



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

---

IRAQ

IAA reference: IAA15/00105

Date and time of decision: 18 December 2015 14:20:10

Kanwal Josan, Reviewer

**Decision**

---

The IAA affirms the decision not to grant the referred applicant a protection visa

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

---

### Decision of the delegate

1. [In] November 2015, a delegate of the Minister for Immigration and Border Protection refused to grant a protection visa to the referred applicant IAA15/00105 (the applicant), an Iraqi citizen.
2. The delegate accepted that the applicant was a member of the Iraqi Army, however did not accept as credible his claims to have been threatened by [Agency 1] in Iraq.
3. The delegate found the applicant's interview testimony to be intentionally evasive and vague, with significant discrepancies between written claims and information provided at interview regarding the existence of a USB device (also described at interview as a memory card) containing video files and lack of knowledge of a friend's affiliation with [Agency 1].
4. At an arrival interview conducted at [detention centre] [in] October 2012 the applicant had stated that he did not know who was threatening him and made no mention of the incident where a USB device was taken by a friend or the multiple threats against him over several years by [Agency 1]. The delegate found this to be evidence that these subsequently stated claims were fabrications.
5. The delegate concluded that the applicant was not a refugee as defined by s.5H(1) of the *Migration Act 1958* (the Act), finding that:
  - The applicant could safely and lawfully access [City 1] from Basra.
  - If the applicant were to return to [City 1], any chance of him facing harm from any Sunni insurgent group or anyone else on account of being a Shia Muslim to be remote.
  - The applicant faces no real chance of harm from Iraqi authorities, [militia] or the community in general due to being an Iraqi Army deserter or a former soldier who worked with [western] troops in Iraq.
6. With regard to complementary protection, the delegate found that the applicant is not a person in respect of whom Australia has protection obligations under s.36(2)(aa) of the Act.

### Information before the IAA

7. I have had regard to the material referred by the Secretary under s.473CB of the Act and a submission subsequently given to the IAA by the applicant's authorised representative on 15 December 2015. This submission largely addresses the delegate's decision, but also contains new information that was not before the delegate when the decision was made. For the reasons discussed later in this decision, I have considered the new information.

### Applicant's claims for protection

---

8. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
  - In 2006 the applicant joined the Iraqi Army where he worked alongside [western] troops. As part of this work he would conduct raids on terrorists and militia members, some of whom belonged to [Agency 1].

- The applicant did not disclose to his friends his work with [western] troops. In 2009 the applicant was in his car with a friend who he did not know was [an Agency 1] supporter. In his car the applicant had a USB device on which were stored photographs of him with [western] troops and videos of him accompanying [western] troops when conducting raids on militias. His friend took the USB device from the car without the applicant's knowledge when the applicant stepped away temporarily from the car.
- A few days later, after the applicant resumed his military duties, [Agency 1] members came to his family home and told the applicant's mother they had evidence about him and his work with [western] troops. After this the applicant heard from his family that [Agency 1] had threatened to kill him if he continued to work with the [western troops].
- The applicant's brother was killed [in] April 2009 in an exchange of gunfire with [Agency 1].
- The applicant's Iraqi commander and his [western] commander both said they could do nothing to protect the applicant while he was outside the military base. They advised him to depart Iraq. This occurred about two years prior to him leaving the country. The applicant's family said [Agency 1] kept coming to their residence threatening them. They chased his [sibling], forcing [his sibling] to give up [a] career as [occupation].
- In 2009 the applicant's family warned him to leave Iraq because [Agency 1] told them they knew where the applicant worked and that they would kill him.
- He left the Army, initially stating this occurred in 2009, but later claimed this occurred in 2011/2012.
- He departed Iraq in August 2012.
- If he returns to Iraq, the applicant fears he will be killed by [Agency 1] due to his work with the [western] troops.
- The applicant will face the death penalty under Article 28(3) of Iraq's Military Penal Code because he deserted from the Iraqi Army and "took some photos of videos of the battles he took part in".

### **Factual findings**

---

9. I find that the applicant is a citizen of Iraq and not of any other country. This is based on information provided by the applicant at interviews with officers of the Department of Immigration and Border Protection (the department) [in] October 2012 and [in] October 2015 and the following documents he submitted<sup>1</sup>:

- Uncertified copy of Iraqi national ID card with English translation.
- Uncertified copy of Iraqi citizenship certificate with English translation.

10. After having regard to the applicant's statutory declaration accompanying his written application for a protection visa<sup>2</sup> and his responses at interviews with officers of the department [in] October 2012 and [in] October 2015, I find that he is a Shia Muslim.

---

<sup>1</sup> [Information deleted]

<sup>2</sup> [Information deleted]

11. The applicant claims to have served in the lower ranks of the Iraqi Army from [year] onwards. Based on the military identity documents<sup>3</sup> presented, which identify the applicant as part of the Iraqi Army's [deleted]<sup>th</sup> Division and the information provided at interview, I find that the applicant served as [an] officer of a rank equivalent to [position] in the Iraqi Army. At interview the applicant provided details of his service history. I accept as plausible his statements and information subsequently provided to the IAA regarding his army service and find that that he served in the Iraqi Army [deleted]<sup>th</sup> Division and then transferred to [another division] in 2007.
12. The applicant claims his Iraqi Army duties involved working alongside [western] troops. The photographs presented with his visa application show him wearing military fatigues and also standing informally with individuals who appear to be [western] military personnel. Country information on the size of [western] troop presence in Iraq and its dual purpose missions of combat and training<sup>4</sup> indicates that it is plausible that the applicant worked with [western] troops. On this basis I accept that that the applicant's Iraqi Army duties involved activity alongside [western] troops.
13. The applicant claims his military duties in the Iraqi army involved [activities] conducting joint raids with [western] troops targeting members of militias, Al Qaeda and [Agency 1]. At interview he described his duties as "getting information from intelligence and joining the [western troops] raiding and storming to stop militias". He described weapons training in the use of M-16 and AK-47 assault rifles and stated that as part of a [unit], he received better pay than ordinary soldiers. The Iraqi Army's [information deleted]<sup>5</sup> [would] have engaged in the types of activities described by the applicant. I have found previously that the applicant served in the Iraqi [Army] and after considering his statements regarding weapons training and higher pay, which is consistent with the country information, I find that he was involved in [particular] duties conducting joint raids with [western] troops on militants, including the [Agency 1].
14. The applicant claims he was targeted by [Agency 1] in 2009 because they had obtained digital photographs and video recordings of him accompanying [western] troops while conducting raids on militants. The credibility of this claim is placed in doubt in a number of regards. His explanation at interview of how [Agency 1] obtained the video files lacks credibility. No mention was made of this incident at the entry interview, where the applicant stated that the source of threats to his safety were from unknown persons who ordered him to cease activity with [western] troops. The scenario where a USB device (or memory card) containing the video files was removed from the applicant's car without his knowledge by a lifelong friend, who, unbeknownst to the applicant was [an Agency 1] supporter, lacks credibility. I do not accept the applicant's contention in the subsequent information that this friend did not tell him about his [Agency 1] sympathies because he knew the applicant was a member of the Iraqi Army. I do not accept that in the volatile Iraqi security environment at the time, a trained professional soldier such as the applicant, would be completely unaware of a lifelong friend's allegiances with a militia group the applicant was actively targeting with [western] troops.
15. I acknowledge that Iraqi soldiers have in the past, and especially in 2008, been targeted by [militias] like [Agency 1]. I acknowledge that an Iraqi soldier such as the applicant, serving with the [Iraqi Army], would have been viewed adversely by [militias]. However, despite claiming to fear [Agency 1] due to repeated specific threats from 2009 onwards from its members that they were going to kill him because they knew where he worked, the applicant remained in Iraq for a further three years, engaged in his normal activities. Even two years after he claims

---

<sup>3</sup> [Information deleted]

<sup>4</sup> [Information deleted]

<sup>5</sup> [Information deleted]

his army commanders advised him to depart Iraq, the applicant remained. The submission provided to the IAA states that it was not easy for someone like the applicant to choose the suitable time to leave the army, however the fact that the applicant went about his ordinary activities and was not attacked or killed between 2009 and 2012 is strong evidence that he has not been threatened by, and is not of active interest to, a [militia] like [Agency 1]. The above noted concerns lead me to the conclusion that the applicant has not been threatened by [Agency 1] as he claims and that a USB storage device (or memory card) containing images of the applicant conducting raids against militant groups was not taken from him by [an Agency 1] supporter.

16. The applicant claims his brother was killed by [Agency 1] in April 2009 following an argument that ensued after [Agency 1] members came to the applicant's family home looking for the applicant. The applicant stated at interview he knew his brother's killers were from the [Agency 1] because they were dressed in [a particular way]. I There is no indication that the applicant's brother was of any interest to [Agency 1] other than due to their claimed interest in the applicant. The applicant stated in his entry interview and at his visa interview that his brother was killed in 2009. I accept at face value the claim that the applicant's brother may have died in 2009, however given I have found the claim relating to the USB device to be implausible, that the applicant was unharmed in the three year period prior to his departure, and my finding that his brother was not otherwise of interest to [Agency 1], I do not accept that the circumstances of his death involved the [Agency 1], or had any connection to the applicant. In light of this, I do not consider that the applicant faces any chance of harm arising from his brother's death.
17. The method by which the applicant exited the Iraqi army is not clearly articulated. Nevertheless, after having regard to his statements at interview that he "quit" the army and "just left", I find that he was not formally discharged from military service and that he abandoned his post with the intention of not returning to it. While conflicting information has been provided about the time of this exit from the Iraqi Army, I accept his statement at interview and the submission to the IAA that this occurred around [number] months prior to his departure from Iraq. Accordingly I find that the applicant deserted from the Iraqi army in 2012.
18. In the submission to the IAA, the applicant presented new information where he claims to face the death penalty under Article 28(3) of Iraq's Military Penal Code no. 19 of 2007 because he "took some photos of videos of the battles he took part in". While the delegate in his decision referred in general terms to Iraqi Army deserters facing the death penalty, no specific reference was made to Iraq's Military Penal Code. I accept as plausible that the applicant may not have been aware of the specific information regarding the death penalty under Article 28(3) of Iraq's Military Penal Code until the decision of the delegate. I am satisfied therefore that the new information was not, and could not have been, provided to the Minister before the Minister made the decision under s.65. As the new information articulates potential extreme personal consequences for the applicant and is directly relevant to the applicant's claims, which in part I accept, I am satisfied that there are exceptional circumstances to justify considering it. As the provisions of s.473DD of the Act have been satisfied, I have considered the new information.

## Refugee assessment

---

19. Section 5H(1) of the *Migration Act 1958* (the Act) provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her

nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### Well-founded fear of persecution

20. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion

21. I have concluded that the applicant is of no interest to [Agency 1]. As a result of this I find that the applicant does not face a real chance of persecution from the [Agency 1]. I accept that in the lead up to the withdrawal of [western] [troops], insurgent groups increased the tempo of their attacks, with the US military acknowledging an increase in [activity]<sup>6</sup>. However I do not consider that the applicant would now be targeted by [Agency 1] or its successor organisations. As late as 2011, [Agency 1's] [leader] ordered his followers to limit attacks to hard [targets]<sup>7</sup>. In addition to this, reports are that most [militia] activity subsided following the US withdrawal in 2011, with [Agency 1] reconstituting [itself]<sup>8</sup>. The armed wing of the Sadrist movement is now known as the Peace Brigade (or Promised Day Brigade). The fact that the Peace Brigade fights alongside Sunni tribes and Christians and participates in joint operations with the Iraqi Security Forces against *Daesh*<sup>9</sup> is indicative of a lack of interest in overt reprisals against individual Iraqi military personnel who may have served alongside American troops.

22. The applicant provided information at interview and subsequently to the IAA that as a deserter from the Iraqi Army, he fears harsh punishment and harm from the authorities if he were to return to Iraq. I accept that as a matter of law, the death penalty may be a possible punishment for desertion in Iraq<sup>10</sup>. However I do not consider there is a real chance this punishment will be imposed now or in the foreseeable future. In an effort to rebuild its army, the Iraqi government is encouraging deserters to re-enlist voluntarily. Nobody re-enlisting is being asked to explain why they abandoned their unit and as at September 2014, around 6,000 soldiers and officers had registered at a military outpost in Kurdistan and around 5,000 in Baghdad<sup>11</sup>. In addition to this, in May 2015 the Iraqi Prime Minister who is also Commander-in-Chief of the Armed Forces, announced a halt of any legal action against deserters<sup>12</sup>. I find

---

<sup>6</sup> [Information deleted]

<sup>7</sup> [Information deleted]

<sup>8</sup> [Information deleted]

<sup>9</sup> “Rethinking Sadr: From Firebrand to Iraqi Statesman?”, Carnegie Endowment for International Peace, 20 November 2014, CX1B9ECAB7538; “The Double Game: The Sadr Strategy in Iraq”, Al Jazeera Centre for Studies, 21 March 2013, CIS27784

<sup>10</sup> “Country report and updates: Iraq”, War Resisters International, 2 October 2002, CX250959; “Iraq: army deserters to be executed”, War Resisters’ International, 4 May 2007, CX314168

<sup>11</sup> “Iraq Army Woos Deserters Back to War on ISIS”, New York Times, 28 September 2014, CX1B9ECAB11500

<sup>12</sup> CXBD6A0DE14049: “Abadi pardons Iraqi military deserters and others”, Iraqi News, 17 May 2015

that the applicant does not face a real chance of persecution due to his status as an Iraqi Army deserter.

23. In the submission to the IAA, the applicant also claimed to fear the death penalty under Article 28(3) of Iraq's Military Penal Code, which provides that any person who "obtains or photocopies things or documents or passed military information that must be kept secret for the safety or interest of the state, directly or by a means to a foreign state..." The applicant claims he will face the death penalty under this provision because he "took some photos of videos of the battles he took part in".
24. I have found previously that a USB storage device (or memory card) containing images of the applicant conducting raids against militant groups was not taken from him by [an Agency 1] supporter. The applicant has provided copies of photographs of himself dressed in military fatigues and standing informally alongside [western] military personnel, but nothing which shows him or any other person in action against militia groups or which would match with images of engaging in battle. The photographs do not reveal any classified information that would be of concern to Iraqi authorities. In addition to this, material provided by the applicant as part of the protection visa application is not disclosed publically and there is no evidence that there has been any wider dissemination of this or any other military information by the applicant. I find therefore that the applicant's actions do not engage the provisions of Article 28(3) of Iraq's Military Penal Code and accordingly that he does not face a real chance of persecution due to the photographs.
25. Apart from stints elsewhere in the country while on Iraqi Army duties, from 2000 until his departure from Iraq in 2012, the applicant lived predominantly in [City 1]. While the applicant has not raised any specific claim to fear harm from Sunni groups because he is a Shia and a former soldier who supported [western] military action, I have considered whether this would give rise to a claim for protection in relation to his former place of residence in [City 1].
26. I accept that the security situation in parts of Iraq is concerning, with reports of escalated sectarian violence in the country's central, northern and western provinces<sup>13</sup>. The resentment of Iraq's Sunni Arabs toward the Shiite-dominated central government facilitated the capture in 2014 of nearly one-third of Iraqi territory by the Sunni extremist group called *Daesh*. The United States is assisting the Iraqi government try to recapture territories in Iraq that have fallen under *Daesh* control, by conducting airstrikes against the group and deploying US military advisors and trainers<sup>14</sup>. The applicant's home city of [City 1] is located [in] a majority Shia part of the country. A September 2012 article assessed as negligible, the capacity of militants to carry out attacks within [City 1]<sup>15</sup>. From August 2011 to August 2012, [number] people were killed, with [deaths] in August 2011 and [in] July 2012.<sup>16</sup> More recent information from the UK Home Office<sup>17</sup> notes that while sporadic outbursts of violence occur in the predominantly Shia populated southern governorates, in 2014 these areas (including [City 1]), remained relatively stable with low levels of violence. The southern governorates remain under the control of the Iraqi Security Forces and [City 1] is well away from *Daesh's* zone of

---

<sup>13</sup> "DFAT Country Reports – Iraq", Department of Foreign Affairs and Trade, 13 February 2015, CISEC96CF1160; "UNHCR Position on Returns to Iraq", UN High Commissioner for Refugees (UNHCR), 27 October 2014, CIS2F827D91427; Minority Rights Group International, "From Crisis to Catastrophe: the situation of minorities in Iraq", 01 October 2014, CIS2F827D91382

<sup>14</sup> "Iraq: Politics, Security, and U.S. Policy", 22 June 2015, CISEC96CF12978

<sup>15</sup> [Information deleted]

<sup>16</sup> [Information deleted]

<sup>17</sup> [Information deleted]

control<sup>18</sup>. There is no indication the current level of stability will change in the foreseeable future.

27. After having regard to the information above regarding the security situation in [City 1], I am satisfied that the applicant would not face a real chance of serious harm from militant groups, including *Daesh* and other Sunni militia groups on return to [City 1].
28. The applicant departed Iraq by air from Basra and there is no impediment to him returning by that route. The predominantly Shia populated southern governorates, including the areas the applicant would pass through from Basra to [City 1], have favourable levels of security and remain under the control of the Iraqi Security Forces<sup>19</sup>. Accordingly I find that the applicant could access [City 1] from Basra.
29. After having regard to the applicant's claims individually and cumulatively, I find that he does not have a well-founded fear of persecution.

### **Refugee: conclusion**

30. The applicant does not meet the requirements of the definition of refugee in s.5H(1).

### **Complementary protection assessment**

---

31. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

### **Real risk of significant harm**

32. Under s.36(2A), a person will suffer 'significant harm' if
  - the person will be arbitrarily deprived of his or her life; or
  - the death penalty will be carried out on the person; or
  - the person will be subjected to torture; or
  - the person will be subjected to cruel or inhuman treatment or punishment; or
  - the person will be subjected to degrading treatment or punishment.
33. I have found that that the applicant is of no interest to [Agency 1] and accordingly does not face a real chance of being killed or harmed in any other way by [Agency 1]. Similarly, there is not a real chance that the Iraqi government would seek to punish the applicant for deserting the Iraqi army or for revealing photographs of himself standing informally with [western] troops. While the security situation in some in some parts of Iraq can be volatile, I have found that the applicant would not face a real chance of being killed or otherwise harmed in any other way in his home area of [City 1]. The applicant can lawfully and safely access his home city of [City 1] from Basra. In *MIAC v SZQRB* (2013) 210 FCR 505, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the

---

<sup>18</sup> [Information deleted]

<sup>19</sup> [Information deleted]



assessment of 'well-founded fear'. Accordingly, for the same reasons set out above, I find that the applicant does not have a real risk of suffering harm on return to Iraq.

34. After having regard to the applicant's circumstances both individually and cumulatively, I find that he does not face a real risk of suffering harm.

**Complementary protection: conclusion**

35. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

**Decision**

---

The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

---

### **Migration Act 1958**

#### **5 (1) Interpretation**

...

**cruel or inhuman treatment or punishment** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**degrading treatment or punishment** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**torture** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
  - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - (c) for the purpose of intimidating or coercing the person or a third person; or
  - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
  - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

**receiving country**, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of well-founded fear of persecution, see section 5J.

...

#### **5J Meaning of well-founded fear of persecution**

(1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:

- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.
- Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
- Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in them practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

#### **5K Membership of a particular social group consisting of family**

For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or
  - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

## 5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

## 5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

## 36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol because the person is a refugee; or
  - (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
  - (b) a non citizen in Australia who is a member of the same family unit as a non citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
  - (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

- (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
  - (a) the non citizen has a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non citizen has a well founded fear that:
  - (a) the country will return the non citizen to another country; and
  - (b) the non citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
  - (a) the non citizen has a well founded fear that the country will return the non citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.