



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA21/10128

Date and time of decision: 14 January 2022 19:26:00

M Wei, 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) lodged an application for a Safe Haven Enterprise Visa (SHEV) in May 2016. On 15 September 2021, a delegate of the Minister for Immigration (the delegate) refused to grant the visa on the basis that the applicant was not a person in respect of whom Australia owes protection obligations.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He is a citizen of Iraq, a Shia Muslim.
 - He was born in a rural area in the outskirts of Karbala, Southern Iraq, where tribal traditions control the daily lives of the people living there.
 - He started a romantic relationship with a girl named [Ms A] in April 2012. This relationship caused the applicant being threatened and harmed in early December 2012. Those incidents led to his leaving Iraq for Australia in mid-December 2012.
 - After he left Iraq, some unidentified persons visited his family three times looking for the applicant. His father was threatened and harmed.
 - He fears going back to Iraq for these reasons.

Factual findings

4. The applicant attended his SHEV interview on 9 October 2017 before another departmental officer, in the presence of his then representative. On 27 August 2021, the delegate sent the applicant through his then representative a written request for further information. The letter noted that the applicant's last contact with the Department was in 2018 and invited the applicant to provide any additional evidence he may wish to submit in support of his application, as well as advise the Department of any changes or corrections he wished to make in relation to his application. The Department did not receive a reply. While I note the delay of the primary decision following the SHEV interview, I am satisfied that the applicant was given the opportunity to put forward further claims/evidence or any change of circumstances despite this delay.
5. The applicant provided to the Department an original Iraqi civil status ID card and an original Iraqi citizenship certificate in support of his claimed identity. A forensic document examiner from the Department of Immigration and Border Protection's document examination unit found that the Iraqi civil status ID card was a counterfeit document and with regard to the citizenship certificate, the result was inconclusive. The applicant was invited to provide comments on the document examiner's assessment regarding his Iraqi civil status ID card. Having had regard to the applicant's responses provided and relevant independent country

information referred to in the decision, the delegate was satisfied that the applicant has provided a reasonable explanation for providing a bogus document as evidence of his identity, nationality or citizenship. The delegate further found that the applicant had subsequently produced satisfactory documentary evidence of his identity, nationality or citizenship in the form of an original citizenship certificate. The delegate was satisfied that s.91WA(1) of the Act does not apply. The delegate was further satisfied that the applicant is a fact track applicant. For the purposes of this review, I accept that the applicant believes that his Iraqi civil status ID card to be a genuine document having obtained from proper channels. Having had regard to the evidence before me including the Iraqi citizenship certificate provided, I agree with the delegate's assessment about the applicant's identity. I do not consider the provision of this Iraqi civil status ID card which found to be counterfeit in the circumstances reflects a poor credibility and draw no adverse inference on his credibility for this reason.

6. During the SHEV interview, the interviewing officer asked the applicant to comment on information before the Department that may suggest that the applicant had not declared he had two brothers being 'SH' and 'CT' in Australia. The applicant adamantly denied that they were his brothers and said they were friends only. The delegate was concerned that the applicant had deliberately attempted to conceal his true family composition for unknown reasons. The referred materials include two photographs which were being discussed at the SHEV interview. Both photographs appear to depict a group of men (also a young girl in Photo B) in social settings. I consider the photographs themselves say little about the applicant's relationship with the other men. The sources of the other information about SH or CT were not among the referred materials. In the circumstances, I draw no adverse inference about the applicant's general credibility on the basis of this information. The applicant's claims for protection do not relate to SH or CT. I do not consider the information about SH or CT is relevant to my assessment about the applicant's protection claims here.
7. Having had regard to the applicant's otherwise consistent claims as to his basic personal information and background, I accept that the applicant was born in Karbala, Southern Iraq in [Year]. I accept that he has one younger brother and two sisters who live in Karbala, so does his father. I accept that the applicant has about 9 years of education in total comprising his primary school and intermediate school studies. I accept that the applicant worked for a family-owned [business] in Karbala from 2006 to 2011 and then worked as [an Occupation] after selling of the family business until he left Iraq in December 2012. I accept that the applicant is a Shia Muslim of Arab ethnicity. I am satisfied that the applicant is a national of Iraq. I find that Iraq is his receiving country for the purpose of this assessment.
8. The applicant has claimed since making his SHEV application that he fled Iraq and he fears returning to Iraq because of issues arose due to his relationship with a girl named [Ms A]. He stated the following in the SHEV application:
 - He met [Ms A] in April 2012 at his friend's [business], where they exchanged phone numbers. Although [Ms A] lived a short distance from his place, because of his local area's conservative culture that does not allow boys and girls to mix, they initially spent most of the time talking to each other over the phone. He stated that they started meeting in person in his [Vehicle] a few months later, in a deserted area near [Ms A]'s school. They would only meet on Mondays and Thursdays and normally spent 5 to 10 minutes.
 - In October 2012 he spoke to his family about his relationship with [Ms A] and his family went to her family asking her family's approval for marriage. However, [Ms A]'s father rejected the marriage proposal saying that [Ms A]'s cousin had asked for her hand and

that her cousin had the power to stop her from marrying anyone else according to the tribal traditions. He did not tell her family that they had a relationship fearing that they might kill him or her as part of the honour killing which was predominant in his area. [Ms A]'s father told him not to tell anyone about his marriage proposal because his brother was a high-ranking police officer who wanted his son to marry [Ms A].

- After that he did not hear anything further from [Ms A]. Her phone line was switched off and she did not come to see him as they used to. He also realised that her family had stopped her from going to school.
 - In the beginning of December 2012, [Ms A]'s cousin came to his family home. Her cousin started shouting and verbally abused the applicant. Her cousin also questioned whether the applicant had slept with [Ms A], to which the applicant answered that he did not. The cousin told the applicant that [Ms A] had told him that she loved the applicant and not him. Her cousin suggested that the applicant and [Ms A] had a sexual relationship which was why [Ms A] loved the applicant. Despite that the applicant had denied all the allegations made by [Ms A]'s cousin, her cousin continued threatening the applicant saying that he would make from him a lesson to everyone in the village.
 - The next day while he was driving his [Vehicle], he was stopped by a police car. The police ordered him to get off his car and let the police dogs biting him while laughing at and filming him, saying that they will show it on [Social media] so the people could have a good laugh at him. The police then left him behind. Other people were too scared to help him. He then drove to a nurse who treated his wounds and injected him with some anti-rabies injections.
 - One week prior to his departure from Iraq, he received a phone call from [Ms A] who told him to leave Iraq as she overheard her father and her uncle agreeing on killing the applicant in a very secretive way. During 'these days', he arranged for his visa and left Iraq [in] December 2012.
 - After his departure from Iraq, his family advised him that a group of three people came to his family home asking to hire the applicant and his car. After his father advised them that the applicant was not home, these people came back twice. When they returned for the second time, they threatened to kill his father if his father were not to reveal the applicant's whereabouts. His father then told them that the applicant was in Australia. They told his father that they would check to see if his father was telling the truth.
9. The applicant was asked about his relationship with [Ms A] and the problems he had faced at the SHEV interview. While the applicant followed the same storylines, broadly consistent with his statement in the SHEV application, he provided confusing and conflicting evidence when the interviewing officer asked him for further details.
10. For example, the applicant provided conflicting and confusing evidence as to if he had tried to call [Ms A] after he made the marriage proposal in October 2012 and before he was threatened by her cousin in early December 2012. He initially gave evidence that he tried to call her during this period and that he had tried to contact her twice or three times by phone though she did not answer. Later on, when he was asked to clarify that if he was still trying to call [Ms A] before he received the threat from her cousin, the applicant then responded that he did not try to contact her because her father said that she was engaged to her cousin. When further confirmation was sought from the applicant that that from October to December before he was threatened by [Ms A]'s cousin that he did not try to contact [Ms A] during that period, the applicant replied 'no, no, I didn't call her. I did not ring her at all'.

11. The applicant initially told the SHEV interviewing officer that a week before her cousin came to threaten him, [Ms A] called him warning that she overheard that her father and her uncle were threatening to have him killed and she advised the applicant to leave Iraq. When he was asked to confirm that [Ms A] warned her before her cousin came to his house, he then said 'no' and talked about that the incident with the police and the police dog the following day. When he was further asked when [Ms A] called to warn him, he said it was three days after her cousin had visited him. The applicant also initially stated that he tried to contact [Ms A] because he worried about her safety as he was threatened by her cousin. However, upon further probe by the interviewing officer, his evidence varied saying that he did not try to call her after he was being threatened by her cousin.
12. I acknowledge that applicant was asked about incidents claimed to have occurred over a number of years ago and that he might not be able to recall all details. However, the matters he was asked about would be quite significant to him if [Ms A]'s father had already told him to stay quiet and warned him that his brother was a high-ranking officer in the police after he asked for marrying her, noting also the claimed threat from her cousin and the warning from [Ms A] was the catalyst that led him to leave Iraq in a week. The applicant's oral evidence at the SHEV interview left me with an impression that he was trying to rehearse his written claims in the SHEV application, rather than speaking from a direct personal experience.
13. The whole narrative about the problems he had faced due to his relationship with [Ms A] appear to be unconvincing and fanciful. The applicant's evidence was that [Ms A] was [Age] years old at the time he was dating her in 2012. When he was asked why [Ms A] would still be at high school then, he replied that she delayed starting school for two years and also failed her studies for two years. Even accepting this was the case, I find it is difficult to believe that [Ms A], given her age, would have not known that she was promised to her cousin and would have let the applicant to approach her father asking to marry her, if they met regularly prior to that. [Ms A] would also likely be knowing that her uncle was a high-ranking police officer. Moreover, although the applicant approached [Ms A]'s father in October, her cousin did not come and threaten the applicant until early December, a few days before he left Iraq. When asked how her cousin found out about his relationship with [Ms A], he claimed that his cousin must have overheard [Ms A]'s sisters talking about it. While [Ms A]'s uncle maybe high-ranking in the Iraq police and perhaps corrupt, it is also questionable that the police would have allowed their dog biting the applicant in front of other onlookers, while laughing at it, filming the incident and threatening the applicant to upload the recording on [Social media].
14. The applicant's written claims for protection in his SHEV application were solely based on his claimed relationship with [Ms A] and threat/harm he claimed to have faced because of this relationship. However, the applicant made no reference to these matters at his two earlier interviews with the Department, that took place shortly after his arrival in Australia on 13 March 2013.
15. In his SHEV statement, the applicant explained why he did not refer to his relationship with [Ms A] or the threat he received in his arrival/entry interview. He stated that he understood the question about why he left Iraq as a question to explain things related to security situation in his area, and for that reason he did not talk about his personal reasons for leaving Iraq, thinking that he might be asked about it later.
16. At the SHEV interview, the applicant was asked to comment on his failure to have referred to the threat he faced due to his relationship with [Ms A] at his biodata interview on 30 March 2013 and the arrival/entry interview on 23 May 2013. It was pointed to the applicant that at the entry interview, he was asked why he had left Iraq and he was also asked later at the

interview what he thought would happen to him if he were to return to Iraq. It was pointed to him that in his responses to both questions, the applicant talked about general security situations referring to bombing and explosions. The applicant maintained that he understood the question asked about why he had left Iraq was a question about general security situation only and not about his personal experiences. He also claimed that other detainees had told him that after his release into the community he would be given another interview where he could elaborate and talk about his personal things. The applicant also said that he was traumatised by what he had witnessed in Iraq and that he did not feel relieved until he arrived in Australia. In his oral submission at the end of the SHEV interview, the applicant's then representative also submitted that the question 'why did you leave Iraq' lacked clarity that it was asking about the applicant's personal circumstances, unlike a question such as 'what happened to you...'

17. I note that applicant's answer to the question why he had left Iraq in the biodata interview referred to that he was not comfortable living in Iraq, among other things. In the arrival interview, in response to the question why he had left Iraq, the applicant specifically referred to a blast occurred about 200 metres away from where he was approximately seven and a half months before he left Iraq. He also talked about that it was hard for him to get a job because he did not finish his education and that the only work opportunities available was to work in the police or army which was dangerous. In response to the question asked at the end of the arrival interview what he thought would happen to him if he were to return to Iraq, his reply was that he was scared that he would be killed in bombings and explosions. I am not convinced that the applicant misunderstood the questions to be about the general security situation only and not his personal circumstances, as it is evident that he had drawn to his personal circumstances.
18. I am mindful that the biodata interview was conducted about two weeks after the applicant's arrival in Australia and only for a brief period of half an hour. I am also mindful that the arrival interview was for a wide range of purposes and not designed to explore an applicant's claims for protection in detail, which also took place prior to his SHEV application. It is also plausible that the applicant might have been told by other detainees that that he would have another interview after he was released from detention. On the other hand, I note it was made clear to the applicant at the onset of the arrival interview that the interview was his opportunity to provide any reasons why he should not be removed from the Australia and that a decision may be made on the basis of the information the Department had. It was also made clear to the applicant that if the information he gave at any future interview was different from what he told at the arrival interview, it could raise doubts about his reliability of his evidence. The applicant confirmed that he understood what was read out to him and that he understood the interpreter. While the arrival interview has its limit and he did not legal representation at that time, this interview took place about two months later after his arrival in Australia and after he had participated in the biodata interview. I also note that the interviewing officer at the arrival interview asked the applicant if he had anything else to tell after he spoke about security situation. The applicant then talked about difficulty in getting a job. The applicant spent about 10 minutes talking about his reasons for leaving Iraq. He provided a quite detailed description regarding one blast in Karbala. He also spoke about that he always said goodbye to his family before going out as he never knew if he would come back or not. He again spoke about his fear of being killed due to random killings and explosions at the end of the arrival interview when asked about what he thought would happen to him if he were to return to Iraq.
19. I am not persuaded by his reasons explaining why he did not mention the threat from [Ms A]'s family, particularly with respect to his arrival interview. The applicant did not refer to any fear of a threat from [Ms A]'s family, even in a summary way, at his arrival interview in May 2013 which took place only several months after he departed Iraq, is concerning. This is particularly

so, given he claims that that he made the arrangement to leave Iraq after he was being threatened and harmed in early December 2012. His later claim that he made the arrangement for leaving Iraq after he received the warning from [Ms A] is also not consistent with his evidence in his arrival interview that he started making arrangements for his travel to Australia about 6 months prior to his journey. I note that the applicant provided relatively convincing details in the arrival interview about the travel arrangement and his journey to Australia.

20. I am not satisfied that the applicant's claims with respect to his relationship with [Ms A] or the threat/harm faced are credible. I am not satisfied that he developed a relationship with [Ms A] in 2012. I am not satisfied he was threatened or harmed in any way or by any one for this reason. I am not satisfied that persons visited his family and threatened his father after he left Iraq.
21. The applicant has indicated that he left Iraq legally on his own passport. He did not indicate he faced any issue when he exited the country via Najif airport. I find so accordingly.
22. I accept that the applicant left Iraq for Australia in 2012 to escape from the Iraq's overall poor general security situation then and for better opportunities in Australia. I am however not satisfied that the applicant was of adverse interest to anyone, including the authorities, any group or any individual when he left Iraq in December 2012.

Refugee assessment

23. 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

24. 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.
25. Country information indicates that approximately 97 percent of the Iraqi population is Muslim. Shia Muslims constitute 55 to 60 percent of the overall population. DFAT states that the

violence between Sunni and Shia has reduced substantially since the mid to late-2000s, though it still occurs occasionally. The applicant is a Shia. I note that Shia Muslims are the significant majority in southern Iraq including Karbala.¹

26. DFAT states that the security situation in Iraq, while varying according to location, is highly unstable and fluid. Other information indicates that since it was being defeated at the end of 2017, the Islamic State (ISIS) has in no large measure returned to its former practices of carrying out urban mass attacks. Nor has it taken back any territorial control, but in all the areas which it previously held, ISIS has shifted back to former insurgency tactics. Although the ISIS staged occasional attacks on Shia targets in Karbala governorate causing civilian casualties, particularly due to that Karbala stands as a Holy city frequented by Shia pilgrims, it never held territory in Southern Iraq including Karbala. Southern governorates have largely escaped the ISIS-related violence that have occurred in other parts of the country. Country information also notes that the security void that opened in the southern governorates when the security forces were redeployed in 2014 to fight ISIS insurgency in central and northern Iraq, has left the southern region open to tribal clashes, criminal activity and political violence. Many incidents in the south involved tribes, the Popular Mobilisation Forces, gangs or a combination of them. In recent years, public protest movement has been played out in the south and Baghdad over corruption and poor public services. Protesters and particularly activists have been targeted. Some protests had turned into violence and protesters and members of the security forces were killed or injured. The country information overall indicates, although security incidents and incidence of general violence have continued to occur in Southern Iraq including Karbala, the number of incidents against civilians and civilian casualties have consistently remained low and such incidents have occurred only sporadically.²

27. I have found that the applicant was not of any adverse interest to anyone while he was in Iraq. There is no probative evidence before me to indicate that the applicant or his family have come to the adverse interest of any one or any group since he left Iraq. There is no suggestion that the applicant has been politically active in Iraq or in Australia or would otherwise be of adverse interest of anyone. His family members have continued to live in Karbala. Having had regard to the information before me overall, while isolated incident of attacks/violence may still occur in future, I am not satisfied there is a real chance that the applicant will face any harm from any one or any group. I am not satisfied that the applicant faces a real chance of harm as a result of sectarian or general violence, if he were to return to Karbala, Southern Iraq, now or in the reasonably foreseeable future.

28. Most entry and exit into and out of Iraq are by air through one of the four international airports operating regular commercial services, located in Baghdad, Erbil, Sulaymaniyah and Basrah in the South. Upon arrival at an international airport, all passengers have their identity information recorded, irrespective of nationality. In country sources advise that authorities would only arrest an Iraqi on return if they had committed a criminal offence and a warrant had been issued for their arrest. Others, even those who had left illegally, would not be subject to arrest on arrival.³ There is no probative evidence before me to support that the applicant had committed a criminal offence. On the information before me, I am not satisfied that the

¹ Department of Foreign Affairs and Trade (DFAT), 'Country Information Report Iraq, 17 August 2020, 20200817105936; European Asylum Support Office (EASO), 'Iraq: Security situation', 30 October 2020, 20201102085642.

² EASO, 'Iraq: Security situation', 30 October 2020, 20201102085642; EASO, 'EASO Country of Origin Information Report - Iraq Security situation', 12 March 2019, 20190313085833; DFAT, 'DFAT Country Information Report Iraq', 17 August 2020, 20200817105936; the New York Times, 'Bus Bomb Kills 12 Iraqis Near Major Pilgrimage Site', 21 September 2019, 20190923101915; Iraqi News, 'Car bomb blast kills Iraqi citizen, wounds 3 others in Karbala', 28 July 2019, 20190729085656.

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

applicant otherwise faces a real chance of any harm from the authorities. Having also considered the general security situation and the applicant's profile, I am not satisfied that the applicant could not safely return to Karbala if he were to return to Iraq.

29. The practice of seeking asylum and then returning to Iraq once conditions permit is well accepted among Iraqis, as evidenced by the large numbers of dual nationals from the US, Western Europe and Australia who return to Iraq. There is considerable evidence that Iraqis who are granted protection by western countries often return to Iraq, sometimes only months after securing residency abroad, to reunite with families, establish and manage businesses or take up or resume employment. DFAT has limited evidence to suggest that voluntary returnees face difficulties in assimilating back into their communities. However, local sources have reported that returning to Iraq can be difficult, particularly if the individual does not return to their original community. Integration within new communities is complicated by the influence of patronage and nepotism on many aspects of life.⁴ Even considering that the applicant could return as an involuntary returnee, the applicant's returning to his former home area means that he has a family network. I acknowledge that he might face some challenge given his long absence from the country. I note that he has also complained about lack of job opportunities in Iraq. On the other hand, the applicant was working while he was in Iraq. His evidence was also his father worked as a civil servant. In the applicant's circumstances, I am not satisfied that he faces a real chance of harm as a Shia Muslim asylum seeker returning from Australia.

30. Overall, I am not satisfied that the applicant faces a real chance of persecution for any of the reasons claimed if he were to return to Iraq now or in the reasonably foreseeable future.

Refugee: conclusion

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

Complementary protection assessment

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

Real risk of significant harm

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

- the person will be arbitrarily deprived of his or her life
- 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.

⁴ Ibid.

34. 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.

35. I have concluded above that there is not a real chance the applicant would face any harm. As real chance and real risk involve the same threshold, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to Iraq, there is a real risk that the applicant will suffer harm, including significant harm.

Complementary protection: conclusion

36. 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.

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.

91W Evidence of identity and bogus documents

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

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

...

91WA Providing bogus documents or destroying identity documents

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

...