



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA17/02076

Date and time of decision: 5 December 2017 10:18:00

Inge Sheck, Reviewer

Decision

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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) is a Shia Muslim from Baghdad, Iraq. He departed Iraq [in] October 2012 and arrived in Australia [in] November 2012. [In] April 2016 he lodged an application for a protection visa (PV).
2. [In] February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Shia Muslim and had been employed as [Occupation 1] in the Police Force from 2004 until his departure from Iraq. During this period he was involved in two incidents with armed men seeking to harm him and he received threats by telephone from both Sunni and Shia militia groups. The delegate did not accept that the applicant's wife continued to receive telephone threats after the applicant's departure and concluded that she remains in the family home. The delegate concluded that there was not a real chance that the applicant would be harmed on return to Baghdad on the basis of his former employment or imputed political opinion.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). The IAA received a submission on behalf of the applicant from his [representative] on 19 March 2017.
4. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information, and the new information was not and could not have been provided to the Minister or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims. The additional document provided on 19 March 2017 includes a submission by the applicant's representative addressing the delegate's decision and findings. As such, it may be regarded as argument rather than new information and I have had regard to it. [The applicant's representative] also refers to, and provides an extract from, the US Department of State Overseas Security Advisory Council (OSAC) report "Iraq 2017 Crime & Safety Report: Baghdad"¹ published on 1 March 2017. This is new information. It postdates the delegate's decision so could not have been provided to the delegate. Although the security situation in Baghdad is relevant to the applicant's claims for protection, the report primarily focuses on the threat to US government personnel and/or US citizens. Further to this, the review material already contains information on the general security situation in Baghdad. I am not satisfied that exceptional circumstances warrant consideration of this new information and have not had regard to it.
5. I have also obtained new information, this being the Department of Foreign Affairs and Trade (DFAT), DFAT Country Report, Iraq, published on 26 June 2017, after the delegate's decision. This information was not before the delegate and is new information. The delegate referred to the most recent report before him, this being the DFAT Iraq Country Information Report 2015, published on 13 February 2015. In light of the age of the previous DFAT report, the currency of the new report, and the potential for significant changes in conditions in Iraq since early 2015, particularly with reference to sectarian violence and to the possibilities of relocation, I consider that there are exceptional reasons to justify considering this new information.

¹ <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21351>

Applicant's claims for protection

6. After his [arrival] the applicant was interviewed by an officer of the Department of Immigration and Border Protection ("the Department") [in] November 2012. Together with his PV application the applicant lodged a Statement of Claims dated [in] February 2016. [In] December 2016 he attended an interview ("the PV interview") with the delegate at which his representative was present. The applicant's then [representative] provided written submissions dated [in] December 2016. The applicant claims:
- He joined the police force in 2004 and was [Occupation 1]. Much of his training was carried out by the US forces. He continued this work until his departure from Iraq. His rank at the time of departure was [rank]. His duties involved [details of duties]. He received a number of commendations over the years for his work in the fight against terrorist activities;
 - Because of his actions he was the subject of threats from both Sunni and Shia militia groups. Both sides resented the presence of the US Forces in Iraq and considered officers such as the applicant an infidel and a traitor for dealing with them. He was targeted by armed men while in a vehicle, in 2005 and again in 2010. He also received telephone calls and text messages saying that he was an infidel and that he and his family would be killed;
 - After he left Iraq his wife continued to receive threats on the applicant's mobile phone, which he had left behind. The threats stopped when she changed the number of the phone. His name is on a list, it does not matter that he is no longer in the Police Force they still consider him a traitor and will kill him if he returns. His family is being monitored, they live in their home for two to three weeks then leave for a similar time before returning;
 - He has always lived in Baghdad. He could not relocate to another area because you need to notify the authorities if you move and the militias have infiltrated most areas of government. They would know where he had gone and kill him.
7. In the submissions of [December] 2016 [the applicant's representative] contended that the essential and significant reasons for the applicant's fear of persecution were his Shia religion, his imputed political opinion as a former member of the Iraqi police force who had collaborated with US government forces and his membership of a particular social group, this being "police officers known to have [worked against] terrorist militias and collaborated with US government forces".

Factual findings

8. I accept that the applicant's background is as follows: he was born on [birth date] in Baghdad city and lived in the [Kadhimiyah] district, before moving to [another location] in 1986. He is of Arab ethnicity, Shia faith and an Iraqi national. Iraq is his receiving country. He departed the country legally. He has one [sibling], who lives in Basra. He completed primary and secondary schooling and then completed a [Diploma] in 2001. During the period 2009 to 2012 he completed a Bachelor degree in [details of degree] at [a] University. He married [in] 2003 and has [a number of children], born in [birth dates of children]. His wife and [children] remain in Baghdad.
9. The applicant has stated that he fears harm from both Sunni and Shia militia groups. In his statement of claims dated [in] February 2016 the applicant notes that the area where he lived,

a mixed Sunni/Shia district, was prone to threats and attacks all of the time by Shia militias as well as Sunni militias aligned with Al Qaeda. Country information on this issue notes that according to some sources, [details deleted]. According to a Sunni resident, Asa'ib Ahl Al-Haq (AAH) and the Mahdi Army visit the area almost every day. In relation to attacks by Al Qaeda, ISIS or related Sunni militia groups, country information from 2015 indicates that ISIS has used mortars to bombard the Kadhimiyah district and the Green Zone. ISIS claims it has also carried out bomb strikes against the Baghdad security forces and the Shia militia fighting alongside them.² I accept that the applicant fears harm due to sectarian violence in Baghdad generally as well as in his areas of work and residence.

10. The applicant has consistently stated that he was an employee of the [Police Force] and this is supported by numerous identity documents that he has provided. I am satisfied that he was [Occupation 1] during the period 2004 to 2012, receiving various promotions in this area and attaining the rank of [rank] at the time of his departure from Iraq. He worked in [Baghdad]. The applicant's central claim is that because of his employment in the Police Force (including his association with the US Forces prior to their withdrawal in 2011) he was threatened by militia groups. The applicant has given a detailed description of incidents in 2005 and in 2010 when the vehicle he was travelling in was followed by armed men. On both occasions he managed to evade the other vehicles and avoid any injury. I accept from the level of consistent detail provided that these incidents occurred. He also states that he received threats by telephone, both voice calls and text messages. The last of these was [shortly before] his departure from Iraq.
11. In relation to the latter claim, the applicant has provided little detail about the number of calls he received, when they started and whether the callers identified themselves (or the group or groups that they represented). In his statement of claims the applicant states that "I also received several text messages threatening to kill me and my family if I didn't stop working for the US and the [police]". When questioned on this at the PV interview the applicant stated that he would be killed even if he quit his job as they considered him an infidel. The applicant advised that there had never been any approaches to his home or threats to him in person or by threat letter. I accept that the applicant received one or more threatening phone calls or text messages while working for the Police Force.
12. The applicant further claims that after his departure from Iraq his wife continued to receive threatening calls and the family has been monitored by a militia group or groups. He states that because of this they live in the family home for two to three weeks at a time before moving to another residence. There are a number of inconsistencies with this part of the applicant's evidence. In his statement of claims the applicant stated that he had left his mobile phone with his wife (and this was the phone that continued to receive the threatening calls) however in his PV interview the applicant stated that before boarding the boat for Australia the people smuggler took all of their passports "and the mobile as well", which would indicate that he still had his phone with him. The applicant further noted in his statement of claims in February 2016 that the militia were unaware that he had left Iraq, which is why they continued to make threatening calls to his phone. This is not consistent with his claim that his family is monitored, which would have revealed his absence. I also do not consider it plausible that the applicant's wife and sons move from the family home to another address and then back again, every few weeks, due to threats from militia. Overall, I am not satisfied that the applicant's former family home has been identified by militia, that it is monitored or that his wife has received threatening telephone messages since the applicant's departure.

² [Source deleted].

13. I am satisfied on the country information and the applicant's evidence that he was of interest to militia groups while working as [Occupation 1] in the Police Force however I am not satisfied that he remains of interest to Sunni or Shia militia groups, that he is labelled as a traitor and an agent of the United States and is perceived by the militias to have a political opinion or that his name is on any list of targets held by militia groups. I note that the applicant has been employed as [an unrelated occupation] since 2015. He has not claimed that he would resume work in the Police Force if returned to Iraq and I find he would not.

Refugee assessment

14. 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

15. 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, and
- 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.

16. The applicant's central claim is that he is at risk of harm due to having been employed as [Occupation 1] from 2004 to 2012 and working with coalition/US Forces until the US withdrawal in 2011. Due to this employment he was seen as an infidel, an agent of the United States and a traitor by both Shia and Sunni militias. I have accepted that the applicant was the subject of telephone threats while undertaking this employment and was also involved in incidents in 2005 and 2010 when he was pursued by armed men and evaded them. It has now been some five years since he was associated with the Iraqi Security Forces (ISF) and involved in any duties such as [details of duties].

17. Country information indicates that the risk faced by individuals associated with the Government has increased with the emergence of ISIS/Daesh which has systematically targeted Government employees, particularly members of the ISF.³ The referred information does not however support a conclusion that former members of the ISF are targeted,

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report, Iraq", 26 June 2017, CISED50AD463132. 3.48

particularly in areas not controlled by ISIS/Daesh. Moreover, given the passage of time since he ceased this work, I am not satisfied the applicant would now be regarded as being associated with the ISF or US Forces. I consider it remote that he would be the subject of any adverse actions in the future, particularly given that the AAH and other militias are now part of the Popular Mobilisation Forces, an umbrella group of mostly Shia militias over which the government claims control.⁴ I have not accepted the applicant's claim that he remains of interest to Sunni or Shia militia groups or that his family [home] was monitored or that his wife continued to receive threatening phone calls after his departure from Iraq. On the basis of the evidence before me, I am not satisfied that there is a real chance of harm to the applicant on return to Iraq due to his former employment as [Occupation 1] and any imputed political opinion due to this former employment or association with US Forces.

18. I accept that the applicant is a Shia Muslim. He has claimed that he is at risk of harm from Sunni militia and extremists on this basis. In considering whether this as well as the overall security situation in Iraq gives rise to a claim for protection, current country information indicates that overall, the security situation in Iraq is fragile and susceptible to rapid and serious deterioration with large-scale conflict in some areas.⁵ Any Shias remaining in ISIS-controlled areas of north, west and central Iraq face a high risk of discrimination and violence.⁶ ISIS' advances in northern and central Iraq in 2014 and into 2015 and the ensuing security vacuum in other parts of the country have reportedly resulted in the empowerment of militias and tribes, a rise in criminality, and an overall weakening of state authority and the rule of law, including in the capital Baghdad and the Southern Governorates.⁷
19. Prior to leaving Baghdad, the applicant lived [near] the Kadhimiyah district. Country information indicates that Kadhimiyah is a predominantly Shia district, which has been subject to ISIS artillery attacks.⁸ Sectarian killings took place in the area in 2013.⁹ More generally, and more recently, ISIS have claimed responsibility for numerous attacks targeting markets, mosques, shops and areas where Shias are likely to congregate. In light of territorial losses, ISIS has reportedly increasingly reverted to attacks against civilians in areas held by the government.¹⁰ Recent attacks against Shias in Baghdad are likely linked to ISIS retaliating against the Government's success in liberating areas previously under ISIS control.¹¹ Civilian casualty figures have risen since mid-2013 compared to previous years, and civilian casualties in 2014 and 2015 represent the highest totals since the height of sectarian conflict in 2006-2007. In 2016, casualty figures have remained at a high level. Based on statistics provided by the UN Assistance Mission for Iraq (UNAMI), Baghdad Governorate was consistently the worst affected governorate in terms of casualty figures every month in 2014, 2015 and 2016.¹² I have found that the applicant's wife and children reside in the family [home]. The applicant has not indicated that they have been the victims of violence, however the referred material confirms the effect of ISIS attacks on civilian Shias, including a bombing in the predominantly Shia

⁴ Ibid; 2.29

⁵ Ibid; 2.33

⁶ Ibid; 3.34

⁷ UN High Commissioner for Refugees (UNHCR), "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; p.3

⁸ Finnish Immigration Service, "Security Situation In Baghdad - The Shia Militias", 29 April 2015, CISEC96CF13199; p.14

⁹ Ibid; p.27

¹⁰ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; p.4

¹¹ DFAT, "DFAT Country Report, Iraq", 26 June 2017; 3.22

¹² UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; p.17

Karrada neighbourhood¹³ which killed 165 and wounded 225, primarily families shopping for the holiday marking the end of Ramadan.¹⁴

20. In relation to the current situation in Baghdad, country information indicates that violence between different Shia armed groups is also a serious concern.¹⁵ Credible in-country contacts suggest that the risk of being caught up in intra-Shia violence is however predominantly borne by those who are actively involved in the militia or tribal group, rather than ordinary civilians who may be perceived to be part of a militia or tribal group's constituency. Overall, DFAT in its recent report assesses that Shias in Baghdad face a moderate risk of violence.¹⁶ I am satisfied that such violence comprises systematic and discriminatory conduct. On the basis of the material before me, I conclude that due to the level of violence aimed at Shia communities by ISIS/Daesh and other groups, there is a real chance that the applicant would suffer serious harm, should he return to Baghdad. I find that the essential and significant reason for such harm is his religion.
21. Section 5J(3) of the Act provides that the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour so as to avoid a real chance of harm, other than certain types of modification. These include altering their religious beliefs. As the applicant's well-founded fear of persecution is due to his religion, section 5J(3) does not apply. Section 5J(2) provides that a person does not have a well-founded fear of persecution if effective protection measures are available to them. In relation to this, DFAT states¹⁷ that the capacity of the Iraqi police force is limited. The police are unable to prevent violent attacks on individuals, groups and on infrastructure and commercial premises, and members often lack training and basic equipment. I am not satisfied that the applicant can obtain protection from the Iraqi State, such that there will not be a real risk of significant harm to him in Baghdad.
22. It is then necessary to consider whether there is a real chance that the applicant will be harmed due to being a Shia in all areas of Iraq. DFAT reported a number of areas remain under ISIS control in the west, north and central areas.¹⁸ ISIS is reported to continue to commit grave and widespread human rights abuses against the population in these areas.¹⁹ Significant numbers of civilians have fled from these areas due to the level of violence. While DFAT does not specify that all areas of the west, north and central provinces in Iraq are under the control of ISIS, it does note that the overall the security situation in Iraq is fragile and susceptible to rapid and serious deterioration with large scale conflict in some areas. It is possible that some areas (aside from Kurdistan discussed below) may be safe for Shias such as the applicant, but given the present volatility, I am unable to rule out the possibility that the applicant has a real chance of serious harm in the areas of north (with the exception of Iraqi Kurdistan), west and central Iraq, now or in the reasonably foreseeable future. As discussed above, such harm would be due to his religion and he would be unable to obtain effective protection from the State in these areas.
23. DFAT advises that government forces retain control of southern Iraq, and this area has remained significantly more secure than other parts of the country.²⁰ Overall, DFAT assesses

¹³ Finnish Immigration Service, "Security Situation In Baghdad - The Shia Militias", 29 April 2015, CISEC96CF13199; p.27

¹⁴ BBC News, Iraq suicide bomb attack: Deaths in Baghdad rise to 165, 4 July 2016

¹⁵ DFAT, "DFAT Country Report, Iraq", 26 June 2017; 2.31

¹⁶ Ibid; 3.34

¹⁷ Ibid; 5.7.

¹⁸ DFAT, "DFAT Country Report, Iraq", 13 February 2015, CISEC96CF1160; 2.33

¹⁹ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; p.2

²⁰ DFAT, "DFAT Country Report, Iraq", 26 June 2017, CISED50AD463132; 5.17

that Shias in Shia dominated areas in the south are at a low risk of general violence.²¹ I conclude that there is not a real chance that the applicant would face harm as a Shia, or as a result of more generalised violence, if he were to reside in a southern province such as Maysan, Basra or Thi Qar now or in the reasonably foreseeable future.

24. The review material indicates that in the Kurdistan Region of Iraq (KRI), indiscriminate violence is not at such a level that substantial grounds exist for believing that a person, solely by being present there for any length of time, faces a real risk of harm which threatened their life or person.²² There are however examples of violent attacks occurring in the Kurdish region and the increasing number of IDPs entering the Kurdish region has strained the Kurdish authorities' ability to guarantee safety.²³ The principal armed groups in the KRG are under the control of the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK).²⁴ I conclude that there is not a real chance that the applicant would face harm due to being a Shia or as a result of more generalised violence, if he were to reside in the KRI now or in the reasonably foreseeable future. As the real chance of persecution does not relate to all areas of Iraq, the applicant does not have a well-founded fear of persecution within the meaning of s.5J: s.5J(1)(c).

Refugee: conclusion

25. 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

26. 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

27. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

²¹ Ibid; 3.34

²² UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67; p.6

²³ DFAT, "DFAT Country Report, Iraq", 26 June 2017, CISED850AD463132; 2.32

²⁴ UK Home Office, "Country Information and Guidance Iraq: Security situation in Baghdad, the south and the Kurdistan Region of Iraq (KRI)", 12 August 2016, OGD7C848D67; p.7

28. I have concluded above that the applicant faces a real chance of being killed or seriously harmed in Baghdad due to being a Shia. DFAT reports that Daesh/ISIS and associated Sunni extremist groups are currently in control of large parts of northern, western and central Iraq²⁵ (with the exception of Iraqi Kurdistan) and I accept that the applicant also faces a real chance of serious harm in these areas on the basis of his religion. As 'real risk' and 'real chance' involve the application of the same standard²⁶ there is also a real risk of significant harm to the applicant, as a Shia, in Baghdad as well as the areas of north (with the exception of Iraqi Kurdistan), west and central Iraq, now and in the reasonably foreseeable future. I have also found above that the applicant faces no real chance of harm in the Southern governorates or Iraqi Kurdistan.

Qualifications to the real risk threshold

29. Section 36(2B) 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
- 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.

30. In considering first whether the applicant could obtain protection from harm from the state against the real risk of significant harm in his home area of Baghdad or in the north (with the exception of Iraqi Kurdistan), west or central Iraq, I have also found above that the Iraqi police force is unable to prevent violent attacks on individuals, groups and on infrastructure and commercial premises, and members often lack training and basic equipment.²⁷ I am not satisfied that the applicant can obtain protection from the Iraqi State, such that there will not be a real risk of significant harm to him in these areas. Section 36(2B)(b) does not apply.

31. Based on the evidence before me, I find the applicant would be targeted by Sunni insurgent groups as a result of him being a Shia Muslim. The real risk of harm is faced by him personally, not the population of Iraq generally.

32. Section 36(2B)(a) 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. I have found that there is not a real chance of harm due to being Shia in the Southern governorates or in the KRI. I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) in these regions.

33. In relation to Iraqi Kurdistan, the applicant is of Arab ethnicity and has never lived in these provinces. Country information indicates that Arab Iraqis would find it particularly difficult to relocate to this area due to official and societal discrimination.²⁸ DFAT is not aware of any official or publicly accessible regulations concerning procedures and practices at checkpoints

²⁵ DFAT, "DFAT Country Report, Iraq", 13 February 2015, CISEC96CF1160; 2.33

²⁶ *MIAC v SZQRB* (2013) 210 FCR 505

²⁷ DFAT, "DFAT Country Report, Iraq", 26 June 2017, CISEDB50AD463132; 5.7.

²⁸ DFAT, "DFAT Country Report, Iraq", 26 June 2017, CISEDB50AD463132; 5.16

into the Kurdish region. Admission into the Kurdish region remains at the discretion of the Kurdistan Regional Government, which has exercised increasing levels of restrictions, including requiring individuals wishing to enter to have a sponsor.²⁹ As he has no family or contacts in this region, I am not satisfied the applicant would be allowed entry into the KRI and therefore am not satisfied that it would be reasonable for him to relocate there.

34. Based on the personal circumstances of the applicant and for the following reasons, I am also not satisfied relocation to a part of southern Iraq is reasonable. Country information indicates that although some people have been able to return to their homes after the liberation of some areas from ISIS/Daesh control, over three million people remain presently displaced in Iraq.³⁰ Recent country information indicates that Shias internally relocating or voluntarily returning to southern Iraq without familial, tribal or political networks would face difficulty assimilating into the community.³¹ Further to this, lack of employment remains a significant issue in southern Iraq, and people from southern Iraq are internally relocating to other areas of Iraq, such as Baghdad, in search of jobs. Lack of services (such as electricity and water) is an increasing issue in the south.³²
35. The most recent UNHCR report on the issue of relocation in Iraq provides as follows: “In the current circumstances, with large-scale internal displacement, a serious humanitarian crisis, mounting intercommunal tensions, access/residency restrictions in virtually all parts of the country and increasing pressure exercised on IDPs to prematurely return to their areas of origin following the retaking of these areas from ISIS, UNHCR does not consider it appropriate for States to deny persons from Iraq international protection on the basis of the applicability of an internal flight or relocation alternative. An internal flight or relocation alternative would only be available in the exceptional circumstances where an individual can legally access and remain in the proposed area of relocation, would not be exposed to a new risk of serious harm there, and has close family links in the proposed area, with the family willing and able to support the individual.”³³
36. In the applicant’s case he was born and raised in Baghdad and his wife and children are there. He has stated that his [sibling] lives in Basra but there is no information on whether they remain in regular contact or whether [the sibling] would be in a position to sponsor or support [the applicant] and his family. He does not have what could be described as a family or tribal network in any of the southern governorates. Taking into account his personal circumstances and the country information I am not satisfied that it would be reasonable for the applicant to relocate to the southern governorates of Iraq. As none of the qualifications to the real risk threshold apply, I conclude that there is a real risk that the applicant will suffer significant harm if returned to Iraq.

Complementary protection: conclusion

37. 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.

²⁹ Ibid; 5.14

³⁰ Ibid; 5.13

³¹ Ibid; 5.18

³² Ibid; 5.19

³³ UNHCR, "UNHCR Position on Returns to Iraq", 14 November 2016, CIS38A80122649; p.23

Decision

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.