



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

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA16/00181

Date and time of decision: 13 May 2016 16:35:10

Rosie Mathlin, Reviewer

**Decision**

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The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

*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

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### Visa application

1. The referred applicant (the applicant) claims to be an Iraqi national. He arrived in Australia by boat [in] October 2012 and applied for a temporary protection visa (TPV) [in] July 2015, claiming that he faces harm
  - as a Sunni Arab from a predominantly Shia area in southern Iraq
  - because he may be forced to fight with Daesh
  - or be imputed to be a supporter of Daesh
  - because he is, or would be perceived as a wealthy person, having owned a factory from 2004-7
  - as a returnee from the west
2. [In] May 2016 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the visa application. He did not accept that the applicant was Sunni and therefore found that he did not face harm from the Shia population of the south, or from Daesh, or as an imputed Daesh supporter. The applicant did not provide sufficient information to satisfy the delegate that he was in fact wealthy, or that he would be perceived as such. The delegate did not accept that the applicant faced harm as a returnee from the west. The delegate found the applicant was not a refugee, did not face a real risk of significant harm and was not a person in respect of whom Australia has protection obligations for the purposes of s.36(2) of the *Migration Act 1958* (the Act).

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

### Applicant's claims for protection

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4. The applicant's claims are contained in the information referred to the IAA. His TPV application was prepared with the assistance of [agency], and a detailed statutory declaration and submissions on country conditions were provided with it. The applicant was interviewed twice by the delegate (protection interviews) [in] November 2015 and [in] January 2016. His claims can be summarised as follows:
  - He was born in Nasiriyah, Thi Qar Province.
  - His parents are separated and he has not seen his father for many years. He has [sibling].
  - He was educated to [number] year of middle school.
  - He left school in [year] to do compulsory military service. He was discharged early from military service due to problems with his eyesight, after paying a bribe. He was discharged in 1995 although his military service record shows that he served until 1996.
  - From 1995 until 2004 he was unemployed and did not seek work. There were few opportunities because of sanctions. Corruption was rife in Iraqi society and in every

workplace at that time. Because the applicant and his mother were religious he did not want to work with people who were taking bribes, and the applicant did not need to work. The family lived off rental income from property owned by the applicant's mother's family.

- When Saddam fell there was lawlessness and violence, but new opportunities. He started his own business, selling [goods], operating from the ground floor of the family home which was owned by his mother.
- From 2005 Sunnis began to be targeted by armed Shia groups operating in his area. In 2006 the imam from the local mosque was murdered. This was a message to Sunnis to stop attending mosque, and the applicant stopped attending even though he is a religious person. In 2014 an administrator from that mosque was tortured and paralysed and the building has now been taken over by Shia groups.
- In late 2006 or early 2007 a Sunni friend warned the applicant to leave, saying people were talking about him - "is that Sunni dog still here". He did not feel safe, and he could not practise his religion openly.
- He and his mother fled to [country]. His [sibling] stayed in Iraq because [sibling] is not religious, [sibling] did not attend mosque or pray; however, [sibling] left Nasiriya and moved from place to place. [Sibling] is now in [country].
- The applicant and his mother remained in [country] from June 2007-December 2011. He held temporary resident status renewable every twelve months. They lived in [District 1] of [city].
- They did not register with UNHCR, the intention was to stay temporarily in [country] and return to Iraq when things improved.
- When fighting broke out in [country] after the Arab spring they decided to return to Iraq.
- The Sunni community in Nasiriya had dwindled from about 500 to 20. People noticed immediately that the applicant was back. On the first night rocks were thrown at his door. The applicant was very well known as a Sunni man. He made arrangements to travel to Australia.

### **Delegate's decision**

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5. The delegate had major concerns about the applicant's credibility.
6. Over the course of two protection interviews he found it difficult to obtain from the applicant specific details of the threats he claimed to have faced in Nasiriya, exactly why he decided to leave, and who he believed had threatened him, or would harm him on return. He considered that much of the applicant's evidence was vague and evasive.
7. Although he accepted that the applicant had provided satisfactory identity documents (scanned copies of his passport and Iraqi identity card), he was concerned that the citizenship certificate submitted by the applicant appeared to show a re-issue date in 2008, when the applicant claimed to have been living in [country]. The applicant denied having returned to Iraq and country information indicated that these documents could only be issued to an applicant personally, not a proxy. The applicant's explanation, that the copy of the certificate presented to the delegate contained a different date to the original, appeared implausible, and was not borne out by the original document that he ultimately presented. In the delegate's view the

apparent anomaly in relation to the date of re-issue of the citizenship certificate indicated that either the document was fraudulent, or the applicant had not been in [country] when he said he was.

8. The delegate had serious doubts about the applicant's claim that he had been unemployed and doing nothing for nine years between finishing his military service and starting his business. In the course of two interviews he was unable to obtain detailed information about what the applicant actually did and how he spent his time over this lengthy period. The delegate also considered it suspicious that the applicant was unmarried and did not accept his explanations for this.
9. These matters caused the delegate to have doubts about the applicant's credibility generally. He also considered that the applicant's identity was 'unsupported' even though he accepted that the passport and identity card were genuine documents. The delegate also accepted that the applicant was an Iraqi citizen from Nasiriya, based on what he found to be a credible account of the applicant's life there. However, he relied on country information in rejecting the applicant's claim to be a Sunni Muslim.
10. The delegate relied on country information indicating that the applicant's tribe is Shia, not Sunni. He found that the applicant's comments on this were rambling and unfocussed and did not address the issue. He also relied on country information indicating that the area of [District 1] where the applicant lived in [country] was predominantly Shia. He did not accept that a Sunni seeking refuge from sectarian violence would choose to live there. The applicant's explanations, that there were no Shia in [District 1], and people did not speak about their religion there, appeared inconsistent with country information indicating that an important Shia pilgrimage site is located there, and that it has been a centre for radical Shia militant groups.
11. The delegate asked the applicant about the most important Sunni texts and hadiths, and was not satisfied with his response. On the basis of these matters, and concerns about his overall credibility, he decided that the applicant was not Sunni. In doing so, he considered a letter submitted by the applicant from [name], [senior official] of the [organisation], to whom the delegate also spoke by telephone. [Name] confirmed that the applicant was a Sunni Muslim who had attended the Centre since 2013. He said that while the Centre was open to all Muslims, it was attended only by Sunnis. The delegate found that the applicant had attended the Centre for the purpose of strengthening his claims to be a refugee.

### **Discussion of claims and evidence**

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12. I share some of the delegate's concerns about the applicant's credibility. His oral evidence was often vague and possibly evasive, and some of his explanations for problems with his evidence appear untrue or nonsensical. He frequently failed to provide direct answers to questions and seemed unable or reluctant to grapple with credibility issues raised by the delegate, including the key questions of exactly what threats had forced him to leave Iraq in 2007, from whom they emanated, and what he feared on return. However, these claims were clearly articulated in the statutory declaration submitted with his TPV, and are broadly consistent with country information about the situation in Nasiriya in 2007, in 2012 and now. I do not consider that his key claims as to his identity, or that he faces harm as a Sunni Muslim, can be dismissed after a proper consideration of all the available evidence.

## Identity documents

13. While the date of re-issue on the citizenship certificate appears anomalous, and the applicant's explanation - that the copy was different to the original - is not plausible, I do not consider that this is a matter which goes to his core claims, or which undermines his credibility overall. Moreover, the applicant has provided other identity documents – a scanned copy of his passport and an identity card – which the delegate accepted as genuine, and which support a finding that his identity is as claimed.

## Religious identity

14. I do not consider that the country information relied by on the delegate provides a sufficient basis on which to reject the applicant's consistently presented claim that he is a Sunni Muslim.
15. The information relied on by the delegate about the [name] tribe is equivocal. None of the sources he relied on asserts explicitly that the [name] tribe is exclusively Shia, and the information indicates that some of the southern Iraqi tribes are Sunni, or mixed. In the decision record the delegate acknowledges information that a minority of tribes within the predominantly Shia tribal federation to which the applicant's tribe belongs are Sunni<sup>1</sup>. The only source referred to by the delegate which explicitly mentions the [name] states that the '.. tribe was part of a Shia tribal resistance against British colonialism in Iraq during the 1930s'<sup>2</sup>; this does not mean, however, that the [name] itself is exclusively Shia.
16. Similarly, the information referred to in the primary decision about the religious profile of [District 1] states that it is a 'predominantly' Shia area where an important Shia shrine which draws a large number of Shia pilgrims is located<sup>3</sup>. That an area is 'predominantly' Shia, however, does not preclude the possibility that Sunnis might choose to live there. One of the reports considered by the delegate includes a table showing that of [number] Iraqi refugees who settled in [District 1] during the period covered, [number] were Shia and [number] were Sunnis. An article in the *New York Times* referred to in the applicant's representative's submission states:

Before the war, the town of [District 1] was mostly Sunni. Residents, some of whom have fled, mingled easily with [nationality] Shiite pilgrims, who brought brisk business. Refugees from conflict, first Palestinians and then Iraqis, found a haven here<sup>4</sup>.
17. Although the applicant's response to the information put to him by the delegate about the sectarian makeup of [District 1] appears doubtful – for example, his suggestion that no one there talks about religion, which seems unlikely given the presence of the shrine and many pilgrims - he also proffered a plausible explanation for his decision to settle there, which is also supported in the country information – that the bus from Iraq stops in [District 1]. Overall, I am not satisfied on the available information about [District 1] that the applicant is not a Sunni Muslim merely because he chose to settle there.
18. As to the religious knowledge exhibited by the applicant, in my view, his inability to answer to the delegate's satisfaction the question 'what is the most important religious text to Sunni

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

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

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

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

Muslims' (after the Koran) does not demonstrate that he is not a Sunni. The source relied on by the delegate<sup>5</sup> as authority for his proposition that the Sahih Bukhari Hadith is 'generally accepted as the most traditional and authentic Hadith and is a canon of the Sunni Muslim faith'<sup>6</sup> is a review of a scholarly book. In my view, it provides no basis for concluding that the Sahih Bukhari Hadith would be viewed as the most important text by an Iraqi Sunni Muslim from Nasiriya, with the religious knowledge of the applicant. Moreover, in my view the questions asked of the applicant about this issue at the protection interviews were inherently ambiguous and in my view it is understandable that he may not have known how to answer.

19. The delegate considered that the applicant provided contradictory evidence about whether he was 'very' religious or not. However, in my view, he has given broadly consistent evidence about the degree of his religious adherence. When his various comments are considered, he makes clear that he sought to lead his life in accordance with Islamic principles, that he attended mosque and prayed (in contrast to his [sibling]), and that he was known in his local area as a Sunni Muslim. Whether this lifestyle could be described, in translation, as 'very' religious or not is not helpful, in my view, for the purpose of assessing either his credibility or his religious views.
20. While there are some problems with the applicant's evidence, in my view these are not greatly significant. Unlike the delegate, I am unable to conclude that nothing he says can be believed. Many of his claims are broadly consistent with country information. The information relied on by the delegate in concluding that the applicant is not a Sunni does not, in my view, support that conclusion. Moreover, I give considerable weight to the supporting letter from the [organisation]. I find it highly unlikely that if he were Shia the applicant would masquerade as a Sunni in order to attend this Centre for the purpose of strengthening his claims to be a refugee, particularly when he attended from 2013, two years before he even put those claims forward in his TPV. I note that in the first protection interview it emerged that the applicant had actually lived at the Centre for a time. I do not consider that the [senior official] of this Centre would have confirmed that the applicant was a Sunni if he were not. I consider that the supporting letter is strong evidence in support of the applicant's claim that he is a Sunni Muslim. I find that this evidence outweighs the other independent evidence which is, at best, equivocal.
21. I accept that the applicant is a Sunni Muslim from Nasiriya in Thi Qar Province.

## **Refugee assessment**

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22. Section 5H(1) of 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**

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<sup>5</sup> Minlib Dallh, O.P., "The canonisation of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon - By Jonathan Brown", 16 January 2009, CISE1310071719

<sup>6</sup> Primary Decision record at [36]

23. 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
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification

### **Nationality**

24. Based on the documentation provided by the applicant (a scanned copy of his passport and his identity card, which were accepted as genuine by the delegate), I accept that the applicant is a national of Iraq and of no other country. I find that Iraq is the receiving country for the purposes of s.5J of the Act.

### **Well-founded fear of persecution**

25. Thi Qar Province is a majority Shia area. DFAT advises that sectarian violence over the last ten years has seen most Sunnis who previously may have lived in mixed areas now living in Sunni-majority provinces and neighbourhoods in Baghdad and central Iraq. During 2013 and 2014 increasing sectarianism has led to increased attacks by Shia militia against Sunni religious structures and institutions, and young Sunni males are frequently kidnapped, tortured and murdered in targeted killings, mainly in central Iraq but also in the southern provinces. The killings have frequently been preceded by letters warning Sunni residents to leave or be killed<sup>7</sup>, as described by the applicant.

26. The country information indicates that Shia militia and armed groups routinely carry out targeted killings, abductions and torture of Sunni males in southern Iraq. DFAT assesses that Sunnis in Shia-dominated and mixed provinces face a high risk of violence from Shia armed opposition groups<sup>8</sup>. Based on DFAT’s assessment, I am satisfied that the applicant, as a Sunni Muslim, faces a real chance of harm in his usual place of residence, Nasiriya, which is a majority Shia area. I am also satisfied that as a Sunni man he would face a real chance of being harmed by armed Shia groups in Baghdad and central Iraq, notwithstanding that DFAT states that ‘young’ Sunni males tend to be targeted, and the applicant is [age].

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<sup>7</sup> Department of Foreign Affairs and Trade (DFAT), DFAT Country Report Iraq, 13 February 2015, 3.55, CISEC96CF1160; see also country information cited in RRT decisions referred to in the applicant’s representative’s submissions: United States Department of State 2014, International Religious Freedom Report for 2013: Iraq, 20 May 2014; Human Rights Watch, Iraq: Campaign of Mass Murders of Sunni Prisoners, 11 July 2014; United States Department of State International Religious Freedom Report for 2013: Iraq, 20 May 2014; Al-Leithy, N, ‘Southern Iraq Swept by Sectarian Displacement’, Al Monitor, 23 September 2013.

<sup>8</sup> DFAT “DFAT Country Report Iraq”, 15 February 2015, CISEC96CF1160 at [3.57]

27. DFAT also assessed that Sunnis in Sunni-dominated provinces face a moderate risk of violence from Sunni armed opposition groups, including Daesh, which frequently target moderate Sunnis, including those who they believe have collaborated with the government, or who they wish to coerce into supporting Daesh<sup>9</sup>. As the applicant has expressed a fear of Daesh and of being recruited into Daesh, I am satisfied that he would not wish to fight with them and could be targeted for that reason. Moreover, based on his evidence about his religious practices I consider it likely that he would be perceived as a moderate Muslim. Daesh and associated Sunni extremist groups currently control large parts of northern, western and central Iraq<sup>10</sup>. Based on the available information, I am satisfied that the 'moderate' risk according to DFAT's assessment constitutes a real chance of harm. I find that if the applicant were to move away from his usual place of residence in the Shia dominated south to mixed, or traditional Sunni majority areas in central, western and northern Iraq, including Baghdad, he would face a real chance of serious harm not only from Shia groups but also from armed Sunni groups.
28. I am satisfied that the harm faced by the applicant is serious harm for the purposes of s.5J(4)(b) of the Act, in that it involves a threat to life or liberty or significant physical harassment or ill-treatment. The country information indicates that such harm is routinely inflicted by Shia and Sunni armed groups on Sunni males, and I am therefore satisfied that it is systematic and discriminatory, as required by s.5J(4)(b)(c). I am satisfied that the harm would be directed at the applicant for the essential and significant reason of his religion.
29. According to DFAT, the Iraqi Security Force (ISF) lacks the capacity to provide protection for Sunnis because of the large size and disparate settlement of the Sunni community. Further, neither Sunni nor Shia provincial governments nor the ISF are able to provide protection from violence<sup>11</sup>.
30. Pursuant to s.5J of the Act, the real chance of persecution must relate to all areas of the receiving country. Country information indicates that the autonomous region of Kurdistan is secure and is host to a large number of Iraqis who have fled violence elsewhere<sup>12</sup>. Neither the Shia nor Sunni armed groups which pose a real chance of harm to the applicant elsewhere in Iraq have a presence there. I therefore find that the real chance of persecution does not relate to all areas of the receiving country. The applicant does not have a well-founded fear of persecution on the basis of his religion for the purpose of s.5J of the Act.

### **Refugee: conclusion**

31. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

### **Complementary protection assessment**

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32. 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.

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<sup>9</sup> Ibid at [3.56]

<sup>10</sup> Ibid at [2.27]

<sup>11</sup> Ibid at [3.57] – [3.58]

<sup>12</sup> Ibid at [2.39] and [5.15]



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

33. 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.

34. As set out above, I find that the applicant faces a real chance of being seriously harmed by Shia armed groups in his home area of southern Iraq; and by Shia or Sunni armed groups in northern, western and central Iraq, on the basis of his religion as a Sunni Muslim. I am also satisfied that there is a real risk<sup>13</sup> that the applicant would face serious harm from these sources if he is removed from Australia to southern, northern, western or central Iraq. I find that the harm would comprise arbitrary deprivation of life and/or cruel or inhuman treatment or punishment and therefore constitutes significant harm for the purposes of s.36(2A) of the Act.

35. Section 36(2B) of the Act provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm; or
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm; or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

### **Protection from an authority of the Country**

36. As set out above, DFAT reports that the Iraqi government and the ISF appear unable or unwilling to control militia activity<sup>14</sup>; and neither Sunni nor Shia provincial governments nor the ISF are able to provide protection from violence<sup>15</sup>.

37. Given this information, I am satisfied that the applicant cannot obtain protection from an authority of the receiving country, such that there would not be a real risk that he will suffer significant harm there for the purpose of s.36(2B)(b) of the Act.

### **Risk faced by population generally**

38. I have found that the applicant faces a real risk of significant harm from Shia militias and from Daesh and associated Sunni extremist groups. As noted above, the risk to the applicant from Shia militias in south and central Iraq, including Baghdad, is because he is Sunni, and Shia

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<sup>13</sup> In *MIAC v SZQRB (2013) 210 FCR 505* the 19 the Full Federal Court held that the “real risk” test in the complementary protection provisions imposes the same standard as the “real chance” test applicable to the assessment of “well-founded fear” (The Court in that case was considering the language in the Refugees Convention.)

<sup>14</sup> *Ibid* at [5.5]

<sup>15</sup> *Ibid* at [3.58]

armed groups target Sunnis. Having regard to s.36(2B)(c), I find that the real risk of harm he faces from Shia armed groups is one faced by the applicant personally and not the population generally.

39. As noted above, DFAT assesses that Sunnis in traditional Sunni areas of central, northern and western Iraq, face a 'moderate risk' of violence from Daesh and other Sunni extremist groups 'due to insurgent activity that is aimed at destabilising the government, promoting sectarian conflict and destabilising communities', and which is aimed at 'moderate Sunnis including those who they believe have collaborated with the government', or who they wish to coerce into providing support<sup>16</sup>. Again, having regard to s.36(2B)(c), I find that the real risk of harm the applicant faces from Sunni armed groups is one faced by the applicant personally, as a moderate Sunni, and not the population generally.

### **Relocation**

40. I have found that the applicant faces a real risk of significant harm in south, north, west and central Iraq, but not in Kurdistan. However, DFAT advises that the borders of Iraqi Kurdistan have been closed without advance warning due to security concerns, and that Kurdistan Regional Government authorities implement stringent controls on the presence of persons not originating from Iraqi Kurdistan. There are no official and publicly accessible regulations concerning procedures and practices at entry checkpoints into Iraqi Kurdistan. DFAT assesses that migration to Iraqi Kurdistan is difficult for most minority groups, and very difficult for Arab Iraqis. Further, long-term relocation to Iraqi Kurdistan requires a sponsor for entry, followed by a residency permit for which there are no uniform procedures in place. Access to employment can prove difficult without family, tribal or political connections<sup>17</sup>. The information before me indicates that the applicant would not have a sponsor or connections in Kurdistan.
41. Given this information, and the security concerns in the northern provinces of Iraq bordering Kurdistan, in particular the ongoing fighting between Kurdish militia and Daesh, I consider that the possibility of a single male Sunni such as the applicant being permitted to enter Kurdistan is extremely remote.
42. In these circumstances I am not satisfied that it would be reasonable for the applicant to relocate to Kurdistan, an area of the receiving country where there would not be a real risk of significant harm for the purpose of s.36(2B)(a).
43. For all of the reasons above, I find that s.36(2B) of the Act does not operate such that the applicant is taken not to have a real risk of significant harm in Iraq.

### **Complementary protection: conclusion**

44. There are 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.

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<sup>16</sup> Ibid at [3.56]-[3.57]

<sup>17</sup> Ibid at [5.15]-[5.18]

## Decision

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The IAA remits the decision for reconsideration with the direction that:

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

## Applicable law

### **Migration Act 1958**

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

...

**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

**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.

...

**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.

...

**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.

...

#### **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 the 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 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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...