



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA18/06155

Date and time of decision: 5 March 2019 12:10:00

I Sheck, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant claims to be a stateless Faili Kurd, born and raised in Iran. He left Iran in September 2012 and arrived in Australia on 1 November 2012. On 12 December 2016 he lodged an application for a protection visa (PV).
2. On 14 December 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visa. The delegate accepted that the applicant was a Faili Kurd and that he was previously stateless, but concluded that the applicant now held Iraqi citizenship. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm for any reasons in Iraq.

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 review material). 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 before the decision was made 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. On 23 January 2019 the IAA received submissions and attached documents from the applicant's representative, [Ms A]. Ms [A]'s submission addresses the delegate's decision and findings. To that extent, it may be regarded as argument rather than 'information' and I have had regard to it.
4. In addition to the legal submissions, the IAA received a statutory declaration made by the applicant on 22 January 2019 plus attachment. In his statutory declaration the applicant maintains that he is stateless and addresses the delegate's findings and conclusions. This too can be considered to be argument and I have had regard to it. The applicant further states that he has obtained a document from the Iranian Bureau for Immigration which confirms his statelessness. A photo of an untranslated document is attached. This is new information. In her covering email Ms [A] states that the applicant wishes to provide a translation of the document as well as further evidence relating to his medical conditions. She requests that the IAA makes no decision "until such time" as these documents are produced. It has now been some six weeks since the initial documents were received. No further correspondence has been received from Ms [A] or the applicant. I conclude that the applicant has been given sufficient opportunity to provide any information in support of his claims, including a translation of the new information. As the new information is not translated I am unable to establish its relevance for the purposes of s.473DC. I have therefore not had regard to it.
5. The applicant also requests that he be interviewed by the IAA. Having listened to the applicant's arrival and PV interviews and having regard to all the other material, including his recent statement and Ms [A]'s submissions which I have considered, I consider that the applicant has been given an opportunity to present his claims and respond to relevant issues considered by the delegate. The applicant has stated that he wishes to explain what he says in his statutory declaration however I am not of the view that the statements require further explanation above and beyond what he has declared. As I have accepted the new document (statutory declaration) provided by the applicant I do not need further input from him on its inclusion. Taking this into account as well as the 'limited form of review' provided by Pt 7AA, I

am not satisfied that there is any reason to seek further evidence by way of interview and decline to exercise my discretionary power under s.473DC(3) of the Act.

Applicant's claims for protection

6. After his arrival at Christmas Island the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 10 November 2012. Together with his PV application he provided a statutory declaration dated 5 December 2016. On 24 August 2018 he attended an interview ("the PV interview") with a Departmental officer at which his then representative Ms [B] [was] present. On 6 September 2018 Ms [B] tendered submissions as well as identity documents relating to the applicant and his family members. Further documents relating to the applicant's father were submitted on 28 September 2018.
7. The applicant claims:
 - His parents were Faili Kurds and Iraqi citizens who were deported from Iraq by the Saddam regime. All of their assets and belongings were confiscated. The applicant and his siblings were born in Iran. As stateless holders of "green cards" they did not have the same rights as Iranian nationals;
 - He was detained by the Basij on one occasion. They need little excuse to do this and if he were to return to Iran he would likely be again detained and beaten;
 - He was discriminated against due to being stateless. He was unable to complete his schooling and was unable to marry an Iranian. His refugee card has now expired and if returned to Iran he would not have any of the rights of registered refugees;
 - In 2015 his father returned to Iraq and had his Iraqi citizenship reinstated. He is employed by the Badr Organisation. The applicant is unable to relocate to Iraq. He has no family there, his father lives on the Badr Organisation base. The organisation is hated by many militia groups and he would be at risk of harm if it was discovered that his father was a member;
 - There is constant danger from armed groups and explosions in Iraq. If he were to enter Iraq there is no guarantee that he would not be injured or killed due to sectarian violence;
 - He suffers from numerous physical and mental health conditions. He would not be able to access appropriate treatment and medication in Iran or Iraq and his health would consequently deteriorate.

Factual findings

8. Based on the information consistently provided in his visa application and oral evidence, I accept that the applicant's background is as follows: he was born on [date of birth] in Yazd City, Yazd province, Iran. He has [siblings]. He is of Shia Muslim faith. He completed primary and some secondary education. He has been employed in various unskilled fields in Iran and has not undertaken paid employment in Australia.
9. The applicant has consistently stated that his parents were deported from Iraq by the Saddam regime and stripped of their Iraqi citizenship. Country information confirms that significant numbers of Iraqis were deported by the Ba'athist government in Iraq, including under Decree

No. 666 (1980) that cancelled the Iraqi citizenship of all Iraqis of 'foreign origin'.¹ The applicant states that his mother was from Baghdad but her ancestors were from Ilam in Iran. His father was from a small [town]. The applicant stated at his PV interview that his family left Iraq on [date] of the 4th month 1980. As the PV interview was in Farsi it is not clear whether the applicant refers to April or Tir, which is the fourth month of the Persian calendar. It is also unclear whether the applicant refers to his maternal or paternal family having left on that day: documents submitted to the delegate indicate that the applicant's mother came to Iran with her parents and siblings when she was [age]; there is nothing to indicate that she was with the applicant's father at the time. I conclude the applicant's parents departed Iraq separately and met in Iran.

10. At his arrival interview in 2012 the applicant stated that he and his parents carried identity cards to show they were stateless. The card to which the applicant refers is the Special Identity Card for Foreign Nationals, which is issued by the Iranian Bureau for Aliens and Foreign Immigrants' Affairs (BAFIA) to refugees from Iraq and Afghanistan. Country information indicates that "green cards" were issued to Iraqi refugees in Iran (of all ethnicities) from the 1980s to the end of 2001.² They were then replaced by the "Amayesh" system. Amayesh cards are renewed annually.³ Following the PV interview the applicant provided very poor quality photocopies of what appear to be his mother's, father's and his Amayesh cards (plus translations). The cards do not show an issue date but indicate, so far as is visible, that they expire [in] October 2008. I am satisfied that the applicant's parents were born in Iraq and were deported to Iran around 1980, where they were recognised by the Iranian government as refugees and issued with the relevant cards. In his arrival interview it is recorded that the applicant holds a National Identity Card. It is clear from the audio of this interview that he states that he holds "like identity card that they carry to show stateless. Like national identity". I am satisfied that the applicant has never held or claimed to hold an Iranian National Identity Card.
11. The applicant has also consistently claimed that he is a Faili Kurd. Country information indicates that Faili Kurds originate from the Zagros Mountains in what is now the Kermanshah region of Iran. Many migrated to Baghdad and other areas of what is now Iraq at the beginning of the 20th century but were later expelled to Iran.⁴ The applicant also claims to be a Shia Muslim, which is consistent with the profile of Faili Kurds.⁵ The applicant has consistently stated that he speaks Faili Kurdish however he has only used Arabic or Farsi interpreters. In his PV interview the applicant gave examples of discrimination that he had suffered and the delegate asked whether this discrimination was due to being stateless or due to his Kurdish ethnicity. The applicant replied "They never called us Kurds at all they just called us Arabs, and a lot of people like us went back to Iraq and they were called Ajam (a pejorative term meaning non-Arab) and they went to the north of Iraq. In that part of the country they are independent." It appears from this response that the applicant is unaware of any difference between Faili and non-Faili Kurds. Faili Kurds mainly reside outside the three northern and predominantly Sunni provinces (Sulaimaniyah, Erbil and Dohuk) that make up Iraqi Kurdistan.⁶ This causes me some concerns regarding the applicant's claimed ethnicity.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Iran", 7 June 2018, CIS7B839411226; 3.14

² DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 3.37

³ DIBP Tehran, 'Feyli Kurds—obtaining identity travel documents', 17 September 2015, CISEC96CF13392; p.2

⁴ DFAT, "DFAT Thematic Report – Faili Kurds in Iraq and Iran", 3 December 2014, CIS2F827D91722; 2.2-2.4

⁵ Ibid; 2.8

⁶ Ibid; 2.11

12. In his 2016 statutory declaration the applicant focusses mainly on the restrictions he was subject to as a refugee or a claimed Faili Kurd in Iran. The applicant claims that he did not have the right to attend school, to work or to marry Iranian women. The applicant claimed that a friend of his wished to marry his Iranian girlfriend but did not do so for fear of “the fine and the lashes and the imprisonment.” These claims are not supported by the country information, which notes that registered refugees in Iran have access to education and healthcare and can apply for work permits.⁷ Country information also indicates that Government permission is required to register a marriage between an Iranian national woman and a non-Iranian man,⁸ which would indicate that such unions are not prohibited as claimed. The applicant’s evidence displays a lack of knowledge as to the actual rights and entitlements of registered Iraqi refugees in Iran (whether Faili Kurd or not). The applicant also claimed in his statutory declaration that they had to move often, as they were not allowed to own a house. This is not consistent with the information provided at his arrival interview, that he lived at [an address] from birth until he came to Australia.
13. Country information indicates that Iraqis deported by the Saddam regime have been returning to Iraq since the fall of the regime in 2003. Since 2006, the Iraqi Government in Iraq has actively encouraged deportees to return and reclaim their citizenship. The 2006 Iraqi Nationality Law repealed decree 666 and states that all persons that had been denaturalized by the former government should have their Iraqi nationality reinstated.⁹ Article 18 of the 2005 Iraqi Constitution provides that anyone born to an Iraqi father or Iraqi mother shall be considered an Iraqi.¹⁰ The applicant has claimed that he held his Amayesh until he departed Iran in 2012. The delegate asked what happened to his last Amayesh and the applicant responded “it was left back in Iran but after I crossed the border and came here it has expired now”. In his statutory declaration of December 2016 the applicant stated that he would ask his brother to send over his Amayesh or a copy of his green card. The delegate asked if he could provide his last Amayesh and the applicant responded that actually he had heard that “the office in Yazd took it back”. I find this response unconvincing. The applicant has now provided a copy of an Amayesh issued in 2007 (and expiring in 2008). He has not provided any credible explanation as to why he has not provided the Amayesh that he would have held immediately prior to his departure in late 2012. He has not provided any current Amayesh held by either of his parents or any other family members.
14. In his statutory declaration of December 2016 the applicant claimed that in 2015 his family went to Iraq for a pilgrimage. When they were returning to Iran they were refused entry. The applicant then states that “although living in Iran is also difficult for them they decided to return to Iran”. This narrative makes no sense. As holders of Amayesh cards the applicant’s family are considered to be refugees from Iraq. This does not entitle them to return to their country of claimed persecution for temporary visits such as a holiday or pilgrimage. Further to this, the claim that they were refused re-entry to Iran or “deported to Iraq” is inconsistent with the following statement that they then “decided to return to Iran”. The delegate put this to the applicant at the PV interview and the applicant gave very different evidence. He stated that only his father had returned to Iraq in 2015 and that he did so due to his employment, rather than for a pilgrimage. He had his Iraqi citizenship renewed but the rest of the family remain stateless. The applicant claimed that there had been interpreter error in the 2016 statement however I am not of the view that this would explain the substantial difference in the narrative. The implausibility of the initial claim and the marked variation in the applicant’s

⁷ DFAT, “DFAT Thematic Report – Faili Kurds in Iraq and Iran”, 3 December 2014, CIS2F827D91722; 3.8, 3.63

⁸ DIBP Tehran, ‘Feyli Kurds—obtaining identity travel documents’, 17 September 2015, CISEC96CF13392

⁹ Ibid; p.3

¹⁰ DFAT, “DFAT Thematic Report – Faili Kurds in Iraq and Iran”, 3 December 2014, CIS2F827D91722; 3.11

later evidence significantly undermines his credibility. The applicant further stated in his 2016 statutory declaration that while in Iraq his father “managed to obtain the Iraqi birth certificates for my parents and my [siblings].” This statement is entirely at odds with the applicant’s consistent statement that he and his [siblings] were born in Iran, not Iraq.

15. The applicant claims to have departed Iran in September 2012 via Imam Khomeini International Airport in Tehran. At his arrival interview he stated that the cost of his travel from Iran to Australia was [amount] [Tomans].¹¹ At the PV interview he stated that the cost of the travel was \$US [amount]; additionally he obtained a false passport for [amount] Tomans. In his PV application the applicant stated at question 58 that the passport was Iranian. At the PV interview he stated that it was an Iraqi passport. It was issued in his name and had his photograph in it. In his statutory declaration of January 2019 the applicant referred to the delegate’s conclusion that it is unlikely a person could depart Imam Khomeini International Airport using a forged passport. The applicant opined that “it is quite easy to obtain a forged passport if you have the financial means”. The review material does not contain any information on the usual price of a false passport, however \$US [amount] does seem particularly cheap. This could lead to a conclusion that the applicant is unaware of the value of a Toman.
16. Taking into account the whole of the applicant’s narrative, I have accepted that he was born in Iran and his parents were deported from Iraq in or around 1980. He has given inconsistent evidence regarding his own Amayesh card, his family’s travels to Iraq in 2015 and what nationality passport he used to depart Iran. His evidence relating to being a Faili Kurd and living as a registered refugee in Iran is not supported by the country information. Finally, I note that when he arrived in Australia in 2012, his arrival interview was conducted in Arabic and he gave this as his preferred language. I consider it unlikely that a man who claims to have spent his entire life in Yazd province in Iran, even if he had Iraqi parents, would have Arabic as his primary language rather than Farsi. I have accepted that the Amayesh cards provided by the applicant are genuine. I conclude that these were the last Amayesh cards issued to the applicant and his parents because the family relocated to Iraq during 2007 or 2008. I conclude that the applicant’s parents had their Iraqi nationality restored in accordance with the 2006 Iraqi Nationality Law and that the applicant was also granted Iraqi citizenship as a child of Iraqi citizens. I conclude that the family have remained in Iraq since that time, which is over ten years. I do not accept that the applicant obtained a false passport. I find that he departed Iraq using his legally issued Iraqi passport.
17. The applicant stated at his arrival interview that he was detained and assaulted by the Basij after attending a protest in 2009 over the outcome of the Presidential elections. At his PV interview he stated that he feared “the conditions of then would be repeated”. As I do not accept that the applicant would return to Iran I will not assess whether he faces harm from the Basij. The applicant has also stated that one of his brothers is incarcerated in Iraq. At his PV interview he initially stated that his brother had been in gaol for three years and later amended this to one or two years. He had been in Iraq for three years. He did not know why his brother was in gaol as his family did not tell him. Due to the variation in this evidence and my concerns regarding the applicant’s credibility I do not accept that his brother is in gaol. I conclude that he is resident in Iraq with the rest of the applicant’s immediate family.
18. The applicant has claimed that if he returns to Iraq he will be harmed due to his father’s employment. Turning then to his father’s employment, at his arrival interview the applicant

¹¹ National Council of Resistance of Iran, “Iran: 2017 Minimum Wage Less Than One Third of Poverty Line”, 17 March 2017, CXC90406619252

stated that his father[works in a certain field]. When asked if any members of his family were members of political parties, the applicant responded that his uncles were in the Al Dawa Party and his father in the Badr Party. The applicant made no mention of his father's work in his 2016 statutory declaration but at the PV interview stated that his father was a paid employee of the Badr Party. The applicant did not know what sort of work he undertook. He travelled between Iraq and Iran. When in Iraq he resided at the Badr Party base in Baghdad. In his recent statutory declaration to the IAA, the applicant states that his father has told him that he was tricked into joining because the Badr Organisation was opposed to the Saddam regime. I have found that the applicant's family reside in Iraq and note that his mother is from Baghdad and his father from Maysan governorate. The applicant has provided ID tags for his father from the Badr Organisation with expiry dates of 2004 and 2006. Although the lack of current documents is a concern, I accept as plausible that the applicant's father remains an employee of the Badr Organisation and that he is based in Baghdad as claimed.

19. The applicant also claims to fear harm due to sectarian violence in Iraq. I accept that he holds such fears. The applicant also suffers from medical conditions. He has provided a letter from his GP dated 8 February 2016 which indicates that he suffers from anxiety, depression, chronic pain and insomnia. I accept that this is accurate. At the PV interview the applicant explained that he had become addicted to [a specified medicine], which he had been prescribed for his chronic pain, and was now taking methadone daily instead. He presented two bottles of methadone. I accept that the applicant is currently on a methadone program in addition to taking appropriate medication for his mental health conditions. He claims that he will be unable to access medication and health care in Iraq. In his statutory declaration of January 2019 the applicant describes his various conditions. He claims that he passes out once a month when he is thinking too much and fears for his safety during these episodes, should he be deported from Australia. This claim is unsupported by any medical evidence and I do not accept it.

Refugee assessment

20. 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

21. 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.

22. I have found that the applicant is a national of Iraq. It follows that Iraq is his receiving country. I have not accepted that the applicant is a Faili Kurd. I have accepted that the applicant's father is an employee of the Badr Organisation. Country information indicates that after the fall of Saddam Hussein, the Supreme Council of Islamic Revolution in Iraq (SCIRI) and its associated militia, the Badr Corps, were transformed into Iraqi political parties. This process led to a partnership with the United States and other entities to build the new Iraqi state. In 2007, SCIRI removed the word "revolutionary" from its name to signify its acceptance of Iraq's new order. Badr Corps -- no longer wishing to emphasize its militancy -- largely integrated itself into the Iraqi security forces through Coalition Provincial Authority Order 91, and became a political party, the Badr Organization.¹² The applicant asserts in his 2019 statutory declaration that "there are many examples of the families of Badr employees being harmed or threatened all over Iraq". The review material does not support the contention that the applicant would face a real chance of any harm due to his father being an employee of the Badr Organisation.

23. I have found that the applicant and his family have been resident in Iraq since 2007-2008. On the basis of his father's employment location, I consider that they reside in Baghdad and that Baghdad would be the applicant's home area on return to Iraq. In assessing whether the applicant faces a real chance of harm due to religious or sectarian violence, country information referenced by the delegate notes that Shia communities are subject to both indiscriminate and targeted violence at the hands of ISIS/Daesh. Violence targeted at Shias is particularly prominent in Baghdad.¹³ The more recent report published by DFAT however notes that ISIS/Daesh was defeated in late 2017 and anti-Shia violence has consequently reduced in 2018.¹⁴ The 2018 DFAT report also however notes that ISIS/Daesh will likely continue to indiscriminately target Iraqi civilians and commit human rights abuses as a small-scale insurgency. For example, on 15 January 2018, ISIS/Daesh attacked a market in central Baghdad, killing at least 38 people and injuring 105.¹⁵

24. Other than the January 2018 attack, the DFAT report does not list any security incidents that occurred in Baghdad during 2018. The delegate has however referenced numerous media reports which indicate that there were further bombings within Baghdad city on 23 May 2018, 4 July 2018 and 14 August 2018.¹⁶ Having regard to information about the nature and frequency of the security incidents in Iraq, the current level of influence of ISIS/Daesh and Sunni insurgent groups, the dominance of the Shia population, and the general security situation, I am satisfied that the risk of harm is not one that rises to a real chance. In the context of the risk of harm to Shias, DFAT also notes that there is a risk of being caught up in intra-Shia violence but this risk is borne by those active in the militia or tribal groups, rather than ordinary civilians.¹⁷ There is no evidence to indicate that this would apply to the applicant. On the totality of the evidence before me, including the applicant's particular circumstances, I

¹² Global Security, "Badr Corps", 24 November 2014, CX1B9ECAB7993

¹³ DFAT, "DFAT Country Report, Iraq", 26 June 2017, CISED50AD4631; 3.32

¹⁴ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018; 3.33

¹⁵ Ibid; 2.34

¹⁶ Faraj, M, Associated Press, "Iraq says suicide bomber kills 7 in northern Baghdad park", 23 May 2018, CXBB8A1DA27933; Catherine, J J, Kurdistan24, "Twin bombings in Baghdad bird market kill one, wound 11", 5 July 2018, CXBB8A1DA30977; Xinhua, "2 killed in bomb explosion at marketplace in Iraq's Baghdad", 14 August 2018, CXBB8A1DA33605 and others

¹⁷ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018, CIS7B839419766; 3.33 and 5.15

am not satisfied that the applicant faces a real chance of harm as a Shia Muslim, or due to sectarian violence, on return to Baghdad now or in the reasonably foreseeable future.

25. I have accepted that applicant suffers from anxiety, depression, chronic pain and insomnia. I accept there are strains on the health care system in Iraq and a deterioration and shortages in services and medication, leading to the population's access to basic health services becoming increasingly impaired. DFAT indicates that Iraqi health services and infrastructure have been degraded by decades of conflict, with the recent conflict and large numbers of displaced people further reducing access to health services, particularly in areas affected by conflict. Many primary health care facilities are under-resourced and inadequately staffed.¹⁸ There is nothing in the referred material on the availability of methadone, which the applicant has been taking for many years for his chronic pain and past opiate dependency. There is nothing in the referred material to indicate that people suffering from mental health issues are targeted for harm. In considering whether this situation gives rise to a well-founded fear of persecution on the part of the applicant, the lack of adequate medical care in a country does not constitute systematic and discriminatory conduct. There is no well-founded fear of persecution on the basis that the applicant suffers from a mental illness or may not be able to access appropriate medical care or medication.
26. The delegate also considered whether the applicant will be harmed, should he return to Iraq, on the basis that he sought asylum in Australia. The DFAT country report indicates that the practice of seeking asylum and then returning to Iraq once conditions permit is well accepted amongst Iraqis. DFAT has limited evidence to suggest that voluntary returnees from the West face difficulties in assimilating back into their communities. However, local sources have said that returning to Iraq can be difficult, particularly if the individual does not return to their original community.¹⁹ I have concluded that members of the applicant's family reside in Baghdad and this is his original community, from which he departed in 2012. I am not satisfied that the applicant faces a real chance of harm on the basis that he has spent time in a western country or that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

27. 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

28. 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

29. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life

¹⁸ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018, CIS7B8839419766; 2.20

¹⁹ Ibid; 5.24

- 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.

30. I have concluded above that the applicant does not face a real chance of harm due to his father's employment in the Badr Organisation, due to being a Shia Muslim, due to the security situation in Iraq or because he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard,²⁰ I am not satisfied that the applicant would face a real risk of harm. I am equally not satisfied that the applicant faces a real risk of being killed, seriously injured or facing any other form of significant harm on return for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

31. I have also considered whether there is a real risk that the applicant would suffer significant harm due to the lack of adequate mental health practitioners in Iraq or any inability to access appropriate medical care or medication, in particular the methadone he is currently prescribed. It has not been claimed that the applicant will be arbitrarily deprived of his life or subject to torture or the death penalty due to this. In terms of whether the inability to access medical care or treatment constitutes cruel or inhuman treatment or degrading treatment, these terms are defined at s.5 of the Act as including an act or omission which intentionally inflicts severe pain or suffering on a person, or pain or suffering which in the all the circumstances could be regarded as cruel or inhuman in nature, or an act or omission that causes extreme humiliation. I am not of the view that any lack of mental health practitioners or medication in Iraq constitutes cruel or inhuman treatment or degrading treatment or punishment. These are situations, not acts or omissions that have the intention of causing harm or extreme humiliation. The situation does not constitute 'significant harm' as defined above.

Complementary protection: conclusion

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

Decision

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

²⁰ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.