



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

FIFTH SECTION

CASE OF M.Y.H. AND OTHERS v. SWEDEN

(Application no. 50859/10)

STRASBOURG

27 June 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.Y.H. and Others v. Sweden,

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

Mark Villiger, *President*,

Angelika Nußberger,

Boštjan M. Zupančič,

Ann Power-Forde,

André Potocki,

Paul Lemmens,

Helena Jäderblom, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 28 May 2013,

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

PROCEDURE

1. The case originated in an application (no. 50859/10) 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 (“the applicants”) on 3 September 2010. The President of the Section acceded to the applicants’ request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Ms M. Bexelius, a lawyer practising in Stockholm. The Swedish Government (“the Government”) were represented by their Agents, Ms C. Hellner and Ms H. Kristiansson, of the Ministry for Foreign Affairs.

3. The applicants alleged that their deportation to Iraq would involve a violation of Article 3 of the Convention.

4. On 21 October 2010 the President of the Section to which the case had been allocated 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.

5. On 12 September 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants, a married couple and their daughter, were born in 1948, 1953 and 1988 respectively.

7. The first applicant arrived in Sweden on 26 January 2008 and applied for asylum two days later. The second and third applicants arrived in Sweden on 31 January 2008 and applied for asylum the following day. In support of their applications, the applicants submitted in essence the following. They were Christians and originated from Mosul and Baghdad. They had lived in a rented house in a predominantly Muslim neighbourhood in Baghdad for 13 years. The first applicant had run a shop selling car spare parts. In August 2006 five masked men, claiming to belong to an opposition group, had come to the shop and demanded that the first applicant pay 10,000 U.S. dollars as he was Christian. He had been able to pay only 700-750 dollars and had been told that the men would return for the rest of the money. They had threatened to kidnap a member of his family if he failed to pay. The first applicant had never returned to the store, but when his son had gone back after a couple of days he had been kidnapped. The son had managed to flee from the boot of the car where he had been held when the car had stopped at a traffic light. A few days later, a friend of the applicants had informed them that he had found a threatening message on the door to their shop. Shortly thereafter, the applicants had left the country for Syria. The family also claimed that it had not been possible to practise their religion where they had lived because of fear of terrorists destroying the church. The second and third applicants claimed that they had been forced to wear the veil. Moreover, while the two parents had higher education in economics and administration, their daughter had not been able to study since the family feared that she would be kidnapped as Christian women were often exposed to kidnapping, rape and murder on their way to university.

8. On 20 September 2008 the Migration Board (*Migrationsverket*) rejected the applications. The Board held that the situation in Iraq as such, or the fact that the applicants were Christians, did not constitute grounds for asylum. It further considered that the blackmailing and kidnapping had had economic grounds rather than religious ones. Even if the family could be seen as a target because of their beliefs, the Board was of the opinion that the incidents were due to the general security situation in Baghdad and not the applicants' religious affiliation. According to the Board, the other claims – the fear of terrorists and the forced use of the veil – were also connected to the general situation in Baghdad. The Board further pointed out that, at the time of its decision, more than two years had passed since the alleged incidents had taken place. In any event, it concluded that the incidents were

not of such severity or intensity that there would be an individual threat against the applicants if they were to return to Iraq.

9. The applicants appealed, adding to their story that their neighbour in Baghdad had informed them that someone had written “Christians are to be killed” and “Your blood should be spilled” on their house in September 2008.

10. On 18 June 2009 the Migration Court (*Migrationsdomstolen*) upheld the decision of the Board. The court held that, having regard to the several years that had passed since the alleged incidents and to the improved security situation in Baghdad, the evidence did not suggest that there was an individualised threat against the applicants upon return.

11. On 4 September 2009 the Migration Court of Appeal (*Migrationsöverdomstolen*) refused the applicants leave to appeal.

12. Subsequently, the applicants claimed that there were impediments to the enforcement of their deportation order. They stated that they were in a bad condition mentally and that the general situation in Iraq had deteriorated.

13. On 9 March 2010 the Migration Board decided not to reconsider the case, finding that no new circumstances justifying a reconsideration had been presented. The Board’s decision was upheld by the Migration Court on 16 June 2010.

II. RELEVANT DOMESTIC LAW

14. 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*, 2005:716).

15. 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).

16. 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*) to allow him or her to remain in Sweden (Chapter 5, section 6). Special consideration should be given, *inter alia*, to the alien's health status. According to the preparatory works (Government Bill 2004/05:170, pp. 190-191), life-threatening physical or mental illness for which no treatment can be given in the alien's home country could constitute a reason for the grant of a residence permit.

17. 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).

18. Under certain conditions, an alien may be granted a residence permit even if a deportation or expulsion order has gained legal force. This is the case where new circumstances have emerged which indicate that there are reasonable grounds for believing, *inter alia*, that an 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 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 this criteria, the Migration Board may instead decide to re-examine the matter. Such a re-examination shall 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 these circumstances could not have been invoked 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 Board shall decide not to grant a re-examination (Chapter 12, section 19).

19. Matters concerning the right of aliens to enter and remain in Sweden are dealt with by three instances: the Migration Board, the Migration Court and the Migration Court of Appeal.

III. RELEVANT INFORMATION ABOUT IRAQ

A. General human rights situation

20. In its *Report on Human Rights in Iraq: 2011*, published in May 2012, the Human Rights Office of the United Nations Mission for Iraq (UNAMI) gave, *inter alia*, the following summary (at pp. vi-vii):

“Levels of violence in Iraq (outside of the Kurdistan Region) remain high, and the number of civilians killed or injured in conflict-related incidents has only slightly decreased compared with figures for 2010. UNAMI figures show that during 2011 some 2,771 civilians were killed and some 7,961 civilians were wounded. Most of the violence was concentrated in and around Baghdad, Ninawa and Kirkuk. Violent incidents also occurred in Anbar and Diyala, while the south around Basra saw very few such incidents. Despite a decline in the overall number of incidents compared with 2010, those that did occur were often more deadly, with a few such attacks claiming scores of victims. As in 2010, attacks specifically targeting political leaders, government officials and security personnel, as well as of community and religious leaders, and legal, medical and education professionals continued. A destabilising factor in relation to security was the steady withdrawal of remaining United States forces (USF-I) – a process completed by 18 December 2011. Shifting relationships between various political blocs, parties and factions, compounded by tribal, ethnic, and religious differences also contributed to a deterioration in the human rights environment.

Civilians continued to suffer from attacks based on their ethnic, religious and other affiliations. There were several large-scale attacks on Shi’a pilgrims and on places of worship. Members of the Christian community were also targeted – as were members of the Turkoman community (particularly around Kirkuk) and members of other religious and ethnic minorities, such as Yezidi, Shabaks, Sabian Mandaeans, and Manichaeans. Members of sexual minorities also suffered from killings and widespread social and State sanctioned discrimination – with Iraqi security forces and other State institutions failing to protect them.

...

Violence perpetrated against women and girls, including so called ‘honour crimes’, is of serious concern. The Government of Iraq has made no attempt to repeal sections of the Iraqi Criminal Code which permits honour as a mitigating factor in relation to crimes of violence against women. Low awareness of women’s rights and the existence of deep-rooted cultural norms are important factors in perpetuating a culture of violence and disregard for the rights of women.”

In regard to the Kurdistan region, the report stated (at pp. viii-ix):

“The overall human rights situation in Kurdistan Region continued to improve, although challenges remain, including concerns over the respect for freedom of assembly and freedom of expression and the protection of journalists.

...

The KRG [Kurdistan Regional Government] introduced some significant legislative reforms, including a landmark domestic violence law which does much to address violence against women and children – however, Female Genital Mutilation (FGM) remains of concern, which the KRG needs to address through social education

programmes and legislative reform. There were also reports of honour killings of women, although the exact levels and prevalence of the problem were difficult to ascertain. The KRG previously suspended sections of the Criminal Code which permitted honour as a mitigating factor in relation to murder in domestic contexts. The region has been proactive in addressing issues that confront the full enjoyment by women of their rights with the establishment of the Kurdistan Region High Advisory Committee on Women to recommend legal and social reforms and to coordinate KRG action on these issues.”

21. In his report of 16 February 2011, the Representative of the (United Nations) Secretary-General on the human rights of internally displaced persons, Mr Walter Kälin, noted the following (at paras. 9-10) after a visit to Iraq in September/October 2010:

”Despite improvements in the overall security situation since 2006, the situation in Iraq is still characterized by continued indiscriminate attacks against civilians, including religious and ethnic minorities, arbitrary arrests, alleged ill-treatment while in detention, and sexual and gender-based violence. Moreover, impunity is reported as being widespread, while access to justice is largely absent due to fear of reprisals, lack of capacity among rule of law institutions, corruption and lack of awareness of accountability mechanisms.

In the Kurdistan Region of Iraq, while the security situation is considerably better than in the rest of the country, specific concerns have been raised with regard to, inter alia: serious violations of the rights of suspects and detainees by KRG authorities; sexual and gender-based violence; and the impact of anti-terrorism legislation on human rights, including specifically the practice of keeping persons in de facto unlimited administrative detention.”

22. The UK Border Agency *Iraq Operational Guidance Note* of December 2011 noted (at paras. 2.3.4 and 2.3.5):

“Violence, albeit still far above what ought to be tolerable, has levelled off in the past two years. Iraqi security forces have taken the lead in several important operations. Recently, they have withstood three noteworthy tests: the departure of close to 100,000 US troops since January 2009; the March 2010 parliamentary elections; and, over the past several months, political uncertainty prompted by institutional deadlock. If insurgents remain as weak as they are and find no fresh opportunity to exploit political fractures, security forces operating at less-than-optimal levels still should face no serious difficulty in confronting them.

It has been reported that although oversight by the MOI [Ministry of Interior] and MOD [Ministry of Defence] has increased, problems continue with all security forces, arising from sectarian divisions, corruption, and unwillingness to serve outside the areas in which personnel were recruited. ...”

B. The specific situation of Christians

23. In its 2011 report, UNAMI noted that, while there had been some improvements in terms of security for Iraq’s ethnic and religious groups, their situation continued to be precarious. According to figures provided by the Iraqi Ministry of Human Rights, 14 Christians were killed in targeted

attacks during the year. The overall figure for civilians killed in conflict-related circumstances was 2,781 (at pp. 30 and 2, respectively).

24. The Minority Rights Group International described the Christians in Iraq thus (*Iraq's Minorities: Participation in Public Life*, November 2011, p. 8):

“Iraqi Christians include Armenians, Chaldeans, Assyrians, Syriacs and Protestants. Christians are at particular risk for a number of reasons, including religious ties with the West, perceptions that Christians are better off than most Iraqis, and leadership positions in the pre-2003 government. The fact that Christians, along with Yezidis, continue to trade in alcohol in Iraq (both groups have traditionally sold alcohol in Iraq), has also made them a target in an increasingly strict Islamic environment. Waves of targeted violence, sometimes in response to the community’s lobbying for more inclusive policies (for example, reserved seats in elections) have forced the Christian community to disperse and seek refuge in neighbouring countries and across the world. In 2003, they numbered between 800,000 and 1.4 million; by July 2011, that number had fallen to 500,000, according to USCIRF [United States Commission on International Religious Freedoms].”

25. On 31 May 2012 the United Nations High Commissioner for Refugees (UNHCR) issued the latest *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq* (hereafter “the UNHCR Guidelines”). The situation for members of religious minorities was summarised as follows (at p. 27):

“UNHCR considers that, depending on the particular circumstances of the case, members of minority religious groups in central and southern Iraq are likely to be in need of international refugee protection on the grounds of religion, (imputed) political opinion or membership in a particular social group.

Christian converts are likely to be in need of international refugee protection in the whole country, including the Kurdistan Region.”

Except for the difficulties for Christian converts, UNHCR gave the following account of the three northern governorates under the control of the KRG (at p. 27):

“In the Kurdistan Region, the rights of religious minorities are generally respected and groups can worship freely without interference. The KRG Ministry of Education funds public schools at the elementary and high school level in the Aramaic language. The curriculum in the Kurdistan Region does not contain religion or Qur’an studies. A significant number of religious minorities, in particular Christians, have sought refuge in the region.”

In regard to Christians in general, the UNHCR Guidelines stated (at pp. 27-28):

“The number of Iraqi Christians (who belong to a number of different branches) has been drastically reduced since 2003, with significant displacement inside and outside the country. Most Christians are located in Baghdad, in and around Mosul (Ninewa Plain), Kirkuk and Basrah. An estimated thirty per cent reside in the northern governorates of Dahuk, Erbil and Sulaymaniyah.

Since the fall of the former regime in 2003, armed Sunni groups have targeted Christians and their places of worship. Attacks are commonly motivated by religion, (imputed) political opinion and/or (perceived) wealth. An attack by Islamic State of Iraq/Al-Qa'eda in Iraq on 31 October 2010 on the Our Lady of Salvation Catholic Cathedral in Baghdad left more than 50 Christians, including two priests, and seven policemen dead, and triggered an exodus of more than 1,300 Christian families from Baghdad, Mosul and Basrah to the Kurdistan Region, other areas of Ninewa Governorate and abroad. In fact, more Christians were displaced in 2010 than any other year since 2003. After the October 2010 attack, threats and violence against Christians further increased and in the following months, persons of Christian faith were specifically targeted in their homes or workplaces.

In 2011 and early 2012, Christians reportedly continued to be subjected to threats, kidnappings, attacks on their homes and assassination. Christians have also been kidnapped against ransom; however, even in criminal cases, consideration should be given to the victim's presumed vulnerability as a member of a religious minority or his/her (perceived) social status. In 2011, churches were repeatedly subject to (attempted) bombings, often coordinated, including in Baghdad, Mosul and Kirkuk. Extremist groups have also targeted Christians for being associated with the sale of alcohol.

In the three northern governorates of Sulaymaniyah, Erbil and Dahuk, the rights of Christians are generally respected and a significant number have sought refuge in the region: in particular, in the Governorate of Dahuk, from where many originate, and the Christian town of Ainkawa, near the city of Erbil. In early December 2011, however, a mob allegedly shouting anti-Christian slogans reportedly attacked mainly Christian and Yazidi-owned liquor shops and businesses in and near the town of Zakho (Dahuk). The attacks were allegedly triggered by an inflammatory Friday prayer sermon condemning "un-Islamic" businesses. Reportedly, up to 30 liquor shops, hotels and a massage parlour were vandalized or burned down. An attempt to attack the Christian quarter in Zakho was reportedly prevented by the security forces. Affected shop owners reportedly found leaflets on the shop walls, threatening them if they were to reopen the shops. Motives for the violence remain unclear. In 2011 several kidnappings of Christians were reported in Ainkawa, spreading fear among the community and resulting in internally displaced Christian families fleeing abroad."

The report went on to examine the particular circumstances for Christian converts (at pp. 28-29):

"The Constitution of Iraq requires the Iraqi State to uphold both freedom of religion and the principles of Islam, which, according to many Islamic scholars, includes capital punishment for leaving Islam. Iraqi Penal Law does not prohibit conversion from Islam to Christianity (or any other religion); however, Iraq's Personal Status Law does not provide for the legal recognition of a change in one's religious status. These apparent contradictions have not yet been tested in court and, as a result, the legal situation of converts remains unclear.

A convert would not be able to have his/her conversion recognized by law, meaning that he/she has no legal means to register the change in religious status and his/her identity card will still identify its holder as "Muslim". As a result, children of converts may be without an identification card, unless their parents register them as Muslims. Children of converts cannot be enrolled in Christian schools and are obliged to participate in mandatory Islamic religion classes in public schools. A female convert cannot marry a Christian man, as she would still be considered Muslim by law. A convert may also have his/her marriage voided as under Shari'a Law, as an "apostate"

cannot marry or remain married to a Muslim and will be excluded from inheritance rights.

Given the widespread animosity towards converts from Islam and the general climate of religious intolerance, the conversion of a Muslim to Christianity would likely result in ostracism and/or violence at the hands of the convert's community, tribe or family. Many, including (Sunni and Shi'ite) religious and political leaders, reportedly believe that apostasy from Islam is punishable by death, or even see the killing of apostates as a religious duty. Additionally, Christian converts risk being suspected as working with the MNF-I [Multi-National Force – Iraq]/USF-I or more generally the “West”, which in the opinion of some has fought a “holy war” against Iraq.

Converts and children of converts may face harassment at their place of employment, or at school. The reporting of harassment to the authorities, may, according to some observers, result in further harassment or violence at the hands of government officials and police.”

26. The UK Border Agency *Iraq Operational Guidance Note* concluded the following with regard to Christians (at para. 3.10.13/3.10.21):

”The authorities in central and southern Iraq are generally unable to provide effective protection to Christians or other religious minorities. The Kurdistan Regional government currently allows Iraqi Christians from central and southern Iraq to settle into its three governorates. ...

Christian converts are unlikely to be provided with effective protection by the central and southern Iraqi authorities or by the authorities of the Kurdistan Region of Iraq. ...”

27. In its *International Religious Freedom Report for 2012*, published on 20 May 2013, the United States Department of State summarised the religious situation in Iraq thus:

“The constitution provides for religious freedom and the government generally respected religious freedom in practice. The trend in the government's respect for religious freedom did not change significantly during the year. The constitution recognizes Islam as the official religion, mandates that Islam be considered a source of legislation, and states that no law may be enacted that contradicts the established provisions of Islam. However, it also states that no law may contradict principles of democracy or the rights and basic freedoms stipulated in the constitution. The constitution guarantees freedom from intellectual, political, and religious coercion. Some apparent contradictions between the constitution and other legal provisions were tested in court during the year; the courts upheld full legal protection for religious freedom in those cases. Other contradictions remain untested. Officials sometimes misused their authority to limit freedom for religious groups other than their own. However, the government continued to call for tolerance and acceptance of all religious minorities, provided security for places of worship such as churches, mosques, shrines, and religious pilgrimage sites and routes, and funded the construction and renovation of places of worship for some religious minorities. Al-Qaeda in Iraq (AQI) and other terrorist and illegally armed groups committed violent attacks that restricted the ability of all believers to practice their religion.

There were reports of societal abuses and discrimination based on religious affiliation, belief, or practice. Sectarian violence occurred throughout the country, although to a lesser extent in the Iraqi Kurdistan Region (IKR), and restricted

religious freedom. No reliable statistics on religiously motivated violence were available. The overwhelming majority of mass casualty terrorist attacks targeted Muslims. A combination of sectarian hiring practices, corruption, targeted attacks, and the uneven application of the law had a detrimental economic effect on minority non-Muslim communities, and contributed to the departure of non-Muslims from the country.”

28. Designating Iraq as a “country of particular concern” for the sixth year running, the United States Commission on International Religious Freedoms, in its *2013 Annual Report*, published on 30 April 2013, made the following findings:

“Over the last several years the Iraqi government has made efforts to increase security for religious sites and worshippers, provide a stronger voice for Iraq’s smallest minorities in parliament, and revise secondary school textbooks to portray minorities in a more positive light. Nevertheless, the government of Iraq continues to tolerate systematic, ongoing, and egregious religious freedom violations, including violent religiously-motivated attacks. Violence against Iraqi civilians continued in 2012 at approximately the same level as in 2011. In addition, the government took actions that increased, rather than reduced, Sunni-Shi’i and Arab-Kurdish tensions, threatening the country’s already fragile stability and further exacerbating the poor religious freedom environment.

...

Shi’i Muslims experienced the worst attacks of any religious community during the reporting period, including against pilgrims participating in celebrations on or around important religious holidays. The government has proven unable to stop religiously-motivated attacks from occurring and lacks the will or capacity to investigate attacks and bring perpetrators to justice. This has created a climate of impunity, which in turn exacerbates a perpetual sense of fear for all religious communities, particularly the smallest ones. Large percentages of the country’s smallest religious minorities – which include Chaldo-Assyrian and other Christians, Sabeen Mandaean, and Yezidis – have fled the country in recent years, threatening these communities’ continued existence in Iraq. The diminished numbers that remain face official discrimination, marginalization, and neglect, particularly in areas of northern Iraq over which the Iraqi government and the Kurdistan Regional Government (KRG) dispute control. Religious freedom abuses continue towards women and individuals who do not conform to strict interpretations of religious norms or attacks on businesses viewed as “un-Islamic”. However, in a positive development, the Iraqi parliament shelved a problematic draft Information Crimes law that would have restricted the freedoms of religion and expression. Additionally the KRG parliament rejected a draft law to “protect sanctities,” which, if adopted, would violate these same freedoms. However, there are reports that KRG officials may still pursue legal action against the media for offending religion, Kurdish history, or national symbols.”

It further noted the following:

“Many of the non-Muslim minorities internally displaced by violence have gone to the north of the country, mainly to Nineveh governorate and the territory of the KRG, which is comprised of three other governorates. Northern Iraq, particularly the Nineveh Plains area of Nineveh governorate, is the historic homeland of Iraq’s Christian community, and the Yezidi community is indigenous to Nineveh and the KRG governorate of Dahuk. The three KRG governorates are relatively secure, but Nineveh governorate, particularly in and around its capital Mosul, remains extremely

dangerous, and control over this ethnically and religiously mixed area is disputed between the KRG and the central Iraqi government.

Religious and ethnic minorities in these areas, including non-Muslims and ethnic Shabak and Turkomen, have accused Kurdish forces and officials of engaging in systematic abuses and discrimination against them to further Kurdish territorial claims. These accusations include reports of Kurdish officials interfering with minorities' voting rights; encroaching on, seizing, and refusing to return minority land; conditioning the provision of services and assistance to minority communities on support for Kurdish expansion; forcing minorities to identify themselves as either Arabs or Kurds; and impeding the formation of local minority police forces. The minorities also accuse both Arab and Kurdish officials of ignoring these vulnerable communities as they focus on their fight for territorial control."

C. Possibility of internal relocation to the Kurdistan Region

29. The Representative of the UN Secretary-General stated in the above-mentioned report of 16 February 2011 (at para. 65):

"In the Kurdistan Region of Iraq, the Representative acknowledges that KRG has received and provided safety to IDPs [internally displaced persons] from all over Iraq regardless of their origin, particularly in the aftermath of the sectarian violence in the country 2006. Stronger coordination and cooperation mechanisms between the Central Government and KRG are necessary however, to address the situation of IDPs in this region, including vulnerable groups, as well as a number of administrative and financial assistance issues, such as difficulties in transferring PDS cards [Public Distribution System food ration cards] and receiving pensions, which are adversely affecting the rights and standard of living of IDPs. As well, while improved social, security, and economic conditions prevail in this region, continued cross border attacks continue to cause periodic displacement of its border populations. The Representative believes that stronger cooperation between the Government of Iraq and KRG, as well as concerted diplomatic efforts and border dialogues with relevant neighbouring countries, must be undertaken in order to prevent and raise awareness of the impact of cross-border attacks on civilian populations."

30. The UNHCR Guidelines contain the following observations (at pp. 48-51):

"A large number of persons from the central governorates have found refuge in the three northern governorates since 2006. Commensurate with the sharp decrease in new displacements generally, the flow of new arrivals has decreased significantly; however, only a few of those previously displaced have to date returned to their places of origin. The influx of IDPs has had an important impact on the host communities, including increasing housing and rental prices, additional pressure on already strained public services and concerns about security and demographic shifts. At the same time, the three northern governorates have also benefited from the migration of professionals bringing skills and disposable incomes that boost the local economy. Unskilled IDPs have provided a source of affordable labour for the construction industry.

The KRG authorities continue to implement stringent controls on the presence of persons not originating from the Kurdistan Region. Depending on the applicant, particularly his/her ethnic and political profile, he/she may not be allowed to relocate to or take up legal residence in the three northern governorates for security, political

or demographic reasons. Others may be able to enter and legalize their stay, but may fear continued persecution as they may still be within reach of the actors of persecution or face undue hardship. Therefore, despite the hospitable attitude of the KRG authorities towards a considerable number of IDPs, the availability of an IFA/IRA [internal flight/relocation alternative] must be carefully assessed on a case-by-case basis ...

...

Since the fall of the former regime, the KRG authorities are very vigilant about who enters the Kurdistan Region and have introduced strict security measures at their checkpoints. However, there are no official and publicly accessible regulations concerning procedures and practices at the entry checkpoints into the Kurdistan Region. An ad hoc and often inconsistent approach can be expected in terms of who is granted access, varying not only from governorate to governorate, but also from checkpoint to checkpoint. The approach at a particular checkpoint may be influenced by several factors including the overall security situation, the particular checkpoint and its staff, the instructions issued on that day and the particular governorate where the checkpoint is situated. UNHCR has repeatedly sought to obtain information and clarification from the KRG authorities on checkpoint practices and entry/residence in the Kurdistan Region, without success. Therefore, persons seeking to relocate to the Kurdistan Region depend on informal information with regard to entry procedures.

Individuals/families wishing to enter the Kurdistan Region can seek to obtain a tourist, work or residence card. The tourist card, which is commonly given to persons from central and southern Iraq who seek to enter the Kurdistan Region, allows the holder to stay for up to 30 days. Depending on the person's profile, but also the checkpoint and the officer in charge, persons seeking to enter as tourists may be required to produce a sponsor. Arabs, Turkmen and Kurds from the disputed areas are usually requested to have a sponsor, while Kurds (not from the disputed areas) and Christians are able to enter without a sponsor.

Alternatively, persons who have a proof of employment (letter of appointment) can obtain a work card, which is valid for 10-15 days and is, in principle, renewable. Persons seeking to stay more than 30 days should in principle obtain a residence card. Long-term stays always require a sponsor. UNHCR is not aware of any IDPs who have received the residence card.

The sponsorship process lacks clarity and there is no uniform procedure in place. In some cases, the sponsor is required to be physically present at the checkpoint to secure the person's entry. In other cases, it seems to suffice that a person seeking to relocate to the Kurdistan Region produces a letter notarized by a court clerk attesting to the person's connection to the sponsor. In some cases, the officer at the checkpoint will simply make a phone call to the sponsor to verify the acquaintance. Iraqis without sufficiently strong ties to the Kurdistan Region and who, therefore, are unable to find a sponsor, may be denied entry into the Kurdistan Region. There are reportedly also different requirements as to the nature of the sponsor.

UNHCR is aware of individuals who have been refused entry into the Kurdistan Region. Arabs, Turkmen and certain profiles of Kurds will likely face extensive questioning and may be denied entry at the checkpoint, mostly due to security concerns. In particular, single Arab males, including minors, are likely either to be denied entry into the Kurdistan Region or to be allowed entry only after a lengthy administrative procedure and heavy interrogation. Checkpoints reportedly maintain "blacklists" of individuals banned from entering the Kurdistan Region, including those considered a security risk, but also those who have previously overstayed or did

not renew their residence permits. Christians, especially those who fled due to targeted attacks, reportedly do not face difficulties in entering the Kurdistan Region.

Persons not originating from one of the three northern governorates intending to remain in the Kurdistan Region for more than 30 days must approach the neighbourhood security station (Asayish) in the area of relocation to obtain a permit to stay (“information card” or karti zaniyari). As with the entry procedures, there are no official rules or regulations concerning the issuance of information cards. Generally, in all three governorates, a sponsor is required in order to obtain the information card. This means that those that were able to enter without a sponsor are, at this stage, obliged to find a sponsor. Families, provided they have a sponsor from the governorate concerned and the necessary personal documentation, are usually able to secure the information card. Single people apparently face more difficulties. Persons who do not have a sponsor will not be able to regularize their continued stay and may be forced to leave.

Persons fleeing persecution at the hands of the KRG or the ruling parties will almost always not be able to find protection in another part of the Kurdistan Region. Persons fleeing persecution at the hands of non-state actors (e.g. family/tribe in the case of fear from “honour killing” or blood feud) may still be within reach of their persecutors. The same applies for persons fearing persecution by armed Islamist groups.”

31. As regards the acquisition of identity documents, the UK Border Agency maintained (*Iraq Operational Guidance Note*, para. 2.4.5):

“It is not necessary for an individual to return to their registered place of residence to transfer documents to a new area of Iraq. It is possible for example to apply at a registration office in Baghdad, to have documents transferred from elsewhere in Iraq. However the MoDM [Ministry of Displacement and Migration] have said that in practice this does not happen because it is now safe enough for someone to return to their registered place of residence to arrange to transfer documents. The processes and procedures were the same throughout governorates across south and central Iraq.”

Disagreeing with the UNHCR as to the possibility of internal relocation for Iraqi asylum seekers, the Border Agency further stated (para. 2.4.14):

“We do not however accept UNHCR’s conclusions on internal relocation from the central governorates and consider that there is likely to be considerable scope for internal relocation that achieves both safety and reasonableness in all the circumstances. We consider UNHCR’s position is tied in with general policy considerations (e.g. about managing the rates of return) deriving from their general and Iraq-specific remit; we do not consider that in the light of the evidence taken as a whole that mere civilian returnees are at real risk of persecution under the Refugee Convention or of serious harm under either the [EU] Qualification Directive or Article 3 [of the European Convention on Human Rights] currently.”

32. *SR (Iraqi/Arab Christian: relocation to KRG) Iraq CG [2009] UKAIT 00038* is a country guidance determination delivered by the UK Upper Tribunal (Immigration and Asylum Chamber) on 31 July 2009. In the headnote, the Upper Tribunal stated:

“An Iraqi Arab Christian at risk in his home area and throughout central and southern Iraq is likely to be able to obtain the documentation needed by a person wishing to relocate within Iraq, and is likely to be able to relocate to the KRG with the

assistance of a sponsor, in particular, on the basis of the latest statistics available, in Erbil or Dohuk.”

33. In a later country guidance case, *MK (documents – relocation) Iraq CG [2012] UKUT 00126 (IAC)*, determined on 25 April 2012, the Upper Tribunal concluded, among other things, the following (at para. 88):

“Entry into and residence in the KRG can be effected by any Iraqi national with a CSID [Civil Status ID], INC [Iraqi Nationality Certificate] and PDS, after registration with the Asayish (local security office). An Arab may need a sponsor; a Kurd will not.

Living conditions in the KRG for a person who has relocated there are not without difficulties, but there are jobs, and there is access to free health care facilities, education, rented accommodation and financial and other support from UNHCR.”

34. The findings in *MK* were endorsed in a recent country guidance determination, *HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC)*, of 13 November 2012. Having particular regard to the Danish/UK report extensively quoted below (at § 35), the Upper Tribunal stated (at para. 348):

”Taking the evidence as a whole, we consider that if anything, it tends to show that no-one needs a sponsor, rather than, as was concluded in *MK*, that a Kurd will not and an Arab may. By needing a sponsor we refer not only to entry but also to residence in the KRG. ...”

On the issue of identity documents, it further noted (at para. 358):

”... [In *MK*] the Tribunal commented that there was nothing to show that it was, or perhaps ever had been, the case that a central register in Baghdad had been kept. [F]urther evidence [now presented] requires us to modify that position. Given the current state of the evidence in this regard, we consider that we can add to the guidance in *MK* by noting the existence of the Central Archive retaining civil identity records on microfiche, providing a further way in which a person can identify themselves and obtain a copy of their CSID, whether from abroad or within Iraq.”

35. The Finnish Immigration Service and the Swiss Federal Office for Migration published on 1 February 2012 the *Report on Joint Finnish-Swiss Fact-Finding Mission to Amman and the Kurdish Regional Government (KRG) Area, May 10-22, 2011* (“the Finnish/Swiss report”). In summarising the situation (at p. 3), it noted, among other things, the following:

”At the time of the FFM [Fact-Finding Mission], there seemed to be little discrimination against ethnic or religious minorities. The flight of Christians from Central Iraq to the KRG area has continued since the bomb attack on a church in Baghdad in October 2010. Internally displaced persons (IDPs) and refugees are better off in the KRG area than in the rest of Iraq and generally felt safe in the region at the time of the FFM. At the same time, some suffer from poverty, remain unregistered, and lack access to proper housing, education, health care, and employment.”

In more detail on the circumstances of Christians in the Kurdistan Region, the report stated as follows (at p. 53):

”According to several interviewed sources, Christians are – as a rule – welcome to settle in the KRG area. Freedom of belief is guaranteed, but there are restrictions in

Islamic law that apply to everyone, Christians included. Some Islamic laws can be somewhat discriminative against Christians. The main problems Christians encounter in the KRG area are not necessarily on the level of legislation but in the application of the law and in daily life. Christian IDPs from Central Iraq (mainly Mosul and Baghdad) can face problems due to their lack of Kurdish language skills and have difficulties in finding decent jobs in the KRG region. At the same time, Christians do get assistance from the KRG.

According to Harikar NGO [the UNHCR Protection and Assistance Centre partner in Dohuk], there is no discrimination against Christians in the Dohuk governorate. On the contrary, President Barzani has invited Christians to the KRG region, for instance, after a bus attack in Mosul in May 2010 and after the attack on Sayidat al-Najat Church in Baghdad in October 2010. Also, about 95% of the Christian villages in the area have been built for them by local authorities. According to the ADM [Assyrian Democratic Movement], however, this is not sufficient. The party mentioned to the fact-finding mission that there is not enough space in the KRG area for all the emigrants or enough places for the estimated 10,000 Christian students from Mosul and Baghdad in the universities. In addition to the limited capacity in KRG universities, which has essentially deprived them of the opportunity to study in the area, students also face problems with registration procedures and the local language.”

On the subject of entry procedures at the KRG area border, it gave the following account (at pp. 59-60):

“The fact-finding mission learned that there have been no relevant, recent changes to KRG entry and screening procedures. UNHCR Iraq in Erbil indicated that there are no government statistics available on who has entered the KRG area and who has been denied access. There are four main entry checkpoints to the KRG area, which are controlled by the KRG Security Protection Agency. The checkpoints apply basically the same entry procedures.

At the same time, some international organizations, NGOs, and the UNHCR claimed that the guidelines on entry practices are not consistent between the three northern governorates of the KRG or between checkpoints leading to a single governorate. There are also no published instructions or regulations on entry procedures, as these would be against the Iraqi Constitution. According to the UNHCR, entry often depends on the commander on duty and the commander’s daily instructions at the checkpoint. The procedures can be tightened or relaxed according to the current security situation in the area.

Several NGOs and the UNHCR have surveyed IDPs at different times concerning entry procedures to the KRG region at different checkpoints. A comparison of the results shows differences in entry practices between governorates and time periods. For instance, the surveys show that the need for a sponsor / guarantor has essentially ceased at a Dohuk governorate entry checkpoint, but that even at one checkpoint congruency can lack at different times.

...

People who are denied entry to the KRG area are often not of Kurdish ethnicity. Kurds and Christians are generally allowed entry, whereas single male Sunni Arabs without a sponsor in the KRG area are refused. The UNHCR noted that female Arabs have also had trouble entering the KRG area. Single females are also at higher risk of harassment by authorities. However, a source mentioned that Arabs from Central and Southern Iraq who invest in the KRG area are welcomed to the region. According to another source, IDPs with money are able to move to Erbil and start a business.

Anyone wishing to enter the KRG area who does not originate from the region typically needs to know someone there (a so-called sponsor / guarantor) or have a letter of reference from an employer in the KRG area. A sponsor is needed if the person wants to stay in the KRG area for more than 10 days or wants to register and seek residency in the region. If someone enters the KRG area and subsequently commits a crime, his or her sponsor will be punished and may even face a prison sentence.

A member of the immediate family or some other relative often acts as the sponsor. An institution such as an university can also act as a sponsor. The fact-finding mission received conflicting information during interviews on whether or not a church can act as a sponsor. The policy applied to Christians was said to have been relaxed after the bomb attack at a church in Baghdad in October 2010. Christians may currently be able to nominate senior clerics as sponsors. The fact-finding mission heard that it is easier for Kurds originating outside the KRG area than for persons of other ethnicities to find a sponsor in the region.”

36. Published in March 2012, the *Joint Report of the Danish Immigration Service / UK Border Agency Fact Finding Mission to Erbil and Dahuk, Kurdistan Region of Iraq (KRI), conducted 11 to 22 November 2011* (“the Danish/UK report”) gave the following information:

“1.02 According to the Director of an international NGO in Erbil, all Iraqis irrespective of ethnic origin or religious orientation are free to enter KRI through the KRG external checkpoints by presenting their Iraqi Civil ID Card [and] there were thousands of persons of Arab origin living in KRI, many living with their families, whilst others had come to KRI for work, including individuals.

...

1.08 [The Director of the Bureau of Migration and Displacement (BMD) of the Ministry of Interior in Erbil explained that at] present approximately 40,000 IDP families from [southern and central] Iraq and the disputed areas reside in all three governorates of KRI, i.e. Erbil, Suleimaniyah and Dohuk governorates.

...

1.10 ... [The Director of BMD stated that] there are large numbers of IDPs from religious minority communities in [southern and central] Iraq and the disputed areas. These are mostly Christians and Saebeas who were displaced following sectarian violence.

...

2.04 [The Head of the Private Bureau of General Security (Asayish)] explained that it was important the KRG authorities knew who was entering KRI and therefore the Asayish had good levels of cooperation with Iraqi intelligence, sharing details of persons who they were required to arrest and stop. In addition the Asayish maintained their own classified information on terrorist groups, such as Ansar-e-Islam or Al Qaeda in Iraq. [He] explained there were two security lists in operation, the “black list”, which included persons who had an arrest warrant outstanding for their detention and a second list, i.e. the “stop list”.

...

2.16 According to [the Head of Asayish,] at KRG external checkpoints, documents would be required to prove the identity of a person[. T]his could include their Civil ID

Card, Nationality Card, passport or, if they worked for a government department, their departmental ID card. However[, he] further explained that a person would not necessarily be denied entry into KRI because he or she lacked some identification documents, as the system is computerised. Muhammed Saleem Mizuree went on to explain that a person already on their database system would be logged with their photo and name recorded onto the system. Consequently such a person could even enter KRI with only a driving licence or a similar document which proved the individual's identity and Iraqi citizenship.

...

2.28 [The General Manager of Kurdistan checkpoints in the Kurdistan Regional Security Protection Agency, KRG Ministry of Interior, Erbil] explained [that] after a person had finished providing information about their identity to Asayish at the KRG external checkpoint, they would then undergo a second procedure at the checkpoint to apply for the appropriate entry card. There existed three entry cards: a Tourism Card, a Work Card, and an Information Card/Residency Card for those seeking to reside in KRI. Once the relevant card had been issued, the person would then be free to travel throughout KRI, including travel between the three KRI governorates, without being required to show any further form of documentation. [He] stated that this procedure made it easy for anyone to move freely within KRI.

...

2.30 During a visit by the delegation to the Mosul-Erbil checkpoint, ... [w]hen asked what would happen if a person did not have an address or know anyone in KRI, [the major who had overall operational responsibility for the checkpoint] explained that such a person would still be allowed to enter and the majority of those coming into KRI were migrant workers in search of employment with no reference in KRI.

2.31 PAO [Public Aid Organisation, the UNHCR Protection and Assistance Centre partner in Erbil] outlined the entry procedures at the KRG external checkpoints and noted that persons seeking to enter the KRI would be questioned and asked to provide their identification, usually a Civil ID Card or Nationality Card, after which they would obtain one of three cards for entry – a Tourism Card, valid for 1 day or up to 1 month and which was renewable; a Work Card valid for 10 – 15 days which was also renewable; or an Information Card/Residency Card for those seeking to reside in KRI. PAO did not know how long this card, issued at the checkpoint, would be valid for.

...

3.05 The Director of an international NGO in Erbil explained that whenever there are specific security concerns and/or threats of terrorist attacks the security and entry procedures will be adapted to the situation. Such procedures only related to security concerns and not to any other factor and these procedures are normal even in Europe.

3.06 When asked if there would be variations in applied entry procedures at KRG checkpoints, an international organization (A) stated that such variations are only related to security concerns and precautions and nothing else.

3.07 According to Harikar NGO, all entry procedures are only related to security considerations and nothing else. Harikar NGO emphasized that its cooperation with the Asayish is good and that the Asayish comply with the law, including the procedures applied at KRG checkpoints. Harikar NGO has not noticed any irregularities or arbitrary practices at the checkpoints.

3.08 [The Head of Asayish] clarified that the policy requiring a person to provide a reference at the KRG external checkpoint, i.e. before entry, existed when the security

situation was more precarious, but was abandoned around two or three years ago. However[, he] added there may still be some instances in which a person was asked by Asayish at the checkpoint to make a telephone call to somebody they knew, to verify their identity.

3.09 During a tour of the Mosul-Erbil checkpoint [the major who had overall operational responsibility for the checkpoint] explained that there was no longer a requirement for a reference to be present at the KRG external checkpoint and [that] this procedure was abolished around four years ago.

...

3.11 The Director of an international NGO in Erbil explained that the former requirement that a reference should be present at the KRG checkpoint in order for a person to enter KRI has been abolished.

3.12 Harikar NGO stated that there is no requirement for a reference to be present at a KRG checkpoint in order for an Iraqi from outside KRI to enter.

...

4.01 [The Head of Asayish] explained that individuals not from KRI may be asked by the Asayish at the checkpoint to telephone an acquaintance in KRI, to verify their identity. When asked if an individual, not from KRI, and who knew no one in KRI would be able to pass through the KRG external checkpoint, [he] explained that this would depend on the individual and the circumstances of the case, but in some instances such a person would be viewed with suspicion. [He] confirmed however [that] such cases were very rare. Less than 30 persons per month across all the KRG external checkpoints, in all three governorates, may be denied entry purely on the grounds that they were considered suspicious for some reason; this included persons who had given inconsistent information when questioned. [He] clarified [that] this figure of "less than 30 cases per month" did not include persons denied entry because they did not have appropriate documentation, and only related to those who were denied entry because they were deemed suspicious for some reason.

...

4.34 When asked how persons without genuine identity documents would be treated by the KRG authorities when seeking to enter KRI, an international organization (B) explained that a Kurd without personal ID documents may be treated more sympathetically and be permitted entry because they would normally know someone in KRI who could identify him or her or they would have a known family/clan name which was recognised. With regard to Christians, the entry arrangements were significantly easier and such persons may even be able to enter KRI without providing any documentation at all. This was because Christians were not considered a terrorist threat to the region – the KRG authorities were very lenient towards Christians. However, the international organization (B) concluded that a person of Arab origin without genuine documents to identify themselves would not be permitted entry.

...

4.41 According to the Director of an international NGO in Erbil, all Iraqis irrespective of ethnic origin or religious orientation are free to enter KRI through the KRG external checkpoints by presenting their Iraqi Civil ID Card. The Director added that Iraqi Turkmen, Christians and Faili Kurds normally enter through these checkpoints without any difficulties. On the other hand Iraqis of Arab origin would normally be required to undergo greater scrutiny, requested to present their Civil ID

Card at the checkpoint and explain the nature and intention of their visit to KRI. However, this procedure was unproblematic and did not require that a reference should be present at the checkpoint. According to [the Director] all persons would be required to routinely show their Civil ID Card at the entry checkpoint and persons of Arab origin faced no problems in staying in the KRI. However the same source clarified that persons of Arab origin would normally have their Civil ID Card photocopied as an extra security precaution. The Director emphasized that persons of Arab origin do not need a reference to be present at the checkpoint.

...

4.44 On the subject of entry procedures at KRG external checkpoints, PAO Erbil clarified that the situation for Christians entering through [Government of Iraq]/KRG checkpoints was one of “positive discrimination” and that such groups experienced no difficulties, neither in entrance nor in obtaining [an] Information Card which is an ID issued for all IDPs. Even if they don’t have [a] sponsor, which is one of the requirements of obtaining this ID, the Ainkawa [a district within Erbil] Churches are taking the responsibility and became their sponsors.

....

8.19 [The Head of Asayish] explained [that] persons displaced by violence coming to KRI from the rest of Iraq would be required to apply for an Information Card at their neighbourhood Asayish in the same way as any other person applying for this card and there existed no special procedure to assist them. [He] however went on to clarify that for Christians there existed special procedures, which meant such persons were not obliged to apply for an Information Card at the Asayish. [He] explained this was because the Christians community was at particular risk from terrorist groups in [southern and central] Iraq and the disputed areas and the terrorist threat posed from Christians was considered to be non-existent.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicants complained that their return to Iraq would involve a violation of Article 3 of the Convention. This provision reads as follows:

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

A. Admissibility

38. The respondent Government claimed that the application was inadmissible for failure to comply with the six-month rule in Article 35 § 1 of the Convention, as the final decision in the domestic proceedings had been taken on 4 September 2009, twelve months before the applicants initiated the present proceedings.

39. The applicants contested this argument.

40. The Court dealt with this issue recently in two cases against Sweden, *P.Z. and Others* and *B.Z.* (nos. 68194/10 and 74352/11, decisions of 29 May 2012), in which it found as follows (§§ 34 and 32, respectively):

“While ... the date of the final domestic decision providing an effective remedy is normally the starting-point for the calculation of the period of six months, the Court reiterates ... that the responsibility of a sending State under Article 2 or 3 of the Convention is, as a rule, incurred only at the time when the measure is taken to remove the individual concerned from its territory. Specific provisions of the Convention should be interpreted and understood in the context of other provisions as well as the issues relevant in a particular type of case. The Court therefore finds that the considerations relevant in determining the date of the sending State’s responsibility must be applicable also in the context of the six-month rule. In other words, the date of the State’s responsibility under Article 2 or 3 corresponds to the date when the six-month period under Article 35 § 1 starts to run for the applicant. If a decision ordering a removal has not been enforced and the individual remains on the territory of the State wishing to remove him or her ... the six-month period has not yet started to run.”

41. The Court sees no reason to find otherwise in the present case. The Government’s objection under Article 35 § 1 must accordingly be rejected.

42. No other ground for declaring the application inadmissible has been invoked or established. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

(a) The applicants

43. The applicants claimed that, should they be returned to Baghdad or other parts of central or southern Iraq, they would face a real risk of being killed or subjected to abduction, threats, physical and mental violence, harassment and discrimination by Islamic extremist groups as well as other individuals because of their Christian beliefs and practices. In addition, the female applicants also claimed that they would be at risk of sexual violence and gender discrimination amounting to treatment contrary to Article 3, on the basis of their gender alone or on the basis of their gender together with their religious beliefs. The applicants asserted that these risks were not due to a general situation of violence in Iraq, but to their belonging to a vulnerable minority.

44. Moreover, they maintained that the incidents to which they had been subjected before leaving Iraq attested to their being at real risk upon return. In this respect, they noted that the Government had not questioned their credibility. In their view, it was very plausible that the family’s Christianity had been the main reason for targeting them, even if the first applicant’s business had been a contributing factor. They would be recognised upon return, as Islamist groups allegedly kept track on inhabitants and because they had lived in the same place for 13 years and were thus known in the

neighbourhood. In these circumstances, it was highly probable that the threatening writings on the house where they had lived constituted a reminder and warning aimed directly at them.

45. The applicants further stated that available country-of-origin information showed that Christians in Iraq had, for several years, been subjected to discrimination, harassment, kidnapping, attacks and other forms of serious violence, against which local authorities were generally unable to afford effective protection. They maintained that the Migration Board and the courts in the domestic proceedings as well as the Government in their observations in the present case had failed to take proper account of such relevant and objective information.

46. As regards internal relocation, the applicants submitted that they were likely to suffer inhuman or degrading treatment in the Kurdistan Region. They pointed out that they had no links with the region, that their financial situation was poor, that two of them were elderly and in relatively bad health and that none of them spoke Kurdish. They also maintained that the security situation for Christians was deteriorating in the Kurdistan Region. In any event, not being able to settle there, they would end up in Baghdad or other parts of central or southern Iraq. As to the first and second applicants' health status, they submitted two medical certificates to the Court, issued in April and May 2012, which stated that the first applicant suffered from hypertension, a benign tumour of the adrenal gland and low levels of blood potassium and that the second applicant's diagnosis included hypertension and depression.

47. Finally, the applicants objected to what they considered to be the Government's contention, that the Court should focus on the procedural soundness of the domestic asylum proceedings and not make its own conclusions on the substantive questions in the case. Instead, the applicants asserted, it was for the Court to determine itself whether there were substantial grounds for believing that the applicants would face a real risk of treatment contrary to Article 3, having regard to all the information before it, including the evidence found in various national and international reports on Iraq.

(b) The Government

48. The Government acknowledged that country-of-origin information showed that the general security situation in the southern and central parts of Iraq was still serious and that Christians made up one of the more exposed groups. However, they maintained that there was no general need of protection for all Christians from Iraq and, consequently, that assessments of protection needs should be made on an individual basis.

49. As to the applicants' personal risks, the Government pointed out that the threats against them had occurred in August 2006, more than six years ago, and asserted that they had only partly been due to the family's religious

beliefs, the other part being of an economic nature based on the first applicant's now discontinued business activities. In the Government's view, the applicants had not shown that the threats against them were still valid. Furthermore, it was not certain that the threats written on the applicant's house more than two years after their departure were directed against them personally.

50. In any event, referring to international reports on Iraq as well as information obtained from the Migration Board, the Government contended that there was an internal flight alternative for the applicants in the three northern governorates of the Kurdistan Region. Allegedly, they would be able to enter without any restrictions or sponsor requirements into this region, which had been identified as the safest and most stable in Iraq, and they would be able to settle there, with access to the same public services as other residents. In fact, there was nothing in the applicants' story that suggested the existence of a threat against them in other parts of Iraq than Baghdad. Moreover, the first and second applicants both had high levels of education and would be able to work and provide for themselves, even in an area of Iraq where they lacked a social network. Their health status did not indicate that they were unfit for work or otherwise affected in their ability to relocate within Iraq.

51. The Government further asserted that the Migration Board and the courts had provided the applicants with effective guarantees against arbitrary *refoulement* and had made thorough assessments, adequately and sufficiently supported by national and international source materials. In the proceedings, the applicants had been given many opportunities to present their case, through interviews conducted by the Board with an interpreter present and by being invited to submit written submissions, at all stages assisted by legal counsel. Moreover, having regard to the expertise held by the migration bodies, the Government maintained that significant weight should be given to their findings.

2. The Court's assessment

(a) General principles

52. 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, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67; *Boujlifa v. France*, judgment of 21 October 1997, *Reports* 1997-VI, p. 2264, § 42; and *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). 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 receiving country. In these circumstances, Article 3 implies the 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-...).

53. The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires that the Court assesses the conditions in the receiving country against the standards of Article 3 of the Convention (*Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I). These standards imply 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 is relative, depending on all the circumstances of the case (*Hilal v. the United Kingdom*, no. 45276/99, § 60, ECHR 2001-II). Owing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, § 40).

54. The assessment of the existence of a real risk must necessarily be a rigorous one (*Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, § 96; 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. In this respect, the Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, among other authorities, *Collins and Akaziebie v. Sweden* (dec.), no. 23944/05, 8 March 2007; and *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008).

55. 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. It must be satisfied, though, 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 (*NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

(b) The general situation in Iraq

56. The Court notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (*H.L.R. v. France*, cited above, § 41). However, the Court has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (*NA. v. the United Kingdom*, cited above, § 115).

57. While the international reports on Iraq attest to a continued difficult situation, including indiscriminate and deadly attacks by violent groups, discrimination as well as heavy-handed treatment by authorities, it appears that the overall situation is slowly improving. In the case of *F.H. v. Sweden* (no. 32621/06, § 93, 20 January 2009), the Court, having at its disposal information material up to and including the year 2008, concluded that the general situation in Iraq was not 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. Taking into account the international and national reports available today, the Court sees no reason to alter the position taken in this respect four years ago.

58. However, the applicants are not in essence claiming that the general circumstances pertaining in Iraq would on their own preclude their return to that country, but that this situation together with, primarily, the fact that they are Christians would put them at real risk of being subjected to treatment prohibited by Article 3.

(c) The situation of Christians in Iraq

59. In the mentioned case of *F.H. v. Sweden*, following its conclusion that the general situation in Iraq was not sufficient to preclude all returns to the country, the Court had occasion to examine the risks facing the applicant on account of his being Christian. It concluded then that he would not face a real risk of persecution or ill-treatment on the basis of his religious affiliation alone. In so doing, the Court had regard to the occurrence of attacks against Christians, some of them deadly, but found that they had been carried out by individuals rather than organised groups and that the applicant would be able to seek protection from the Iraqi authorities who would be willing and able to help him (§ 97 of the judgment).

60. During the subsequent four years, attacks on Christians have continued, including the attack on 31 October 2010 on the Catholic church

Our Lady of Salvation in Baghdad, claiming more than 50 victims. The available evidence rather suggests that, in comparison with 2008/09, such violence has escalated. While still the great majority of civilians killed in Iraq are Muslims, a high number of attacks have been recorded in recent years which appear to have specifically targeted Christians and been conducted by organised extremist groups. As noted by the UNHCR (see § 25 above) and others, Christians form a vulnerable minority in the southern and central parts of Iraq, either directly because of their faith or because of their perceived wealth or connections with foreign forces and countries or the practice of some of them to sell alcohol. The UK Border Agency concluded in December 2011 that the authorities in these parts of the country were generally unable to protect Christians and other religious minorities (§ 26 above).

61. The question arises whether the vulnerability of the Christian group and the risks which the individuals face on account of their faith make it impossible to return members of this group to Iraq without violating their rights under Article 3. The Court considers, however, that it need not determine this issue, as there is an internal relocation alternative available to them in the Kurdistan Region. This will be examined in the following.

(d) The possibility of relocation to the Kurdistan Region

62. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight or relocation alternative in their assessment of an individual's claim that a return to the country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision. However, the Court has held that reliance on such an 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. Therefore, as a precondition of relying on an internal flight or relocation 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 or her ending up in a part of the country of origin where there is a real risk of ill-treatment (*Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 266, 28 June 2011, with further references).

63. The three northern governorates – Dahuk, Erbil and Sulaymaniyah – forming the Kurdistan Region of Iraq, or KRI, are, according to international sources, a relatively safe area. While there have been incidents of violence and threats, the rights of Christians are generally considered to be respected. As noted by various sources, large numbers of Christians have travelled to the Kurdistan Region and found refuge there.

64. As regards the possibility of entering the KRI, some sources state that the border checks are often inconsistent, varying not only from governorate to governorate but also from checkpoint to checkpoint (see the UNHCR Guidelines, at § 30 above, and the Finnish/Swiss report, which appears to rely heavily on the UNHCR's conclusions in this respect, at § 35 above). However, the difficulties faced by some at the KRI checkpoints do not seem to be relevant for Christians. This has been noted by, among others, the UNHCR. Rather, members of the Christian group are given preferential treatment as compared to others wishing to enter the Kurdistan Region. As stated by a representative of an international organisation and the head of Asaysih, the KRI general security authority, to investigators of the Danish/UK fact-finding mission, this is because Christians are at particular risk of terrorist attacks in southern and central Iraq and as the Christians are not considered to pose any terrorist threat themselves (see § 36 above, at 4.34 and 8.19).

65. Moreover, while Christians may be able to enter the three northern governorates without providing any documentation at all (see Danish/UK report, § 36 above, at 4.34), in any event there does not seem to be any difficulty to obtain identity documents in case old ones have been lost. As concluded by the UK Border Agency (§ 31 above) and the UK Upper Tribunal in the recent country guidance case of *HM and others* (§ 34 above), it is possible for an individual to obtain identity documents from a central register in Baghdad, which retains identity records on microfiche, whether he or she is applying from abroad or within Iraq. In regard to the need for a sponsor resident in the Kurdistan Region, the Upper Tribunal further concluded, in the case mentioned above, that no-one was required to have a sponsor, whether for their entry into or for their continued residence in the KRI. It appears that the UNHCR is of the same opinion as regards entry, although its statement in the Guidelines directly concerns only the requirements of a tourist (§ 30 above). The Finnish/Swiss report states that Christians may be able to nominate senior clerics as sponsors (§ 35 above); thus, they do not have to have a personal acquaintance to vouch for them.

66. Internal relocation inevitably involves certain hardship. Various sources have attested that people who relocate to the Kurdistan Region may face difficulties, for instance, in finding proper jobs and housing there, not the least if they do not speak Kurdish. Nevertheless, the evidence before the Court suggests that there are jobs available and that settlers have access to health care as well as financial and other support from the UNHCR and local authorities. In any event, there is no indication that the general living conditions in the KRI for a Christian settler would be unreasonable or in any way amount to treatment prohibited by Article 3. Nor is there a real risk of his or her ending up in the other parts of Iraq.

67. In conclusion, therefore, the Court considers that relocation to the Kurdistan Region is a viable alternative for a Christian fearing persecution

or ill-treatment in other parts of Iraq. The reliance by a Contracting State on such an alternative would thus not, in general, give rise to an issue under Article 3.

(e) The particular circumstances of the applicants

68. It remains for the Court to determine whether, despite what has been stated above, the personal circumstances of the three applicants would make it unreasonable for them to settle in the Kurdistan Region. In this respect, the Court first notes that the applicants' accounts were examined by the Migration Board and the Migration Court, which both gave extensive reasons for their decisions that they were not in need of protection in Sweden. The applicants were able to present the arguments they wished with the assistance of legal counsel and language interpretation.

69. As regards the incidents to which the applicants were subjected in Iraq, the Court notes that they all occurred in Baghdad. While they have claimed that they would risk ill-treatment also in the Kurdistan Region, where the situations for Christians are allegedly deteriorating, these claims have not been substantiated and are not supported by the information on the KRI available to the Court.

70. The first and second applicants have also pointed out that they are elderly and in bad health. However, the medical certificates submitted during the proceedings before the Court do not suggest that they have such medical problems that they could not return to Iraq, nor are they of such an advanced age that it of itself would render their deportation unreasonable.

71. Moreover, the second and third applicants have maintained that they, as women, would face a risk of sexual violence and gender discrimination in Iraq. In this respect, the Court finds that, notwithstanding the fact that women in Iraq undoubtedly are in an unfavoured position as compared to men, the applicants' submissions and the available country-of-origin information do not indicate that they are at real risk of gender-related ill-treatment upon return which could involve a violation of Article 3.

72. The Court finally considers that also the other allegations of the applicants – that they are poor and have no links to the Kurdistan Region – fail to show that they would be subjected to ill-treatment upon return.

(f) Conclusion

73. Having regard to the above, the Court concludes that, although the applicants, as Christians, belong to a vulnerable minority and irrespective of whether they can be said to face, as members of that group, a real risk of treatment proscribed by Article 3 of the Convention in the southern and central parts of Iraq, they may reasonably relocate to the Kurdistan Region, where they will not face such a risk. Neither the general situation in that

region, including that of the Christian minority, nor any of the applicants' personal circumstances indicate the existence of said risk.

Consequently, their deportation to Iraq would not involve a violation of Article 3.

II. RULE 39 OF THE RULES OF COURT

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

75. It considers that the indication made to the Government under Rule 39 of the Rules of Court (see § 4 above) must continue in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;
2. *Holds* by five votes to two that the implementation of the deportation order against the applicants would not give rise to a violation of Article 3 of the Convention;
3. *Decides* unanimously to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to deport the applicants until such time as the present judgment becomes final or until further order.

Done in English, and notified in writing on 27 June 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
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 Lemmens;
- (b) separate opinion of Judge Power-Forde joined by Judge Zupančič.

M.V.
C.W.

CONCURRING OPINION OF JUDGE LEMMENS

I voted with my colleagues in finding that there would be no violation of Article 3 of the Convention if the deportation order were implemented.

In my opinion, however, it was not necessary to discuss the merits of the application as it should have been declared inadmissible for failure to comply with the six-month rule.

Each of the applicants filed an asylum request. When the Migration Board rejected their requests, it decided at the same time that the applicants had to be deported to Iraq (or to another country willing to receive them). The risk of ill-treatment that the applicants allegedly run stems from the deportation orders. These orders became enforceable when the Migration Court of Appeal decided, on 4 September 2009, to refuse leave to appeal against the Migration Court's judgment upholding the rejection of the asylum requests. In my opinion, the Government were right in arguing that the six-month time-limit started to run from that date. As a result, the application, which was lodged on 3 September 2010, should have been declared inadmissible.

It is true that the Court rejected a similar objection raised by the same Government in two decisions of 29 May 2012, quoted in paragraph 40 of the judgment (*P.Z. and Others v. Sweden*, no. 68194/10, and *B.Z. v. Sweden*, no. 74352/11; see also, implicitly, as indicated by the applicants, *N. v. Sweden*, no. 23505/09, §§ 1, 14 and 39, 20 July 2010). With all due respect, however, I must confess that I am not convinced by the reasoning in those decisions. In particular, while I agree that the (actual, not potential) responsibility of a sending State under Article 3 of the Convention is "incurred only at the time when the measure is taken to remove the individual concerned", I do not see why it follows from this that the six-month period for lodging an application with the Court does not start to run until the actual deportation. It may well be that the sending State does not immediately enforce an enforceable deportation order, for a variety of imaginable reasons, and thus tolerates a person remaining for some time in the country. As long as this tolerance exists, the alleged violation is only a potential one. However, the person concerned can already complain about such a potential violation. I do not see why a person making use of that possibility should not respect the six-month rule. It would seem to me that the six-month period in such a situation starts to run from the moment when the decision that gives rise to the alleged potential violation becomes final, that is, from the moment when the deportation order becomes enforceable.

In the present case the applicants lodged their application after their request for re-examination of the matter was rejected by the Migration Board (on 9 March 2010) and after that decision was upheld by the Migration Court (on 16 June 2010) (see paragraphs 12-13). I note incidentally that they did not appeal against the latter judgment, but will not

draw any conclusions from this. The question arises whether a new period of six months started to run from the date of delivery of the judgment of the Migration Court.

According to the relevant provisions of domestic law, the Migration Board will decide to re-examine the matter if new circumstances are invoked by the alien. If that does not apply, as was found in the case of the applicants, the Migration Board will not re-examine the matter (see Chapter 12, Section 19, of the Aliens Act, quoted in paragraph 18).

In my opinion, the rejection of a request for re-examination based on new circumstances does not cause a new six-month period to start to run, at least not in respect of the circumstances already invoked in the initial proceedings. In the present case, the applicants complain about a potential violation of Article 3 of the Convention on the basis of circumstances invoked in the initial proceedings, which ended with the Migration Court of Appeal's decision of 4 September 2009. In these circumstances it does not seem to me that their attempt to obtain a re-examination of their case brings their application, lodged on 3 September 2010, within the six-month time-limit.

DISSENTING OPINION OF JUDGE POWER-FORDE JOINED BY JUDGE ZUPANČIČ

This important lead judgment concerns the application of the Court's jurisprudence on internal flight relocation to the forced return of a specific category of failed asylum seekers to Iraq. More particularly, it raises the question as to the quality of the guarantees that must be in place before such persons may be deported back to their country of origin. There is a critical lacuna in the majority's judgment that prevents me from joining them in finding that the implementation of deportation orders made in respect of the applicants would not give rise to a violation under Article 3 of the Convention.

The applicants are not just failed asylum seekers being returned to a country from which they have fled because of the dangers of war. They are persons who belong to a particular group that is, specifically, targeted in their home country because they exercise their fundamental right to freedom of religion and belief.

In *F.H. v. Sweden* I disagreed with the majority's view that the general situation in Iraq, as of 2009, was not so serious as to prevent forcible expulsion. At that time, I gave significant weight to the view of the UNHCR that Iraqis were to be presumed to have international protection needs and that they should be considered to be refugees 'on a *prima facie* basis'.

It is clear that matters have moved forward since that date. On 21 May 2012 the UNHCR issued new Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq¹. That Agency has modified its position since 2009 and its current recommendation is that all claims be assessed on their individual merits, on a case-by-case basis, and in the light of up to date information.²

There are two aspects of the 2012 Guidelines that are of particular relevance in the instant case. The first is that Iraqi asylum seekers with certain profiles and depending on their particular circumstances "*are likely to be in need of international refugee protection*".³ Such profiles include "individuals with religion based claims" and "certain professionals".⁴ The second is the UNHCR's view that internal flight options are "*often not available in Iraq*" due to serious risks faced by Iraqis throughout the country, including, threats to safety and security, accessibility problems and lack of livelihood opportunities.

¹ On 21 May 2012 the UNHCR issued new Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq. These guidelines replaced the earlier 2009 Guidelines. They were prepared based on an analysis of up-to-date and relevant information from a wide variety of sources as of the 18th of March 2012.

² 2012 Guidelines, page 6.

³ Ibid.,23.

⁴ Ibid.

Notwithstanding the fact that, as of late, the general situation in Iraq is deteriorating steadily,¹ I can agree with the majority that, in principle, it is not of sufficient gravity, in itself, to prevent the return of failed asylum seekers to Iraq (§ 57).

Further, and notwithstanding the fact that attacks and violence against Christians have increased since October 2010 resulting in their massive displacement within Iraq,² I can also accept that, in principle, the alternative relocation and settlement of Christians within the Kurdish Region, would not, in itself, violate Article 3.

My disagreement with the majority lies in its *application* of the Court's jurisprudence on internal flight relocation to the facts of the instant case. More particularly, I cannot overlook its failure to test whether the necessary guarantees required by the Court are *de facto* in place prior to the applicants' forced return to Iraq.

The Court's case-law on internal flight relocation is clear. The relevant principles are articulated in *Salah Sheekh v. the Netherlands*³ and have been confirmed, more recently, in *Sufi and Elmi v. the United Kingdom*.⁴ The Court considers that, as a precondition for relying on an internal flight alternative, certain guarantees have to be in place. These include: (i) that the person to be expelled must be able to travel safely to the area concerned; (ii) that the person concerned must be able to gain admittance to the area concerned; and (iii) that the person concerned must be able to settle in the area concerned.

To require that 'guarantees' are in place before deportations on the basis of an internal flight option can proceed is to set a high threshold of evidence in terms of the returnee's future safety. Likelihoods, chances or positive indications are not enough. This is rightly so given the seriousness of what is at issue in sanctioning the forced return of persons with an unquestionable history of persecution in their home country to a different region thereof. It is entirely appropriate that the Court has set the bar at the level of 'guarantee'. Safe transit to, actual admittance into and the ability to settle within the relocated area must be 'guaranteed' as a precondition for reliance upon internal flight options.

Furthermore, such guarantees must be in place at the point when the assessment of risk under Article 3 is being made by the Court.⁵ If they are not, then an issue under Article 3 may arise, "*the more so if in the absence*

¹ The UN figures showed that 1,045 civilians and security personnel were killed in May 2013. That surpassed the 712 killed in April, the deadliest month recorded since June 2008. <http://www.guardian.co.uk/world/2013/jun/01/iraq-highest-monthly-death-toll-years>.

² 2012 Guidelines, page 28.

³ *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 141-142, 11 January 2007.

⁴ *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011.

⁵ *Salah Sheekh*, § 136.

of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment”.¹

Having identified the necessary guarantees, the Court in *Salah Sheekh* and *Sufi and Elmi* went on to test whether they were, in fact, established in each case. Thus, it considered, in detail, the risks involved in transit to the relatively ‘safe places’ of Somaliland and Puntland or other parts of central or southern Somalia.² It also examined the likelihood of the applicants being allowed or enabled to stay in the ‘safe territory’³ and it examined, specifically, the humanitarian conditions in the IDP camps in assessing a returnee’s ability to cater for his most basic needs, his vulnerability to ill-treatment and the prospects of his situation improving within a reasonable time.⁴ Despite the positive indications of ‘relative safety’ relied upon by the Dutch and British governments, it was the absence of the requisite guarantees that led the Court in both cases to reject proposals to deport the applicants on the basis of internal flight options, finding that, to do so in the absence of such guarantees would violate Article 3.

The majority’s approach to the *application* of the relevant principles in the instant case stands in marked contrast to the Court’s approach in these earlier cases. In § 62 it recites the relevant principles and notes the guarantees that are required to be in place. Having done so, however, it fails to apply those principles by testing whether, in the circumstances of the instant case, the prerequisite guarantees are *de facto* in place.

On the required guarantee of ‘safe travel’, for example, there is no mention anywhere in the judgment as to how the Government proposes to have the applicants travel to the area concerned. A relevant question arises as to whether the Respondent State is required to arrange for deportation directly to the relocation area, or, alternatively, to send the applicants to a destination from where they can move to the safe area themselves without prohibitive risk or hardship. Since this question remains unaddressed and therefore unanswered in the judgment, there is no possibility for this Court to consider, as it did in *Salah Sheekh* and *Sufi and Elmi*, any of the risks involved in the applicants’ transit to the Kurdistan region.

A consideration of the transit risks is all the more important having regard to the recent escalation in violence in Iraq which comes one year after the UNHCR had already observed that:-

“In terms of access, roads between the Kurdistan Region and central Iraq cannot be considered safe. ... Roads that are not under the control of the Kurdish forces are unpredictable and have reportedly been the site of a high numbers (sic) of attacks. There are several official checkpoints between the central part of the country and the KRG-administered area. There are also random check points set up depending on the

¹ *Salah Sheekh*, § 141 and *Sufi and Elmi*, § 266.

² *Salah Sheekh*, §§ 143-148 and *Sufi and Elmi*, § 266-296.

³ *Salah Sheekh*, §§ 143.

⁴ *Sufi and Elmi*, § 283.

security situation. Further, the borders of the Kurdistan Region, including between its own governorates, have been observed to close without advance warning due to security concerns. Other areas along the unofficial border have been heavily mined in the past decade and are regularly patrolled by Kurdish Security Forces. Such conditions make it nearly impossible for persons to cross into the three northern governorates through the countryside without danger.”

The omission in the Judgment of any consideration of the means and routes to be deployed by the State in deporting the applicants to the Kurdistan Region means that the first prerequisite guarantee that the applicants can, in fact, travel safely to the area concerned has not been established.

As to the existence of the other necessary guarantees, I cannot but conclude that there remains some doubt as to whether they have been met in this case. In *Salah Sheekh v. the Netherlands* the Government had provided information that Somalis were free to enter and leave the country as State borders were subject to very few controls. The Court accepted that the Government may well succeed in removing the applicant to the relatively safe territory of either Somaliland or Puntland but it went on to observe that

“[T]his by no means constitutes a guarantee that the applicant, once there, will be allowed or enabled to stay in the territory, and with no monitoring of deported rejected asylum seekers taking place, the Government have no way of verifying whether or not the applicant succeeds in gaining admittance.”

I accept that Christians are regarded as not posing any terrorist threat to the Kurdish region and that, in general, there is an hospitable attitude adopted by the Kurdish authorities towards a considerable number of IDPs, including, Christians. However, one cannot fail to take cognisance of the UNHCR’s finding that:-

“The KRG authorities continue to implement stringent controls on the presence of persons not originating from the Kurdistan Region.”¹

and that

“There are no official and publicly accessible regulations concerning procedures and practices at the entry checkpoints into the Kurdistan Region. An ad hoc and often inconsistent approach can be expected in terms of who is granted access, varying not only from governorate to governorate but also from checkpoint to checkpoint.”²

That being so and, in the absence of any reliable monitoring of the fate of deported rejected asylum seekers, there must remain some doubt as to whether the applicants will be ‘guaranteed’ admittance into the Kurdish Region given the myriad uncertainties that abound. Quite simply, there is no agreement in the reports relied upon by the majority on this and on a

¹ 2012 Guidelines, page 49.

² Ibid. page 50.

number of important issues that will, inevitably, affect the lives of the applicants.

Even if one could accept the likelihood that the applicants would gain admittance to the Kurdish Region, the Government has *no way of verifying* whether the applicants could remain and settle in this place. These doubts as to the requisite guarantees arise prior to any consideration of the humanitarian conditions in which the applicants will be expected to live. Clearly, they will face hardship and difficulty in accessing food rations, housing, education and employment. The recent influx of Syrian refugees into the northern area of Iraq cannot but exacerbate these problems.

It is, primarily, the absence of the requisite guarantee as to safe transit that prevents me from voting with the majority in this case although doubts as to the other necessary guarantees only serve to compound the problem. It falls to the Government to satisfy the Court that the applicants will not be at risk of treatment that violates Article 3 by reason of their decision to deport them back to Iraq. Absent any information as to how the applicants are to reach the Kurdish Region there is a critical lacuna in the majority's judgment which needs to be addressed in order to ensure that internal flight relocation can, indeed, be used.

Consequently, whilst I do not exclude that, in principle, internal relocation alternatives for Iraqi Christians may raise no issue under Article 3, I am not satisfied that, in the instant case, the requisite guarantees that are required by the Court have been provided. Consequently, in my view, this case raises a serious question concerning the application of the Convention and, in particular, the quality of the guarantees that must exist as a precondition for a State's reliance upon internal flight relocation as a means of circumventing the absolute nature of the prohibition contained in Article 3 of the Convention. This serious issue is one of general importance as it affects significant numbers of a vulnerable religious minority who are being forcibly returned to a country in which they are specifically targeted as the subjects of violent attack on the basis of their religious beliefs.