



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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IRAQ

IAA reference: IAA19/06782

Date and time of decision: 12 July 2019 14:10:00

C Wilson, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a Shia Muslim from Basrah province, Iraq. [In] May 2013 he arrived in Australia as an unauthorised maritime arrival. On 7 February 2017 he applied for a Safe Haven Enterprise Visa (SHEV).
2. On 15 June 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the application. The delegate accepted the applicant had briefly run a music shop and closed it a month later because of threats from the Mahdi Army. The delegate did not accept the applicant was of ongoing adverse interest to the Mahdi Army or any other groups.
3. A reviewer of this Authority affirmed the delegate's decision on 16 February 2018.<sup>1</sup> The applicant sought judicial review and the matter was remitted by a consent order of the Federal Circuit Court [in] June 2019.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant's representative provided written submissions to the Authority on 9 August 2017 containing legal argument and responding to the delegate's decision. There was no new information in the submissions. I have taken the submissions dated 9 August 2017 into account.
6. No further information has been received from the applicant since the matter was remitted by the Federal Circuit Court.
7. I have obtained my own new information in the form of the most recent Department of Foreign Affairs and Trade (DFAT) *Country Information Report Iraq* dated 9 October 2018. The DFAT report relied on by the delegate was dated 13 February 2015. It has been more than two years since the delegate's decision and the 2015 DFAT report has been replaced twice by more recent reports. In the circumstances I am satisfied that there are exceptional circumstances to justify considering the most recent DFAT report dated 9 October 2018.
8. I note the previous Reviewer obtained the DFAT *Country Information Report Iraq* dated 26 June 2017, and found there were exceptional circumstances to justify considering it as a more up to date report than the 2015 report relied on by the delegate. As this 2017 report has now been replaced by the 2018 report I am not satisfied there are exceptional circumstances to justify considering the now superseded DFAT report dated 26 June 2017. I am therefore unable to consider it.

### Applicant's claims for protection

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9. The applicant's claims can be summarised as follows:

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<sup>1</sup> Different reviewer, IAA17/02928.

- The applicant is a young single male from Al Qornah, Basrah Province, Iraq. He is a Shia Muslim.
- He opened a shop selling CDs in January 2013. He rented a shop in a market and travelled to Baghdad to purchase the stock. He knew it would be a risky business to sell music, but he took the risk as his family were living under harsh financial circumstances.
- A few days after opening the shop he received a threatening letter from a militant group called the Mahdi Army. The letter said he should close the shop or they would kill him. He continued trading, but only in the evening and with the shutters pulled down.
- He received a second threatening letter three weeks later. The letter said he would be killed within days and would be caught no matter where he went in Iraq. He closed the shop and moved to his [relative's] house, also in Al Qornah. He stayed in hiding at his [relative's] house for three months whilst organising a smuggler to get him out of Iraq. He only went out of the house to organise his passport.
- He heard from his family that the Mahdi Army were looking for him. Once he departed Iraq his family circulated the news that he was out of the country to avoid further contact with the Mahdi Army. Since he arrived in Australia the Mahdi Army only went to his family home once.
- The music shop was left untouched. After he left Iraq his brothers got the stock from the shop and re-sold it elsewhere.
- He fears returning to Iraq because the Mahdi Army will still want to carry out their threat to kill him.

### **Refugee assessment**

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10. 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**

11. 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.
12. I accept the applicant is a citizen of Iraq, based on the identity documents he provided to the Department. The applicant lived all his life in Iraq in Al Qornah, his family continue to live there, and for these reasons I find it is the city he will return to. I find Iraq is his receiving country and Al Qornah in Basrah Province is his home area and the area he is likely to return to.
  13. The applicant claims he left Iraq because he was threatened with execution by the Mahdi Army for operating a music store. Although the threats were made in January 2013 he claims they will still want to harm him whenever he returns to Iran.
  14. The applicant was a young man [of specified age] when he opened the music store. It was his second job since leaving school, having previously worked for 6 months in an unskilled job with a [product] company. He says he had to open a music store, even though it was risky, because his family were in financial hardship. I find it unlikely his family were in hardship however, given he had the financial resources to rent a shop and buy stock. Further, when he fled Iraq a few months later his family were able to give him around 10,000 USD to pay for his journey to Australia. These factors suggest his family were not in financial hardship. Whatever his motivations were, I accept he did open a music store selling CDs.
  15. The delegate interviewed the applicant on 5 June 2017 and oral evidence given at that interview is referred to in the decision record. Unfortunately the recording of that interview is unavailable. The representative noted in their submission from August 2017 that they had sought a copy of the recording and been told it was unavailable due to technical error. The applicant does not raise in the submissions any allegation of misrepresentation of his claims or evidence in the delegate's decision. I note the delegate, after interviewing the applicant, found he was a credible witness and accepted his claims. Apart from the concern noted above about his family's financial position, I also accept the applicant's core claims. That is, I accept he operated a music store for the month of January 2013. I accept he received two threatening letters from the Mahdi Army. I accept he closed his store, his at his [relative's] house, and his brothers later sold off the stock. I accept the militia who had threatened him visited his family around that time and visited one more time after he left Iraq. There is no evidence they harmed his family or attacked his shop.
  16. The Mahdi Army was a Shia militia group formed by Muqtada al-Sadr in 2003, in response to the US invasion of Iraq. Muqtada al-Sadr is the son of the founder of the Sadrist Movement, a nationalist political movement popular among Iraq's Shia lower class. The initial goal of the Mahdi Army was to expel the US coalition from Iraq. In 2008 Muqtada al-Sadr shifted the focus of the group from military operations to the provision of social services, but kept a small military arm of the group. The group was renamed 'Mumahidoon' but continued to be referred to colloquially as the Mahdi Army. In August 2013 Muqtada al-Sadr dismantled the Mahdi Army, but then re-formed it in June 2014 as the 'Peace Brigades' with the aim of defeating the Islamic State of Iraq and the Levant (ISIL). Since 2014 the Peace Brigades have worked with the Iraqi Security Forces against ISIL. The Mahdi Army has for the most part had a positive relationship with the Shia community in Iraq, because of its work in social services. However some communities became disillusioned with the group for its corruption and 'thuggish' behaviour. The group became known for committing crimes including robberies, rapes and murders, and kidnappings for ransom. It also extorted money from local

businesses for 'protection'.<sup>2</sup> In 2018 DFAT reported the 'Peace Brigades' comprising the former Mahdi Army fighters continued as a Shia armed group amongst around 200 armed groups making up the Popular Mobilisation Forces (PMF). The PMF works as an independent military organisation with the Iraqi Security Forces. DFAT noted local and international observers had accused some PMF groups of committing abuses against civilians and engaging in criminal activities.<sup>3</sup>

17. The applicant claims he was labelled as an infidel by the Mahdi Army for operating a music store. Since 2003 there has been targeting of artists, singers and actors by Sunni and Shia extremist groups in Iraq because they were perceived to be 'un-Islamic' or 'Western' activities. This occurred particularly at the height of the violence between 2006 and 2008, and in October 2011 a music store in Baghdad was bombed. Country information indicates this situation has changed. The UNHCR reported in 2012 however that 'Iraq's cultural scene is said to be flourishing again...In January 2011 the New Minister of Education reversed a decision of his predecessor to ban music and theatre classes in art institutes.'<sup>4</sup> I note this information on the improvement in the situation for music and artists is dated 7 years ago, but there is nothing in the 2015 or 2018 DFAT reports to indicate music shop owners, or artists or singers, are a group of adverse interest. The only information before me of any recent attacks on music shops is the article given to the delegate by the applicant about an explosion in a shop selling musical instruments in February 2017.<sup>5</sup> The article states no information was available about who bombed this shop in Old Basra. It was not known if the bombing was for terrorist or criminal reasons. The article speculates that ISIL could be involved, noting their doctrine prohibiting the trading in or playing of musical instruments. However this appears to be mere speculation. There is certainly no evidence in the article to indicate the Mahdi Army or a militia group like them was responsible.
  
18. I accept that in 2012 persons associated with the Mahdi Army made threats to the applicant because he operated a music store. I accept he may have even been threatened with execution. I accept persons associated with the Mahdi Army inquired as to his whereabouts with his family at this time, and once more after he left the country. I note however that when the applicant left his shop and fled to his [relative's] house, there was no action taken by the Mahdi Army at the actual shop. The applicant's brothers were able to collect the remaining stock after the applicant had come to Australia and re-sell the stock elsewhere. They encountered no harm in doing so. If the applicant and his shop were a priority target for the local Mahdi Army I do not accept his brothers could have removed and sold the stock, nor that they would have risked doing so. The applicant has provided country information on only on attack on a musical instrument store in 2017, and even that information is equivocal on who committed the attack. No other information has been provided to show any recent attacks on music shop owners or music shops in his home city of Al Qornah or more broadly in Basrah province. No-one has been looking for the applicant since mid-2013. I note the applicant states his father is unwell and remains indoors, so his father is not sure if the Mahdi Army came searching more often. However, even if his father remained indoors, I consider the applicant's brothers or even neighbours would have been aware of any visits. It is now more than 6 years after this event the Mahdi Army is no longer in existence. In fact it was disbanded in August 2013. I accept member of the Mahdi Army in 2013 may now be members of other local Shia militia groups such as the Peace Brigades. It is also possible the local members of the Mahdi Army who targeted him at that time are no longer in Al Qornah.

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<sup>2</sup> *Mahdi Army*, Stanford University, 17 January 2017.

<sup>3</sup> DFAT *Country Information Report Iraq*, 9 October 2018.

<sup>4</sup> UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq*, 31 May 2012.

<sup>5</sup> Iraqi News, 'Explosion hits Basra musical instruments store', 5 February 2017.

I acknowledge DFAT reported that some PMF groups have been engaged in criminal activity and abuse of civilians. However, I consider the chance of persons in the Peace Brigades or other Shia militia groups in his home area, having an adverse interest in the applicant now or in the reasonably foreseeable future, for events in early 2013, is farfetched. I make this finding having regard to the following: he only operated the shop for a month; the shop itself was never damaged; there is no evidence other similar shop owners have been targeted in his home city since this incident in January 2013; the only recent incident raised by the applicant was the explosion in a musical instrument store in Basra in February 2017 but the information on who carried out the bombing or for what motive is not known; there is no evidence anyone has been looking for him since 2013; and his family have never been threatened or harmed in relation to the threats against the applicant in early 2013. I find the chance of the applicant being harmed because he owned a music shop for a month in 2013, even accepting that at that time he received a death threat, is too remote to amount to a real chance.

19. As noted above, there is no information before me that persons selling CDs in music shops in the applicant's home area are currently being targeted. There is nothing in the DFAT report from 2015 suggesting such persons are being targeted. There is also no suggestion the applicant would return to such a business. His brothers are said to run their own stores. It is not clear what type of stores they own, but there is no information before me that they own music stores. There is no information the applicant has worked or had any involvement in anything related to music or CDs in his 6 years in Australia. Even if the applicant was inclined to once again run a music shop selling CDs, and if Shia militia were once again targeting such businesses, I find he could modify his behaviour by operating a different type of business to avoid the harm. Even if such a modification was out of a fear of harm, I find taking steps to operate a different type of shop is not unreasonable and is not the type of behaviour modification that is impermissible under s.5J(3).
20. The delegate found there was an implied claim that the applicant feared harm because of his Shia Muslim religion. As I do not know what the applicant said in his SHEV interview I accept this may have been an implied claim and have considered it. I note that Shias are the dominant group in Iraq and according to DFAT Shias face little or no discrimination. Shia communities have been subject to general and targeted violence by Sunni extremist groups, but the violence is largely aimed at destabilising the government rather than targeting individuals. The violence against Shias is more prevalent in Baghdad. Shia dominated provinces, such as the applicant's home province of Basrah, experience fewer attacks.<sup>6</sup> Violence between Shia militias occurs in Shia dominated areas, but it is those that are involved in militia groups that are at greater risk, not ordinary Shias.<sup>7</sup> There is no suggestion the applicant is involved or would involve himself in any Shia militia group. DFAT advises southern Iraq, including Basrah province, is more secure than other parts of Iraq.<sup>8</sup> I have considered the US Department of State *Overseas Security Advisory Council* (OSAC) report<sup>9</sup> referred to the delegate by the applicant. The report is intended for US consular staff in Basrah city; not local Shias in Al Qornah, Basrah province. In any event it does not mention any attacks in the applicant's city of Al Qornah. I acknowledge the information in the report that the crime rate in Basrah has been affected by the redeployment of security forces in southern Iraq to fight ISIL in the north, and that the security situation in Iraq is fluid, volatile and potentially very dangerous. However, I rely on the more recent information from DFAT

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<sup>6</sup> DFAT *Country Information Report Iraq*, 13 February 2015.

<sup>7</sup> DFAT *Country Information Report Iraq*, 9 October 2018.

<sup>8</sup> Ibid

<sup>9</sup> 10 March 2016.

that advises southern Iraq remains more secure than other parts of the country. Country information from 2015 referred to in the delegate's decision indicated the presence of ISIL in southern Iraq was minimal.<sup>10</sup> The applicant has not provided any information to demonstrate any change in this situation. I find the applicant as a Shia in the Shia majority in southern Iraq does not face a real chance of harm for reason of his religion.

21. The delegate also considered whether the applicant faced a real chance of harm as a failed asylum seeker returning from a Western country. I do not know whether this was raised by the applicant in his SHEV interview. On the basis it may have been raised by the applicant or discussed at interview, I have considered it. I note the applicant left Iraq on his own passport, which he obtained shortly before leaving Iraq. He had no difficulty in obtaining the passport or leaving the country. DFAT advises Iraqis returning to Iraq are not arrested on arrival, even if they left illegally, which is not the case for the applicant. The Iraqi authorities will arrest persons on return if they have committed a criminal offence and there is a warrant issued. There is no suggestion this applies to the applicant. DFAT also reports there is considerable evidence that Iraqis freely return to Iraq, to reunite with family or for work reasons, after securing residency in Australia. Seeking asylum in the West is said to be well accepted in Iraq. DFAT reports Iraqis who have sought asylum overseas and returned to southern Iraq have done so without significant difficulty.<sup>11</sup> There is no information before me that the applicant has raised any difficulties he may have because he is returning after seeking asylum in the West. There is nothing in the country information before me to indicate the applicant may face difficulties amounting to serious harm because he is a failed asylum seeker returning from Australia. I find the applicant does not face a real chance of harm in Iraq for reason of returning as a failed asylum seeker from a Western country.
22. The delegate also considered whether the applicant had an imputed political opinion for working for a Western company. Namely, his work for the [product] company for 6 months in a low level job. There was no claim by the applicant on this basis, and nothing before me to indicate he was of adverse interest to any militias for this reason when he was in Iraq. I consider the chance of him facing harm for the low level work he did for [that company] in 2012 is too remote to amount to a real chance.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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

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<sup>10</sup> DFAT *Country Information Report Iraq*, 13 February 2015; *Iraq: Security Situation in South Iraq*, Office of the Commissioner General for Refugees and Stateless Persons, 29 May 2015; *Iraq: Crime soars in Basra as army leaves to fight ISIS*, Associated Press, 10 January 2016.

<sup>11</sup> DFAT *Country Information Report Iraq*, 9 October 2018.

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

25. 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.
26. I have found the applicant does not face a real chance of harm because he operated a CD store for a month, was threatened by the Mahdi Army in 2013, worked for a [product] company for 6 months in 2012, is a Shia from Southern Iraq, or because he would be returning from a Western country as a failed asylum seeker. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant will not face a real risk of significant harm for any of the reasons claimed or at all.

### **Complementary protection: conclusion**

27. 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**

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



## Applicable law

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### ***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.