



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA21/09440

Date and time of decision: 30 July 2021 13:09:00

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 (the applicant) is an Iraqi national from Maysan governorate. He last departed Iraq in 2004 and arrived in Australia [in] September 2013. On 25 September 2017 he lodged an application for a protection visa (PV).
2. The applicant's PV made on 25 September 2017 was part of a combined application. The other applicants were his wife N, his stepson A and his son M. On 29 August 2018 the Department was notified that the applicant and N had separated [in] August 2018 and the children remained in the care of their mother N. [In] June 2021 a delegate of the Minister for Immigration (the delegate) determined that N satisfied the criterion in s.36(2)(aa) of the *Migration Act 1958* (the Act). As members of N's family unit, the delegate also determined that her sons A and M satisfy the criterion in s36(2)(c) of the Act.
3. On 28 June 2021 the delegate refused to grant the applicant's visa. The delegate did not accept that the applicant and N had reconciled and found that they remained separated. As the applicant was not a member of the same family unit as N the delegate assessed his application separately. The delegate accepted that the applicant was a Sunni from a mixed faith family and that his brother had been killed by militia in 2006 but did not accept that the applicant had been threatened by militia due to his previous military service. The delegate concluded that the applicant would not face a real chance or a real risk of serious or significant harm in Iraq due to the security situation in Maysan, due to being a Sunni Muslim, due to being an imputed supporter of the (former) Saddam regime or for seeking asylum in a western country.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the Act.
5. On 22 July 2021 the IAA received a submission on behalf of the applicant from his representative, [Representative A] of [Agency 1]. Section 473DD of the Act prohibits the IAA from considering any 'new information' from an applicant except in limited specified circumstances. The submission by [Representative A] references parts of the detailed submissions provided to the delegate on 30 May 2021 and includes legal argument relating to whether the applicant is a member of the same family unit as his stepson A and son M. I do not regard this as new information and have had regard to it.

Applicant's claims for protection

6. After his arrival in Australia the applicant was interviewed by officers of the then Department of Immigration and Border Protection on 14 September 2013 and 28 October 2014. The applicant provided details of his claims for protection in a statement of claims lodged with his PV application. On 14 May 2021 the applicant attended an interview with the delegate by videoconference, at which his then representative [Representative B] from [Agency 1] was present (the PV interview). Submissions were made on 30 May 2021. The applicant claims:
 - He undertook compulsory military service for five years from 1995. Shortly after his discharge he was approached by a member of the Ba'ath Party and told that he had to re-enlist. Instead he travelled to [Country 1], where he lived and worked until 2003. He

then returned to Iraq to protect his family during the invasion. Following the invasion the applicant and his family were targeted by Shia militia groups. Because he had been in the military he was accused of supporting Saddam Hussein and threatened. His brother was accused of supporting the Saddam regime and was assassinated in 2006. If the applicant returns to Iraq he will be killed by Shia militia groups including the Mahdi Army due to his previous military service when the Saddam regime was in power;

- He comes from a mixed faith family, his father was Sunni Muslim and his mother, Shia. The applicant is a Sunni Muslim. The government of Iraq takes their orders from Tehran. The Iranians don't like Sunnis. If he returns to Iraq he will be arrested and then put in gaol until the government has the opportunity to have him killed;
- It is submitted that the applicant faces harm due to his membership of a particular social group, this being "an individual who has married his wife without his wife's family's permission", thus sounding in the risk of harm by wife's family;
- It is also submitted that the applicant fears political opinions being imputed to him as a person returning from a western country as a failed asylum seeker. This adds to his profile as an individual who would be targeted for imputed political views whether based on imputed religious heritage, apostasy or for living in the West.

Factual findings

7. The applicant's evidence regarding his family, education and background has been consistent and I am satisfied that it is as stated. Based on the information provided in his arrival and PV interviews, his PV application and identity documents, I find as follows: the applicant was born on [date] in Amarah, Maysan and is an Iraqi national. He is of Arab ethnicity and Sunni Muslim faith. He had [specified family members]. The applicant undertook primary and secondary schooling and ceased studies at [age]. He undertook compulsory military service [between specified years]. He lived and worked in [Country 1] from 2001 to 2003, [Country 2] from 2004 to 2006 and [Country 3] from 2006 to 2013. He married N in [Country 3] in May 2013 and their son M was born in Australia in [year]. The applicant has been employed in [a specified occupation] in Australia.
8. The applicant's central claim for protection is that if he returned to Iraq he would be targeted by militia groups due to his previous military service. The applicant has consistently claimed that his brother S was assassinated by militia groups in 2006 and has provided documents indicating that S was martyred [in] August 2006. I accept that he was killed by a militia group. The applicant contends that S was killed due to the perception that he was a supporter of the Saddam regime and/or the Ba'ath Party and the applicant would be harmed due to the same perception, as he was a member of the armed forces under the Saddam regime. In terms of S's death, a number of media and other articles referenced by the delegate indicate that many members of the Iraqi Police Force were killed by militias in 2004 and 2005.¹ On the evidence before me, I am not satisfied that S's death was due to any factors other than his occupation as a police officer.
9. In terms of the applicant's military service he has maintained, and I accept, that [between specified years] he was a conscript undertaking compulsory national military service. His Completion of National Service Certificate shows that he was in [a specified force]. He has not

¹ 'Attacks target police across Iraq', 25 July 2005, CX128479; Guardian (UK), 'Attacks target Iraqi police', 29 December 2004, CX110492; 'Militants target Iraqi police', 15 September 2004, CX102667; Agence France Presse (AFP) - France, 'Suicide bombers target Baghdad police convoys', 17 July 2005, CX127254; 'Car bombs target police across Iraq', 07 February 2005, CX113551

claimed to have been a member of the Ba'ath Party at any point and I find he was not. In the submissions to the delegate of 30 May 2021 it is contended that “the applicant’s military role creates the real possibility of persecuting agents determining that the applicant was a member, or otherwise supportive of, the Baathist Party”. As all Iraqi men between the ages of 18 and 45 are eligible for the draft,² I do not accept the applicant’s claim that completion of compulsory national service would lead to a perception that a conscript was a supporter of the government of the day. For the same reason, I consider it highly unlikely that the applicant’s involuntary conscription during the period [between specified years] would lead to the imputation that he was a Ba'ath party member or supporter. Even if, contrary to my finding, such a perception did exist, I am not satisfied that the applicant has a well-founded fear of persecution on that basis, for reasons explained later in this decision.

10. In his statement of claims the applicant states that after the fall of the Saddam regime he was often threatened with violence by Shia militia groups. He has not however claimed that any violence occurred. In his PV interview the applicant stated that he left Iraq in 2004 as roadside bombs were very common and Iraq was unsafe. When then asked how he personally had been threatened the applicant responded that the Mahdi Army had a list of people that they wished to kill and his name was on that list. He knew this because his neighbour read the list and told him that the Mahdi Army were going to send him a bomb. I do not find this evidence persuasive and do not accept that the applicant was threatened by the Mahdi Army or any other militia groups. I conclude that the applicant, together with his brother E, left Iraq in 2004 due to the increase in violence stemming from the lengthy insurgency against the US-led coalition forces.³
11. The applicant also claims that he would face harm on return to Iraq due to his Sunni faith. At the PV interview he asserted that “the government is Iranian they don’t like Sunnis”. He also pointed out that the province of Maysan is majority Shia. I accept the applicant’s statement that some members of his immediate family are Sunni and others Shia. The applicant stated that he does not attend mosque but prefers to pray and fast at home. I accept that this is the case. The applicant advised the delegate that some of his siblings live in Maysan and some in Karbala. None of his immediate family members have regular income, most just pick up day work when available. I accept that this is the case; country information notes that unemployment is high in Iraq, at 11 per cent, and labour force participation, at 48.7 per cent, is among the lowest in the world.⁴
12. It is submitted on behalf of the applicant that he would face harm at the hands of his wife N’s family in Iraq. The applicant and N met in [Country 3] in 2012. N was a widow. They married in May 2013 and their son was born in [a specified] year. The applicant did not mention any risk of harm from his wife’s family in his 2017 statement of claims. At the PV interview the delegate asked him whether he had ever spoken to N’s family. He responded that he had not, her family didn’t even know that they were married. I accept that the applicant and N’s marriage was not approved by either of their families. N’s family currently reside in Baghdad which is some 300 kilometres from Maysan governorate. As N and the children are likely to be granted an Australian protection visa, and the applicant and N are separated, I conclude that N would not be returning to Iraq with the applicant. I am not satisfied on the evidence before me that the applicant could in any way be identified in Iraq as N’s husband. In N’s decision record, the delegate notes that she claims to have lost contact with her father and brother since her departure from Iraq in 2012 and has not told her sister that she is married. There is

² Department of Foreign Affairs and Trade (DFAT), “Military service documentation”, 28 August 2002, CX71583

³ DFAT, 'DFAT Country Information Report Iraq 17 August 2020', 20200817105936; 2.3

⁴ Ibid; 2.23

no evidence to suggest that N's family, even if they are aware that N has remarried, know the applicant's name. I do not accept that the applicant would face any chance of harm from N's relatives, if he returned to Iraq.

Refugee assessment

13. 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

14. 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.
15. The applicant is a national of Iraq. It follows that Iraq is his receiving country. I have not accepted the applicant's claim that he was threatened by members of Shia militia groups in 2004 or that he would be harmed by members of his estranged wife N's family, should he return to Iraq.
16. The applicant contends that he would be harmed by militia groups on return to Iraq due to the perception that he was a supporter or member of the Ba'ath Party during his period of conscription. He has never been an actual member. A 2016 report referenced by the applicant's representative notes that although Shia militia targeted alleged or actual former Ba'athists after the fall of the Saddam regime in 2003, today, members of the former Ba'ath Party or the former regime's armed forces or security and intelligence services are reportedly no longer systematically singled out for attack by armed groups.⁵ More recent reporting notes that the passage of time and the turbulence of recent years has also reduced the level of societal hostility against Ba'athists, with many Iraqis too young to remember the Saddam era⁶. Country information also indicates that at a societal level, it is broadly agreed among Iraqis that what applies to the Ba'ath party should not apply to the Ba'athists as individuals, given the

⁵ UK Home Office "Country Policy and Information Note Iraq: Ba'athists", November 2016, 6.4.7

⁶ DFAT, 'DFAT Country Information Report Iraq 17 August 2020', 20200817105936; 3.79

pressures that forced millions of Iraqis to join the party and that linked all aspects of the state to it. As a result, former Ba'ath party 'mere members' face a low risk of targeted violence in Iraq.⁷ I am not satisfied that the applicant faces a real chance of harm from any groups or individuals due to any perception that he was a member or supporter of the Ba'ath Party in the 1990s.

17. The applicant claims that he fears harm from Shia militia groups as well as the Iraqi authorities due to being a Sunni Muslim. The applicant has not specifically claimed to fear harm on the basis of the overall security situation in Iraq however I will consider whether the applicant faces a real chance of persecution because of sectarian violence and the overall security situation, particularly in Maysan governorate. The most recent country information in the review material indicates that the security situation in Iraq, while varying according to location, is highly unstable and fluid. Security incidents occur often and without warning, including rocket attacks, mortar attacks, attacks with improvised explosive devices (IEDs), grenade attacks, small arms fire, assassinations and kidnapping for ransom.⁸ Despite its territorial defeat in December 2017, ISIS/Da'esh remains a major perpetrator of abuses and atrocities.⁹ Over 2019 and 2020 however violence by ISIS/Da'esh continued to fall, and in particular the number and impact of bomb attacks with explosives (whether or not by suicide bombers) continued to decline
18. The Southern governorates of Iraq, including Maysan, have been largely spared from open fighting but ISIS/Da'esh does carry out terrorist attacks there. None at all were however recorded in Maysan in the period from January 2019 to February 2020. There were several deaths in October 2019 which occurred during demonstrations and in November 2019 three civilian activists were shot and killed in separate incidents.¹⁰ The number of incidents caused by ISIS/Da'esh per month is also recorded by Joel Wing of Musings on Iraq. The most recent monthly reports included in the review material all show zero incidents for Maysan governorate in the tables: "Security Incidents by Province" and "Casualties by Province".¹¹ The modus operandi of ISIS/Da'esh remains: targeted executions of people working for or with the government, ambushes against Iraqi Security Forces and Popular Mobilization Forces and extortion of the rural population to obtain funds and food. Roadside bombs as assault weapons and other IEDs are still used in densely populated areas, but the intensive urban terror campaigns – as from 2012 to 2016, with dozens of vehicle-borne IEDs and suicide vehicle-borne IEDs - have not returned anywhere.¹² Overall, I am not satisfied on the review material that ordinary civilian residents of Maysan face a real chance of harm due to ISIS/Da'esh attacks.
19. Although violent crime, including bombings, kidnappings and killings, does still occur across Iraq, on the basis of the material before me I am not satisfied that it is currently at a level that would give rise to a real chance that the applicant would face serious harm, should he return. I further note that should the applicant be harmed due to security incidents such harm would not be due to his race, religion, nationality, membership of a particular social group or political

⁷ DFAT, 'DFAT Country Information Report – Iraq', 9 October 2018, CIS7B839419766; 3.48 to 3.51

⁸ DFAT, 'DFAT Country Information Report Iraq 17 August 2020', 20200817105936; 2.54

⁹ Ibid; 2.56

¹⁰ Office of the Commission General for Refugees and Stateless Persons (Belgium), 'COI Focus - Iraq: Security Situation in Central and Southern Iraq', 20 March 2020, 20200619134831; pp. 38 to 40

¹¹ Wing, J, Musings on Iraq, 'Islamic State Attacks Decline In December 2020', 4 January 2021, 20210105080839; Wing, J, Musings on Iraq, 'Violence Continues To Decline In Iraq Winter 2020-21', 4 February 2021, 20210209100327; Wing, J, Musings on Iraq, 'IS Winter Break Continues In Feb While Pro-Iran Groups Picking Up Attacks', 8 March 2021, 20210309103820;

¹² Ibid; pp.12 to 13

opinion. I am therefore not satisfied that he has a well-founded fear of persecution due to the security situation.

20. In considering whether the applicant would face a real chance of harm in Maysan due to being a Sunni Muslim, the current country information indicates that sectarian violence between Sunni and Shi'a has reduced substantially since the mid to late-2000s, but still occurs occasionally. International observers attribute the reduction in sectarian violence to an increase in self-segregation by communities, and to conscious efforts by political leaders to remove sectarian slogans from public discourse after the military defeat of ISIS/Da'esh. It was reportedly common during the lead-up to the May 2018 election to hear politicians and commentators emphasising the need to rise above sectarianism and revenge to stabilise the country.¹³ I further note that the 2018 DFAT report included an assessment of whether Shia or Sunni Muslims face discrimination or harm due to their religions.¹⁴ The conclusion at that time was that outside areas recently controlled by ISIS/Da'esh (which does not include Maysan or any other Southern governorate), Sunnis faced a low risk of societal violence on the basis of their religion. Sunnis faced a moderate risk of official and societal discrimination in areas where they are a minority,¹⁵ which would include Maysan governorate. The 2020 DFAT report does not contain any assessment of Shia or Sunni Muslims in the "Refugee Convention Claims" chapter. From this I conclude that being a Sunni Muslim is no longer of itself a basis on which a person may face a real chance of serious harm. I am not satisfied that the applicant faces a real chance of harm in Maysan due to being a Sunni Muslim or due to sectarian violence.
21. It is submitted that the applicant faces harm on return to Iraq as a returning failed asylum seeker from a Western country. In terms of whether the applicant would face a real chance of harm from the Iraqi authorities or individuals due to a perception that he holds "western" views, the DFAT country report indicates that the practice of seeking asylum and then returning to Iraq once conditions permit is well accepted amongst Iraqis.¹⁶ 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 sought asylum in Australia.

Refugee: conclusion

22. 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

23. 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

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

¹³ DFAT, 'DFAT Country Information Report Iraq 17 August 2020', 20200817105936; 2.60

¹⁴ DFAT, "DFAT Country Information Report - Iraq", 9 October 2018, CIS7B839419766; 3.32 to 3.37

¹⁵ Ibid; 3.37

¹⁶ DFAT, 'DFAT Country Information Report Iraq 17 August 2020', 20200817105936; 5.43

- 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.

25. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are in turn defined in s.5(1) of the Act.

26. I have concluded above that the applicant does not face a real chance of harm from his estranged wife’s family, on the basis that he may be perceived to have supported the Ba'ath party in the 1990s, due to sectarian conflict, that he is a Sunni Muslim or a failed asylum seeker from a Western country. As ‘real risk’ and ‘real chance’ involve the application of the same standard,¹⁷ I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on this ground.

27. I have also found that although there is criminal activity by way of security incidents across Iraq it is not at such a level that would constitute a real chance, and therefore a real risk, that the applicant would be harmed. In any event, I further note that s.36(2B) provides that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally. As any risk of significant harm due to the security situation is one faced by Iraqis generally, the applicant does not face a real risk of significant harm due to the security situation in Iraq.

Complementary protection: conclusion

28. 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).

Member of same family unit

29. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression ‘member of the family unit’ is defined in r.1.12 of the Regulations to include a spouse of the family head or a dependent child of the family head.

30. In her submissions to the IAA of 22 July 2021 [Representative A] contends that the children A and M are members of the applicant’s family unit as they are dependent children of the applicant (stepson and son, respectively). I accept this to be the case, however in determining whether the applicant can then meet the criteria for a protection visa under s.36(2)(b) or

¹⁷ *MIAC v SZQRB* (2013) 210 FCR 505

s.36(2)(c) of the Act, at least one of the children would need to meet the criteria of s.36(2)(a) or (aa) of the Act, or alternatively the applicant would need to be a member of the family unit of at least one of the children (as 'family head'). In her determination of 28 June 2021, the delegate determined that A and M satisfy the criterion in s.36(2)(c) only. In coming to this conclusion, the delegate decided not to assess the claims raised on behalf of the children.

31. In considering whether the applicant is a member of the family unit of at least one of the children (as 'family head') he would need to meet the requirements of r.1.12(4) of the Regulations. This requires that he is a relative, of the family head or of a spouse or de facto partner of the family head, who: (i) does not have a spouse or de facto partner; and (ii) is usually resident in the family head's household; and (iii) is dependent on the family head. The applicant is a relative (parent) of M and step-parent of A. He does not presently have a spouse or partner and is presently resident in the children's household. He is however clearly not dependent on either of the children. [Representative A] notes in her submissions that "the applicant has, and does still, provide support to the Children (both emotional and financial)" and I accept that is the case. This means that he does not meet the requirements of r.1.12(4).
32. Turning then to whether either of the children should meet the requirements of s.36(2)(a) or (aa) of the Act in their own right, [Representative A] submits: "We note that the Children (via their parents) have raised independent claims for protection. The Delegate has observed as such. The Delegate has not, however, assessed the independent claims of the Children. This is problematic in two regards: First, given the fact that the Applicant is a member of the same family unit as the Children, the Delegate is unable to disregard assessing the Children's claims, where such claims may result in the Applicant being granted a protection visa. Second, in any event, to disregard (and not assess) a child's independent claims, and simply assess their derivative claim as an MSFU, is unfair to the child. For instance, if the child ceases to be an MSFU of the other party (for instance, once the child becomes an adult), then they are denied an independent ground for protection. This may be particularly relevant at future protection visa reapplication stages. Accordingly, the Delegate has not conducted an adequate assessment of the Applicant's legal position. To remedy the Department's irregularity in this regard, we submit that the IAA must wholly consider and assess the Children's claims."
33. I do not consider that I am in fact able to assess the children's claims as submitted by [Representative A]. First, the children's visa applications are now finally determined. Second, under Part 7AA of the Act the IAA is only able to review fast track reviewable decisions referred to it under s.473CA of the Act, that is, certain decisions to refuse a protection visa. There has been no decision made to refuse to grant a protection visa to either of the children M or A, and no referral to the IAA under s.473CA. This means there is no fast track decision for me to review in relation to either of them. In the circumstances, whatever opinion I may form as to the independent claims of the children, I have no jurisdiction to determine whether either is a person in respect of whom the Minister is satisfied Australia has protection obligations under s.36(2)(a) or (aa) for the purposes of s.36(2)(b) or (c). As the applicant is not a member of the same family unit as a person who is mentioned in s.36(2)(a) or (aa) he does not meet the criteria for grant of a protection visa under s.36(2)(b) or s.36(2)(c).

Decision

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

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.