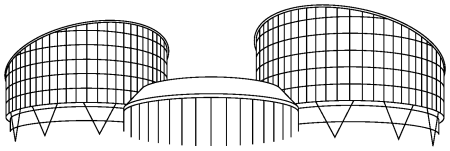

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF J.K. AND OTHERS v. SWEDEN

(Application no. 59166/12)

JUDGMENT

STRASBOURG

23 August 2016

This judgment is final but it may be subject to editorial revision.

In the case of J.K. and Others v. Sweden,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Kristina Pardalos,
Helena Jäderblom,
Krzysztof Wojtyczek,
Valeriu Griţco,
Dmitry Dedov,
Iulia Motoc,
Jon Fridrik Kjølbro,
Síofra O'Leary,
Carlo Ranzoni,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Alena Poláčková, *judges,*

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 24 February 2016 and on 27 June 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 59166/12) 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 three Iraqi nationals, Mr J.K. and his wife and son ("the applicants"), on 13 September 2012. The President of the Grand Chamber upheld the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants, who had been granted legal aid, were represented by Ms C. Skyfacos, a lawyer practising in Limhamn. The Swedish Government ("the Government") were represented by their Agent, Mr A. Rönquist, of the Ministry for Foreign Affairs.

3. The applicants alleged, in particular, that their removal to Iraq would entail a violation of Article 3 of the Convention.

4. On 18 September 2012 the President of the Third Section of the Court decided to apply Rule 39 of the Rules of Court, indicating to the

Government that the applicants should not be deported to Iraq for the duration of the proceedings before the Court. The application was thereafter allocated to the Fifth Section of the Court (Rule 52 § 1). On 4 June 2015 a Chamber of that Section, composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Vincent A. De Gaetano, André Potocki, Helena Jäderblom and Aleš Pejchal, judges, and also of Milan Blaško, Deputy Section Registrar, delivered its judgment. It decided unanimously to declare the complaint concerning Article 3 of the Convention admissible, and held, by five votes to two, that the implementation of the deportation order in respect of the applicants would not give rise to a violation of Article 3. The partly dissenting opinion of Judge Zupančič and a statement of dissent by Judge De Gaetano were annexed to the judgment. On 25 August 2015 the applicants requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 19 October 2015 the panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Síofra O'Leary, substitute judge, replaced András Sajó, who was prevented from sitting (Rule 24 § 3).

6. The applicants and the Government each filed further written observations (Rule 59 § 1) on the merits.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 24 February 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr A. RÖNQUIST, Ambassador and Director-General for Legal Affairs, Ministry for Foreign Affairs, *Agent*,
Ms K. FABIAN, Deputy Director, Ministry for Foreign Affairs,
Ms H. LINDQUIST, Special Adviser, Ministry for Foreign Affairs,
Ms A. WILTON WAHREN, Deputy Director-General, Ministry of Justice,
Ms L. ÖMAN BRISTOW, Desk Officer, Ministry of Justice,
Ms Å. CARLANDER HEMINGWAY, Head of Unit, Swedish Migration Agency, *Advisers*;

(b) *for the applicants*
Ms C. SKYFACOS, *Counsel*,
Ms Å. NILSSON, *Adviser*.

The Court heard addresses by Mr Rönquist, Ms Skyfacos and Ms Nilsson, as well as Mr Rönquist's reply to a question put by one of the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, a married couple and their son, were born in 1964, 1965 and 2000 respectively.

A. Account of events in Iraq

9. The applicants were brought up in Baghdad. Since the 1990s the husband (the first applicant) had run his own construction and transport business with exclusively American clients and had had his office at the United States military base "Victoria camp" (seemingly referring to Camp Victory). Several of his employees had on occasion been warned not to cooperate with the Americans.

10. On 26 October 2004 the first applicant was the target of a murder attempt carried out by al-Qaeda. He had to stay in hospital for three months. There, unknown men asked for him, after which he was treated in three different hospitals.

11. In 2005 his brother was kidnapped by al-Qaeda members, who claimed that they would kill him because of the first applicant's collaboration with the Americans. His brother was released through bribery a few days later and immediately fled from Iraq. The applicants fled to Jordan and stayed there until December 2006, before returning to Iraq.

12. Soon afterwards, al-Qaeda members placed a bomb next to the applicants' house. However, it was detected by the first applicant's wife (the second applicant), and the American forces arrested the perpetrator. During interrogation, the perpetrator confessed that he had been paid by al-Qaeda to kill the first applicant and disclosed the names of sixteen people who had been designated to watch the applicants. Thereafter, the applicants moved to Syria, although the first applicant continued his business in Iraq. During this time, al-Qaeda destroyed their home and the first applicant's business stocks.

13. In January 2008 the applicants returned to Baghdad. In October 2008 the first applicant and his daughter were shot at when driving. The daughter was taken to hospital, where she died. The first applicant then stopped working and the family moved to a series of different locations in Baghdad. The first applicant's business stocks were attacked four or five times by al-Qaeda members, who had threatened the guards. The first applicant stated that he had not received any personal threats since 2008 as the family had repeatedly moved around. The son (the third applicant) had spent most of his time indoors for fear of attacks and had only attended school for his final examinations. The applicants had never asked the domestic authorities for protection, fearing that the authorities lacked the ability to protect them and

might disclose their address, on account of al-Qaeda's collaboration with the authorities. The applicants maintained that, in the event of their return to Iraq, they risked persecution by al-Qaeda and that the first applicant appeared on al-Qaeda's death list.

B. Ordinary asylum proceedings

14. On 14 December 2010 the first applicant applied for asylum and a residence permit in Sweden. On 11 July 2011 his application was rejected since he was registered as having left the country.

15. On 25 August 2011 the first applicant applied anew for asylum and a residence permit in Sweden, as did the other applicants on 19 September 2011. As to their state of health, the first applicant still had an open and infected wound on his stomach where he had been shot in 2004. They submitted several documents, including identity papers, a death certificate for the first and second applicants' daughter and a medical certificate for the first applicant's injury.

16. All three applicants were given an introductory interview by the Migration Agency (*Migrationsverket*) on 26 September 2011. Subsequently, the first and second applicants were given a further interview on 11 October 2011, which lasted almost three and a half hours. The third applicant was interviewed briefly for a second time and the first applicant was interviewed a third time. The applicants were assisted by State-appointed counsel.

17. On 22 November 2011 the Migration Agency rejected the applicants' asylum application. In respect of the Iraqi authorities' ability to provide protection against persecution by non-State actors, the Agency stated:

> "...
>
> Every citizen should have access to police authorities within a reasonable visiting distance. During the past few years the police authorities have taken numerous measures to fight against corruption, clan and militia connections and pure criminality within the police.
>
> The current country information, however, shows that there are serious shortcomings in the police's work on crime-scene investigations and inquests. One of the reasons is probably that many police officers are relatively new and lack experience, and that it takes time to introduce a new method of investigation based on technical evidence. This problem is naturally accentuated by the fact that many individual police officers live under a threat emanating from different terrorist groups, which is likely to diminish their effectiveness. Nevertheless, the current country information shows that the number of suspects who have been prosecuted during the past few years has increased significantly. Even if fewer than half of all suspects are eventually prosecuted, this is still an improvement.
>
> The Iraqi security forces have been reinforced significantly and no longer have any shortcomings in human terms. Instances of police infiltration, which were previously widespread, have decreased significantly. The leading representatives of the police

authority have expressed both their willingness and their ambition to maintain general security in Iraq. The current country information also shows that it has become more difficult for al-Qaeda Iraq to operate freely in Iraq and that there has been a significant decline in sectarian violence. Today violence is mainly aimed at individual targets, especially civil servants, police, security forces and some minorities.

..."

Regarding the assessment of the applicants' refugee status, as well as their need for alternative protection, the Agency held as follows:

"...

The Migration Agency notes that [the first applicant] had a contract with the Americans until 2008. For this reason [the first applicant] has been exposed to two murder attempts, his brother has been kidnapped and [the first and second applicant]'s daughter has been killed. Furthermore, on several occasions, [the first applicant] has suffered physical damage to his house and stock. [The first and second applicants] are convinced that al-Qaeda is behind these abuses. The family are also afraid of al-Qaeda in the event of their return.

The Migration Agency notes that [the first applicant] stopped working for the Americans in 2008 after his and [the second applicant]'s daughter was killed. The Migration Agency further notes that [the first applicant] stayed in Baghdad until December 2010 and that [the second and third applicants] lived in Baghdad until September 2011. During this period they were not exposed to any direct abuses. [The first applicant] has, however, been indirectly threatened on four or five occasions by the people who guard his stock. Also, his stock has been attacked. [The first and second applicants] explained that they had managed to escape from abuses because they were in hiding and living in different places in Baghdad. The Migration Agency notes that [the first and second applicants] have two daughters who live with their grandmother in Baghdad and a daughter who is married and lives with her family in Baghdad. These family members have not been exposed to any threats or abuses.

The Migration Agency notes that the abuses which the family claim to be at risk of being exposed to are criminal acts which their home country's authorities have a duty to prosecute. In order to decide whether the family can enjoy protection against the abuses they fear, the Migration Agency notes the following.

In accordance with the principle that it is for an asylum-seeker to justify his or her need for protection and that it is primarily for the applicant to provide relevant information for the assessment in the case, the onus must be on the applicant to plead that he or she cannot or, owing to a severe fear of the consequences, for example, will not avail himself or herself of the protection of the authorities available in Iraq. In addition, the applicant must justify this. The shortcomings which still exist in the Iraqi legal system are then to be noted and evaluated in the context of the individual assessment of each asylum case. The circumstances on which an applicant relies in arguing that protection by the authorities is deficient are first of all examined in the usual way. In those cases in which the alleged risk of persecution or other abuses does not emanate from the authorities, which as a rule is the case in Iraq, the applicant must show what efforts he or she has made to be afforded protection by the authorities. The applicant can do this either by relying on evidence or by giving a credible account of events which appear plausible. When assessing the authorities' ability to protect against threats of violence emanating from terrorist groups or unknown perpetrators in a specific case, the individual's situation, as well as the severity of the violence or threats, their nature and their local reach, must be assessed individually (see Migration

Agency, Legal opinion on protection by the authorities in Iraq, 5 April 2011, Lifos 24948).

The Migration Agency considers that the family have been exposed to the most serious forms of abuses (*ytterst allvarliga övergrepp*) by al-Qaeda from 2004 until 2008. Such abuses, however, took place three years ago and nowadays it is more difficult for al-Qaeda to operate freely in Iraq. [The first and second applicants] never turned to the Iraqi authorities for protection. [The first applicant] has stated that the Iraqi authorities lack the capacity to protect the family. Further, he has stated that he did not dare to turn to the authorities because he would then have been forced to disclose his address, which could have resulted in al-Qaeda being able to find him. [The second applicant] has stated that al-Qaeda works together with the authorities. As stated earlier, the Migration Agency finds that there has been a significant decline in instances of police infiltration, which previously were widespread. Against the background of the fact that [the first and second applicants] have not even tried to seek the protection of the Iraqi authorities, the Migration Agency considers that they have not made a plausible case that they would not have access to protection by the authorities in the event of potential threats from al-Qaeda upon returning to Iraq.

Against this background, the Migration Agency finds that [the first and second applicants] have not made a plausible case that the Iraqi authorities lack the capacity and the will to protect the family from being exposed to persecution within the meaning of Chapter 4, section 1, of the Aliens Act or to abuses within the meaning of Chapter 4, section 2, first subsection, first point, first line, of the Aliens Act. The Migration Agency notes in this context that there is no armed conflict in Iraq. The Migration Agency therefore finds that the family are not to be regarded as refugees or as being in need of alternative or other protection, for which reason the family do not have the right to refugee status or alternative protection status.

The Migration Agency notes that fierce tensions between opposing factions are prevalent in Baghdad. Nevertheless, against the background of the above reasoning, the Migration Agency finds that the family also cannot be regarded as being otherwise in need of protection, within the meaning of Chapter 4, section 2a, first subsection, of the Aliens Act. The family do not therefore have any right to a status falling under any other need of protection.

...”

In conclusion, the Migration Agency found that there were no grounds to grant the family residence permits. Against this background, the Migration Agency rejected the family’s application and ordered their deportation from Sweden on the strength of Chapter 8, section 1, of the Aliens Act.

18. The applicants appealed to the Migration Court (*Migrationsdomstolen*), maintaining that the Iraqi authorities had been and would be unable to protect them. They had contacted the police following the fire to their home and the first applicant’s business stock in 2006 and 2008 and the murder of the first and second applicants’ daughter in 2008, but thereafter they had not dared to contact the authorities owing to the risk of disclosing their residence. Together with their written submissions, they enclosed a translated written statement allegedly from a neighbour in Baghdad, who stated that a masked terrorist group had come looking for the first applicant on 10 September 2011 at 10 p.m. and that the neighbour had

told them that the applicants had moved to an unknown place. The neighbour also stated that, just after the incident, the first applicant had called him and been told about the incident. The applicants also submitted a translated residence certificate/police report allegedly certifying that their house had been burned down by a terrorist group on 12 November 2011. Furthermore, the applicants submitted a DVD containing an audiovisual recording of a public debate on television concerning corruption and the infiltration of al-Qaeda members within the Iraqi administration. The applicants mentioned in that connection that the first applicant had participated in the public debate, which had been broadcast on the Alhurra channel in Iraq on 12 February 2008, that is to say, four years earlier. Finally, submitting various medical certificates, the applicants contended that the first applicant's health had deteriorated and that he could not obtain adequate hospital care in Iraq.

The Migration Agency made submissions before the Migration Court. It stated, among other things, that the documents submitted concerning the alleged incidents on 10 September and 12 November 2011 were of a simple nature and of little value as evidence.

19. On 23 April 2012 the Migration Court upheld the Migration Agency's decision. Concerning the need for protection, the court held:

> "It is undisputed in the present case that the applicants' grounds for protection must be examined in relation to Iraq. The general situation in Iraq is not such that as to confer the automatic right to a residence permit. Therefore, an individual assessment of the grounds for protection invoked by the applicants must be made.
>
> The applicants have alleged that they are in need of protection upon returning to Iraq as they risk being exposed to ill-treatment by al-Qaeda because [the first applicant]'s company did contract-based work for the Americans in Iraq until 2008.
>
> The Migration Court considers that the alleged events took place in the distant past, that it is difficult to see why there would still be a threat as [the first applicant] no longer performs such work, and that, in the event that some threats should still exist, it appears likely [*framstår som troligt*] that the Iraqi law-enforcement authorities are both willing and able to offer the applicants the necessary protection. In such circumstances, there are no grounds to grant the applicants any residence permit on the basis of a need for protection.
>
> ..."

20. The applicants appealed to the Migration Court of Appeal (*Migrationsöverdomstolen*). Their request for leave to appeal was refused on 9 August 2012.

C. Extraordinary proceedings

21. On 29 August 2012 the applicants submitted an application to the Migration Agency for a re-examination of their case. They maintained that the first applicant was under threat from al-Qaeda because he had been

politically active. They enclosed a video showing the first applicant being interviewed in English, a video showing a demonstration, and a video showing a television debate.

22. On 26 September 2012 the Migration Agency refused the applicants' application. The applicants did not appeal to the Migration Court against that decision.

II. RELEVANT DOMESTIC LAW

23. The basic provisions applicable in the present case, concerning the right of aliens to enter and to remain in Sweden, are laid down in the Aliens Act (*Utlänningslagen*, Act no. 2005:716).

24. An alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence permit in Sweden (Chapter 5, section 1, of the Act). The term "refugee" refers to an alien who is outside the country of his or her nationality owing to a well-founded fear of being persecuted on grounds of race, nationality, religious or political beliefs, or on grounds of gender, sexual orientation or other membership of a particular social group, and who is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country (Chapter 4, section 1). This applies irrespective of whether the persecution is at the hands of the authorities of the country or if those authorities cannot be expected to offer protection against persecution by private individuals. By "an alien otherwise in need of protection" is meant, *inter alia*, a person who has left the country of his or her nationality because of a well-founded fear of being sentenced to death or receiving corporal punishment, or of being subjected to torture or other inhuman or degrading treatment or punishment (Chapter 4, section 2).

25. Moreover, if a residence permit cannot be granted on the above grounds, such a permit may be issued to an alien if, after an overall assessment of his or her situation, there are such particularly distressing circumstances (*synnerligen ömmande omständigheter*) as to allow him or her to remain in Sweden (Chapter 5, section 6).

26. As regards the enforcement of a deportation or expulsion order, account has to be taken of the risk of capital punishment or torture and other inhuman or degrading treatment or punishment. According to a special provision on impediments to enforcement, an alien must not be sent 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 (Chapter 12, section 1). In addition, an alien must not, in principle, be sent to a country where he or she risks persecution (Chapter 12, section 2).

27. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has acquired legal force. This is the

case where new circumstances have emerged which indicate that there are reasonable grounds for believing, *inter alia*, that enforcement would put the alien in danger of being subjected to capital or corporal punishment, torture or other inhuman or degrading treatment or punishment, or where there are medical or other special reasons why the order should not be enforced (Chapter 12, section 18). If a residence permit cannot be granted under these criteria, the Migration Agency may instead decide to re-examine the matter. Such re-examination is to be carried out where it may be assumed, on the basis of new circumstances invoked by the alien, that there are lasting impediments to enforcement of the nature referred to in Chapter 12, sections 1 and 2, and that these circumstances could not have been raised previously or the alien shows that he or she has a valid excuse for not having done so. Should the applicable conditions not have been met, the Migration Agency will decide not to grant re-examination (Chapter 12, section 19).

28. Matters concerning the right of aliens to enter and remain in Sweden are dealt with by three bodies: the Migration Agency, the Migration Court and the Migration Court of Appeal.

29. A deportation or expulsion order may – save for a few exceptions of no relevance to the present case – be enforced only when it has acquired legal force. Thus, appeals to the courts against a decision by the Migration Agency on an application for asylum and a residence permit in ordinary proceedings have automatic suspensive effect. If, after the decision in the ordinary proceedings has acquired legal force, the alien makes an application under Chapter 12, sections 18 or 19, it is up to the Agency to decide whether to suspend the enforcement (*inhibition*) on the basis of the new circumstances presented. Accordingly, such an application does not have automatic suspensive effect, nor does an appeal to the courts against a decision taken by the Agency under section 19 (no appeal lies against a decision taken under section 18).

III. RELEVANT COUNTRY INFORMATION ON IRAQ

30. Extensive information about the general human rights situation in Iraq and the possibility of internal relocation to the Kurdistan Region can be found in, *inter alia*, *M.Y.H. and Others v. Sweden* (no. 50859/10, §§ 20-36, 27 June 2013) and *A.A.M. v. Sweden* (no. 68519/10, §§ 29-39, 3 April 2014). The information set out below concerns events and developments occurring after the delivery of the latter judgment on 3 April 2014.

A. General security situation

31. In mid-June 2014, following clashes which had begun in December 2013, the Islamic State of Iraq and al-Sham (ISIS – also known as Islamic

State of Iraq and the Levant (ISIL)) and aligned forces began a major offensive in northern Iraq against the Iraqi Government during which they captured Samarra, Mosul and Tikrit.

32. According to a briefing by Amnesty International entitled "Northern Iraq: Civilians in the line of fire", dated 14 July 2014:

> "The takeover in early June by the Islamic State in Iraq and al-Sham (ISIS) of Mosul, Iraq's second largest city, and other towns and villages in north-western Iraq has resulted in a dramatic resurgence of sectarian tensions and the massive displacement of communities fearing sectarian attacks and reprisals. Virtually the entire non-Sunni population of Mosul, Tal 'Afar and surrounding areas which have come under ISIS control has fled following killings, abductions, threats and attacks against their properties and places of worship.
>
> It is difficult to establish the true scale of the killings and abductions that ISIS has committed. Amnesty International has gathered evidence about scores of cases. To date, ISIS does not appear to have engaged in mass targeting of civilians, but its choice of targets – Shi'a Muslims and Shi'a shrines – has caused fear and panic among the Shi'a community, who make up the majority of Iraq's population but are a minority in the region. The result has been a mass exodus of Shi'a Muslims as well as members of other minorities, such as Christians and Yezidis. Sunni Muslims believed to be opposed to ISIS, members of the security forces, civil servants, and those who previously worked with US forces have similarly fled – some after they and their relatives were targeted by ISIS.
>
> ISIS has called on former members of the security forces and others whom they consider were involved in government repression to 'repent', and has promised not to harm those who do. The process involves a public declaration of repentance (*towba*), which in effect also entails a pledge of allegiance and obedience to ISIS, in mosques specially designated for the purpose. Many of those who have remained in ISIS-controlled areas are taking up the invitation and publicly repenting. The practice, however, is not without risks, as it allows ISIS to collect names, addresses, ID numbers and other identification details of thousands of men, who it could decide to target later.
>
> Meanwhile, Amnesty International has gathered evidence pointing to a pattern of extrajudicial executions of detainees by Iraqi government forces and Shi'a militias in the cities of Tal 'Afar, Mosul and Ba'quba. Air strikes launched by Iraqi government forces against ISIS-controlled areas have also killed and injured dozens of civilians, some in indiscriminate attacks.
>
> This briefing is based on a two-week investigation in northern Iraq, during which Amnesty International visited the cities of Mosul, Kirkuk, Dohuk and Erbil and surrounding towns and villages in these areas, and the camps for displaced people in al-Khazer/Kalak and Garmawa; and met with survivors and relatives of victims of attacks perpetrated by ISIS and by government forces and allied militias, civilians displaced by the conflict, members and representatives of minorities, religious figures, local civil society organizations, international organizations assisting the displaced, and Peshmerga military commanders. All the interviews mentioned in the document were carried out during this visit.
>
> ...
>
> Amnesty International's assessment is that all parties to the conflict have committed violations of international humanitarian law, including war crimes, and gross abuses

of human rights. What is more, their attacks are causing massive displacement of civilians.

Where armed actors operate in populated residential areas, the warring parties must take all feasible precautions to minimize harm to civilians. They must take precautions to protect civilians and civilian objects under their control against the effects of attacks by the adversary, including by avoiding – to the maximum extent feasible – locating military objectives within or near densely populated areas. International humanitarian law also expressly prohibits tactics such as using 'human shields' to prevent attacks on military targets. However, failure by one side to separate its fighters from civilians and civilian objects does not relieve its opponent of its obligation under international humanitarian law to direct attacks only at combatants and military objectives and to take all necessary precautions in attacks to spare civilians and civilian objects. International humanitarian law prohibits intentional attacks directed against civilians not taking part in hostilities, indiscriminate attacks (which do not distinguish between civilian and military targets), and disproportionate attacks (which may be expected to cause incidental harm to civilians that would be excessive in relation to the concrete and direct military advantage anticipated). Such attacks constitute war crimes. These rules apply equally to all parties to armed conflicts at all times without exception.

The conflict in northern Iraq has displaced hundreds of thousands of civilians, who have fled to neighbouring Kurdish areas administered by the KRG. Most are living in dire conditions, some in camps for internally displaced people (IDPs) and others sheltering in schools, mosques, churches and with host communities. At first civilians who fled after ISIS captured large areas of north-western Iraq were being allowed to enter the Kurdistan Region of Iraq (KRI), but in recent weeks access for non-Kurdish Iraqis has been severely restricted by the KRG. Some of those who fled are seeking refuge in the KRI while others, mostly Shi'a Turkmen and Shabak, want to travel southwards to the capital and beyond where the majority of the population is Shi'a and where they feel they would be safer.

While the Iraqi central government remains beset by political and sectarian divisions, and the KRG appears increasingly focused on annexing more territory to the areas it controls, Iraqi civilians caught up in the conflict are finding it increasingly difficult to find protection and assistance.

Amnesty International calls on all parties to the conflict to put an immediate end to the killing of captives and the abduction of civilians; to treat detainees humanely at all times; to refrain from carrying out indiscriminate attacks, including the use of artillery shelling and unguided aerial bombardments in areas with large concentrations of civilians. It also reiterates its call on the KRG to allow civilians who are fleeing the fighting – whatever their religion or ethnicity – to seek refuge in and safe passage through KRG-controlled areas."

33. The position of the Office of the United Nations High Commissioner for Refugees (UNHCR) on returns to Iraq, dated October 2014, stated among other things:

"*Introduction*

1. Since the publication of UNHCR's 2012 Iraq Eligibility Guidelines and the 2012 Aide Mémoire relating to Palestinian refugees in Iraq, Iraq has experienced a new surge in violence between Iraqi security forces (ISF) and Kurdish forces (*Peshmerga*) on the one hand and the group 'Islamic State of Iraq and Al-Sham' (hereafter ISIS), which operates both in Iraq and Syria, and affiliated armed groups on the other hand. Civilians are killed and wounded every day as a result of this surge of violence, including suicide attacks and car bombs, shelling, airstrikes, and executions. As a result of advances by ISIS, the Government of Iraq is reported to have lost full or partial control over considerable parts of the country's territory, particularly in Al-Anbar, Ninewa, Salah Al-Din, Kirkuk and Diyala governorates. Although the ISF and Kurdish forces, supported by US airstrikes, have recently regained control over some localities, mostly along the internal boundaries with the Kurdistan Region, overall frontlines remain fluid. The conflict, which re-escalated in Al-Anbar governorate in January 2014 and since then spread to other governorates, has been labelled as a non-international armed conflict. Casualties so far in 2014 represent the highest total since the height of sectarian conflict in 2006-2007.

...

UNHCR Position on Returns

27. As the situation in Iraq remains highly fluid and volatile, and since all parts of the country are reported to have been affected, directly or indirectly, by the ongoing crisis, UNHCR urges States not to forcibly return persons originating from Iraq until tangible improvements in the security and human rights situation have occurred. In the current circumstances, many persons fleeing Iraq are likely to meet the 1951 Convention criteria for refugee status. When, in the context of the adjudication of an individual case of a person originating from Iraq, 1951 Convention criteria are found not to apply, broader refugee criteria as contained in relevant regional instruments or complementary forms of protection are likely to apply. In the current circumstances, with massive new internal displacement coupled with a large-scale humanitarian crisis, mounting sectarian tensions and reported access restrictions, particularly into the Kurdistan Region of Iraq, UNHCR does in principle not consider it appropriate for States to deny persons from Iraq international protection on the basis of the applicability of an internal flight or relocation alternative. Depending on the profile of the individual case, exclusion considerations may need to be examined."

34. According to Human Rights Watch's World Report 2015 on Iraq, issued on 29 January 2015:

"*Abuses by Security Forces and Government-Backed Militias*

In March, former Prime Minister al-Maliki told senior security advisers that he would form a new security force consisting of three militias: Asa'ib, Kita'ib Hezbollah, and the Badr Brigades. These militias kidnapped and murdered Sunni civilians throughout Baghdad, Diyala, and Hilla provinces, at a time when the armed conflict between government forces and Sunni insurgents was intensifying.

According to witnesses and medical and government sources, pro-government militias were responsible for the killing of 61 Sunni men between June 1 and July 9, 2014, and the killing of at least 48 Sunni men in March and April in villages and towns in an area known as the 'Baghdad Belt'. Dozens of residents of five towns in the Baghdad Belt said that security forces, alongside government-backed militias,

attacked their towns, kidnapping and killing residents and setting fire to their homes, livestock, and crops.

A survivor of an attack on a Sunni mosque in eastern Diyala province in August said that members of Asa'ib Ahl al-Haqq entered the mosque during the Friday prayer, shot and killed the imam, and then opened fire on the other men in the mosque, killing at least 70 people. Three other Diyala residents reported that Asa'ib Ahl al-Haqq had kidnapped and killed their relatives.

Iraqi security forces and militias affiliated with the government were responsible for the unlawful execution of at least 255 prisoners in six Iraqi cities and towns in June. The vast majority of security forces and militias are Shia, while the murdered prisoners were Sunni. At least eight of those killed were boys under age 18."

35. The Briefing Notes of 9 February 2015 issued by the German Federal Office for Migration and Asylum, Information Centre Asylum and Migration, stated in relation to Iraq:

"*Security situation*

Daily reports of armed clashes and suicide bombings continue unabated. A suicide attack carried out in Baghdad on 9 February 2015 killed at least 12 people. More than 40 people were wounded. The attack was carried out in the Kadhimiya district which has a large Shia population. So far, no one has claimed responsibility for the attack. On 7 February 2015, more than 30 persons were killed and more than 70 were wounded in suicide bombings in Baghdad. The majority of casualties were reportedly Shia Muslims and security officers.

The night-time curfew was lifted in Baghdad on 7 February 2015.

The Islamic State (IS) is said to have killed 48 people on its territory in Iraq since the beginning of the year, the vast majority in the city of Mosul (Ninive province) and in the suburbs surrounding Mosul.

..."

36. The United States (US) State Department's Country Reports on Human Rights Practices for 2014, issued in February 2015, noted the following in respect of Iraq:

"ISIL committed the overwhelming number of serious human rights abuses. In a systematic and widespread fashion, ISIL targeted government officials and members of the security forces as well as civilians, especially Shia, religious and ethnic minorities, women, and children. To a lesser extent, Iraqi security forces (ISF) and Shia militias also reportedly committed abuses in the disorganized security environment.

Destabilizing violence and fighting between government forces and ISIL escalated in Anbar Province at the end of 2013 and spread to other provinces during the year. On June 9, ISIL launched an assault and quickly captured Mosul, the second largest city. Subsequently ISIL forces took control of large areas of Anbar, Ninewa, Salah ad Din, and Diyala provinces. Armed clashes between ISIL and the ISF, including the Peshmerga – the armed forces of the Kurdistan regional government – caused massive internal displacements, with the United Nations estimating more than two million persons forced to flee their homes nationwide. The humanitarian crisis worsened in July and August, as ISIL targeted ethnic and religious minorities, perpetrated gender-

based violence, sold women and children off as slaves, recruited child soldiers, and destroyed civilian infrastructure.

Severe human rights problems persisted. Large-scale and frequent killings, the vast majority of which ISIL carried out, destabilized the country. They included the June 10 mass killing of more than 600 inmates, almost all Shia, at Badoush prison near Mosul. ISIL also killed, abducted, and expelled from their homes members of religious and ethnic groups, including Christians, Shia Shabak, Shia Turkmen, and Yezidis. Simultaneously, but on a much smaller scale, there were unverified reports of government actors and Shia militias killing Sunni prisoners."

37. On 9 March 2015 Iraqi News (IraqiNews.com) reported that the US Chief of Staff Martin Dempsey, at a joint press conference with the Iraqi Minister of Defence, Khalid al-Ubaidi, had said: "Protecting Baghdad and al-Mosul Dam as well as Haditha district are among the top priorities of the International Coalition."

38. The United Kingdom Home Office's Country Information and Guidance on the security situation in Iraq, issued in November 2015, stated as follows under the heading "Policy Summary":

"The security situation in the 'contested areas' of Iraq, identified as the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-din, has reached such a level that a removal to these areas would breach Article 15(c) of the Qualification Directive (QD).

The security situation in the parts of the 'Baghdad Belts' (the areas surrounding Baghdad City), which border Anbar, Salah Al-Din and Diyala governorates, has reached such a level that a removal to these areas would breach Article 15(c) of the QD.

In the rest of Iraq – the governorates of Baghdad (including Baghdad City), Babil, Basrah, Kerbala, Najaf, Muthanna, Thi-Qar, Missan, Quadissiya and Wassit, and the Kurdistan Region of Iraq (KRI) which comprise Erbil, Sulaymaniyah and Dahuk governorates – indiscriminate violence does not reach such a level that is in general a 15(c) risk. However, decision makers should consider whether there are particular factors relevant to the person's individual circumstances which might nevertheless place them at enhanced risk.

The security situation remains fluid and decision makers should take into account up-to-date country information in assessing the risk."

B. Situation of persons who collaborated with foreign armed forces

39. The United Kingdom Home Office's Country of Origin Information Report on Iraq of 10 December 2009 stated:

"... civilians employed or otherwise affiliated with the MNF-I [Multi-National Force in Iraq] are at risk of being targeted by non-state actors. In areas where security has improved over the last year, the risks to persons affiliated with the MNF-I have diminished to some extent, but are still considerable given the continued influence of extremist groups. In areas where AQI [al-Qaeda in Iraq] and other insurgent groups continue to be present, in particular in Ninewa and Diyala Governorates, the risk of being targeted remains much higher. The risk is particularly high for persons working as interpreters for the MNF-I given their exposure and possible involvement in

> military activities, e.g. arrests, raids or interrogation of insurgent or militia members. Reportedly, some 300 interpreters have been killed in Iraq since 2003. There is also a heightened risk of attack in areas with a high concentration of foreign personnel such as the IZ [International Zone] or military compounds, particularly at checkpoints approaching these facilities and when travelling in military convoys ...
>
> ...
>
> Iraqi nationals employed by foreign companies are at risk of being attacked when outside a secure compound such as the IZ or a military base."

40. The interim report of 14 January 2011 issued by the Norwegian Country of Origin Information Centre (Landinfo) and the Swedish Migration Agency on their fact-finding mission to Iraq observed that there had been a number of incidents where Iraqis who had worked for Americans had been killed. The United States had an assistance programme for Iraqis who had been subjected to threats for working at the embassy in Baghdad. Recruitment was carried out only after careful scrutiny, which could take three to six months.

41. The United Kingdom Home Office's Operational Guidance Note on Iraq, of 22 August 2014, stated the following:

> "3.10.9 Conclusion. Persons perceived to collaborate or who have collaborated with the current Iraqi Government and its institutions, the former US/multi-national forces or foreign companies are at risk of persecution in Iraq. This includes certain affiliated professionals such as judges, academics, teachers and legal professionals. A claimant who has a localised threat on the basis that they are perceived to be a collaborator may be able to relocate to an area where that localised threat does not exist. The case owner will need to take into consideration the particular profile of the claimant, the nature of the threat and how far it would extend, and whether it would be unduly harsh to expect the claimant to relocate. A claim made on these grounds may be well founded and a grant of refugee status due to political opinion or imputed political opinion may be appropriate depending on the facts of the case."

42. According to Amnesty International Deutschland's 2015 Report on Iraq (translation from German original at https://www.amnesty.de/jahresbericht/2015/irak):

> "ISIS soldiers also killed Sunnis, blaming them for insufficient support or alleging that they were working for the Iraqi government and their security forces or were at the service of the US troops during the war in Iraq."

C. Ability of the Iraqi authorities to protect their citizens

43. According to the report of 5 May 2014 by Landinfo and the Migration Agency on "Iraq: Rule of Law and the Security and Legal System":

> "The Iraqi constitution of 2005 guarantees a security system protected by apolitical and non-sectarian security forces. Also in numbers the forces are well disposed to protect the people of Iraq. However, politicization of the Iraqi security forces (ISF), corruption, sectarianism and lack of proper training blur the picture.

The legal system is also outlined in the constitution, where it is described as an independent system above all powers except the law. However, in reality the police and courts (and other institutions) still have shortcomings.

The regular police are considered the most corrupt institution of the security and legal system and thus people are apprehensive to report crimes, even though there are indications that today police work is better performed than in 2010.

Corruption seems to be less common among judges than the police, but the judiciary is not independent as was envisaged by the constitution and still remained in 2010. Courts may be under pressure from influential politicians, tribes and other actors (like militias and criminals). A considerable lack or shortage of judges combined with the many arrests because of the insurgency has led to a large backlog, which is negative for both the defendants and the injured parties.

Not only cases are pending, but also draft laws and this does not improve the rule of law. For example, the judiciary is not yet governed by the law envisaged in the constitution.

There are some remedies for the people to lodge complaints against the authorities, but perhaps the most important institution to deal with these complaints, the High Commission for Human Rights established in 2012, is still not functioning properly.

The remedies against corruption are weaker today than in 2010, mostly due to political interference and limited capacity.

There are legal measures to punish misconducting officials, but implementing them is not always easy – even if there is a will.

All in all, the worsened security situation and the political tug of war influence each other, and leads to deficits in both the capacity and the integrity of the Iraqi security and legal system – more so than in 2010 when we last assessed the rule of law in Iraq. The system still works, but the shortcomings seem to increase."

44. The US State Department's Country Reports on Human Rights Practices for 2014, issued in February 2015, stated the following on the role of the police and the security apparatus in Iraq:

"Due to attacks and offensive operations by the Islamic State of Iraq and the Levant (ISIL) during the year, the government lost effective control over large areas of the country, principally in Arab Sunni and some mixed Sunni/Shia areas. Control over the security forces was inconsistent, and the deterioration of the security situation led to a re-emergence of Shia militias, which operated largely outside the authority of the government.

...

Widespread corruption at all levels of government and society exacerbated the lack of effective human rights protections.

...

International human rights organizations criticized the increasingly sectarian nature of militia activity and the lack of sufficient government oversight. Prime Minister al-Abadi repeatedly called for the elimination of independent militias and ordered all militia groups brought under ISF authority. Shia religious leaders also called for Shia volunteers to fight under the command of the security forces and condemned violence against civilians, including destruction of personal property. Nevertheless, in the vast

majority of cases, Shia militias operated independently and without oversight or direction from the government.

...

Problems persisted within the country's provincial police forces, including corruption and the unwillingness of some officers to serve outside the areas from which they originated. The army and federal police recruited and deployed soldiers and police officers on a nationwide basis, reducing the likelihood of corruption related to personal ties to tribes or militants. This practice led to complaints from local communities that members of the army and police were abusive because of ethnosectarian differences.

Security forces made limited efforts to prevent or respond to societal violence."

D. Internal relocation in Iraq

45. The United Kingdom Home Office's Country Information and Guidance on Iraq concerning internal relocation (and technical obstacles), issued on 24 December 2014, included the following under the heading "Policy Summary":

"*Return arrangements from the UK*

1.4.1 Current return arrangements from the UK to Iraq, either via Erbil or Baghdad, do not breach Article 3 of the ECHR.

Obtaining civil documentation in a new place of residence

1.4.2 The Civil Status ID Card and the Nationality Certificate are two of the most important forms of civil documentation, because they directly or indirectly provide access to a range of economic and social rights.

1.4.3 A person returned to Iraq who was unable to replace their Civil Status ID Card or Nationality Certificate would likely face significant difficulties in accessing services and a livelihood and would face destitution which is likely to reach the Article 3 threshold.

1.4.4 However, persons from non-contested areas of Iraq who are returned either to Erbil or Baghdad would in general be able to reacquire their Civil Status ID Card, Nationality Certificate and other civil documentation by either returning to their place of origin or by approaching relevant government and non-government agencies found across the non-contested areas.

1.4.5 Persons from contested areas of Iraq who are returned to Baghdad would in general be able to reacquire their Civil Status ID Card, Nationality Certificate and other civil documentation by approaching relevant agencies found in Baghdad and Najaf.

1.4.6 Persons in the UK seeking to reacquire their Civil Status ID Card and Nationality Certificate would be able to approach the Iraqi embassy in London for assistance, providing they can first prove their identity. This would generally be possible for persons compulsorily returned to Baghdad, as they would be in possession of a valid or expired passport of Laissez Passer document.

1.4.7 For those unable to prove their identity to the Iraqi embassy, the individual may be able to reacquire documents via a proxy in Iraq, e.g. from a relative or lawyer with a power of attorney.

Relocation to the Kurdistan Region of Iraq (KRI)

1.4.8 Persons originating from KRI will in general be able to relocate to another area of the KRI.

1.4.9 Persons of Kurdish ethnicity who originate from outside of KRI and who are returned to Baghdad will in general be able to relocate to KRI providing they first regularise their documentation in Baghdad (or elsewhere).

1.4.10 For non-Kurdish persons with established family or other links to KRI (e.g. tribal or previous employment), internal relocation will usually be a reasonable alternative.

1.4.11 If a person is of Arab or Turkmen ethnic origin, internal relocation to KRI will be difficult. Internal relocation to Baghdad or the south is more likely to be reasonable. If this is not reasonable due to the particular circumstances of the case, a grant of protection may be appropriate.

Relocation to Baghdad and the south

1.4.12 In general Arab Sunnis; Kurds and Shias will be able to relocate to Baghdad, where it is noted there is a sizable Arab Sunni IDP population.

1.4.13 Shia Muslims seeking to internally relocate will in general be able to relocate to southern governorates. Sunni Muslims may be able to relocate to the south.

1.4.14 In general currently there are no insurmountable barriers preventing Iraqi nationals from relocating to Baghdad or the governorates in the south, although all cases need to be decided on their individual facts."

46. The United Kingdom Home Office's Country Information and Guidance on Iraq concerning internal relocation, issued in November 2015, stated the following under the heading "Policy Summary":

"*Possibility of internal relocation*

In general, relocation to Baghdad from Anbar, Diyala, Kirkuk (aka Ta'min), Ninewah and Salah Al-din, and the north, west and east parts of the 'Baghdad Belts' (the 'contested areas') is possible. Decision makers will, however, need to take into account all the relevant personal factors which will impact on a person's ability to relocate, and the up-to-date country information.

The southern governorates (Basra, Kerbala, Najaf, Muthana, Thi-Qar, Missan, Qadissiya and Wassit) do not reach the threshold of 15(c) and there is no real risk of harm to ordinary civilians travelling to those areas from Baghdad. It is likely to be reasonable in general for persons from the 'contested areas' (or elsewhere) to relocate to Baghdad, although decision makers must take into account a person's individual circumstances and up to date country information.

Relocation to the Iraqi Kurdistan Region (IKR) is possible in general for Iraqi Kurds from IKR and those not from the IKR via Baghdad, although decision makers must take into account relevant factors which will impact on their ability to relocate.

In general, it is not reasonable for non-Kurds who do not originate from the IKR to relocate to the IKR.

Feasibility of return

A person can only be returned to Baghdad city if they have an Iraqi passport (current or expired) or a laissez-passer. If they do not have one of these documents then return is not 'feasible'.

A lack of these travel documents is a technical obstacle to return, and is not a reason itself to grant protection.

Only when return is feasible (i.e. the person has or can obtain a current or expired passport or a laissez-passer) can the issue of documentation (or lack of it) be considered in any assessment of protection.

Persons originating from the IKR who have been pre-cleared by the IKR authorities are returned to Erbil Airport, do not require a passport or a laissez-passer."

IV. RELEVANT EUROPEAN UNION LAW AND CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

47. Article 4 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (as recast by Directive 2011/95/EU of 13 December 2011; hereinafter "the Qualification Directive") provides:

"*Assessment of facts and circumstances*

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

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

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established."

48. The required level of protection is defined in Article 7 of the Qualification Directive:

"1. Protection against persecution or serious harm can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.

2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts."

49. In *M.M. v. Minister for Justice, Equality and Law Reform and Others* (Case C-277/11, judgment of 22 November 2012), the Court of Justice of the European Union (hereinafter "the CJEU") held:

"63. As is clear from its title, Article 4 of Directive 2004/83 relates to the 'assessment of facts and circumstances'.

64. In actual fact, that 'assessment' takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.

65. Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.

66. This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.

67. Moreover, the interpretation set out in the previous paragraph finds support in Article 8(2)(b) of Directive 2005/85, pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited."

50. Joined cases *X, Y and Z* (Joined Cases C-199/12 to C-201/12 of 7 November 2013) concerned asylum-seekers who sought international protection as a result of their homosexuality in circumstances in which it had not been shown that they had already been persecuted or been subject to direct threats of persecution in the past. Although Article 4 § 4 of the Qualification Directive was not directly the subject of the request for a preliminary ruling, the CJEU nevertheless found as follows:

"72. As regards the restraint that a person should exercise, in the system provided for by the Directive, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution ...

73. That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 90), will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive (*Y and Z*, paragraph 77)."

51. In the case of *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, judgment of 2 March 2010, ECR I-1493), the CJEU considered the

assessment of a change in a refugee's circumstances and, in particular, when refugee status might cease to exist:

> "69. Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.
>
> 70. In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status."

V. RELEVANT GUIDELINES AND OTHER MATERIAL FROM THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)

52. According to the UNHCR standards, while the burden of proof lies with the asylum-seeker, owing to the special circumstances of an asylum claim, the State official who examines an asylum claim carries with the asylum-seeker a shared duty to "ascertain and evaluate all relevant facts".

53. The relevant parts of the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims state as follows:

> "**II. Burden of Proof**
>
> 5. Facts in support of refugee claims are established by adducing proof or evidence of the alleged facts. Evidence may be oral or documentary. The duty to produce evidence in order affirmatively to prove such alleged facts, is termed 'burden of proof'.
>
> 6. According to general legal principles of the law of evidence, the burden of proof lies on the person who makes the assertion. Thus, in refugee claims, it is the applicant who has the burden of establishing the veracity of his/her allegations and the accuracy of the facts on which the refugee claim is based. The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached. In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.
>
> **III. Standard of Proof – General Framework and Definitional Issues**
>
> 7. In the context of the applicant's responsibility to prove facts in support of his/her claim, the term 'standard of proof' means the threshold to be met by the applicant in

persuading the adjudicator as to the truth of his/her factual assertions. Facts which need to be 'proved' are those which concern the background and personal experiences of the applicant which purportedly have given rise to fear of persecution and the resultant unwillingness to avail himself/herself of the protection of the country of origin.

8. In common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved 'beyond reasonable doubt'. In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a 'balance of probabilities'. Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible.

9. Obviously the applicant has the duty to tell the truth. In saying this though, consideration should also be given to the fact that, due to the applicant's traumatic experiences, he/she may not speak freely; or that due to time lapse or the intensity of past events, the applicant may not be able to remember all factual details or to recount them accurately or may confuse them; thus he/she may be vague or inaccurate in providing detailed facts. Inability to remember or provide all dates or minor details, as well as minor inconsistencies, insubstantial vagueness or incorrect statements which are not material may be taken into account in the final assessment on credibility, but should not be used as decisive factors.

10. As regards supportive evidence, where there is corroborative evidence supporting the statements of the applicant, this would reinforce the veracity of the statements made. On the other hand, given the special situation of asylum-seekers, they should not be required to produce all necessary evidence. In particular, it should be recognised that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.

11. In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.

12. The term 'benefit of the doubt' is used in the context of standard of proof relating to the factual assertions made by the applicant. Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the 'benefit of the doubt'.

IV. Standard of Proof in Establishing the Well-Foundedness of the Fear of Persecution

13. The phrase 'well-founded fear of being persecuted' is the key phrase of the refugee definition. Although the expression 'well-founded fear' contains two elements, one subjective (fear) and one objective (well-founded), both elements must be evaluated together.

14. In this context, the term 'fear' means that the person believes or anticipates that he/she will be subject to that persecution. This is established very largely by what the person presents as his/her state of mind on departure. Normally, the statement of the applicant will be accepted as significant demonstration of the existence of the fear, assuming there are no facts giving rise to serious credibility doubts on the point. The applicant must, in addition, demonstrate that the fear alleged is well-founded.

15. The drafting history of the Convention is instructive on this issue. One of the categories of 'refugees' referred to in Annex I of the IRO Constitution, is that of persons who 'expressed valid objections to returning' to their countries, 'valid objection' being defined as 'persecution, or fear, based on reasonable grounds of persecution'. The IRO Manual declared that 'reasonable grounds' were to be understood as meaning that the applicant has given 'a plausible and coherent account of why he fears persecution'. The Ad Hoc Committee on Statelessness and Related Problems adopted the expression 'well-founded fear of persecution' rather than adhered to the wording of the IRO Constitution. In commenting on this phrase, in its Final Report the Ad Hoc Committee stated that 'well-founded fear' means that a person can show 'good reason' why he fears persecution.

Threshold

16. The Handbook states that an applicant's fear of persecution should be considered well-founded if he 'can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable...'.

17. A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish 'well-foundedness', persecution must be proved to be reasonably possible. Attached as an annex is an overview of some recent jurisprudence, by country.

Indicators for assessing well-foundedness of fear

18. While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.

19. The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account. Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country's human rights situation and record; the country's legislation; the persecuting agent's policies or practices, in particular towards persons who are in similar situation as the

applicant, etc. While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin."

54. The UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (originally issued in 1979 and most recently reissued in 2011; hereinafter "the UNHCR Handbook") develop further the principles spelled out in the 1998 Note. Paragraphs 196 and 197 of the Handbook state as follows:

"196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

55. The applicants complained that their return to Iraq would entail a violation of Article 3 of the Convention, which reads as follows:

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

A. The Chamber judgment

56. The Chamber noted that, although the general situation in Iraq had significantly worsened since June 2014, so far there were no international reports on Iraq which could lead it to conclude that the general situation was

so serious as to cause, by itself, a violation of Article 3 of the Convention in the event of a person's return to that country.

57. As to the particular circumstances of the applicants, the Chamber first noted that their claims had been carefully examined by the Migration Agency and the Migration Court, both of which had acknowledged that the first applicant had cooperated with Americans and that, as a result, the applicants had been subjected to serious threats and violence by al-Qaeda during the years 2004 to 2008. However, since the first applicant had stopped working with American companies in 2008 they had considered it unlikely that any possible threats against the applicants were still so present and concrete as to justify the granting of asylum.

58. The Chamber further noted that, before the Migration Agency, the first applicant had confirmed that he had not received any personal threats from al-Qaeda since 2008. However, having been refused asylum by the Migration Agency on 22 November 2011, the applicants had changed their explanations and had stated that al-Qaeda had also come looking for the first applicant on 10 September 2011 at their house in Baghdad and had burned down their house on 12 November 2011. The Chamber underlined that the Migration Agency had not found the applicants or the documents submitted on these points to be credible. The Chamber found it noteworthy that the first applicant had not mentioned the first incident to the Migration Agency, despite being interviewed by that body three times. Moreover, it observed that the evidence submitted to the domestic courts as well as to the Court, allegedly certifying that al-Qaeda had also searched for the first applicant in September 2011 and that his house had been burned down on 12 November 2011, was very simple in nature, such as to cast doubt on its authenticity. Accordingly, the Chamber found no reason to disagree with the Migration Agency that the applicants had not substantiated their allegation that they had been threatened and persecuted by al-Qaeda after 2008.

59. Likewise, as to the applicants' allegation that the first applicant was at risk because of his participation in a televised public debate in February 2010, the Chamber noted that the applicants had not mentioned the recording at all to the Migration Agency, despite being interviewed several times. The first applicant had submitted the recording for the first time with his written submissions to the Migration Court on 1 February 2012. The Swedish authorities were not convinced that the recording had dated from February 2010 or that the applicants would be unable to obtain protection from the Iraqi authorities because the first applicant had publicly criticised them during the debate. In sum, the Chamber agreed with the Swedish authorities that the applicants had failed to substantiate these allegations.

60. Having regard to the above, and noting that the first applicant had ceased his business with the Americans in 2008, that the most recent substantiated violent attack by al-Qaeda against the applicants had taken place in October 2008, almost six and a half years earlier, and in particular

that the first applicant had stayed in Baghdad until December 2010 and the second and third applicants until September 2011, without having substantiated their allegation that they had been subjected to further direct threats, the Chamber endorsed the assessment by the Swedish authorities that there was insufficient evidence to conclude that the applicants would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Iraq. Accordingly, the Chamber found that their removal would not give rise to a violation of Article 3 of the Convention.

B. The parties' submissions

1. The applicants

61. The applicants argued that in its Chamber judgment the Court had decided to place the entire burden of proof on the applicants and had not granted them the benefit of the doubt. It had chosen to ignore parts of the applicants' evidence, finding that the last threat from al-Qaeda had occurred in 2008. Concerning the threats from 2008 onwards, the applicants claimed that the Swedish authorities and courts had dismissed the evidence submitted by them and had found that it was not likely that there were threats against the first applicant in his home country. It was common in the Swedish asylum process for evidence submitted by asylum-seekers to be investigated in order to ascertain its credibility. However, in the present case, the domestic authorities had categorically dismissed the evidence submitted by the applicants without making any effort to investigate its veracity by, for example, contacting the Iraqi authorities or the Alhurra media channel. They had thus not fulfilled their obligations under Articles 3 and 6 of the Convention. Had the Swedish authorities – and the Chamber – had any doubts about the credibility of the evidence submitted, they should first have made a well-informed decision on whether or not to accept it as credible. Had they correctly evaluated the evidence submitted, their assessment would most likely have been different from the one they had made in their decisions. As the Swedish authorities had not questioned the veracity of the applicants' claims, they should have given the first applicant the benefit of the doubt.

62. The applicants pointed out that the Qualification Directive had established a "benefit of the doubt" rule for asylum-seekers regarding evidence submitted in support of their asylum cases. If an asylum-seeker's general credibility was not called into question, he or she should make an honest effort to support his or her oral submissions. In the assessment of the credibility of the submissions, importance should be placed on whether they were coherent and not contradictory, and whether their essential elements remained unchanged during the asylum proceedings. In the first applicant's case there had been no reason to call his credibility into question. There had

been a natural reason for invoking his political activities late in the asylum process: he had not been afforded an opportunity to give a complete account of his arguments in his asylum interview and therefore he had focused on the most urgent threat, namely that posed by al-Qaeda. Whether the televised public debate had been aired in 2008 or 2010 did not in any way invalidate or mitigate the first applicant's credibility or the threat level against him. The fact that the debate had been aired should have been a sufficient reason to take it seriously and investigate it. The only reason why the first applicant had not been subjected to ill-treatment between 2008 and 2011 was that he had been in hiding.

63. The applicants contended that if the first applicant were to be deported to his home country, he would necessarily have to be in contact with government agencies. If a threat from government agencies had existed before he had fled to Sweden, the threat would continue to exist upon his return. Should he be forced to return, he would have to deny his identity and hide from the government authorities, and this would be in clear breach of the Convention. Available country information suggested that former employees of the American troops were placed in a vulnerable situation. Besides being regarded as traitors to their homeland by al-Qaeda, they were now also under threat from ISIS, who saw them as direct targets. Many former collaborators had lost their lives in areas under ISIS control.

64. The Swedish courts and authorities, as well as the Chamber, had acknowledged that the first applicant had had a well-founded reason to fear for his life during the period between 2004 and 2008. The ill-treatment he had suffered was in essence comparable to torture. On the sole basis of the incidents to which he had referred, the burden of proof should have been placed on the Swedish authorities and not on him. The incidents referred to and the ill-treatment suffered by the first applicant were also indicative of the assessment of the potential threats and risks he was likely to face on his return. As the domestic authorities had accepted that all these incidents had actually taken place, the incidents at issue should have been the starting-point for a forward-looking threat assessment. The Swedish authorities should have presented enough arguments to counter this threat assessment on the basis of actual events. Since they had failed to do so, the assumption had to be that the same threat scenario still persisted. The Swedish authorities should also have taken into consideration the first applicant's previous experiences and his vulnerability resulting from cooperation with the American forces in Iraq. The Iraqi authorities would not be able to protect him if he needed protection in the future. The burden of proof should have rested with the Swedish authorities, which had not been able to prove that the first applicant would not be subjected to any ill-treatment contrary to Article 3 of the Convention if returned to his home country.

65. Under Swedish law, asylum-seekers had to make a plausible claim in order to discharge their burden of proof. However, the standard of

probability varied from case to case and from court to court, and there were no established guidelines as to when, for example, a document was to be considered to be of such low quality that it had no evidentiary value. This assessment was thus arbitrary. In the present case, the authorities had placed the whole burden of proof on the applicants and, throughout the proceedings, had found that they had not discharged this burden of proof. This had been done without stating, in detail or otherwise, how the facts had actually been established. For this reason it was difficult to determine whether an excessive burden of proof had been placed on the applicants.

66. The applicants concluded that, on the basis of their previous experiences and the deteriorating security situation in Iraq, they would face a real risk of being subjected to treatment in breach of Article 3 if returned to Iraq.

2. The Government

67. The Government agreed with the Chamber's conclusion that there would be no violation of Article 3 of the Convention if the applicants were returned to Iraq.

68. As to the general situation in Iraq, the Government noted that both the Migration Agency and the Migration Court had found that the security situation in Iraq was not such that there was a general need for international protection for asylum-seekers, a finding that had been confirmed by the Court in its Chamber judgment. According to the most recent information provided by the Migration Agency, the intensity of violence in Baghdad still did not constitute a real risk of treatment contrary to Article 3 of the Convention. The Court's assessment in its Chamber judgment was thus still valid as far as the general situation in Iraq, including Baghdad, was concerned.

69. As regards protection by the Iraqi authorities, country-of-origin information indicated that there was a properly functioning judicial system in place in Baghdad. According to the Migration Agency's legal opinion, the issue of whether the protection afforded by the authorities in a country was sufficient had to be considered on the basis of whether the country in question would take the necessary action to prevent persecution of, or severe injury to, a person.

70. Concerning the applicants' personal circumstances, the Government noted that the first applicant had not mentioned his alleged persecution by al-Qaeda in his interviews which had taken place only a few weeks after the alleged incident, and that the documents submitted in support of that allegation had been of a very simple nature, thus casting doubt on their authenticity. The Government agreed with the Chamber that the applicants had not substantiated their allegation that they had been persecuted by al-Qaeda after 2008. The Government stressed that the first applicant had not provided any evidence that he had been subjected to any personal threats

since 2008. He had stayed in Baghdad until December 2010 and his wife and son until September 2011 without being subjected to any direct threats or assaults. Two of his daughters still lived in Baghdad and had not been subjected to any threats. As the attacks on the first applicant had been focused on those years when he had had a business contract with the American forces and had ceased thereafter, it was likely that the threats and attacks were not linked to him personally but rather were intended to deter him from cooperating with the Americans. Moreover, the first applicant had never asked the Iraqi authorities for any protection. The Government maintained that the applicants had failed to show that they had been unable to be granted protection by the Iraqi authorities.

71. The Government noted that the first applicant had also alleged a risk of persecution owing to his participation in a televised public debate. However, he had failed to mention this issue in his asylum interviews, in his written submissions to the Migration Agency and in his appeal to the Migration Court. When he had done so in his subsequent submissions, he had initially claimed that the debate had taken place in February 2008, then in February 2010. The DVD of the debate submitted as evidence clearly indicated that the recording had not been made after 4 March 2008. The Chamber had agreed with the Government that the applicants had failed to show either that the recording had been made after 4 March 2008 or that the first applicant risked being persecuted on account of it.

72. The Government further contended that there was no reason to believe that the first applicant and his family would find themselves in a particularly vulnerable situation upon returning to Baghdad. The Government agreed with the Chamber that there was insufficient evidence to conclude that, owing to their personal circumstances, the applicants would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Iraq.

The Government submitted that the available country-of-origin information showed that the general situation in Baghdad in 2008, with groups linked to al-Qaeda threatening and punishing anyone cooperating or working with American or Western forces, no longer prevailed. Instead, current country-of-origin information indicated that the greatest threat in relation to the general situation in Baghdad today emanated from ISIS, which was seeking to persecute Shia Muslims in general and other religious minorities.

In the applicants' case, the threats and the violence had been closely connected to the first applicant's cooperation with the American forces. As this cooperation had long since ceased, the situation for the applicants had changed. Furthermore, according to country-of-origin information, the Iraqi authorities were no longer deemed to be infiltrated by terrorist groups such as al-Qaeda or ISIS, contrary to the applicants' contention. While such

groups had their origins in Sunni extremist groups, the authorities in Baghdad were dominated by the Shiite community.

Thus, when making a full and *ex nunc* assessment, there was insufficient evidence to conclude that the applicants would face a real and individual risk of being subjected to treatment contrary to Article 3 if the expulsion orders were to be implemented.

73. As to the issue of burden of proof, the Government noted that, according to Swedish case-law, the UNHCR Handbook was an important source of law and the UNHCR reports and recommendations an important source of guidance which, however, had to be balanced against information about the situation in a given country. According to the domestic case-law, a person applying for a residence permit bore the initial burden of proving that the actual circumstances required for a residence permit to be granted were in place. While the initial burden of proof lay with the applicant, the obligation to elicit and evaluate the relevant facts was shared between the applicant and the migration authorities and courts. According to the *travaux préparatoires* to the Swedish Aliens Act, the standard of proof could not be set too high for claims concerning the risk of persecution as it was rarely possible to present solid evidence that could clearly confirm the existence of such a risk. It was often necessary to give the applicant the benefit of the doubt when all available evidence had been obtained and checked and when the examiner was satisfied with the applicant's general credibility. A prerequisite for the benefit of the doubt was that the applicant's statement was coherent and not contradictory and that the essence of the statement remained unchanged during the asylum procedure.

74. According to the principle that the courts had ultimate responsibility for investigations, as set forth in section 8 of the Administrative Court Procedure Act, the Migration Court had to take all relevant circumstances into account and ensure that the investigation of the case was adequate and complete. The Migration Agency had an obligation to provide service and guidance and to investigate. It had to help individuals to take advantage of their rights and guide them by taking the initiative to conduct further investigations, depending on the circumstances. In asylum cases this obligation to investigate was even more far-reaching. Moreover, according to the domestic case-law, the threshold for evidence was set higher for circumstances that could reasonably be confirmed by the applicant but lower for circumstances that were more difficult to prove.

75. The Government noted that, in the present case, the first applicant's account of the risk of persecution by al-Qaeda until 2008 was essentially consistent and detailed, did not contain contradictory information, and was supported by relevant country-of-origin information. He had thus discharged his burden of proof and was therefore entitled to be given the benefit of the doubt. However, as the applicants had not sought asylum until December 2010 and September 2011, they had to plausibly establish that, as

matters stood at the time of the domestic proceedings, they would still face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon returning to Baghdad. They had failed to discharge this burden of proof. It was only after the Migration Agency had denied the applicants residence permits that they had come up with new claims and evidence which had been incoherent and contradictory. As the essence of their account had changed, they could not be given the benefit of the doubt. As there was a lack of credibility, the domestic authorities and courts had no reason to investigate these claims any further. The applicants' situation had changed after 2008 and their need for protection had ceased. During the domestic proceedings the migration authorities had taken all relevant circumstances into account and ensured that the investigation of the case was adequate and complete. The domestic decisions did not imply that an excessive burden of proof had been placed on the applicants.

76. Lastly, the Government pointed out that the present case differed from the case of *R.C. v. Sweden* (no. 41827/07, 9 March 2010), which concerned allegations of torture and ill-treatment at the hands of the domestic authorities. In the present case the alleged persecution of the applicants had been carried out by non-State actors. The applicants had failed to substantiate their claim that they faced a substantial risk of being subjected to ill-treatment upon their return, at this point in time, to Iraq.

C. The Court's assessment

1. General principles

(a) General nature of obligations under Article 3

77. The Court noted the following in *Labita v. Italy* ([GC], no. 26772/95, § 119, ECHR 2000-IV):

> "As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999‑V, and the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79)."

(b) Principle of *non-refoulement*

78. The Court has on many occasions acknowledged the importance of the principle of *non-refoulement* (see, for example, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 286, ECHR 2011, and *M.A. v. Cyprus*, no. 41872/10, § 133, ECHR 2013 (extracts)). The Court's main concern in cases concerning the expulsion of asylum-seekers is "whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled" (see, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, § 286; *Müslim v. Turkey*, no. 53566/99, §§ 72-76, 26 April 2005; and *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III).

(c) General principles concerning the application of Article 3 in expulsion cases

79. The general principles concerning Article 3 in expulsion cases have been set out in *Saadi v. Italy* ([GC] no. 37201/06, §§ 124-133, ECHR 2008) and, most recently, in *F.G. v. Sweden* ([GC], no. 43611/11, ECHR 2016). The relevant paragraphs of the latter judgment read as follows:

> "111. The Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; and *Boujlifa v. France*, 21 October 1997, § 42, *Reports of Judgments and Decisions* 1997-VI). However, the expulsion of an alien 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 in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see, among other authorities, *Saadi v. Italy* [GC], no. 37201/06, §§ 124-125, ECHR 2008).
>
> 112. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires the Court to examine the conditions in the destination country in the light of the standards of Article 3 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards entail that the ill-treatment the applicant alleges he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this level is relative, depending on all the circumstances of the case (see *Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II).

(d) Risk of ill-treatment by private groups

80. Owing to the absolute character of the right guaranteed, Article 3 of the Convention applies not only to the danger emanating from State authorities but also 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 (see *NA. v. the United Kingdom*, no. 25904/07, § 110, 17 July 2008; *F.H. v. Sweden*, no. 32621/06, § 102, 20 January 2009; and *H.L.R. v. France*, 29 April 1997, § 40, *Reports of Judgments and Decisions* 1997-III).

81. In this context, the possibility of protection or relocation of the applicant in the State of origin is also of relevance. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision (see *Salah Sheekh v. the Netherlands*, no. 1948/04, § 141, 11 January 2007; *Chahal v. the United Kingdom*, 15 November 1996, § 98, *Reports* 1996-V; and *Hilal v. the United Kingdom*, no. 45276/99, §§ 67-68, ECHR 2001-II).

82. However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention (see *Salah Sheekh*, cited above, § 141, and *T.I. v. the United Kingdom* (dec.), cited above). Therefore, as a precondition of relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment (see *Salah Sheekh*, cited above, § 141, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 266, 28 June 2011).

(e) Principle of *ex nunc* evaluation of the circumstances

83. In the Court's case-law the principle of *ex nunc* evaluation of the circumstances has been established in a number of cases. This principle has most recently been set out in *F.G. v. Sweden* (cited above):

> "115. If the applicant has not already been deported, the material point in time for the assessment must be that of the Court's consideration of the case (see *Chahal*, cited above, § 86). A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken (see, for example, *Maslov v. Austria* [GC], no. 1638/03, §§ 87-95, ECHR 2008 and *Sufi and Elmi v. the United Kingdom*, cited above, § 215). This situation typically arises when, as in the present case, deportation is delayed as a result of the indication by the Court of an interim measure under Rule 39 of the Rules of Court. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. The assessment must focus on the foreseeable consequences of the

applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see, for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 136, 11 January 2007; and *Vilvarajah and Others v. the United Kingdom*, cited above, §§ 107 and 108)."

(f) Principle of subsidiarity

84. In *F.G. v. Sweden* (cited above), the Court described the nature of its examination in cases concerning the expulsion of asylum-seekers as follows:

"117. In cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled. By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 286-287, ECHR 2011). The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or third States, agencies of the United Nations and reputable non-governmental organisations (see, among other authorities, *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

118. Moreover, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see, among other authorities, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 179-80, 24 March 2011; *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, § 113, 3 October 2013; and *Savriddin Dzhurayev v. Russia*, no. 71386/10, § 155, ECHR 2013 (extracts). As a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned (see, for example, *R.C. v. Sweden*, no. 41827/07, § 52, 9 March 2010)."

(g) Assessment of the existence of a real risk

85. In *Saadi v. Italy* (cited above, § 140) the Court held:

"... for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3 (see paragraphs 125 and 132 above and the case-law cited in those paragraphs)."

86. In *F.G. v. Sweden* (cited above), the Court found the following concerning the assessment of the existence of a real risk:

"113. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports* 1996-V,

and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant 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, for example, *Saadi v. Italy*, cited above, § 129, and *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). ...

114. The assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215). In this connection, and where it is relevant to do so, the Court will have regard to whether there is a general situation of violence existing in the country of destination (see *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 216, 28 June 2011).

...

116. It is for the Court to consider in an expulsion case whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, it is clear that not every situation of general violence will give rise to such a risk. On the contrary, the Court has made it clear that a general situation of violence would only be of sufficient intensity to create such a risk 'in the most extreme cases' where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *Sufi and Elmi*, cited above, §§ 216 and 218. See also, among others, *L.M. and Others v. Russia*, nos. 40081/14, 40088/14 and 40127/14, § 108, 15 October 2015; and *Mamazhonov v. Russia*, no. 17239/13, §§ 132-133, 23 October 2014)."

87. With regard to the assessment of evidence, it has been established in the Court's case-law that "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion" (see *F.G. v. Sweden*, cited above, § 115, quoted at paragraph 83 above). The Contracting State therefore has the obligation to take into account not only the evidence submitted by the applicant but also all other facts which are relevant in the case under examination.

88. In assessing the weight to be attached to country material, the Court has found in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (see *Saadi v. Italy*, cited above, § 143; *NA. v. the United Kingdom*, cited above, § 120; and *Sufi and Elmi*, cited above, § 230).

89. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question (see *Sufi and Elmi*, cited above, § 231). The Court appreciates

the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on (see *Sufi and Elmi*, cited above, § 232).

90. In assessing the risk, the Court may obtain relevant materials *proprio motu.* This principle has been firmly established in the Court's case-law (see *H.L.R. v. France*, cited above, § 37; *Hilal*, cited above, § 60; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, ECHR 2012). In respect of materials obtained *proprio motu*, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations (see *F.G. v. Sweden*, cited above, § 117, quoted at paragraph 84 above). In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources (see *Salah Sheekh*, cited above, § 136).

(h) Distribution of the burden of proof

91. Regarding the burden of proof in expulsion cases, it is the Court's well-established case-law that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it (see *F.G. v. Sweden*, cited above, § 120; *Saadi v. Italy*, cited above, § 129; *NA. v. the United Kingdom*, cited above, § 111; and *R.C. v. Sweden*, cited above, § 50).

92. According to the Court's case-law, it is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail (see *Said v. the Netherlands*, no. 2345/02, § 49, ECHR 2005-VI). The Court, however, acknowledges the fact that with regard to applications for recognition of refugee status, it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the

country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive *per se* (see *Bahaddar v. the Netherlands*, 19 February 1998, § 45, *Reports* 1998-I, and, *mutatis mutandis*, *Said*, cited above, § 49).

93. 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 assessing the credibility of their statements and the documents submitted in support thereof. Yet 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 inaccuracies in those submissions (see *F.G. v. Sweden*, cited above, § 113; *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *S.H.H. v. the United Kingdom*, no. 60367/10, § 71, 29 January 2013). Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (see *Said*, cited above, § 53, and, *mutatis mutandis*, *N. v. Finland*, no. 38885/02, §§ 154-155, 26 July 2005).

94. As a general rule, an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of destination.

95. Moreover, although a number of individual factors may not, when considered separately, constitute a real risk, the same factors may give rise to a real risk when taken cumulatively and when considered in a situation of general violence and heightened security (see *NA. v. the United Kingdom*, cited above, § 130). The following elements may represent such risk factors: previous criminal record and/or arrest warrant, the age, gender and origin of a returnee, a previous record as a suspected or actual member of a persecuted group, and a previous asylum claim submitted abroad (see *NA. v. the United Kingdom*, cited above, §§ 143-144 and 146).

96. The Court notes that it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings. Asylum-seekers are normally the only parties who are able to provide information about their own personal circumstances. Therefore, as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants, who must submit, as soon as possible, all evidence relating to their individual circumstances that is needed to substantiate their application for international protection. This requirement is also expressed both in the UNHCR documents (see paragraph 6 of the UNHCR Note on Burden and Standard of Proof in Refugee Claims and paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining

Refugee Status, both referred to in paragraphs 53-54 above) and in Article 4 § 1 of the EU Qualification Directive, as well as in the subsequent case-law of the CJEU (see paragraphs 47 and 49-50 above).

97. However, the rules concerning the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see *Bahaddar*, cited above § 45, and, *mutatis mutandis*, *Said*, cited above, § 49). Both the standards developed by the UNCHR (paragraph 12 of the Note and paragraph 196 of the Handbook, both cited in paragraphs 53-54 above) and Article 4 § 5 of the Qualification Directive recognise, explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection.

98. The Court notes that, as far as the evaluation of the general situation in a specific country is concerned, a different approach should be taken. In respect of such matters, the domestic authorities examining a request for international protection have full access to information. For this reason, the general situation in another country, including the ability of its public authorities to provide protection, has to be established *proprio motu* by the competent domestic immigration authorities (see, *mutatis mutandis*, *H.L.R. v. France*, cited above, § 37; *Hilal*, cited above, § 60; and *Hirsi Jamaa and Others*, cited above, § 116). A similar approach is advocated in paragraph 6 of the above-mentioned Note issued by the UNHCR, according to which the authorities adjudicating on an asylum claim have to take "the objective situation in the country of origin concerned" into account *proprio motu*. Similarly, Article 4 § 3 of the Qualification Directive requires that "all relevant facts as they relate to the country of origin" are taken into account.

(i) Past ill-treatment as an indication of risk

99. Specific issues arise when an asylum-seeker alleges that he or she has been ill-treated in the past, since past ill-treatment may be relevant for assessing the level of risk of future ill-treatment. According to the established case-law, in the evaluation of the risk of future ill-treatment it is necessary to take due account of the fact that the applicant has made a plausible case that he or she was subjected to ill-treatment contrary to Article 3 of the Convention in the past. For example, in *R.C. v. Sweden*, in which the applicant had already been tortured, the Court considered that "the onus rest[ed] with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded" (see *R.C. v. Sweden*, cited above, § 55). In *R.J. v. France*, while sharing the French Government's doubts as to the claims made by the applicant, a Tamil from Sri Lanka, concerning the conditions of his detention and his financial support for the Liberation

Tigers of Tamil Eelam (LTTE), the Court found that the Government had failed to effectively rebut the strong presumption raised by the medical certificate of treatment contrary to Article 3 (see *R.J. v. France*, no. 10466/11, § 42, 19 September 2013). In the case of *D.N.W. v. Sweden* the Court concluded that "the applicant ha[d] failed to make it plausible that he would face a real risk of being killed or subjected to ill-treatment upon return to Ethiopia" even though it accepted that the applicant had been detained and subjected to ill-treatment by the Ethiopian authorities in the past (see *D.N.W. v. Sweden*, no. 29946/10, §§ 42 and 45, 6 December 2012).

100. This issue has also been touched upon in the EU Qualification Directive and in the UNHCR documents. In particular, Article 4 § 4 of the Qualification Directive (see paragraph 47 above) provides – as regards the assessment of refugee status or other need for international protection by the authorities of European Union member States – that "[t]he fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

101. Furthermore, this issue, which is closely linked with the general questions of assessment of evidence, is addressed in paragraph 19 of the UNHCR Note on Burden and Standard of Proof in Refugee Claims, dealing with indicators for assessing the well-foundedness of a fear of persecution, which states as follows: "While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. By the same token, the fact of past persecution is not necessarily conclusive of the possibility of renewed persecution, particularly where there has been an important change in the conditions in the country of origin" (see paragraph 53 above). The Court considers that the UNHCR's general approach to the burden of proof is also of interest in the present context: while the burden of proof lies with the asylum-seeker, the State official examining the asylum claim shares the duty to ascertain and evaluate all relevant facts with the asylum-seeker (see paragraph 6 of the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims and paragraph 196 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status – cited in paragraphs 53 and 54 above). Moreover, as regards the assessment of the overall credibility of an asylum claim, paragraph 11 of the Note on Burden and Standard of Proof in Refugee Claims states that credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed (see paragraph 53 above).

102. The Court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in

cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the Government to dispel any doubts about that risk.

(j) Membership of a targeted group

103. The above-mentioned requirement that an asylum-seeker is capable of distinguishing his or her situation from the general perils in the country of destination is, however, relaxed in certain circumstances, for example where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment (see *Salah Sheekh*, cited above, § 148; *S.H. v. the United Kingdom*, no. 19956/06, §§ 69-71, 15 June 2010; and *NA. v. the United Kingdom*, cited above, § 116).

104. Moreover, in *Saadi v. Italy* (cited above) the Court held:

> "132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *mutatis mutandis*, *Salah Sheekh*, cited above, §§ 138-49)."

105. In those circumstances, the Court will not then insist that the applicant demonstrate the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see *Salah Sheekh*, cited above, § 148; and *NA. v. the United Kingdom*, cited above, § 116).

2. Application of the above principles to the applicants' case

(a) Material time of the risk assessment

106. According to the Court's established case-law, the existence of a risk of ill-treatment must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion (see *F.G. v. Sweden*, cited above, § 115, quoted at paragraph 83 above). However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy*, cited above, § 133; *Chahal*, cited above, §§ 85-86; and *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004).

107. Since the applicants in the present case have not yet been deported, the question whether they would face a real risk of persecution upon their

return to Iraq must be examined in the light of the present-day situation. The Court will therefore consider the applicants' situation as it presents itself today, taking into account the historical facts in so far as they shed light on the current situation.

(b) General security situation in Iraq

108. The Court notes that both the Swedish Migration Agency and the Migration Court concluded in 2011 and 2012 respectively that the security situation in Iraq was not such that there was a general need for international protection for asylum-seekers. This finding was subsequently confirmed by the Chamber in its judgment of June 2015 in the present case.

109. The Government noted in their written observations that, according to the most recent information provided by the Migration Agency, the intensity of violence in Baghdad still did not constitute a real risk of treatment contrary to Article 3 of the Convention. They referred, *inter alia*, to the United Kingdom Home Office's report from April 2015 and reports by the Norwegian Landinfo from 2014 and 2015. The applicants simply noted in their observations that the security situation in Iraq was deteriorating, without making reference to any supporting documents.

110. The Court accepts the Government's position on the general security situation in Iraq and finds that it is substantiated. Furthermore, the most recent reports by the United Kingdom Home Office, dating from November 2015, support this finding. Although the security situation in Baghdad City has deteriorated, the intensity of violence has not reached a level which would constitute, as such, a real risk of treatment contrary to Article 3 of the Convention. Nor do any of the recent reports from independent international human rights protection associations referred to in paragraphs 32-34 above contain any information capable of leading to such a conclusion.

111. As the general security situation in Iraq does not as such prevent the applicants' removal, the Court must therefore assess whether their personal circumstances are such that they would face a real risk of treatment contrary to Article 3 if expelled to Iraq.

(c) Personal circumstances of the applicants

112. The Court notes first of all that, in the present case, the alleged threats have concerned several members of the applicant family, including the first and second applicants' daughter and the first applicant's brother. As these threats were mainly due to the first applicant's actions, the Court will therefore focus on his situation. The first applicant claimed that he would run a real risk of ill-treatment if returned to Iraq, on two grounds: on the one hand, his alleged persecution by al-Qaeda on account of his business relationship with the American forces until 2008 and, on the other hand, the

possible persecution by the Iraqi authorities on account of a televised public debate in which he had participated.

113. The Court reiterates that it is assessing the applicants' situation from the present-day point of view. The main question is not how the Swedish immigration authorities assessed the case at the time (that is, when the Migration Agency and the Migration Court took their decisions on 22 November 2011 and 23 April 2012 respectively) but rather whether, in the present-day situation, the applicants would still face a real risk of persecution for the above-mentioned reasons if removed to Iraq (see *F.G. v. Sweden*, cited above, § 115).

114. From the outset, the Court sees no reason to cast doubt on the Migration Agency's findings that the family had been exposed to the most serious forms of abuses (*ytterst allvarliga övergrepp*) by al-Qaeda from 2004 until 2008 (see paragraph 17 above, and *F.G. v. Sweden*, cited above, §§ 117-118, quoted in paragraph 84 above), which do not seem to have been questioned in the Agency's submissions to the Migration Court, or in the conclusions of the latter, and which appear to be undisputed in the Convention proceedings. The Court also notes that the applicants alleged in the proceedings before the Migration Agency that indirect threats against them and attacks on the first applicant's business stock had continued after 2008, that they had only escaped further abuses by going into hiding and that they had been unable to avail themselves of the Iraqi authorities' protection as the latter were infiltrated by al-Qaeda. The Court sees no reason to question this account. Thus, on the whole, the Court is satisfied that the applicants' account of events which occurred between 2004 and 2010 is generally coherent and credible. This account is consistent with relevant country-of-origin information available from reliable and objective sources (see paragraph 39 above). Having regard to the fact that the applicants had been subjected to ill-treatment by al-Qaeda, the Court finds that there is a strong indication that they would continue to be at risk from non-State actors in Iraq (see paragraph 102 above).

115. It is therefore for the Government to dispel any doubts about that risk. In this connection the Court notes that the Government submitted before it that the Migration Agency had argued before the Migration Court that the documents submitted by the applicants in respect of the alleged events in September and November 2011 were of a simple nature and of little evidentiary value; the Government also questioned why the applicants had not made more detailed submissions concerning the continuing abuses after 2008 at an earlier stage in the asylum proceedings. They argued that this state of affairs lessened the applicants' credibility, as did the timing and manner of their reliance on the DVD containing the audiovisual recording of the television debate in which the first applicant had participated (see paragraph 71 above), whereas the applicants disputed that contention (see paragraph 61 above). However, the Court observes that the Migration

Agency did not comment on the applicants' credibility or the DVD. Nor did the Migration Court specifically address these issues in its reasoning.

In the absence of further concrete reasoning on these issues in the Migration Authority's and the Migration Court's respective findings, the Court does not have the benefit of their assessment in this regard.

However, the Court does not find it necessary to resolve the disagreement between the parties on these matters since, in any event, the domestic decisions do not appear to have entirely excluded a continuing risk from al-Qaeda.

Instead they appear to have supported the view that – at the time of their decisions – the ability of al-Qaeda to operate freely had declined, as had that group's infiltration of the authorities, and that conversely, the authorities' ability to protect the applicants had increased (see paragraphs 17 and 19 above).

116. It appears from various reports from reliable and objective sources that persons who collaborated in different ways with the authorities of the occupying powers in Iraq after the war have been and continue to be targeted by al-Qaeda and other groups. The United Kingdom Home Office's Country of Origin Information Report on Iraq of 2009 stated that civilians employed or otherwise affiliated with the Multi-National Force in Iraq were at risk of being targeted by non-State actors. Similarly, the Home Office's report of 2014 stated that persons who were perceived to collaborate or had collaborated with the current Iraqi Government and its institutions, the former US or multinational forces or foreign companies were at risk of persecution in Iraq. The reports single out certain particularly targeted groups, such as interpreters, Iraqi nationals employed by foreign companies, and certain affiliated professionals such as judges, academics, teachers and legal professionals (see paragraphs 39-42 above).

117. The first applicant belongs to the group of persons systematically targeted for their relationship with American armed forces. The Court is mindful of the fact that the level and forms of involvement in "collaboration" with foreign troops and authorities may vary and that, consequently, the level of risk can also vary to some extent. In this connection attention must be paid to the fact that it has already been established that the first applicant was ill-treated until 2008. Moreover, another significant factor is that his contacts with the American forces were highly visible as his office was situated at the United States military base referred to by the applicants as "Victoria Camp". The above-mentioned reports provide little or no support for the assumption – which transpires from the domestic decisions – that threats from al-Qaeda must have ceased once the first applicant terminated his business relationship with the American forces. In the light of the particular circumstances of this case, the Court finds that the first applicant and the two other members of his family

who are applicants in this case would face a real risk of continued persecution by non-State actors if returned to Iraq.

118. A connected question is whether the Iraqi authorities would be able to provide protection to the applicants. The applicants contested this, whereas the Government contended that a properly functioning judicial system was in place in Baghdad.

119. The Court notes in this connection that, according to the standards of European Union law, the State or entity providing protection must meet certain specific requirements: in particular, it must be "operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution of serious harm" (see Article 7 of the Qualification Directive, cited in paragraph 48 above).

120. It appears from the most recent objective international human rights sources that there are deficits in both the capacity and the integrity of the Iraqi security and legal system. The system still works, but the shortcomings have increased since 2010 (see paragraph 43 above).

Moreover, the US Department of State has noted that widespread corruption at all levels of government and society has exacerbated the lack of effective human rights protections and that the security forces have made limited efforts to prevent or respond to societal violence (see paragraph 44 above). The situation has thus clearly deteriorated since 2011 and 2012, when the Migration Agency and the Migration Court respectively assessed the situation and the latter found that, in the event that threats still existed, it appeared likely that the Iraqi law-enforcement authorities were both willing and able to offer the applicants the necessary protection (see paragraph 19 above). Lastly, this issue is to be seen against a background of a generally deteriorating security situation, marked by an increase in sectarian violence and attacks and advances by ISIS, as a result of which large areas of the territory are outside the Iraqi Government's effective control (see paragraph 44 above).

121. The Court considers that, in the light of the above information on matters including the complex and volatile general security situation, the Iraqi authorities' capacity to protect their people must be regarded as diminished. Although the current level of protection may still be sufficient for the general public in Iraq, the situation is different for individuals, such as the applicants, who are members of a targeted group. The Court is therefore not convinced, in the particular circumstances of the applicants' case, that the Iraqi State would be able to provide them with effective protection against threats by al-Qaeda or other private groups in the current situation. The cumulative effect of the applicants' personal circumstances and the Iraqi authorities' diminished ability to protect them must therefore be considered to create a real risk of ill-treatment in the event of their return to Iraq.

122. As the Iraqi authorities' ability to protect the applicants must be regarded as diminished throughout Iraq, the possibility of internal relocation is not a realistic option in the applicants' case.

123. The Court therefore finds that substantial grounds have been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 if returned to Iraq. Accordingly, the Court considers that the implementation of the deportation order in respect of the applicants would entail a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

125. The applicants claimed 10,000 euros (EUR) each in respect of pecuniary damage and EUR 20,000 each in respect of non-pecuniary damage.

126. The Government stressed that the deportation order in respect of the applicants had not been enforced and therefore no compensation for pecuniary or non-pecuniary damage should be awarded to them. They accordingly submitted that the applicants' claims should be dismissed.

127. As to pecuniary damage, the Court considers that the applicants have not substantiated their claim and therefore rejects it. As to non-pecuniary damage, the Court considers that its finding in the present judgment (see paragraph 123 above) constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants (see, to similar effect, *Saadi v. Italy*, cited above, § 188, and *Nizamov and Others v. Russia*, nos. 22636/13, 24034/13, 24334/13 and 24528/13, § 50, 7 May 2014).

B. Costs and expenses

128. The applicants claimed 25,000 Swedish kronor (SEK – approximately EUR 2,729) for costs and expenses incurred before the Chamber and SEK 144,180 (approximately EUR 15,738) for those incurred before the Grand Chamber, corresponding to seventy-eight hours' work. Their total claim for costs and expenses was thus SEK 169,180 (approximately EUR 18,467).

129. The Government submitted that the compensation for costs and expenses before the Grand Chamber should not exceed an amount equivalent to thirty hours' work.

130. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and to its case-law, the Court considers the sum of EUR 10,000 (plus any tax that may be chargeable to the applicants) to be reasonable to cover costs under all heads, and awards that sum to the applicants.

C. Default interest

131. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Holds*, by ten votes to seven, that if implemented, the order for the applicants' deportation to Iraq would give rise to a violation of Article 3 of the Convention;

2. *Holds*, by fifteen votes to two, that the Court's finding in respect of Article 3 constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

3. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicants, within three months, the following amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and notified in writing on 23 August 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Prebensen	Guido Raimondi
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Bianku;

(b) concurring opinion of Judge O'Leary;

(c) joint dissenting opinion of Judges Jäderblom, Griţco, Dedov, Kjølbro, Kucsko-Stadlmayer and Poláčková;

(d) dissenting opinion of Judge Ranzoni.

G.R.A.
S.C.P

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CONCURRING OPINION OF JUDGE BIANKU

I agree with the way this judgment lays down the general principles governing expulsion cases under Article 3 of the Convention. I think it was high time, indeed, to do so. I also agree with the way in which these general principles were applied in the concrete circumstances of the case, leading to the finding of a potential violation.

I would add, however, the following. When dealing with asylum cases, our Court finds itself in a particularly delicate situation compared with the analysis it has to conduct in relation to other Convention-protected rights. This is linked to the fact that the Court has to conduct an *ex nunc* analysis of the situation in the country of destination. I fully agree with the need for such an analysis and I do not see any other possibility in a system aiming to offer effective and practical protection of the rights enshrined in the Convention. However, before deciding to conduct such an analysis and to proceed with the application of the general principles, as established in paragraphs 77-105 of this judgment, the Court should check whether the analysis conducted at national level in the particular case has been Convention compliant or not. By circumventing this check and avoiding giving a clear answer as to whether or not the national authorities have failed to do their job, I do not think that our Court helps them in applying the Convention standards at national level. While saying this, I do not rule out the possibility that the Court might deem it necessary to conduct an *ex novo* analysis itself, on account of a change of circumstances, after the national authorities have reached their conclusion.

Therefore, I would have preferred this judgment to have included another general principle after all those already set out, which would concern the test of the necessity of a new analysis of the case in Strasbourg. To my mind that test would be met only in two circumstances: first, when the national authorities have not conducted a Convention-compliant assessment of the concrete circumstances of the case and, second, when fundamental changes in circumstances, whether general or personal, require that, with a view to the effective protection of Article 3 rights, the Strasbourg Court should conduct a fresh analysis.

I would then have preferred the analysis of the specific circumstances of the case to start with the question whether the necessity test for a Strasbourg analysis has been met in this case. I respectfully consider that the majority have avoided giving a direct answer in that regard.[1] I believe that in this

[1] See paragraph 113 of the judgment, where the majority of the Grand Chamber conclude that the main question is not how the Swedish authorities assessed the case at the time. Compare this with the case of *F.G. v. Sweden* ([GC], no. 43611/11, § 117 *in fine*, ECHR 2016): "The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for

case the first requirement of the necessity test has been met, in so far as the national authorities, and specifically the Migration Court as the court of last resort at national level, failed to meet the Convention standard. I state this with the utmost respect for the Swedish authorities and the remarkable work they do in dealing with all the asylum requests before them.

Under the Court's well-established case-law, "[t]he Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[2] This has rightly been confirmed in paragraph 86 of the judgment.

The Migration Court, in the applicants' case, concluded that "in the event that some threats should still exist, it appears likely that [in French '*il était probable que*'] the Iraqi law-enforcement authorities are both willing and able to offer the applicants the necessary protection".[3] In my opinion, this conclusion on the risk assessment does not comply with the test required by the Convention in asylum cases brought under Article 3. The likeliness or probability of the protection of an asylum seeker upon his or her return does not comply with the test of a rigorous examination of the applicants' allegations. When absolute rights protected by the Convention are at stake, the national authorities cannot discharge their obligations by concluding that it is likely that these rights will not be violated in the country of destination. The rigorous test requires that in their assessment the authorities should check whether there are substantial grounds to believe that there would be no real risk for the applicants' rights in the event of their return to Iraq. The wording used by the Swedish Migration Court does not convince me that the required rigour was applied in the examination of the applicants' case. For this reason, I think that an analysis by the Strasbourg Court should have been triggered and indeed was fully justified in this case.

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instance, other Contracting or third States, agencies of the United Nations and reputable non-governmental organisations (see, among other authorities, *NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008)."

[2] See *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 108, Series A no. 215.

[3] See paragraph 19 of the Grand Chamber judgment.

CONCURRING OPINION OF JUDGE O'LEARY

1. I voted, albeit with some hesitation, with the majority in this case due to the particular features of the applicants' case as well as the general situation in Iraq and given the Court's obligation, pursuant to its Article 3 case-law, to engage in an *ex nunc* assessment of the risk which the applicants would face if returned to Iraq.

2. As Judge Zupančič indicated in his dissenting opinion at Chamber level, asylum cases like this one, when examined by the Court under Article 3, depend often, on the one hand, on geographically distant, historical events. On the other, they require the Court to craft prognostic judgments concerning what will or will not happen in the future if the applicants are returned to their country of origin.[1]

3. Since I agree with most of the general principles outlined by the Grand Chamber judgment and support the conclusion of a violation, this concurring opinion is limited to highlighting some aspects of the majority judgment which risk creating unnecessary difficulties both for domestic asylum authorities and for the different sections of this Court called on to deal with Article 3 complaints introduced by failed asylum-seekers the subject of deportation orders.

4. Firstly, the Grand Chamber judgment in *J.K. v. Sweden* highlights a fault line running through the Court's current case-law on asylum and immigration, at least to the extent that that jurisprudence concerns member States, like Sweden, of the EU. At the heart of this case, as the majority judgment highlights (see paragraphs 85-102) is how the question of risk is to be assessed, with reference to Article 3, when it is established or accepted that the asylum-seeker has been the subject of past persecution or serious harm in the country to which the respondent State is seeking to return him. As a member State of the EU, Sweden is subject to the detailed rules of the Common European Asylum System and, within that context, the Qualification Directive.[2] Despite the fact that the Swedish legislation interpreted and applied by the competent authorities transposes this detailed EU secondary legislation, the majority judgment proceeds as if this is an irrelevance, referring only to EU asylum law when selectively borrowing elements to set its own jurisprudential standard for the burden of proof (see further paragraph 7 below). Nowhere in the Grand Chamber judgment, not even in the paragraphs setting out domestic law (paragraphs 23-29 of the

[1] See the dissenting opinion of Judge Zupančič annexed to the Chamber judgment of 4 June 2015.

[2] Directive 2004/83/EC of the European Parliament and of the Council, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304/12), subsequently recast by Directive 2011/95/EU, of 13 December 2011 (OJ 2011 L 337/9).

majority judgment), are the provisions of Swedish law which transposed the relevant provisions of the Qualification Directive, particularly Article 4, explained or reproduced.

5. I have stressed in a recent case on Article 5 of the Convention that the fact that a decision the subject of an application before this Court finds its origins in EU law is, of course, not a guarantee of Convention compatibility.[3] Nevertheless, if this Court is to fulfil its European supervisory role in the field of fundamental rights, it is incumbent on it to engage with and understand the complex legislation which member States of the EU may, in certain distinct fields of law, be required to transpose. In *Avotiņš v. Latvia*, the Grand Chamber, in a spirit of complementarity, rightly enjoined the domestic courts of EU member States to examine, regardless of the mutual recognition mechanism established by EU law, any complaint which raises "a serious and substantiated complaint to the effect that the protection of a Convention right has been manifestly deficient" where that situation cannot be remedied by EU law.[4] In the same spirit, it is incumbent on this Court, when examining complaints with a heavy EU law component, to understand fully the legal framework with which it is confronted and on which the impugned decisions of the domestic authorities are based.

6. Lest this be read as a criticism aimed solely at this Court, I should stress it is not. It is essential that respondent Governments explain clearly, in cases where this arises, the nature and scope of the relevant provisions of national law and the EU law provisions which serve as their source or background. It is not for this Court to interpret them but it must understand them. Without this information, particularly in the field of immigration and asylum law, the Court is provided with an insufficient overview of the relevant legal framework with which domestic authorities and courts are working and the interrelationship between its component parts. This lack of clarity does not serve applicants, respondent Governments or the national asylum authorities called on to apply both the decisions of this Court and that of the Court of Justice in Luxembourg well. In the words of a domestic judge engaged in a recent Article 3 risk assessment similar to that at issue in the present case:

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[3] See the separate opinion in *A.M. v. France*, no. 56324/13, judgment of 12 July 2016, which concerned administrative detention awaiting expulsion after illegal entry on the basis of the EU Returns Directive as transposed into the national law of the respondent State.

[4] Judgment of the Grand Chamber of 23 May 2016, paragraph 116.

> "By contrast with other major national or regional courts, such as the U.S. Supreme Court or the Court of Justice of the EU, there are no legislative checks and balances to moderate the effect of any particular Strasbourg decision. To that extent, the European Court of Human Rights must have one of the highest ratios of power to accountability of any major judicial organ. (...) where the court is dealing with a matter where such checks and balances are absent, one might hope that a finding of a violation would arise only where the breach was clearly established."[5]

While the judge in question goes on to recognize that this Court's case-law does (generally) imply a rigourous and careful approach before concluding that deporting an individual would be a violation of Article 3 of the Convention, the message is clear: rigour and care are essential if our jurisprudence in this field is to be understood and followed.

7. Secondly, in seeking to clarify its case-law pursuant to Article 3 of the Convention on the general assessment of risk, past ill-treatment as an indication of future risk and the burden of proof in this context, the Grand Chamber has sought inspiration from notes and guidelines established by the UNHCR and the provisions of the Qualification Directive, in particular, Article 4. Yet, as Judge Ranzoni highlights in his dissenting opinion, it is not for the Grand Chamber to pick and choose preferred elements from either or both sources, leaving aside those elements which suit its judicial narrative less well and jettisoning all important context. The result is a well-intentioned but slightly cobbled together formula in paragraph 102 which competent authorities may have some difficulty with in practice. How is a national judge called on to apply Article 4(4) of the Qualification Directive via the prism of his or her transposing national legislation, while insuring compliance with the requirements of Article 3 of the Convention, to reconcile the "serious indication" to which the former refers with the "strong indication" which the Court now identifies as the relevant standard under Article 3? There is no explanation for this altered language. In addition, as regards paragraph 97, whatever about the UNHCR documents referred to, Article 4(5) of the Qualification Directive does not recognise, explicitly or implicitly, that the benefit of the doubt *should* be granted in favour of an individual seeking international protection. Article 4(5) states rather that where aspects of the applicant's statements are not supported by documentary evidence, those aspects shall not need confirmation where five clearly defined conditions are met. There is no need to reproduce all of those conditions in detail. Suffice it to say that by finding that asylum-seekers *should* be given the benefit of the doubt, without in anyway qualifying that statement with a general "in certain circumstances" or "subject to certain conditions", the Grand Chamber glosses over essential

[5] Judgment of the Irish High Court of 24 June 2016 in *X.X. v. Minister for Justice and Equality*, paragraphs 124-125.

details and conditions built into the sources on which it claims to rely.[6] In order to find a violation of Article 3 in the instant case, this muddying of legal waters was not necessary and, given that this is a Grand Chamber judgment, far from desirable.

8. Thirdly, it should be stressed that the majority judgment is to be welcomed to the extent that it systematizes some of the general principles to be applied by domestic authorities in Article 3 cases and, in addition, clarifies the nature of the *ex nunc* assessment the Court engages in pursuant to this provision (see paragraphs 77-90). Nevertheless, when it comes to applying those general principles to the facts of the instant case, some of the unnecessary weaknesses identified above in paragraphs 97 and 102 find their mirror image when it comes to application of the general principles in paragraph 114. Some of these weaknesses are highlighted in the joint dissenting opinion annexed to the majority judgment. While I would disagree with the latter in their alternative assessment of risk, or rather the lack thereof, I would certainly agree that it was unnecessary for the majority to rely on such reductive reasoning in this crucial paragraph. This case turned on the evidentiary burden which had to be discharged once it was accepted, as it was, that the applicant and his family had been the victims of serious persecution, resulting in death and serious injury, in Iraq and that significant parts of their account were credible. The Grand Chamber had to assess in this context whether, given past events, the probability that the Iraqi authorities would be both willing and able to protect the applicant, a former U.S. army collaborator, and his family was a sufficient basis to be able to deport them. Despite evidence that the applicant had participated in a TV debate in which he had criticised the authorities precisely on this point, the Migration Board refused to re-examine their case,[7] a fact alone which could have been examined more closely by the Court in the light of its recent decision in *F.G. v. Sweden*.[8] In the context of the Court's own *ex nunc* assessment, given the situation in Iraq and Baghdad mid-2016, it was possible to provide more than the bare statement in paragraph 114 to the effect that past ill-treatment by al-Qaeda allowed the Court to find "that there is a strong indication that they would continue to be at risk from non-State actors in Iraq", referring in a circular manner in support of this statement to a previous paragraph under the general principles where this criterion of past ill-treatment in the assessment of future risk is enunciated.

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[6] Contrast with the more limited concession in paragraph 93 of the Grand Chamber judgment, where it is stated that "it is frequently necessary" to give asylum-seekers the benefit of the doubt because they "often" find themselves in special situations.

[7] See paragraphs 21-22 of the Grand Chamber judgment.

[8] See the judgment of the Grand Chamber of 23 March 2016 in *F.G. v. Sweden*, no. 43611/11, paragraph 127, on the need, *in certain circumstances*, and given the absolute nature of Article 3 rights, for the authorities to carry out an assessment of risk of their own motion.

Again, the potential violation of Article 3 should the applicants be expelled to Iraq could have been established on a more solid basis. Once it is recognised, as it was by the Swedish authorities, that the attacks on the applicant, on the one hand, and the death of his daughter, on the other, occurred and the reason for those attacks, a *prima facie* case in favour of granting asylum began to form, and the evidentiary burden passed to the State, particularly when it came to disproving the risks posed by the general situation in the receiving State, the threat from non-State actors and the inability of the authorities in said State to protect the applicants when and if returned.[9] I respectfully disagree with the joint dissent when they "assume" that, since threats to the applicant and his family had stopped when he ceased his collaboration with the U.S. forces, no future risk lay and when they state, without more, that "there appears to be no risk of persecution of the applicants on account of the activities of ISIS either". However, they are entirely correct in their contention that the Grand Chamber, in its *ex nunc* assessment, had to engage clearly and concretely with these issues. Was it not possible to refer, amongst others, to the UNHCR guidelines, albeit from 2012, which made clear that civilians (formerly) employed or otherwise affiliated with the former MNF-I/USF-I or international companies, as well as their families, were still at risk of being targeted by non-State actors for their (imputed) political opinion and identified who those non-State actors were?[10] The Court itself has previously recognized that individuals who worked directly with the international forces or for a company connected to those forces must, as a rule, be considered to be at greater risk in Iraq than the average population.[11]

9. It was also open to the Grand Chamber, in the context of the latter assessment, to recognize that the violation which it finds against the respondent State is in part due to the situation of, at times, acute volatility in the receiving State and is the result of an assessment undertaken by the Court in June 2016, over four years after the key decision by the Migration

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[9] I borrow this succinct overview of where the legal heart of the case is located from Judge Zupančič's dissent, closing paragraph, Section II.

[10] See UN High Commissioner for Refugees (UNHCR), *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, HCR/EG/IRQ/12/03, available at: http://www.refworld.org/docid/4fc77d522.html. For the relevance of such guidelines see *A.M. v. Netherlands*, no. 29094/09, paragraph 84, judgment of 5 July 2016, not yet final, where the absence of the applicant's group from such a UNHCR potential risk profile was a factor supporting a conclusion as to absence of risk. See also, as regards the general situation in Iraq, the U.K. Home Office, *Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)*, April 2016, as well as the U.S. government's approach to collaborators in U.S. Department of State, *Proposed Refugee Admissions for Fiscal Year 2016*, 1 October 2015.

[11] See *T.A. v. Sweden*, no. 48866/10, judgment of 19 December 2013, paragraph 42, although it should be noted no violation was found in that case due, in part, to the passage of time since the applicant had received threats for his collaboration with U.S. forces.

Court. The violation imputed to the respondent State should be viewed in the light of this significant time lapse.[12]

10. As the dissenting opinions demonstrate, views will undoubtedly differ as regards the application of the general principles derived from the case-law to an individual asylum-seeker's circumstances in the context of an *ex nunc* assessment by this Court. There is no doubt that such assessments have fourth instance overtones[13] and it is precisely because of this that the Grand Chamber should have handled more carefully the two crucial paragraphs discussed above.

[12] See paragraphs 145 and 151 of *Neulinger and Shuruk v. Switzerland*, no. 41615/07, Grand Chamber judgment of 6 July 2010.

[13] The statement in paragraph 117 of *F.G. v. Sweden*, cited above, to the effect that "[i]n cases concerning the expulsion of asylum-seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention relating to the status of refugees" is entirely correct in theory. However, given the nature of the *ex nunc* assessment, it is less accurate, in certain cases, in practice.

JOINT DISSENTING OPINION OF JUDGES JÄDERBLOM, GRIȚCO, DEDOV, KJØLBRO, KUCSKO-STADLMAYER AND POLÁČKOVÁ

1. We regret that we are not able to subscribe to the view of the majority in this case that there would be a potential violation of Article 3 of the Convention should the applicants be expelled to Iraq.

2. The parties agreed that the applicants and some other members of their family had been subjected to persecution by al-Qaeda until 2008 on account of the services provided by the first applicant to the American forces. The crucial question in this case is how to deal with the applicants' allegation of subsequent events that took place after those services ended, bearing in mind that although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, the present conditions are decisive for the assessment of applicants' claims (see, among other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 86, *Reports of Judgments and Decisions* 1996-V; *Venkadajalasarma v. the Netherlands*, no. 58510/00, § 67, 17 February 2004; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 121, ECHR 2012; and *A.G.R. v. the Netherlands*, no. 13442/08, § 55, 12 January 2016).

3. The majority see no reason to question the applicants' account. They are satisfied that the applicants' account of the events which occurred between 2004 and 2010 is generally coherent, credible and consistent with relevant country-of-origin information and that it provides a strong indication that the applicants continue to be at risk from non-State actors in Iraq (see paragraph 114 of the judgment). After concluding that there is a strong indication of this continued risk, the majority find that it is for the Government to dispel any doubts about it. Here the majority refer back to the assessments made by the Migration Agency and the Migration Court and find their reasoning to be lacking. However, the majority do not take into account the Government's submissions on the relevant points but conclude that the domestic decisions do not appear to have entirely excluded a continuing risk from al-Qaeda and that they instead appear to have supported the view that the Iraqi authorities' ability to protect the applicants had increased (see paragraph 115).

4. The question is whether or not the respondent State would be fulfilling its obligations under the substantive limb of Article 3 were it to execute the authorities' decision to expel the applicants to Iraq. Even though the domestic authorities' assessment of the facts, including the credibility of accounts provided by asylum-seekers, is very important for the Court's assessment of an application, the principal issue in the present case is not the Swedish immigration authorities' decisions at the time, but whether, in the present-day situation, the applicants would face a real risk of persecution if returned to Iraq (see paragraph 113 of the judgment). This inevitably

means that the Court takes on the responsibility for determining all the facts on which it bases its risk assessment under Article 3. However, respecting the principle of subsidiarity, "it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them" (see paragraph 84), and therefore any assessment of the relevant facts and evidence that has previously been made in the domestic context must be taken into account. As it is the Government who defend the State in the case before the Court, and as a possible potential violation of Article 3 is at issue, their submissions as regards the facts and the applicants' credibility must be taken into account in the Court's *ex nunc* assessment of any future risks for the applicants. All this must be done without the Court having had the opportunity to hear the applicants in person and, in this case, without any of the written evidence adduced in the domestic proceedings having been presented to all the judges. Furthermore, even accepting past ill-treatment as a "strong indication" of risk (see paragraphs 99-102), if such ill-treatment ceased while the applicants remained in their home country, that risk indication is diminished in our opinion. However, we agree with the majority that any acceptance of past ill-treatment as an indication of a risk presupposes that the applicant "has made a generally coherent and credible account of events" (see paragraph 103).

5. It is not clear from the majority's reasoning in paragraph 114 or elsewhere in the judgment on what grounds they base their conclusion that the applicants' account of events is generally credible, or why they disregard the Government's contention to the contrary. In our opinion the assessment of the applicants' credibility in this case should include the following aspects: an evaluation of the Government's claim that the first applicant had not mentioned in his interviews at the Migration Agency in 2011 his allegation that al-Qaeda had been searching for him only a few weeks previously; scrutiny of the report allegedly produced by the Iraqi authorities (to which the applicants claimed that they did not have access) in relation to the alleged burning down of the applicants' house in November 2011; an assessment of the claim that the applicants risk persecution on account of the first applicant's political activities, set against the Government's contention that this factor was not mentioned in the proceedings before the Migration Agency but only in the later appeal to the Migration Court; and an assessment of the claim by the applicants that al-Qaeda had searched for the first applicant in 2011, the only evidence of which is a report by a former neighbour in Baghdad, the evidentiary value of which is low according to the respondent State.

6. We conclude the following as regards these aspects. In combination with the fact that the last-mentioned event was not brought up in the interviews at the Migration Agency, the neighbour's report gives the impression of having been constructed retrospectively, and therefore that

event should be regarded as unsubstantiated. The report of the fire at the applicants' house has been considered to be of low evidentiary value by the Migration Agency, and even if that event were accepted as fact, there is no indication of any specific category of perpetrator. The first applicant's claims as regards his political activities are supported by a video recording of a political debate which apparently is not correctly dated. Moreover, this was also an alleged event which could have been mentioned from the outset of the asylum proceedings, and the failure to do so has not been sufficiently explained. Against this background we do not agree with the majority's finding that the applicants' account of events is "generally credible".

7. In sum, we find that the allegations by the applicants in their submissions before the domestic authorities after the first set of proceedings before the Migration Agency were not merely unsubstantiated, but undermined their asylum claim, especially as regards the events that allegedly took place after 2008. We therefore conclude that the applicants have not shown that they were subjected to persecution by third parties after that date and do not agree that the burden of proof shifted to the Government to dispel any doubts about the risk of such persecution in the future.

8. As the parties agreed that the applicants had been persecuted until 2008 we accept that as fact, but we conclude that the persecution stopped at that point and that this coincided with the first applicant's termination of his business activities linked to the American forces. Under these circumstances, the applicants' past ill-treatment cannot serve as the main basis for an assessment of a future risk of persecution, but is one factor among others to be taken into account.

9. The question is whether, in spite of the fact that the persecution of the applicants ended by 2008, there exists today a real risk of their persecution by any group because of the first applicant's previous business activities. We agree with the majority that the general situation in Iraq does not call for the conclusion that it in itself entails a risk of treatment in violation of Article 3. The evaluation of such a risk should thus be based on the following elements pertaining to the applicants' individual situation on account of the first applicant's previous services to the American forces:

(i) the applicants were persecuted by al-Qaeda until the first applicant ended his business with the Americans in October 2008, and

(ii) the applicants each remained in Baghdad for between two and three years thereafter without being persecuted.

10. The applicants claimed that they had gone into hiding in Baghdad by moving between different addresses before leaving Iraq. This has not been contested by the Government. Even if the applicants were hiding and thereby avoided threats from al-Qaeda, they have not claimed that the rest of their family – two daughters who lived in Baghdad and were not in hiding – were ever threatened on account of the activities of the first

applicant. Against this background we cannot conclude that the hiding and moving around in Baghdad constituted the sole reason why their persecution ended.

11. The first applicant claimed that he had provided construction and transport services to the Americans, operating out of one of their camps in Baghdad. He has not described in any detail what those services consisted of. Although it is clear that certain categories of collaborators with the former US/multinational forces – apparently mainly those who have shown a political or ideological commitment to those forces – are still targeted by various groups (see paragraph 41 of the judgment), the reports appear not to be as conclusive when it comes to former independent providers of practical services untainted by ideological commitment. As the reports describe an ongoing threat from al-Qaeda towards certain collaborators it may be assumed that had any threats ended after the first applicant stopped providing his services, he and his family would no longer be under threat from that particular organisation. As regards other groups, such as ISIS, some country information has been cited in the judgment as regards their activities throughout Iraq. However, none of these reports describe a risk from ISIS that is any different from that of al-Qaeda as regards persecution of persons in Baghdad. Consequently, there appears to be no risk of persecution of the applicants on account of the activities of ISIS either.

12. To sum up, there is no disagreement between the parties that the applicants were subjected to persecution by al-Qaeda until the first applicant stopped providing services to the American forces in 2008. The applicants remained in Baghdad for a considerable length of time after their persecution ended in 2008. Their past ill-treatment can therefore not in itself serve as an indication of a future risk of being subjected to the same type of persecution as previously. It is therefore for the applicants to show that were they to be returned to Iraq in the present conditions there would be a real risk of ill-treatment emanating from al-Qaeda or any other group. They have not been able to do this. For these reasons we consider that there would not be a violation of Article 3 if the order to expel the applicants to Iraq were implemented.

DISSENTING OPINION OF JUDGE RANZONI

1. I respectfully disagree with the majority that the applicants' expulsion to Iraq would give rise to a violation of Article 3 of the Convention. I cannot agree either with the general principles set out in paragraph 102 of the Grand Chamber judgment or with their subsequent application in the instant case.

General principles

2. In paragraphs 77 to 105 the judgment of the Grand Chamber presents the general principles applicable in this field. The Court's existing case-law is correctly summed up, albeit not always in full. For example, in paragraph 99, under the heading of "Past ill-treatment as an indication of risk", the judgment omits a reference to *I. v. Sweden* (no. 61204/09, 5 September 2013), in which the Court held in paragraph 62, with reference to several other judgments:

> "where an asylum seeker, like the first applicant, invokes that he or she has previously been subjected to ill-treatment, whether undisputed or supported by evidence, it may nevertheless be expected that he or she indicates that there are substantial and concrete grounds for believing that upon return to the home country he or she would be exposed to a risk of such treatment again, for example because of the asylum seeker's political activities, membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities, a pending arrest order, or other concrete difficulties with the authorities concerned."

These principles are of significance for me when considering the present case and assessing the majority's reasoning.

3. The Grand Chamber judgment, after referring to provisions and principles laid down in the EU Qualification Directive (see paragraph 100) and UNHCR documents (see paragraph 101), makes the following statement in paragraph 102 without any further explanation:

> "The Court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the Government to dispel any doubts about that risk."

4. At first sight, it does not seem clear whether the intention is to reflect the principles laid down in the existing case-law or whether new principles are to be established. A thorough assessment of the different criteria and their application later in the judgment makes it plain that the majority have established new principles in this crucial paragraph 102 without providing sufficient reasoning.

5. These new general principles are my main concern. First, their development is not explained in the judgment. Secondly, they are in my view an unbalanced and fragmentary mixture of existing case-law and other international sources; they are not clear enough and not persuasive and are therefore not suitable for giving helpful guidance either to the domestic authorities in their difficult task of assessing asylum cases or to the Court itself when it is called upon, pursuant to Article 3, to make its own assessment. Thirdly, under the title "Past ill-treatment as an indication of risk" these principles mix different elements like the burden of proof, credibility and the consequences of past ill-treatment in an incoherent and, at least for me, unsatisfactory manner. Fourthly, taking into account the existing case-law, the establishment of new principles is not necessary.

6. I will now concentrate on the four terms used in paragraph 102 of the judgment which, to my mind, are the most problematic: *past ill-treatment*, *strong indication*, *generally* and *any doubts*.

7. *Past ill-treatment*: The judgment does not explain what kind of past "ill-treatment" is required for indicating a risk of future ill-treatment. Does that mean that any ill-treatment would be sufficient, even if it does not reach the threshold of Article 3? In my opinion only past ill-treatment contrary to Article 3 could, in principle, justify a conclusion that there is a risk of future ill-treatment of a similar gravity. In any event, past ill-treatment cannot be seen as the only element in this risk assessment.

Furthermore, paragraph 102 remains silent on the consequences of the lapse of time between past ill-treatment and the assessment of any future risk. This raises the following question: is ill-treatment which, for example, occurred five or even ten years before the asylum request was made still sufficient to provide a strong indication of future ill-treatment?

8. *Strong indication*: At the outset, it is not at all clear and nowhere in the judgment is it explained where the term "*strong*" stems from. The term *indication* seems to be inspired by Article 4 § 4 of the EU Qualification Directive (see paragraph 100 of the judgment), which provides:

> "The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

However, this Directive does not refer to a *strong* indication but only to a *serious* indication. Why does the judgment of the Grand Chamber use the term *strong* without any explanation? By the way, the difference in the wording also alters or at least confuses the EU standard, where the *serious* indication of a continuing real risk is based on past persecution and serious harm.

The use of *strong* may have been taken from *R.J. v. France* (no. 10466/11, 19 September 2013), referred to in paragraph 99 of the

judgment as follows: "[T]he Court found that the Government had failed to effectively rebut the strong presumption raised by the medical certificate of treatment contrary to Article 3". However, the Court in *R.J. v. France* acknowledged the *strong presumption* solely on the basis of the veracity of past ill-treatment and the injuries sustained as recorded in a medical certificate. A similar approach was taken in *R.C. v. Sweden* (no. 41827/07, 9 March 2010). There, the term *strong* was also used, but again simply to qualify the assumption that the injuries noted in the medical certificate had been caused by (past) ill-treatment (presumably by the domestic authorities). Neither in *R.J. v. France* nor in *R.C. v. Sweden* did the Court conclude that past ill-treatment provided a *strong presumption* or a *strong indication* of future ill-treatment upon the asylum-seeker's return to his country of origin.

Thus, the Court's case-law forms no basis for justifying the use of the term *strong indication* to determine the impact of past ill-treatment on the risk of future ill-treatment.

9. *Generally coherent and credible account*: In my view, the asylum-seeker's account of (past) events must be coherent and credible and it is not sufficient for the account just to be *generally* coherent and credible. The Court has stated in several judgments that if the veracity of the asylum-seeker's submissions is questioned, he or she must provide a satisfactory explanation for any alleged discrepancies (see *F.G. v. Sweden* [GC], no. 43611/11, § 113, ECHR 2016, with further references). But it is also an important factor for the benefit of the doubt that the asylum-seeker's statements were coherent and not contradictory and that the very essence of those statements remained unchanged during the asylum procedure. Of course, if only some details of the account may appear somewhat implausible, that does not necessarily detract from the overall credibility of the applicant's claim. That is what the judgment of the Grand Chamber notes in paragraph 93 (last sentence), although it adds - without any explanation - the term *general*. However, the reference to *Said v. the Netherlands* (no. 2345/02, § 53, ECHR 2005-VI) and, *mutatis mutandis*, *N. v. Finland* (no. 38885/02, §§ 154-155, 26 July 2005) does not support this addition; the term *general* is not used in either of these two judgments.

That leads to the question where the term *generally*, used in paragraph 102 of the Grand Chamber judgment, stems from. Neither the Court's case-law nor the EU Qualification Directive nor the UNHCR documents indicate that an asylum-seeker's account must simply be *generally* coherent and/or credible. The expression *general credibility* in Article 4 § 5 (e) of the Directive does not constitute a valid basis because it refers not to the credibility of the account (in German: *Glaubhaftigkeit*) but to the credibility of the person (in German: *Glaubwürdigkeit*). These are different concepts.

Moreover, Article 4 § 5 of the Directive appears to concern the conditions under which an applicant's statement does not need confirmation, and one of these conditions reads as follows:

> "(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case."

The purpose of using the term "*generally* coherent and credible account" in the majority judgment seems to be to lower the credibility threshold in order to shift the burden of proof as soon as possible to the State. I cannot agree with such an approach, and the consequences thereof are visible in paragraph 114 of the judgment. Although the applicants' allegations concerning the period since 2008 give rise to serious doubts and are in several respects neither substantiated nor consistent but contradictory, they are nevertheless described as *generally* coherent and credible. Pursuant to the newly established principles and having regard to the *consistency* "with information from reliable and objective sources about the general situation in the country at issue" (see paragraph 102), this suffices for the majority to shift the burden of proof to the State. I am not able to follow this line of reasoning.

10. The notion and interpretation of *reliable and objective sources* could also give rise to some observations, but in the present context I will refrain from further elaborating on this point.

11. The last term I would like to discuss is the requirement for the State to *dispel <u>any doubts</u>*: If the burden of proof is, owing to the lowered credibility requirement, so quickly shifted, it seems nearly impossible for States to dispel *any* doubts. In my opinion, the majority have established very problematic principles and imposed a heavy burden (of proof) on member States.

I could, in principle, subscribe to this requirement but only under the following conditions:

(a) if the asylum-seeker has made a coherent and credible account of events of past ill-treatment which met the Article 3 threshold;

(b) if this account is consistent with information from reliable and objective sources about the situation in the country at issue, providing a serious indication of a future, real risk of such ill-treatment; and

(c) if the asylum-seeker has indicated substantial and concrete grounds for believing that the risk of further such ill-treatment still persists (see in this context *I. v. Sweden*, cited above, § 62).

In such circumstances, it would be for the State to dispel any doubts about the risk. That approach would be consistent with our case-law (see, for example, *F.G. v. Sweden*, cited above, § 120, and *Saadi v. Italy* [GC], no. 37201/06, § 129, ECHR 2008).

However, if the principles set out in paragraph 102 were to be applied, a less strict requirement than the requirement to *dispel any doubts* should

have been provided. The Court could, for example, once again have taken inspiration from the EU Qualification Directive, which in Article 4 § 4 states that a serious indication can be rebutted if "*there are good reasons to consider that such persecution or serious harm will not be repeated*". A similar approach would have been more appropriate in the present case.

12. Against this background, I cannot agree with the principles established by the majority in paragraph 102 of the judgment.

Application of the general principles

13. Even applying all the above-mentioned principles, my own assessment, contrary to the majority's assessment, does not lead to a finding of a potential violation of Article 3 of the Convention should the applicants be expelled to Iraq. In this regard I agree with the joint dissenting opinion of my colleagues Judges Jäderblom, Griţco, Dedov, Kjølbro, Kucsko-Stadlmayer and Poláčková, and have nothing further to add.