THIRD SECTION

CASE OF F.H. v. SWEDEN

(Application no. 32621/06)

JUDGMENT

STRASBOURG

20 January 2009

FINAL

05/06/2009

This judgment may be subject to editorial revision.

In the case of F.H. v. Sweden,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 16 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 32621/06) against the Kingdom of **Sweden** lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr F.H. ("the applicant"), on 15 August 2006. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr H. Bredberg, a lawyer practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Ms I. Kalmerborn, of the Ministry for Foreign Affairs.

3. The applicant alleged that, if deported from **Sweden** to Iraq, he would face a real risk of being killed or subjected to inhuman treatment and torture in violation of Articles 2 and 3 of the Convention.

4. The President of the Chamber and subsequently the Chamber decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings not to expel the applicant pending the Court's decision. The case was further granted priority under Rule 41 of the Rules of Court.

5. By a decision of 13 May 2008, the Court declared the application admissible.

6. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1956 and is currently in **Sweden**.

A. Background and the request for asylum in Sweden

8. On 9 January 1993 the applicant arrived in **Sweden** and applied to the Immigration Board (*Invandrarverket*) for asylum and a residence permit, claiming that he had left Iraq due to his fear of Saddam Hussein and his regime. He brought his three children with him (born in 1987, 1988 and 1991, respectively) while his wife arrived in July 1994. At the initial interview held with the applicant on the day of his arrival in **Sweden**, he stated, *inter alia*, that he was Christian and had worked as a major in the Republican Guard where he had served in a transport division for heavy vehicles. He had deserted from the army fourteen days previously and had fled to the northern part of Iraq where, with the help of a smuggler, he had managed to get on a plane to Stockholm. He had had neither ticket nor passport and his wife had remained in northern Iraq.

9. In a written submission dated 20 January 1993 the applicant added mainly the following to his

initial account. He was born in Basra but had moved to Baghdad in 1986 when he married. Between October 1981 and February 1990, during the war with Iran, he had served in the military and he had been called up again between August 1990 and January 1992, during the occupation of Kuwait, to serve in an armoured transport division assigned to transport tanks. He had been given four military awards for bravery and four medals, however such medals had been given to a large number of officers and soldiers. In October 1992 he had been called upon to carry out military assignments (allegedly murders and terrorist acts) against the Shi'as in Al Ahwar. As he had felt unable to murder his own people, he had deserted and left Iraq on 20 December 1992. In this respect, he submitted that he sympathised with all organisations working against Saddam Hussein and working towards a democratic government. Following his desertion, he had visited his relatives in Basra and then made his way, with his family, to northern Iraq, where he and his children had travelled to **Sweden** via Turkey with the help of smugglers. Since he had held the rank of major in the reserve and had deserted, he would be executed if he were forced to return to Iraq. Apart from his four medals he also had an identity card as a major which confirmed that he was one of Saddam Hussein's friends.

10. At a second interview at the Immigration Board, held on 17 September 1993, the applicant confirmed the information provided by him and added, in particular, that he had not engaged in any political activities.

11. On 14 and 15 December 1993 another two in-depth interviews were held with the applicant in which he essentially stated the following. He was Christian and belonged to the Ba'ath Party where he had attained the level of "advanced sympathiser" which was the level before becoming a full member. He had been drafted to the military in October 1981, had become an officer in 1986 and had risen to major in 1990. He claimed that he had never participated in any combat or killed anyone since his military work had mainly consisted of ensuring the functioning of transports and support for the front line. As an officer, he had been placed under the orders of others and thus had never had any influence himself. He had participated in the war against Iran and when this ended in 1988 he had been transferred to an armoured tank division within the Republican Guard. In March 1992 he had received four medals for bravery from the Ministry of Defence. He stated that about 500 officers had received such medals and that they were mainly perceived as an encouragement to the officers. At this time he had also received a special identity card, "Friends of Saddam", which almost every officer in the Republican Guard and some officers in the regular army received. He had never met Saddam Hussein personally but the card gave certain privileges, *inter alia*, in contacts with the authorities. During the interview on 15 December 1993, the applicant changed certain statements which he had previously given to the Immigration Board. In particular, he claimed that he had not been called back into service after he left the military in January 1992. Moreover, he stated that he had applied for a visa for a tourist trip to Malta with his family at the Maltese Embassy in Baghdad and that they had received both visas and exit permits for a month. Hence, on 4 October 1992, the family had travelled legally from Baghdad to Jordan and from there by plane to Malta. He and his children had then travelled to **Sweden** from Malta, with the help of smugglers. The applicant stated that he wished to return to Iraq if Saddam Hussein lost power.

12. One further supplementary interview was held with the applicant on 10 January 1994 in which he maintained that he had left Iraq legally on 4 October 1992 by car to Jordan, after the family had received valid passports, exit permits and visas. He also added that, from Jordan, the family had flown to Cyprus from where they had intended to continue to Greece. Since this had not been possible, they had returned to Jordan before travelling to Malta where they had arrived on 19 October 1992. Since the smugglers had not been able to arrange a passport for his wife, she had had to remain in Malta when the rest of the family went to **Sweden**.

13. In February 1994 the Swedish Security Police (*Säkerhetspolisen*) proposed a rejection of the applicant's asylum request for security reasons. On the basis of this, the Immigration Board decided to transfer the case to the Government for consideration but it recommended that the application be rejected. In its view, the applicant had not convincingly shown that he was in need of protection in **Sweden**. Although it accepted the applicant's military background, it did not believe his reasons for leaving Iraq, *inter alia*, because he had only admitted leaving Iraq legally with his own passport and an exit permit, and the route used, once confronted with facts.

14. Subsequently, in 1997, the Security Police informed the Government that they no longer had

any objections to the application from the point of view of security. Hence, the case was transferred back to the Immigration Board.

15. On 11 June 1998 the Immigration Board rejected the application for asylum with reference to its recommendation to the Government and noting that it found no reason to change the evaluation made at that time. Moreover, it dismissed the applicant's request for a residence permit on the ground that it was not competent to change or repeal a final court judgment concerning expulsion. The Board observed that only the Government could repeal an expulsion order based on a criminal conviction and, in that connection, consider a request for a residence permit.

B. The criminal proceedings

16. In the meantime, on 2 May 1995, before the asylum application had been determined, the District Court (*tingsrätten*) of Tierp convicted the applicant of murder and sentenced him to forensic psychiatric care, the duration of which was subject to a medical evaluation. It further ordered that the applicant be expelled from **Sweden** with a prohibition on returning. The applicant had admitted that he had killed his wife but claimed that he had acted in psychosis and had not intended to kill her. He had suspected that she had been unfaithful and had conspired against him behind his back. In its judgment, the court noted that the applicant, after having locked the door to the children's room, had repeatedly stabbed his wife while she was asleep. In these circumstances, the court found that the applicant had been completely indifferent as to whether his wife died or not and therefore should be convicted of murder. However, since a forensic psychiatric examination showed that he had committed the crime in a state of "serious mental disturbance" (*allvarlig psykisk störning*) and was still, during the examination, suffering from such a disturbance, the court concluded that he was in need of treatment and sentenced him to forensic psychiatric care.

17. As concerned the expulsion, the applicant had stated before the District Court that he had been an officer in Saddam Hussein's army and often away on missions. Because of the war, he and his family had fled from Iraq in 1993 but he had psychological problems stemming from the war.

18. The District Court had also consulted the Immigration Board and it had submitted that, although it had not yet made a decision regarding the applicant's application for asylum and a residence permit, it considered that there were no impediments to the expulsion of the applicant to his home country. The Board noted that the applicant, an army officer, had left Iraq legally with a valid Iraqi passport containing a one-month exit visa. He had not brought his national passport with him when he entered **Sweden**. Having regard to the Board's view and noting that the applicant had committed a very serious crime, the District Court concluded that he should be expelled from **Sweden** for life.

19. The applicant did not appeal against the judgment which, consequently, gained legal force.

20. It would appear that, following the applicant's criminal conviction, his children were taken into compulsory public care and placed with a Swedish family. Furthermore, a special guardian was appointed for them and they were granted permanent residence permits in **Sweden**.

21. On 14 December 2004 the County Administrative Court (*länsrätten*) of the County of Dalarna decided to end the forensic psychiatric care and to release the applicant.

C. Requests for the expulsion order to be revoked

22. In the meantime, in July 1998, the applicant requested the Government to repeal the expulsion order against him. He insisted that he would be tortured and executed if he was returned to Iraq because he had deserted from the Iraqi army.

23. On 12 November 1998 the Government rejected the request as they found that no special reasons existed for repealing the expulsion order.

24. The applicant renewed his request in February 2001, maintaining his claims. Upon request by the Government, the Migration Board (*Migrationsverket*) submitted its view on the case, stating that the applicant's reasons had been examined previously and that no new circumstances had appeared for which reason the enforcement of the expulsion could take place. However, the Board added that there had been practical impediments to enforcement for some time with regard to Iraq.

25. On 17 May 2001 the Government found that there were insufficient reasons for revoking the expulsion order. However, having regard to the situation in Iraq at the time, the Government decided to grant the applicant a temporary residence permit and work permit up until 17 November 2001.

26. In a new application, dated 7 November 2001, the applicant requested that the expulsion order be revoked and that he be granted a permanent residence permit or, in the alternative, that his temporary residence permit be extended for at least one year.

27. The Migration Board submitted its comments on the case on 12 December 2002, concluding that there were no legal or practical impediments to the enforcement of the expulsion order and that the applicant should be able to return to Iraq.

28. Following the fall of Saddam Hussein's regime in April 2003, the Migration Board sent another submission to the Government on 17 November 2003 where it noted that the applicant's case now had to be seen in another light. His reasons for fearing a return to Iraq had been removed now that Saddam Hussein was no longer in power. The Coalition Provisional Authority governing Iraq at the time was striving to build up a society characterised by democracy and respect for human rights and those who had been close to the old regime and who had committed war crimes and other crimes against humanity would be brought to justice. Thus, the Board considered that the applicant would not risk being tortured or treated inhumanely if sent back to Iraq and consequently there was no impediment to his expulsion.

29. In reply, the applicant claimed that since he had been an officer in the Republican Guard, he would be exposed to persecution and acts of revenge from primarily Shi'a Muslim groups and that there was no functioning legal system or police force which could give him protection against abuse. It followed that there existed impediments to the enforcement of his expulsion.

30. Since the Government had several pending cases concerning expulsion to Iraq, they requested the Iraq Office at the Swedish Embassy in Jordan to reply to some questions relating to the situation in Iraq.

31. In November 2004 the Iraq Office sent, *inter alia*, the following information to the Government, which was communicated to the applicant. In August 2004 the death penalty was reintroduced in Iraq for offences such as murder, kidnapping and crimes against national security. Moreover, according to the Iraqi Penal Code of 1969, a person who had been convicted or acquitted by final judgment in another country could not be retried in Iraq. However, it was not known whether this provision had been modified or changed by the Interim Government. Furthermore, it was difficult to assess "tribal justice" in Iraq due to the poor security situation in the country but it was possible that, if a person were to return to an area where he was known and his victim was also known, there could be a risk of revenge or "tribal justice". It was further noted that there were reports of harassment against Christians and that attacks had been directed against Christians and other minorities during 2004.

32. The applicant commented on the information and stressed that he was Christian and that the Christian minority in Iraq was being persecuted. Moreover, he had held a prominent position in the Ba'ath Party, had belonged to the exclusive circle that had been given the "Saddam's Friends" identity card and he was well known and hated by many. Thus, it was certain that he would be killed if returned to Iraq.

33. On 21 March 2005 the Minister of Justice at the time decided to suspend the enforcement of the expulsion order until otherwise decided or until the Government made a final decision on the case. He further decided that the applicant should report to the police three times per week in order to prevent him from going into hiding.

34. Subsequently, the Government requested the Iraq Office at the Swedish Embassy in Jordan to reply to some supplementary questions relating to the situation in Iraq, which it did on 3 November 2005. In its reply it noted that, at the time, it was very difficult to obtain a complete overview and clear information about Iraq. Still, it observed that persons who had been part of the Republican Guard, other special military units or the military in general were being arrested and tried in Iraq. According to sources such as the UNHCR, the activities of these persons within their organisation determined how they were being treated more than to which military unit they had belonged. However, their position and military rank was of relevance as an indication of who could be targeted. In this context it was noted that members from special units, such as the Republican Guard, were being re-employed into the current special units. Moreover, the UNHCR had stated that even though

many Iraqis were harassed as a result of their former membership of the Ba'ath Party, this harassment did not necessarily amount to persecution. A careful individual assessment was always necessary.

35. The applicant, in a comment on the Iraq Office's information, maintained that there was a real risk that he would be subjected to extrajudicial execution if returned to Iraq due to his previous connections to Saddam Hussein's regime.

36. On 27 June 2006 the Migration Board submitted its opinion on whether the reintroduction of the death penalty in Iraq in 2004 had an impact on the enforceability of the applicant's expulsion order. It considered that none of the information submitted by the applicant, in his detailed asylum interview in 1993 and later, regarding his position and activities until he left Iraq in 1992, indicated that he would risk legal measures, least of all the death penalty, from the current Iraqi government. Neither his membership of the Ba'ath Party nor his relatively subordinate position in a non-combat unit were likely to cause him problems with the Iraqi authorities upon return to his home country. Thus, there were no impediments to the enforcement of the expulsion order.

37. On 6 July 2006 the Government decided not to revoke the expulsion order and rejected the applicant's request for a residence permit. It found that there was neither any impediment to the enforcement of the expulsion nor any other special reason under the Aliens Act to revoke the expulsion order.

38. As the expulsion order had become enforceable anew, the police authority, on 27 July 2006, detained the applicant awaiting the enforcement of his expulsion order.

D. Application of Rule 39 of the Rules of Court and further developments in the case

39. On 15 August 2006 the applicant requested the Court to indicate to the Swedish Government under Rule 39 of the Rules of Court a suspension of his expulsion to Iraq. He alleged that he would be executed or tortured and imprisoned if returned to his home country because he had been an officer during Saddam Hussein's regime and had belonged to his "inner circle". Moreover, since he was Christian, he risked persecution on religious grounds.

40. On 17 August 2006 the Court decided to apply Rule 39 and to suspend the expulsion until 1 September 2006 in order to obtain some further information from the Swedish Government. In particular, the Government were requested to give their opinion on whether the applicant would risk being brought to trial before the Supreme Iraqi Criminal Tribunal (hereafter referred to as "the SICT") and sentenced to death.

41. On the following day, the Minister of Justice at that time decided to suspend the expulsion of the applicant until further notice. He also decided to keep the applicant in detention since there was reason to believe that he would otherwise try to abscond. The detention decision was reconsidered every two months until 29 June 2007, when it was decided that he should be released and that he should report to the police twice a week.

42. In the meantime, on 31 August 2006, the Government replied to the Court's request. They first observed that the SICT had jurisdiction over individuals residing in Iraq accused of war crimes, genocide, crimes against humanity and a number of "political" offences under Iraqi law, including waste of national resources and abuse of position. It applied the penalties available in Iraqi law, including the death penalty. The Iraqi Governing Council had agreed that the SICT should process a limited series of 10 to 15 trials, focusing on major events that showed the geographic and temporal spread of the regime's crimes, and that only the highest-level perpetrators should be tried before the SICT. Other perpetrators should be tried by regular Iraqi courts.

43. The Government further noted that the applicant's claim that he had belonged to Saddam Hussein's inner circle was recent and did not correspond to the detailed statements given by him during the asylum proceedings. They also stressed that the applicant had neither claimed to have committed any crime, nor that he was, or might be, suspected of having committed a crime which fell under the jurisdiction of the SICT. The sole fact that he had held a subordinate position as an officer in the Republican Guard or been a member of the Ba'ath Party did not give reason to believe that he would be suspected of such serious or brought to trial before the SICT.

44. On 1 September 2006 the Court extended the application of Rule 39 until 15 September 2006

in order to enable the applicant to reply to the Government's comments.

45. The applicant submitted his comments in reply to those of the Government on 13 September 2006. He stated that the Ba'ath Party had been an elite party with only a few full members. He had been an "advanced sympathiser" which meant that he had held a high position in the hierarchy. Moreover, although he had not been in the infantry, he had participated in battle in an armoured unit during the various wars until 1992 when he had left the country because he had been ordered to carry out military actions that were against international law. The Government's allegation that he had said that he had not been or could not be suspected of crimes under the jurisdiction of the SICT was wrong. The assessment of his application for asylum took place in 1993, at a time when the SICT had not yet come into existence and he had also not been asked about it later. Apart from the risk of being sentenced by the SICT or another jurisdiction, there was a real risk that he would be the victim of an extrajudicial killing. Extremist militias tried to find and kill all officers who had fought for Saddam Hussein in the war against Iran or who had fought against the Shi'as in southern Iraq in 1991. The retaliation was collective and directed against all officers who had fought under Saddam Hussein. The applicant also stressed that as a Christian he would be without protection in Iraq and his situation upon return would thus be most serious.

46. On 13 September 2006 the Court extended the application of Rule 39 until 26 September 2006, on which date it was extended until further notice.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law on expulsion

47. Pursuant to Chapter 1, Article 8 of the Penal Code (*Brottsbalken*, 1962:700), a crime may, apart from ordinary sanctions, result in special consequences defined by law. Expulsion on account of a criminal offence constitutes such a consequence and the decision in this respect is made by the court in which the criminal proceedings take place.

48. Provisions on expulsion on this ground are laid down in the Aliens Act (*Utlänningslagen*, 2005:716 – hereafter "the 2005 Act") which replaced the old Aliens Act (*Utlänningslagen*, 1989:529) on 31 March 2006. However, the rules on expulsion on account of a criminal offence remain the same in substance under the 2005 Act as under the old Aliens Act. Thus, in the following, reference will only be made to the 2005 Act.

49. According to Chapter 8, sections 8 and 11 of the 2005 Act, an alien may not be expelled from **Sweden** on account of having committed a criminal offence unless certain conditions are satisfied and the person's links to Swedish society have been taken into account.

50. Moreover, the court must have regard to the general provisions on impediments to the enforcement of an expulsion decision. Thus, pursuant to Chapter 12, section 1 of the 2005 Act, there is an absolute impediment to expelling an alien to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment. Furthermore, a risk of persecution generally constitutes an impediment to enforcing an expulsion decision.

51. A decision to expel an alien on account of having committed a criminal offence is, according to Chapter 12, section 14 § 3(2) of the 2005 Act, enforced by the police authority. If the police authority finds that there are impediments to the enforcement, it shall notify the Migration Board, which shall refer the matter to the Government to examine whether the expulsion can be executed (Chapter 12, section 20 of the 2005 Act). If there are no impediments to the enforcement, the alien shall normally be sent to his or her country of origin or, if possible, to the country from which he came to **Sweden** (Chapter 12, section 4 of the 2005 Act).

52. According to Chapter 8, section 14 of the 2005 Act, if the Government find that a judgment or decision to expel a person on account of having committed a criminal offence cannot be executed or if there are otherwise special reasons not to enforce the decision, the Government may repeal, in part or completely, the judgment or decision of the court. When considering whether to repeal an expulsion order, the Government shall above all take into account any new circumstances, namely circumstances that did not exist at the time of the courts' examination of the criminal case. In the

travaux préparatoires to this provision (Government Bill 1988/89:86, p. 193), strong family ties and severe illness are given as examples of such "special reasons" that may warrant revocation of an expulsion order. The Government may also, in accordance with Chapter 11, Article 13, of the Instrument of Government (*Regeringsformen*), pardon or reduce a penal sanction or other legal effect of a criminal act.

53. In cases where the expulsion order is not revoked, the Government may still grant a temporary residence permit and work permit. For as long as such a permit is valid, the expulsion order may not be executed (Chapter 8, section 14 of the 2005 Act).

B. Swedish policy on asylum seekers from Iraq and expulsion to Iraq

54. In a judgment of 26 February 2007 (MIG 2007:9), the Migration Court of Appeal (*Migrationsöverdomstolen*) found that, at that time, the security situation in Iraq was very serious but that it did not amount to an internal armed conflict, as defined by international law. Moreover, it noted that it was practically possible to return to Iraq voluntarily and that some Iraqis indeed did so. In these circumstances, an individual assessment of each asylum seeker's personal grounds for requesting asylum and a residence permit in **Sweden** had to be carried out. This conclusion has been reiterated by the Migration Court of Appeal on several occasions during the last year (see, for example, MIG 2007:22 and MIG 2007:33). Furthermore, on 24 April 2008, in a leading decision concerning three Christian asylum seekers from Mosul (a mother and her two minor children), the Director-General for Legal Affairs of the Migration Board made the assessment that the general situation for Christians in Iraq, and in the province of Nineve (where Mosul is situated), was not so serious that this group could be considered to be in need of protection in **Sweden**. An individual assessment had to be made in each case of the reasons invoked by the asylum seeker.

55. On 18 February 2008 the Swedish Government signed a Memorandum of Understanding with the Iraqi Government, whereby the two countries "resolve to cooperate in order to assist the voluntary, dignified, safe and orderly return to and successful reintegration in Iraq of Iraqis now in **Sweden**". Although primarily focusing on voluntary returns, the Memorandum also allowed for forced returns of failed asylum seekers.

III. INFORMATION ON IRAQ

A. General background

56. During the regime of Saddam Hussein, Iraq was at war with Iran between 1980 and 1988. In August 1990, Iraq invaded Kuwait, which led to the "First Gulf War", lasting for six weeks between 17 January and 28 February 1991. Between March and April 1991 the regime suppressed a Kurdish insurgency in northern Iraq and a Shi'a insurgency in the south of the country. In March 2003 the "Second Gulf War" started when US-led multinational forces invaded Iraq and overthrew Saddam Hussein's regime. The Republican Guard was involved in all of these conflicts. It expanded rapidly during the Iraq-Iran War and comprised the best equipped and trained units among Saddam Hussein's forces. In May 2003 the Republican Guard, the Iraqi army, the police and the Ba'ath Party were officially dissolved by the Coalition Provisional Authority (hereafter "the CPA") in a process called the "De-ba'athification" (through CPA Order Number 2 of 23 May 2003). Subsequently, in June 2004 power was transferred from the CPA to the Iraqi Interim Government and, in October 2005, a permanent government was elected by the Iraqis.

B. Ba'ath Party membership

57. The Ba'ath Party membership lists have never been found and there is relatively little information about the inner workings of the party and its structure. However, it would appear that membership was originally highly restricted but that the rules were significantly relaxed in the 1990s, leading to a great expansion of the membership in order to bolster stability (International Center for Transitional Justice, *Briefing Paper: Iraq's New "Accountability and Justice" Law*, 22

January 2008, hereafter "ICTJ Briefing Paper"). There were several levels of membership (between 6 and 8, depending on the source) and training and probation periods (divided into 3 to 5 levels) were always required before becoming a full member of the party (Ibid. and Landinfo, *Baath-partiet. Medlemskapsnivåer og partiorganisasjon [The Ba'ath Party. Membership levels and party organisation]*, 13 June 2008 – hereafter "Landinfo"). The total number of party members has been estimated to between 1 and 2.5 million (Landinfo). A person who was a "sympathiser" or an "advanced partisan" was not a full member of the Party. Moreover, it would appear that persons who had been in the Ba'ath Party for at least 10 years were called "Friends of Saddam" (UNGA, A/51/496, Note by the Secretary-General, *Situation of Human Rights in Iraq*, 15 October 1996).

58. The De-ba'athification process was widely criticised as it was seen as a collective punishment while, at the same time, providing impunity for others. Therefore, in January 2008 the Iraqi Parliament passed the Accountability and Justice Act which established a clearer legal framework for dismissals and reinstatements of former Ba'ath Party members and introduced an element of individual responsibility into the process. The law allows for some higher ranking members of the Ba'ath Party to apply for reinstatement (an estimated 30.000 persons) and makes most individuals who have been dismissed eligible for pensions, with the exception of some of the highest part members and those who have been involved in corruption or committed crimes (ICTJ Briefing Paper and International Herald Tribune, Solomon Moore, *Uncertainty surrounds new Iraqi De-ba'athification law*, 14 January 2008).

C. The Iraqi High Tribunal and criminal responsibility

59. Holders of high positions in the Ba'ath Party who were suspected of having been close to the old regime and/or taken part in different violent actions could be, and had been, arrested and called to account. It was the person's own background and the credibility of his or her account that determined the risk of judicial proceedings (Information from the Iraq Office of the Swedish Embassy in Jordan to the Swedish Government, dated 15 March 2007; hereafter "the Iraq Office's Information"). Hence, in 2003, the Iraqi High Tribunal (IHT, formerly the SICT) was created to try persons accused of committing war crimes, crimes against humanity, genocide and specified offences between 17 July 1968 and 1 May 2003. The IHT had already tried and convicted Saddam Hussein and a few of his closest collaborators. Several of them had been sentenced to death and some to life imprisonment. At least one defendant had been acquitted (US Department of State, *Iraq, Country Reports on Human Rights Practices 2007*, 11 March 2008; hereafter "US Country Report").

60. According to the Iraq Office's Information, for individuals who did not "qualify" for examination by the IHT, there still remained a risk of review by the usual legal system and its criminal courts. The death penalty had been reintroduced in 2004 for, *inter alia*, crimes against national security, murder, kidnapping and drug trafficking and it was increasingly used. Moreover, in particular in Baghdad, southern and central Iraq, several Shi'a militia groups more or less systematically, and very extensively, sought out people who were guilty of acts of aggression under the former regime. The more well known a person had been as a representative of the former regime, the greater the risk of being discovered and punished.

61. In February 2008 the Iraqi parliament adopted an Amnesty Law which provided a general amnesty for all convicted Iraqis and those accused of crimes but who were still under investigation or trial. It did not apply to persons convicted of very serious crimes such as murder, rape, kidnapping, drug-related crimes and embezzlement (Reuters, *Factbox: Iraq's amnesty and provincial powers law*, 18 February 2008). By October 2008 just over 122,000 detainees in Iraqi jails had been released by virtue of the Amnesty law, while roughly 30,000 remained in prison as the law did not apply to them (Iraq Updates, Voices of Iraq, *More than 120,000 detainees covered by amnesty law*, 12 October 2008).

D. The current security situation in Iraq

62. On 29 October 2008 the US military relinquished security responsibility to Iraqi forces of Wasit province, the 13th province out of 18 to be placed under Iraqi control. Only Baghdad and the

four Northern provinces remained under US command (Center for Excellence, *Iraq Crisis Report*, 29 October 2008).

63. The declared state of emergency lapsed in April 2007 and has not been renewed. However, there were reports that law enforcement activities often continued as if the state of emergency was still in effect (US Country Report). Civilians were targeted by attacks by Sunni and Shi'a groups across the country, and there were widespread and severe human rights abuses, including kidnappings, disappearances, torture and killings. The authorities frequently did not maintain effective control over security forces and did not have effective mechanisms to investigate and punish abuse and corruption (US Country Report).

64. In October 2008, the UN Special Representative of the Secretary General for Iraq stated there had been a noticeable drop in violence over the past year and that Iraq had made significant strides towards stability and institution building although the human rights situation continued to be serious (UNAMI press releases 24 October 2008, *UNAMI Commemorates the 63rd United Nations Day*). According to Iraq Body Count (www.iraqbodycount.org as downloaded on 6 November 2008), civilian deaths in Iraq had gradually decreased since August 2007, with the exception of March and April 2008. Thus, there were 590 civilian deaths in August 2008 and 539 in September 2008, as compared to 2,324 in August 2007 and 1,220 in September 2007. The decrease in civilian deaths has mainly been attributed to the cease-fire declared in August 2007 by Moqtada al-Sadr, the leader of the Mahdi Army (a Shi'a paramilitary force created in June 2003 to fight against the multinational forces). The ceasefire was initially declared for a period of six months but was prolonged and, in August 2008, al-Sadr announced an indefinite ceasefire and stated that anyone in his Mahdi Army who did not follow his order would not be considered a member of his group (United Press International, *Sadr declares another ceasefire*, 29 August 2008). Moreover, according to Human Rights Watch, violence has abated because Sunni and Shi'a populations have fled from mixed areas and thus have become increasingly divided into geographically distinct communities (Human Rights Watch, *World Report –Iraq*, 31 January 2008).

65. Another sign of the decrease in violence is the establishment of the World Health Organization's (WHO) permanent office in Baghdad in June 2008 (UNAMI press release 28 June 2008, *The World Health Organization Establishes Permanent Office in Baghdad*) and the activities of some 32 humanitarian international NGOs with programmes in Iraq, operating directly or via implementing partners, although the Iraqi Red Crescent Society was the only agency operating openly nation-wide through its 18 branches (Center of Excellence, *Iraq Crisis Report*, 29 October 2008). Furthermore, several Arab countries, including Bahrain and Kuwait, sent ambassadors to Iraq during September and October 2008 to open their Embassies (Center of Excellence, *Iraq Crisis Report*, 22 October 2008).

E. Christians in Iraq

66. The Iraqi Constitution provides for freedom of religion. Passports do not indicate an individual's religion but the national identity card explicitly notes the holder's religion. According to the official 1987 census, there were 1.4 million Christians living in Iraq. Although difficult to verify, the Christian Peace Association (CPA), estimated that about 450,000 Christians remained in Iraq at the end of October 2007, most of whom had moved to the northern provinces, although since September 2007 there had been attacks and threats against the community in Kirkuk and Mosul (The Humanitarian News and Analysis Service, IRIN, *Iraq: Christians seek new life in Europe*, 5 November 2007). The Iraqi Government and religious leaders publicly denounced all incidents of sectarian violence and repeatedly encouraged unity among the country's religious groups. However, deficiencies in security force capabilities made it difficult for the Iraqi Security Forces and the justice system to investigate or address alleged violations (US Department of State, *International Religious Freedom Report 2007 -Iraq*, 14 September 2007).

67. Between 4 and 13 October 2008, 12 Christians were killed in Mosul and others were threatened to leave the city. About 11,000 Christians left as a result, although the Iraqi Prime Minister ordered the Iraqi Army and police in the Mosul area to protect the members of the Christian community. On 19 October 2008 security had been restored and the displaced persons were

encouraged by the authorities to return. The Organisation of the Islamic Conference, among others, condemned the attacks (US Department of State, *Iraq Weekly Status Report*, 15 and 22 October 2008, and IRIN, *Iraq: Uncertainty over who is behind attacks on Christians*, 20 October 2008).

F. Iraqi refugees

68. Currently there are about 2,700,000 Iraqis displaced within Iraq and over 2,000,000 Iraqis have left the country, most of them for Syria and Jordan (Center of Excellence, *Iraq Crisis Report*, 22 October 2008).

69. Since March 2003, the UNHCR has advocated recognition of the international protection needs of Iraqis outside their country, and hence a suspension of forced returns, due to the objective situation of armed conflict and generalised violence in Iraq (UNHCR, *Strategy for the Iraq Situation*, as revised 1 January 2007 and *Addenum to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, December 2007). In September 2008 the UNHCR stated that it hoped that the majority of Iraqi refugees would be able to return home in safety once the necessary conditions of stability and security were established but that these conditions were not yet present. The security environment remained precarious, particularly in Central and Southern Iraq, where issues relating to shelter and property restitution or compensation had not yet been solved (UNHCR, *UNCHR urges reinforced EU commitment to protection of Iraqi refugees*, 23 September 2008).

70. The United Nations and the International Organisation for Migration (IOM) have stated that, although they "do not necessarily encourage return at this time because of security concerns, both are committed to providing assistance to those who do decide to return" (IOM, *Assessment of Iraqi Return*, August 2008). The IOM has further noted that the rate of displacement in Iraq has slowed and that the rate of return has accelerated, mostly to Baghdad. So far, more than 100,000 people have returned to Baghdad, the absolute majority being internally displaced persons who have returned to their homes of origin (Center of Excellence, *Iraq Crisis Report*, 22 October 2008). Moreover, the Iraqi Government have initiated a financial incentive and subsidy programme for returnee families and they are working to develop their capacity to register and assist the increasing number of returnees (IOM, cited above). According to the IOM, military operations, general insecurity and occupied houses are the primary reasons preventing Iraqis from returning home.

71. Amnesty International considered that Iraq was still in a situation of internal armed conflict and criticised several European countries, including **Sweden**, Denmark and the United Kingdom, for forcibly returning failed asylum seekers to all parts of Iraq (Amnesty International, *Iraq - Rhetoric and reality: the Iraqi refugee crisis*, June 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

72. The applicant claimed that an expulsion to Iraq would subject him to a real risk of being killed or subjected to torture or inhuman and degrading punishment, in violation of his rights under Articles 2 and 3 of the Convention. These provisions read, in relevant parts, as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court finds that the issues raised in the present case under Articles 2 and 3 of the Convention are indissociable and will therefore examine them together.

A. The parties' submissions

1. The applicant

73. The applicant argued that, if forced to return to Iraq, he would face a real and serious risk of being sentenced to death by an Iraqi court or of being killed extrajudicially, primarily by Shi'a militia groups.

74. He claimed that he had told the Swedish Security Police, when they had interviewed him in 1993, that he had participated in about fifteen battles during the Iran-Iraq war and during the internal "cleansing" operations in southern and northern Iraq in 1991. He had been trained as an infantry soldier and had been active as such from 1980 to 1988. Thus, he had been taught how to handle weapons and hand-to-hand fighting. In 1988 he had reached the rank of officer and thereafter he had been working with logistics. During this period he had also had to write reports on Shi'a insurgency leaders which had led to the execution of two of them. According to the applicant, the Shi'as considered these two persons martyrs and there were "people's committees" within the Mahdi Army, and other Shi'a militias, which reported on the whereabouts of all former officers belonging to the Republican Guard and executed them. It was irrelevant whether the applicant had personally killed any of these or not.

75. Furthermore, the applicant strongly objected to any claim that he was not credible. For instance, he had never alleged that he had belonged to Saddam Hussein's inner circle and he had stated all along that he had never even met him. However, he maintained that he was well known and that the Shi'as by way of their various militias were actively looking for persons with the applicant's background and killing them. The fact that a long time had elapsed since he had served in the Republican Guard was irrelevant.

76. In the applicant's view, it was also possible that he might be tried again in Iraq for the murder of his wife. This was particularly so since he had been sentenced to forensic psychiatric care and not to imprisonment.

77. Finally, he stressed that, according to estimates, before 2003 approximately 1% of Iraq's twenty-six million inhabitants were Christians but that more than half of these had now left the country because they had been targeted. He was Christian and, as such, risked being killed in Iraq.

78. Thus, the applicant was convinced that on the basis of all of the above grounds, he would face a real risk of being killed or tortured or ill-treated contrary to Articles 2 or 3 of the Convention if forced to return to Iraq.

2. The Government

79. The Government considered that the application did not disclose any violation of Articles 2 or 3 of the Convention.

80. They submitted that, although the situation in Iraq was still problematic, Iraqis did return to their home country, in particular to Baghdad and that, during the first four months of 2008, almost 300 Iraqis had returned voluntarily to Iraq from **Sweden**. In any event, for a violation to be established, the general situation in the country of destination was not enough. It had to be shown that the applicant would run a real and personal risk of being subjected to treatment contrary to Articles 2 or 3 of the Convention if returned to Iraq.

81. In this respect, the Government questioned the applicant's general credibility, pointing out that his statements to the Government and to the Court had, generally, been very vague and sweeping and had been unsupported by further details, particulars, facts or examples. They submitted that the information given by the applicant during the asylum interviews in 1993/94, namely that he had held a relatively subordinate position in a non-combat unit in the Iraqi army more than fourteen years earlier, had to form the basis for an assessment of whether he risked execution or torture or other ill-treatment if returned to Iraq.

82. Consequently, the Government doubted the veracity of the applicant's claim that he had been close to Saddam Hussein or that he had held a prominent position within the Ba'ath Party since these

claims had been put forward late in the proceedings. Before that, he had consistently stated that he had been an "advanced sympathiser". In any event, the Government noted that it had not been unusual to be a member of the Ba'ath Party, but more or less a prerequisite for anyone who had wanted to advance in any way in Iraq.

83. The Government further observed that the applicant's claim that he had participated in combat during the war against Iran, in the first Gulf war and against the Shi'a insurgency was contrary to his previous statements that he had not participated in battle as he had been responsible for transporting vehicles and food. Furthermore, they observed that he had offered no explanations or circumstances in support of why any charges might be brought against him, reiterating that the applicant had repeatedly stated that he had not participated in battle or killed anyone. Thus, the Government argued that he had failed to show that he might be brought to justice before an Iraqi court, let alone that it would give him a death sentence.

84. In any event, they argued that the sole fact that a person had served in the Iraqi military under Saddam Hussein did not subject him to a risk of capital punishment or torture but that the individual risk depended on the person's position, military rank and the activities in which he had been involved. They gave the example of the Iraqi Minister of Defence, Mr Abdu Alqadir Al-Ubaydi, who had been in the military since 1973 and had led an armoured brigade during the Iran-Iraq war. Moreover, the Government pointed out that, in June 2008, over 14,000 applications had been received from former Ba'ath Party members for reinstatement or pensions under the Accountability and Justice Law. Hence, there was nothing to suggest that the applicant would be at risk in Iraq. Anyhow, the Government noted that the applicant had not claimed that he was personally wanted, or searched for, by the Iraqi authorities.

85. In line with the above, the Government submitted that the applicant did not face a real risk of being killed extrajudicially. In their view, it was unlikely that the reintegration of former officers now taking place in Iraq would be possible if everyone who had been in Saddam Hussein's army risked extrajudicial killing solely on this account. Also, considering the large number of members of the Ba'ath Party during the old regime, it was not likely that the applicant's low position in the party would now, more than fourteen years after he left the country, attract any interest in Iraq or subject him to a risk of fatal retaliation from different interest groups, including from Shi'a militia groups.

86. As concerned the issue of whether the applicant might risk being sentenced in Iraq a second time for the murder of his wife in **Sweden**, the Government referred to the Iraqi Penal law from 1969 and stressed that the applicant had fully served the sentence imposed on him in 1995 in **Sweden** and that there was no reason to expect the Iraqi authorities to have an interest in pursuing the applicant in a new trial in Iraq for the same crime.

87. The Government further submitted that the sole fact that someone was a Christian could not be considered to entail an additional risk of being exposed to violence. They claimed that the applicant had not described himself as actively religious in **Sweden** or in Iraq in such a way that people would associate him with Christianity and he would be personally targeted because of this in Iraq.

88. Hence, in conclusion, the Government contended that the applicant had not shown that he would face a real and personal risk of treatment contrary to Articles 2 or 3 of the Convention if expelled to Iraq.

B. The Court's assessment

89. The Court observes that Contracting States have the right as a matter of international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (*Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-....). However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country (*Saadi v. Italy* [GC], no. 37201/06, § 125, ECHR 2008-...).

90. It further notes that a general situation of violence will not normally in itself entail a violation

of Article 3 in the event of an expulsion (see *H.L.R. v. France*, 29 April 1997, § 41, *Reports of Judgments and Decisions* 1997-III). However, the Court has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA v. the United Kingdom*, no. 25904/07, § 115, 17 July 2008).

91. In the present case, the Court recognises the problematic security situation in Iraq. However, it notes that the situation has improved over the last year which is demonstrated, *inter alia*, through the progressive relinquishment of security responsibility over Iraqi provinces from US forces to Iraqi forces, the indefinite cease-fire declared by the Madhi Army in August 2008, a significant decrease in civilian deaths and the fact that some Iraqis are voluntarily starting to return to their homes, encouraged by the Iraqi Government's financial incentives and subsidy programme. Although the Court is aware that the UNHCR, UN and IOM recommend that countries refrain from forcibly returning refugees to Iraq, they have stated that they are committed to providing assistance to those who return. Moreover, the Court observes that their recommendations are partly based on the security situation and partly due to practical problems for returnees such as shelter, health care and property restitution.

92. In this connection, the Court stresses that it attaches importance to information contained in recent reports from independent international human rights organisations or governmental sources (see, among others, *Saadi v. Italy*, cited above, § 131). However, its own assessment of the general situation in the country of destination is carried out only to determine whether there would be a violation of Article 3 if the applicant were to be returned to that country. Consequently, where reports are focused on general socio-economic and humanitarian conditions, the Court has been inclined to accord less weight to them, since such conditions do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3 (see *NA v. the United Kingdom*, cited above, § 122).

93. Hence, in the present case, the Court concludes that whilst the general situation in Iraq, and in Baghdad, is insecure and problematic, it is not so serious as to cause, by itself, a violation of Article 3 of the Convention if the applicant were to return to that country. The Court therefore has to establish whether the applicant's personal situation is such that his return to Iraq would contravene Articles 2 or 3 of the Convention.

94. In the case before it, the Court observes that the applicant has invoked several grounds for his fear of returning to Iraq, namely his Christian faith, his background as a member of the Republican Guard and the Ba'ath Party which would put him at risk of being sentenced to death or of being killed by Shi'a militia groups, and a risk of being convicted a second time for the murder of his wife.

95. The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akasiebie v.* ***Sweden*** (dec.), no. 23944/05, 8 March 2007, and *Matsiukhina and Matsiukhin v.* ***Sweden*** (dec.), no. 31260/04, 21 June 2005). In principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it.

96. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to Iraq, bearing in mind the general situation there and his personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, § 108 *in fine*).

97. The Court will first consider the applicant's claim that he would risk being killed because he belongs to the Christian faith. In this respect, the Court observes that Iraqi national identity cards explicitly note the holder's religion. Thus, even if the applicant were not to manifest his religious

beliefs openly, it is likely that his religious affiliation would become known to others as he would have to show his identity card to the authorities in the course of everyday life. The Court also takes into account that there have been several incidents directed against Christians in Iraq, as recently as October 2008 twelve Christians were killed in attacks in the town of Mosul. However, Christian congregations are still functioning in Iraq and, from the general information available, it can be seen that the Iraqi Government has condemned all attacks against this group and that they intervened with police and military following the October attack to ensure their safety. Hence, it is clear that there is no State-sanctioned persecution of Christians and, since the attacks were also condemned by Islamic groups and no one has accepted responsibility for them, it appears that the reported attacks were carried out by individuals rather than by organised groups. In these circumstances, the Court finds that the applicant would be able to seek the protection of the Iraqi authorities if he felt threatened and that the authorities would be willing and in a position to help him. Thus, the Court considers that he would not face a real risk of persecution or ill-treatment on the basis of his religious affiliation.

98. Next, the applicant alleged that he would risk being sentenced to death by an Iraqi court as he had been a member of the Republican Guard and the Ba'ath Party.

99. Although the Court does not question that the applicant has been a member of the Republic Guard and served in the Iraq-Iran war and the First Gulf War, it observes that the applicant, during the asylum interviews in 1993 and 1994, consistently held that he had never participated in combat or killed anyone since his tasks had mainly consisted in ensuring the functioning of transports and support to the front line. He also stated that he had never had any influence himself but only carried out orders from his superiors and that he had deserted from the army when ordered to carry out attacks on the Shi'as in 1992. The Court observes that the applicant has essentially maintained this account, stating that in 1988 he had been promoted to officer and thereafter he had been working with logistics. Furthermore, the applicant has at no point claimed that he is sought or wanted by the Iraqi authorities for any crime, indeed, he has consistently held that he left the country when ordered to carry out acts against international law. On the basis of this information, and noting that some former Republican Guards have been integrated into the new Iraqi army, the Court finds nothing to indicate that the applicant would risk being charged with any type of crime before the Iraqi courts, let alone the IHT/SICT, for having served in the Republican Guard. Consequently there is no real risk that he would be sentenced to death.

100. As concerns the applicant's membership in the Ba'ath Party, the Court observes that he has claimed to have been an "advanced sympathiser" and not a full member of the party, but that he had been given a "Friends of Saddam" card which entitled him to certain privileges. In his submissions before the Government in 2005, the applicant alleged that he had held a prominent position within the Ba'ath Party and that he was well-known and hated by many. Further, in his submission of 13 September 2006 to the Court, he specified that he had been an "advanced sympathiser" which meant that he had held a high position in the hierarchy. Here, the Court observes that there is relatively little information about the structure of the Ba'ath Party (see above § 57) but that it would appear that, on the one hand, an "advanced sympathiser" was not a full member of the party and rather low in the hierarchy whereas, on the other hand, a holder of a "Friends of Saddam" card was a person who had been a Party member for at least ten years. Thus, the Court finds that, on the basis of the information and evidence presented to it, it is not possible to establish whether or not the applicant was a full member of the Ba'ath Party or, if he was, what exact level he had attained within it. However, having regard to the fact that the applicant has consistently held that he has never met Saddam Hussein or been involved in any political activities, as well as his statement that most officers within the Republican Guard and some officers in the regular army received this special card, the Court considers it highly unlikely that he belonged to any of the higher levels of the Ba'ath Party. In any event, the Court observes that the Accountability and Justice Act has opened the door for most former Ba'ath Party members to apply for reinstatement into civil service positions. Moreover, the Act has introduced an element of personal responsibility thereby removing the idea of a "collective guilt" of all Ba'ath Party members. The Court further observes that the Iraqi parliament adopted an Amnesty Law in February 2008 (see above § 61) which has resulted in the release, so far, of over 120,000 detainees in Iraq. Having regard to the aforementioned and to the above finding of the Court that the applicant did not risk being charged with any type of crime before the Iraqi courts, the Court considers that the applicant does not face a real risk of being persecuted, and even less of being

sentenced to death, for having been a member of the Ba'ath Party.

101. The applicant has further alleged that he would risk being killed extrajudicially by Shi'a militia groups because he had been in the Republican Guard. In his submission of 13 September 2006 to the Court, the applicant claimed that Shi'a militia groups have tried to find and kill all officers who had fought for Saddam Hussein in the war against Iran or against the Shi'as in southern Iraq in 1991. Moreover, in his later submission to the Court he has added that, while working with logistics, he had had to write reports on Shi'a insurgency leaders which had led to the execution of two of them.

102. As concerns this complaint, the Court first reiterates that, owing to the absolute character of the right guaranteed, Article 3 of the Convention may apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, cited above, § 40). The Court recognises that several Shi'a militia groups, and in particular the Mahdi Army, have sought revenge for previous wrong-doing against the Shi'a population without the Iraqi authorities having been able to prevent it. However, the Mahdi Army has, more than one year ago, introduced a cease-fire which is now in force for an indefinite period of time and, as a consequence, the sectarian violence has decreased significantly.

103. In relation to the applicant, the Court considers that the very late addition to his submissions, about having written reports about Shi'a insurgency leaders, is not very credible as he did not mention this before the Swedish authorities or courts at any point but only in his last submission to the Court. In any event, the Court observes that the applicant has maintained all along, including before the Court, that from 1988 until he left Iraq, he had been working in a transport division with logistics and that he had deserted from the army because he did not want to take part in the attacks against the Shi'as in Al Ahwar. To the Court, this rather indicates that the applicant did not personally carry out any violent or criminal acts against the Shi'a population for which they would seek revenge. The mere fact of him having been in the Republican Guard is not sufficient to establish that he would face a real risk of being persecuted or attacked by Shi'a militia groups. This is in particular so having regard to the Mahdi Army's cease-fire and the facts that it is more than 15 years since the applicant left Iraq and that he did not hold a prominent position within the Republican Guard or the Ba'ath Party.

104. Lastly, the applicant has expressed his fear of being convicted a second time in Iraq for the murder of his wife. However, the Court reiterates that the crime took place in **Sweden**, that the applicant was tried and convicted in **Sweden** and that he has purged his sentence in **Sweden**. The Court also notes that, despite some uncertainties surrounding its current status, the Iraqi Penal Code of 1969 prohibits retrial in Iraq of a person who has been convicted by final judgment in another country (see above § 31). In any event, the Court considers that the applicant has not submitted sufficient evidence as concerns the alleged possibility of his retrial in Iraq and therefore this complaint is unsubstantiated.

105. Having regard to all of the above, the Court concludes that substantial grounds for believing that the applicant would be exposed to a real risk of being killed or subjected to treatment contrary to Articles 2 or 3 of the Convention if deported to Iraq, have not been shown in the present case. Accordingly, the implementation of the deportation order against the applicant would not give rise to a violation of Articles 2 or 3 of the Convention.

II. RULE 39 OF THE RULES OF COURT

106. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

107. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see above § 4) must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to

the Grand Chamber under Article 43 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds* by 5 votes to 2 that the implementation of the deportation order against the applicant would not give rise to a violation of Articles 2 or 3 of the Convention;

2. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to deport the applicant until such time as the present judgment becomes final or further order.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada Josep Casadevall
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Power joined by Judge Zupančič is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE POWER JOINED BY JUDGE ZUPANČIČ

Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to (...) expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule. (*Saadi v. Italy* [GC], no. 37201/06, § 138, ECHR 2008-...)

I do not share the confidence of the majority that the forcible return of the applicant to Iraq would not engage the respondent State's obligations pursuant to Articles 2 or 3 of the Convention. As the values in issue are fundamental and the rights in question are absolute, the assessment of the existence of a risk must be a "rigorous" one (*Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports of Judgments and Decisions* 1996-V). In determining whether a risk of ill-treatment arises in the context of a proposed deportation order "*the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances*".[1]

The General Situation in Iraq

International forces have been present in Iraq since the U.S. led military invasion in March 2003. Almost six years on, several militia groups are fighting against those international forces and against each other. Updated reports from independent human rights bodies provide a revealing picture of the reality of life in Iraq and it is not reassuring.[2] According to the UNHCR, recent events in Baghdad and central Iraq show that the situation "remains highly fragile".[3] "Sectarian and intra-sectarian violence remains high" and targeted violence, suicide attacks, kidnappings and extra-judicial killings are "a regular occurrence".[4] Political assassinations, abductions and killings of journalists, members of religious and ethnic minority groups, persons not

considered to be following "Islamic" rules and former Ba'athists remain a reality.[5] No synopsis could convey, adequately, the extent of the disorder as described in the published reports and there is nothing close to a safe environment obtaining in Iraq at this time. The applicant was born in Basra but is from Baghdad. The probability of his being subjected to treatment in violation of Articles 2 or 3, if deported, must be assessed against the reality of the current situation.

In making its assessment, the majority notes that a general situation of violence existing in the country of destination does not in itself entail, in the event of deportation, a violation of Articles 2 or 3 of the Convention (see § 90 of the judgment) and it cites *H.L.R. v. France* (judgment of 29 April 1997, § 41, *Reports* 1997-III) as authority for that proposition. In *H.L.R.,* the Court was concerned with an expulsion from France to Colombia where the applicant had been involved in drug trafficking. While noting that the "atmosphere" in Colombia at the relevant time was "tense" (ibid., § 42) the Court was satisfied that there was nothing to indicate that the applicant would not be afforded appropriate protection by the authorities (ibid., § 32). The seriousness of the situation in Iraq, today, is of a different order of magnitude to the "tense atmosphere" obtaining in Colombia in 1997. The Court in *H.L.R.* cannot be regarded as having articulated an unqualified statement of principle in relation to all countries where "a general situation of violence" exists. Careful consideration must be given to the nature, severity and extent of the violence and each case must be assessed, rigorously, on its own merits.

The majority accepts that there is a "*problematic security situation in Iraq*". It notes, however, that it has improved over the last year, demonstrated, *inter alia*, by the fact that "*some Iraqis are voluntarily starting to return to their homes*" (§ 91 of the judgment). It cites the respondent State's submission that during the first four months of 2008, almost 300 Iraqis had returned home, voluntarily, from **Sweden**. There is, in my view, a world of a difference between 300 people choosing, voluntarily, to assume the risks involved in returning to their war torn country and the forcible expulsion (by a Convention State) of vulnerable people to such a volatile conflict zone. In view of the objective situation of armed conflict and violence, the UNHCR continues to advocate for "the recognition of the international protection needs of Iraqis outside their country and for a suspension of forced returns".[6] Such people "may be presumed to have international protection needs" and the UNHCR considers them to be "refugees on a *prima facie* basis".[7] While expressing the hope that Iraqis would be able to return home in safety once the necessary conditions of stability and security were established, the UNHCR nevertheless confirmed, as recently as September 2008, "that these conditions were not yet present" (see § 69 of the judgment). (Emphases added)

It is, of course, accepted that the language of the UNHCR or of other international human rights NGOs is not framed, specifically, by reference to the European Convention on Human Rights and to the high threshold of Article 3 as elaborated in the case law of this Court. Nevertheless, this Court frequently (and rightly) attaches importance to the observations and conclusions of such organisations when making its own assessment of a risk faced by an applicant if a deportation order were to be implemented. (See *Jabari v. Turkey*, no. 40035/98, § 41, ECHR 2000-VIII; *Said v. the Netherlands*, no. 2345/02, § 54, ECHR 2005-VI; *Saadi v. Italy*, cited above, § 131; and *NA v. the United Kingdom*, no.25904/07, § 124, 17 July 2008.) Thus, the objective reports of independent human rights bodies must be given due weight and, when considered with other factors in relation to alleged risk, *may* be decisive in terms of tipping the balance when it comes to the preponderance of evidence. Faced with the divergent claims of opposing parties and having regard to the rigorous assessment that is required, I take the view that significant weight should attach to the objective reports of independent human rights organisations regarding the current situation in Iraq, particularly, where those reports address, specifically, the grounds for the alleged real risk of ill treatment that are raised in the case before the Court.

The Personal Circumstances of the Applicant

Against the background of the general situation in Iraq, the Court is obliged to consider the personal circumstances of the proposed deportee in its assessment of the risks involved. The

applicant is, undoubtedly, a vulnerable person, who was detained and treated within the respondent State's psychiatric care services in the aftermath of the deranged and unlawful killing of his wife in a state of "*serious mental disturbance*". That vulnerability is a factor to be weighed in the balance.

In addition, regard must also be had to the specific circumstances which he claims would expose him to a real risk of being killed, tortured or ill-treated if deported to Iraq. These include, *inter alia*, his former military activities as an officer and a major within the Republican Guard, his consequent interest to Shi'a militia groups that, allegedly, report upon the whereabouts of such former officers and execute them and his membership of the minority Christian faith. He also claims that the risk of being killed or ill-treated is augmented by the possibility that he will face a retrial in Iraq arising from his conviction, in **Sweden**, for the death of his wife.

Assessment of Risk Based on Membership of Former Regime

The majority does not question the applicant's membership of the Republican Guard nor his war time service in Iran and the Gulf under Saddam Hussein. However, having regard to the fact that he claims not to have, personally, killed anyone but only to have provided "support" (in the form of tanks and transport) to those in the "front line" (who, presumably, did) and in view of the fact that "some" former Republican Guards have been integrated into the new Iraqi army, the majority concludes that there is nothing to indicate that he would be charged with any crime before the Iraqi courts and that "there is no real risk that he would be sentenced to death" (§ 99 of the judgment).

In its 2008 Report, Amnesty International stated, specifically, in relation to the trials of former officials that the Supreme Iraqi Criminal Tribunal (SICT) *"continued to try former senior party, army, security and Government officials associated with the previous Ba'ath administration headed by Saddam Hussein for gross human rights violations committed during Saddam Hussein's rule."*[8] It observed that "*several defendants were sentenced to death after grossly unfair trials and three, sentenced in 2006, were executed"*.[9] In such circumstances, the distinction between front line service and front line support under the Hussein regime may be quite irrelevant if the applicant faces trial in a country whose legal culture, according to Human Rights Watch, has not yet accepted concepts like the right to a credible defence nor committed itself to meeting basic standards of due process.[10]

The applicant also claims that if returned to Iraq he would face a real risk of being killed, extra-judicially, by Shi'a militia groups who are actively looking for people with his background and killing them because of their association with the former regime. He claims that two militia leaders were executed by the former regime following reports written by him when he was an officer in the Republican Guard. In assessing the risk posed to the applicant by Shi'a militia groups, the majority, firstly, finds his account about the writing of reports on insurgency leaders to be "not very credible" because of the late reference thereto in the overall proceedings. I disagree. The applicant had no reason to furnish details of such reports in his initial asylum interviews in 1993 because his fear, at that time, had nothing to do with the activities of Shi'a militia groups. It was grounded, instead, upon the likely consequences he would face, having deserted Hussein's regime. His first reference to a fear of persecution from Shi'a militias came, understandably, much later on in the proceedings (January 2004) in the aftermath of the fall of the former dictator.

However, even if doubt surrounds such detail as the writing of two reports, no doubt, whatsoever, has been cast over the fact that the applicant was an officer and a major within the Republican Guard and a "card carrying member" of the former regime. According to the respondent State's own information regarding extrajudicial attacks, there is a "*great risk*" of being affected in large parts of Iraq. Its sources confirmed that "S*everal Shia extremist militia groups, often on dubious grounds, more or less systematically, and very extensively sought out people who were guilty of being "fellow travellers" of the earlier regime and of aggression under that regime*".[11]

The majority recognises "*that several Shi'a militia groups, and in particular the Mahdi Army,*

have sought revenge for previous wrongdoing against the Shi'a population without the Iraqi authorities having been able to prevent it" (§ 102 of the judgment). Yet, in response to the applicant's claim concerning the risk posed to him by such groups and notwithstanding the respondent State's confirmation of their extensive pursuit of former "fellow travellers", the majority concludes that there is no real risk based on the "mere fact" of the applicant's membership of the Republican Guard. They rely, *inter alia*, upon the fact that *one* such militia group, the Mahdi Army, has introduced a ceasefire over a year ago. The judgment remains silent, however, on the risk posed by the *several other militia groups* who have entered into no such ceasefire. Consequently, the assessment of the risk of the applicant being killed or ill treated by Shi'a militias, in my view, falls short of the "rigour" that is required as a matter of law.

Where an applicant adduces evidence capable of proving that there are substantial grounds for believing that if deported he would be exposed to a real risk of treatment contrary to Article 3, it is for the respondent government to dispel any doubts about it (*NA v. the United Kingdom*, cited above, § 111) (emphasis added). Instead of dispelling doubts about the evidence of the risks alleged, the respondent State's information, as cited above, tends to endorse the applicant's claim. Additionally, the applicant has cited as evidence the fact that on 23 May 2007 Talal Karim Tobi was executed. This execution, he claims, was broadcast on Iraqi television. The applicant stated that he knew Mr Tobi and that he was of the same background as the applicant, namely, "a Christian officer who was a member of the Republican Guard".[12] There is nothing in the respondent State's submissions either addressing this matter or seeking to distinguish it from the instant case, let alone dispelling any doubts about it. Accordingly, the requirement of the principle set out in *NA v. the United Kingdom* has not, to my mind, been met.

Assessment of Risk Based on Religious Affiliation

In its conclusion that the applicant would not face a real risk of persecution based on his religious affiliation, the majority refer to the fact that "*there is no State sanctioned persecution of Christians*" (§ 97 of the judgment). That not being the requisite test, however, they proceed to find that protection from the Iraqi authorities would be available, if necessary. Their conclusion, in this regard, is difficult to reconcile with such objective evidence as is available. In its decision on admissibility in May of this year, the Court noted the increase in violence and threats against Christians in Iraq.[13] The evidence available, today, indicates a deterioration rather than an improvement in the situation. In October 2008, twelve Christians were killed in Mosul and others were threatened to leave the city. Consequently, some 11,000 Christians have fled notwithstanding directions from the Iraqi Prime Minister ordering the police and the army to protect such minorities (§ 67 of the judgment).

Reports from the British Home Office UK Border Agency (UKBA) and the International Minority Rights Group (MRG) also confirm that Iraq's Christians are threatened and targeted as a minority group, particularly, in Baghdad.[14] According to the MRG Report of 2008 "*Iraq's Christian minorities (...) are now all under severe threat.*" [15] While making up 4 per cent of the overall population, it is claimed that they constitute 40 per cent of Iraqi refugees.[16] In the light of such evidence and the respondent government's failure to "dispel any doubts" about it, once again, the requirement set out in *NA v. the United Kingdom* has not been met and the assessment of the risk, in my view, lacks the "rigour" required as a matter of law.

Assessment of the Risk of Retrial

That same deficiency is also apparent, to my mind, in the majority's reasoning on the applicant's claim that he fears a retrial in Iraq in relation to the death of his wife. On the current status of the law in Iraq, the respondent State has submitted the following. The death penalty was reintroduced in 2004 for certain offences, including murder. It is difficult to give an opinion on the probability of a death sentence and its enforcement, other than to say that its use has increased.[17] It is not clear which legislation is applied in Iraqi courts.[18] It is not known whether a legal provision of the 1969 Penal

Code prohibiting re-trials (without the Ministry for Justice's permission) following convictions abroad is still in force.[19] It cannot be taken for granted that a person sentenced for a crime abroad can be sure, on that account, of being free in Iraq if the act is also criminal under Iraqi law.[20] Article 2 of the new Iraqi Constitution stipulates that Islam constitutes the fundamental source of justice and that no law may contradict the teachings of Islam.[21] It is very difficult to assess "tribal justice" in Iraq.[22]

Despite the doubts, uncertainties and general lack of information admitted by the respondent State in this regard, the majority concludes that there "*seems to be no reason why an Iraqi court would indict and retry the applicant*". This conclusion is difficult to reconcile with the dearth of information concerning the risk of a retrial. All of the uncertainties surrounding this risk reflect, manifestly, the underlying reality that the Iraqi legal system is itself uncertain and that there are indications linking "*present criminal justice to past repression through the arbitrary exercise of authority.*"[23]

Given the absolute nature of the rights in issue and the acknowledged uncertainty surrounding the risk of re-trial and penalty, I cannot agree that the applicant's claim in this regard can be set aside as "unsubstantiated". An assertion of an exposure to a real risk of death and ill-treatment has been made. It has not been denied. The best that is available by way of response is an honest admission of uncertainty. In such circumstances, this Court should not set aside the applicant's claim without being satisfied that a thorough and rigorous assessment of that risk has been conducted. If such an assessment is not possible then the doubt has not been dispelled and the applicant should not be exposed to facing the risk alleged.

Because of his official rank within Saddam Hussein's Republican Guard, his consequent interest to Shi'a militias, his membership of the minority Christian faith and his possible retrial in a country which has recently reintroduced the death penalty for the offence in question, the applicant has, in my view, produced cumulative evidence capable of proving that there are substantial grounds for believing that, if deported, he would be exposed to a real risk of treatment contrary to Articles 2 and 3. It was for the respondent State "*to dispel any doubts about it*". This has not been done. Therefore, having regard to his personal circumstances and against the background of the general situation in Iraq today, I am satisfied that it has been established, on the balance of probabilities, that there would be a violation of the applicant's rights under Articles 2 or 3 of the Convention if the decision to deport him were to be enforced.

[1] *Saadi v Italy*, § 130.

[2]See UNHCR, *Strategy for the Iraq Situation*, (Revised 1 January 2007); and UNHCR, *Addendum to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, (UNHCR, Geneva, December 2007); Amnesty International Report 2008, *The State of the World's Human Rights*; Human Rights Watch *The Quality of Justice: Failings of Iraqi's Central Criminal Court*, December 2008.

[3]See UNHCR, *Addendum to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, (UNHCR, Geneva, December 2007), p. 10.

[4] Ibid., p. 6.

[5] Ibid.

[6] UNHCR, *Strategy for the Iraq Situation*, (Revised 1 January 2007), p. 3, § 11.

[7] Ibid., § 12.

[8] Amnesty International Report 2008, *The State of the World's Human Rights,* p. 163.

[9] Ibid.

[10] Human Rights Watch, *The Quality of Justice: Failings of Iraqi's Central Criminal Court*, December 2008, p. 3.

[11]Government's Observations on Admissibility and Merits, 27 April 2007, § 51; see also, § 60 of Judgment.

[12] Applicant's Observations on Admissibility and Merits, 20 June 2007.

[13] Decision of 13 May 2008, § 61.

[14] UK Border Agency *Country of Origin Information Report: Iraq*, 3 September 2008, pp. 134-137.

[15] International Minority Rights Group Report, 2008.

[16] Ibid.

[17] Government's Observations on Admissibility and Merits, 27 April 2007, § 50.

[18] Ibid., § 38.

[19] Ibid.

[20] Ibid., § 52.

[21] Ibid.

[22] Ibid., § 38.

[23] Human Rights Watch, *The Quality of Justice: Failings of Iraqi's Central Criminal Court*, December 2008, p. 3.