no weight on his claim to have studied at the al Sadr Hawza nor do we accept that he has ever received an authority from Sadeq al Sadr. In short, our acceptance that he has studied religion in Najaf is not an acceptance that he studied at an institute associated with Sadeq al Sadr or that the appellant holds an authority from Sadeq al Sadr.

[76] Second, when [CD] gave oral evidence he was questioned by counsel on the point whether the appellant holds an authority from Sadeq al Sadr. The witness made it clear that he has no personal knowledge of this alleged fact:

Q The appellant has an authority from Sadeq al Sadr. Are you aware of that?

A This is what I understood from him.

[77] Third, the unsworn witness statement by [EF] does not speak to the claimed authority from Sadeq al Sadr. At most it goes no further than supporting the claim (accepted by the Authority) that the appellant studied religion in Najaf. If anything, the statement undermines the appellant's claim to hold an "authority" from Sadeq al Sadr as the witness cannot positively identify the appellant as a representative of Sadeq al Sadr. The witness is left to rely very much on what the appellant has said about himself:

- 4 I met [the appellant] when I came to the Migrant Resettlement Centre to meet any new Iraqis who had arrived and welcome them to New Zealand. When [the appellant] introduced himself that let me realise I knew that he was one of ALSADER student. Because my job is one of ALSADER lecture representative and distributor in Jordan, and I knew about most of ALSADER student and representative.
- 5 Although I did not know [the appellant] before, I immediately recognised him as being a student of Howze. He had the knowledge and the ability that a student of Howze has. I believe that he is an Imam.

[78] In conclusion, we do not accept that there is any credible independent evidence that the appellant holds an authority from Sadeq al Sadr.

[79] The appellant's evidence as to his obligation (as the holder of an authority from Sadeq al Sadr) to follow the son, Muqtada al Sadr is also contradicted by [CD], the only other witness to give oral evidence at the appeal hearing. This witness stated that an imam such as the appellant would be expected (if not required) to have a spiritual leader. He would also be obliged to carry out the instructions of that leader. However, when the leader died the appellant would be expected to seek out and give allegiance to the next most senior and learned individual. The witness did not put Muqtada al Sadr in that category, being openly dismissive of this individual because of both his youth and lack of training. When the Authority asked the witness directly whether the appellant would be obliged to follow the son of Sadeq al Sadr, his reply was unequivocal, saying that the appellant did not have to follow this person. He went to great lengths to explain that the status of scholar or imam in the Shi'ia religion is not based on inheritance. It is a status that is earned according to strict criteria in terms of education, judgment, character, reputation and the like. Indeed, the appellant's own actions demonstrate the truth of this statement. After Sadeq al Sadr was assassinated, the appellant studied under an Afghani scholar.

[80] The other point made by the witness was that what the appellant risked by not being an imam was not loss of his life, but loss of his stature, reputation and pride.

[81] The appellant was present during the giving of this evidence. He was later questioned about the witness's evidence as at counsel's request, the evidence of the witness had been interposed between the end of the Authority's questions of the appellant and his re-examination. The appellant was notably evasive. On the one hand he accepted that he had never given allegiance to Muqtada al Sadr and he further maintained that he did not like or agree with Muqtada's ideas. He essentially agreed with the witness's evidence. But he went on to say that it was Muqtada al Sadr's connection with al-Haeri which was the telling point. The appellant's explanation was convoluted and, in the Authority's assessment, self-serving. On the one hand he wishes to maintain that he wants to have no part in politics and specifically, political violence. On the other hand, to succeed in his refugee claim he knows that he must establish that he has some kind of duty to be in the camp of Muqtada al Sadr. Our assessment of this passage of his evidence is that he will say anything to place him shoulder to shoulder with Muqtada but at the same time make himself out to be someone who is acting under duress. In short the Authority does not believe the appellant's claim that he will have to join the Mahdi army or support Muqtada al Sadr or al-Haeri.

### **Overall conclusion on credibility**

[82] The Authority has concluded that there is almost nothing in the appellant's account which is true. All that the Authority accepts is that he is the imam of a Shi'ia mosque in al Zubayr who once studied religion in Najaf. These are the only facts which the Authority is prepared to find in the appellant's favour. Those findings are made in the light of the fact that the appellant has produced two signed (albeit unsworn) statements by a husband and wife who say that they knew the appellant and his wife in al Zubayr and who claim that they can confirm that the appellant is the imam at the mosque in question. There is also some evidence that he has studied religion in Najaf. As for the rest, the appellant has skilfully woven himself as a fictional character into the fabric of events in Iraq.

## **Examination of risk of persecution against facts as found**

[83] The question which now arises is whether on the two facts found in the appellant's favour there is a real risk of the appellant being persecuted for a Convention reason should he return to Iraq. In short, whether the claimed fear of being persecuted is a well-founded one. In this regard the appellant claims to be at risk from virtually everyone in Iraq including the American forces, the British forces, the Governing Council, the al-Hakim camp, the Sistani camp, followers of the Sunni religion, Ba'athists and remnants of the Saddam Hussein regime. One may comment that the very breadth of his claims indicates the fanciful nature of his refugee claim.

[84] Be that as it may the Authority has carefully examined all of the country information tendered by the appellant together with the two video tapes and related documentation which both the appellant and his solicitor have so assiduously collated. The Authority can find no evidence in this material to show that a Shi'ia imam of a mosque in al Zubayr who once studied in Najaf is at risk of being persecuted for a Convention reason. The evidence only shows that there have been some attacks on some religious authorities in Iraq:

(a) The attack on the Hay al Sha'ab Mosque (see BBC Arabic.com, "Attack on a Baghdad Mosque" (undated but printed 7 September 2003)) reveals that the attack was directed at the worshippers and not the imam. The other attack referred to in this report, being an attack in Khadimiyah city in Baghdad, was an attack on the speaker of a particular mosque, not the imam himself. Little of evidentiary value can be extracted from this undated and brief report.

(b) The same may be said of the Associated Press report of 9 June 2003 "Previously banned militia patrols Iraqi holy city with US acceptance", an item taken from the website of *The Boston Globe*. In the English translation there is a single line which asserts that "attacks on mosques have become often" since the killing of Bakr al-Hakim. The nature of those attacks, their motivation, the geographical location of the mosques and the targets of the attacks are simply not given.

- (c) Next the appellant relies on the article sourced from Azzaman and which, in the English translation, has the heading “al Hakim: Assailants are trying to exploit the absence of security and the non-existence of authority in Al-Najaf”. The report is undated. It refers to attacks on assistants of Grand Ayatollah al Sistani. It is clear that these persons were attacked because of their close links to al Sistani, links which the appellant does not have. The report also mentions the shooting of a religious student because he refused to direct gunmen to the house of Hassan al-Hakim. Again, this is not an incident which helps the appellant’s case because the student was shot simply because he happened to be in the wrong place at the wrong time.
- (d) There have also been the well publicised political assassinations of Abdul Majid al-Khoei and of Mohammad Bakr al-Hakim and the attempt on the life of Mohammad Saeed al-Hakim. However the religious and political profile of each was of a wholly different kind to the appellant, each in their own way being a significant player in post-Ba’athist Iraq, a profile which the appellant, despite his protestations to the contrary, simply does not share.

[85] The reasoning process of the appellant appears to be that because vague and sketchy reports can be found of attacks on mosques and religious leaders and because he is the imam of a mosque, therefore he has a well-founded fear of being attacked. In the Authority’s view the logic is facile and based on nothing more than supposition.

[86] In short, our assessment of the country information is that the claim by the appellant that he is at risk of being persecuted in Iraq is no more than conjecture or surmise. However, the stipulation by Article 1A(2) of the Refugee Convention that the fear of being persecuted be “well-founded” means that there must be a real substantial basis for believing that the applicant for refugee status is at risk of being persecuted. A fear of being persecuted is not well-founded if it is merely assumed or if it is mere speculation. See *Refugee Appeal No. 72668/01* [2002] NZAR 649 at [147]. As that decision makes clear at [132] to [141], the test is an objective one. Evidence which establishes that some mosques and some religious leaders in Iraq are attacked in unknown circumstances by unknown persons for unknown reasons



does not establish a real substantial basis for a finding that all imams of all mosques in Iraq are at risk of being attacked.

[87] Nor is there any credible evidence that the appellant's return to Iraq as a failed asylum-seeker will place him at risk of being persecuted for a Convention reason. It is fanciful to suggest (as he does) that his absence abroad could lead to the perception that he is a foreigner and a belief that he is pro-American. A further claim made at the appeal hearing was that another Iraqi at the Mangere Detention Centre has eavesdropped on the appellant. It is no more than supposition that anything the appellant has said about his case has been overheard and it is entirely speculative that if anything has been overheard, that information has been passed to some unidentified person in Iraq who could, as a result, possibly persecute the appellant on return for a Convention reason. The eavesdropper claim simply illustrates the extraordinary lengths the appellant will go to in order to make fanciful claims.

[88] In short, we are satisfied that in Iraq there is no risk of harm to the appellant for reason of his religion or political beliefs or any other Convention ground. Nor do we accept that there is a warrant for his arrest or that he would be of interest to anyone, whether state or non-state. The entire refugee claim is simply a tissue of lies skilfully woven around the fact that he was once an imam at a mosque in al Zubayr but for reasons of his own he has come to Australasia in the hope of finding a better life.

[89] It was suggested by the appellant that as Iraqi nationals have been accepted for resettlement in New Zealand under the so-called "quota" programme, that it would be inconsistent for the appellant to be declined refugee status. This issue was discussed with counsel at the hearing. The Authority has been given no information about the circumstances of the individuals selected for resettlement in New Zealand or of the selection criteria. It cannot be assumed, without more, that each satisfies the definition "refugee" in Article 1 of the Refugee Convention. Not all persons selected for resettlement in New Zealand are Convention refugees. In the circumstances there is no evidential basis for the appellant's complaint but more fundamentally, our specific finding is that he does not have a well-founded fear of being persecuted in Iraq for a Convention reason. The fact that a person comes from a country where there is violence does not by virtue of that fact become a refugee. See Professor James C Hathaway, *The Law of Refugee Status* (1991) 185-188 and

see also *Refugee Appeal No. 71462/99* (27 September 1999); [2000] INLR 311 at [49] - [77].

## **CONCLUSION**

[90] Having rejected the claims made by the appellant in support of his refugee application, the Authority finds that he is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. The two issues earlier identified are answered in the negative. Refugee status is declined. The appeal is dismissed.

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[Rodger Haines QC]  
Chairperson